Immunity Case Law Update

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I. Extending immunity to private parties.

***Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015).**

Issue:

Whether sovereign immunity extended to engineering firm that designed and constructed a roadway under a contract with a governmental entity.

Facts:

The suit arose from an accident on the Westpark Tollway in Fort Bend County. An intoxicated driver entered an exit ramp, driving east in the westbound lanes for approximately eight miles before colliding with a car driven by Pedro Olivares, Jr., killing both drivers.

The Fort Bend County Toll Road Authority was created to design, build, and operate the portion of the Tollway within Fort Bend County. Rather than utilize government employees to carry out its responsibilities, the Authority entered into an Engineering Services Agreement with Brown & Gay Engineering, Inc. The Authority delegated the responsibility of designing road signs and traffic layouts to Brown & Gay, subject to approval by the Authority. Brown & Gay was contractually responsible for furnishing the necessary equipment and personnel to perform its duties and was required to maintain insurance for the project, including workers' compensation, commercial general liability, business automobile liability, umbrella excess liability, and professional liability.

Olivares's mother, individually and as representative of his estate, and his father sued the Authority and Brown & Gay. They alleged that the failure to design and install proper signs, warning flashers, and other traffic-control devices around the exit ramp caused Olivares's death. Eventually, the Olivares's nonsuited the Authority. Brown & Gay then filed a plea to the jurisdiction, arguing that it was entitled to the Authority's governmental immunity because it was acting as the Authority's employee and acting in its official capacity. The trial court granted the plea, but the court of appeals reversed.

Analysis:

The Supreme Court resolved the case by looking to the purposes of sovereign immunity and whether the extension of immunity to Brown & Gay would serve those purposes.

The "modern-day justifications [for sovereign immunity] revolve around protecting the public treasury." Shielding governmental entities from suits for money damages leaves to the Legislature to determine when to allow tax resources from being shifted "away from their intended purposes towards defending lawsuits and paying judgments." This also serves separation-of-powers purposes "by preventing the judiciary from interfering with the Legislature's prerogative to allocate tax dollars." "Sovereign immunity thus protects the public as a whole by preventing potential disruption of key government services that could occur when government funds are unexpectedly and substantially diverted by litigation."

Brown & Gay argued that extending sovereign immunity to private contractors would serve the purpose of protecting the public fisc because proving contractors immunity would reduce the costs of contracts in the long run. The Court explained that sovereign immunity is not simply a cost-saving measure. Rather, it guards against "unforeseen expenditures" that could "hamper government functions" by diverting funds away from their allocated purposes. Providing immunity to a private contractor does not serve this goal. Even if contract prices were higher due to the threat of litigation, those costs will be reflected in negotiated contract prices, allowing the government "to plan spending on the project with reasonable accuracy." The Olivares's suit "threatens only Brown & Gay's pockets."

The Supreme Court also addressed federal cases and Texas intermediate appellate court cases that extended immunity to private parties. The Court noted that those cases generally involved some element of control by the government—that is, that "the alleged cause of the injury was not the independent action of the contractor, but the action taken by the government *through* the contractor." Brown & Gay was an independent contractor with discretion on how to design the Tollway's signage and road layouts; the Authority had no control. "[W]e need not establish today whether some degree of control by the government would extend its immunity protection to a private party; we hold only that no control is determinative."

The Court concluded that extending immunity in this case would not serve the rationale that justifies immunity. "The Olivares's suit does not threaten allocated government funds and does not seek to hold Brown & Gay liable merely for following the government's directions."

II. Tort Claims Act.

A. Premise Liability under Recreational Use Statute.

***University of Texas at Arlington v. Williams*, 459 S.W.3d 48 (Tex. 2015).**

Issue:

"We granted UTA's petition to consider whether attending a soccer game as a spectator is a recreational activity under the recreational use statute[,Tex. Civ. Prac. & Rem. Code §§ 75.001–.007]."

Facts:

UTA's former football stadium was used by the university's track and field teams and also leased out to the Arlington ISD for football games and other events.

Williams was at the stadium to watch her daughter's high school soccer game. After the game, Williams went to sign a release form required by school policy before her daughter could leave the stadium with the family. The stadium seating was raised above the level of the field; a guard rail separated the seating from the playing area. A gate in the guard rail provided access when portable stairs were provided. At the time, there were no stairs, and the gate was closed. The gate's latch was broken and it was instead secured by chain and padlock. Williams leaned against the gate while reaching for the clipboard containing the release form. The gate opened and Williams fell, injuring her rib and arm.

Williams brought a premises liability suit, alleging that UTA "was negligent and grossly negligent in securing the gate with a chain and lock it knew to be inadequate, and in failing to maintain the gate and repair its broken latch." *Univ. of Texas at Arlington v. Williams*, 459 S.W.3d 48 (Tex. 2015).

UTA filed a plea to the jurisdiction and motion to dismiss, asserting sovereign immunity and the recreational use statute. Williams responded, in part, that the recreational use statute did not apply because she was not engaged in a recreational activity at the time of the accident. The trial court denied UTA's plea and motion. On UTA's appeal, the court of appeals affirmed, reasoning that "[n]either spectating at a sporting event nor exiting the premises after spectating is like the activities listed as recreation under the recreational use statute. Nor do these activities fall within the section's catchall of 'any other activity associated

with enjoying nature or the outdoors.'" *Univ. of Texas at Arlington v. Williams*, 455 S.W.3d 640, 645 (Tex. App.—Fort Worth 2013), *aff'd,* 459 S.W.3d 48 (Tex. 2015).

Analysis:

Although a majority of the Supreme Court determined that the recreational use statue did not apply, no majority could agree on the reasoning.

Justice Devine wrote an opinion, joined by Chief Justice Hecht, Justice Green, and Justice Lehrmann. The plurality opinion reasoned that the "catchall " provision of the recreational use statute, providing that "recreation" includes "any other activity associated with enjoying nature or the outdoors," Tex. Civ. Prac. & Rem. Code § 75.001(3)(l), "does not 'catch' an activity simply because it occurs outside." Rather, the use of the word "nature" in conjunction with "the outdoors," indicates that the statute applies to "that part of the physical word that is removed from human habitation." (The Court used the Merriam-Webster Thesaurus definition, noting that "outdoors" was a synonym for "nature" used in this sense.) "Although soccer may be played in an open-air stadium, a soccer game, as ordinarily understood, is not associated with nature in the sense indicated by the statutory definition of 'recreation.' Because the outdoors and nature are not integral to the enjoyment of this activity and because the activity is unlike the others that the statute uses to define 'recreation,' we conclude that subpart (L)'s so-called 'catch-all' does not catch this activity."

Justice Guzman concurred, joined by Justice Willett. She stated that, under the Supreme Court's precedent, the focus should be on the specific activity the plaintiff was engaging in at the time of the injury. She concluded that, at the time of the injury, Williams was no longer a spectator—the match had ended. Rather, "at the time Williams was injured, she had fully transitioned to a new activity—acquiring and signing a release form in accordance with school policy." Justice Guzman, explained, "[W]e must construe the catchall provision narrowly to encompass only those activities closely connected to enjoying the outdoors." Acquiring and signing a release form is "not akin to the sports and hobbies expressly listed in the statue."

Justice Boyd also concurred and wrote a separate opinion, agreeing with the holding, but not the reasoning of the plurality opinion. He reasoned that the recreational use statute abrogated a common-law right and therefore must be construed narrowly to apply only to cases "clearly within its purview." Williams activities did not fall "clearly within [the statute's] purview."

Finally, Justice Johnson, joined by Justice Brown, concurred concerning the gross negligence claim, but dissented from the judgment concerning the ordinary negligence claims. Justice Johnson stated that the language of the statute encompasses a wide variety of activities, and the statute "does not contain any language differentiating team sports and activities from non-team sports and activities." He also concluded that, because the recreational use statute prevails over the Trot Claims Act, it barred Williams's ordinary negligence claim that would otherwise be allowed by the Tort Claims Act, if the recreational use statute covered the claim. But, Justice Johnson asserted, the varying opinions in the case indicated that it was not clear whether the claim was covered, "and the Legislature has instructed that a statutory waiver of immunity must be clear and unambiguous in order to be effective." Therefore, Justice Johnson would have held that the recreational use statute applied to the ordinary negligence claim and revers the court of appeals's judgment as to that claim, but affirm the remand of the gross negligence claim to the trial court.

***Lawson v. City of Diboll*, No. 15-0037, 2015 WL 5458763, at *2 (Tex. Sept. 18, 2015).**

Issue:

Whether the recreational use statute encompasses trip-and-fall claims made a spectator at a youth softball game at baseball complex in a city park.

Facts:

The City of Diboll owned and operated a park that included a baseball complex. The plaintiff attended her granddaughter's softball game on opening day of the youth baseball and softball leagues, an event that garnered approximately 1,500 spectators. After the game, the plaintiff was walking from the baseball complex to the parking lot. A hollow pipe protruded from the paved sidewalk; the pipe was designed to hold a vertical metal pole used to prevent unauthorized vehicle access to the complex. The protrusion was approximately four inches high and painted yellow, but the plaintiff claimed she could not see it due to the crowd of people.

The plaintiff sued the City for premises liability. The City filed a plea to the jurisdiction based on the heightened liability requirements of the recreational use statute. The trial court denied the plea, and, on interlocutory appeal, the court of appeals reversed and dismissed the claim for want of jurisdiction.

Analysis:

The Supreme Court, in a per curiam opinion, explained that, in the *University of Texas at Arlington v. Williams* case, "a majority of the Court agreed that under facts similar to those in this case, the recreational use statute does not apply."

***Suarez v. City of Texas City*, 465 S.W.3d 623 (2015).**

Issue:

Whether some evidence of the City's liability "to invoke the Texas Tort Claims Act's waiver of governmental immunity, as limited by the recreational use statute."

Facts:

Suarez sued, individually and as the survivor of her husband and daughters, following a tragic accident in the waters adjacent to the Texas City Dike.

Prior to Hurricane Ike, there had been signs placed at several locations indicating the various dangers in the waters adjacent to the dike, such as "undertow and wake from passing ships," "undertow[,] wake, rip current, and sink holes," and "undertow from passing ships." Some signs also warned, "No lifeguard on duty," and that swimming was "at your own risk" or should occur "in designated area only." Hurricane Ike destroyed or damaged all the warning signs.

The City engaged in extensive repairs before re-opening the Dike to the public. However, the only warning signs that were replaced were "monument" signs at two boat ramps. The signs are "large, wooden destination markers ... similar to signs that had been in place at the same location before the hurricane." In both English and Spanish, the signs warned: "Warning! No Swimming [or] Diving." The signs also contained a further warning in English: "Beware Undertow and Wake from Passing ships."

Shortly after the Dike reopened, Suarez, her husband, and their nine-year-old twin daughters visited the Dike with other family members and friends. They drove to the beach area on the Dike. There were no warning signs at the beach. The twin girls were wading in water up to their knees. Very shortly thereafter, they were seen further from the beach struggling to stay afloat. Suarez's husband and two other men tried to save the girls. Suarez's husband was swept farther from shore with his daughters, and all three drowned.

Suarez sued Texas City alleging that it had actual or constructive knowledge that a hidden, dangerous condition existed in the water where the family drowned and that Texas City was therefore negligent and grossly negligent for, among other things, creating the beach and failing to place warning signs of dangerous conditions that were not obvious to swimmers. The City filed a plea to the jurisdiction, which the trial court denied. The court of appeals reversed, with one justice dissenting from denial of en banc reconsideration.

Analysis:

The Supreme Court first acknowledged that the duty to warn in this case was not clearly established under Texas law. The Court, however, did not consider whether the City had a duty to warn because, even assuming such a duty existed, there was no evidence that the City was grossly negligent as required to be liable under the recreational use statute and Tort Claims Act.

Under the recreational use statute, gross negligence has an objective and a subjective component:

> (1) viewed objectively from the standpoint of the actor at the time of its occurrence, the act or omission involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
>
> (2) the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Because the City's immunity is waived under the Tort Claims Act only to the extent it would be liable, the Supreme Court reviewed the record for "legally sufficient evidence that Texas City had actual, subjective awareness that conditions at the beach involved an extreme degree of harm but nevertheless was consciously indifferent to the rights, safety, or welfare of others."

The Court assumed that there was evidence of an extreme risk, but concluded that Suarez's claims failed because there was no evidence that the City was "subjectively aware of perils at the beach that were beyond the ken of a reasonable recreational user."

The Court examined Suarez's specific allegations that the City had knowledge of "latent perils" at the Dike, describing them as "circumstantial evidence" of the City's knowledge. Specifically, the facts relied on by Suarez were that "prior to Hurricane Ike, Texas City (1) had posted warning signs—including signs that said: 'Beware. Undertow and wake, rip currents, and sink holes,' 'No lifeguard on duty. Swim at your own risk,' and 'Swim in designated area only'—but failed to replace the signs after the hurricane; (2) had previously provided a 'designated swimming area' somewhere at the beach but had not established such an area after Hurricane Ike; and (3) knew an unspecified number of drowning deaths had previously occurred at unknown locations along the Dike over the course of an unspecified time period." Reviewing the record evidence in support of each of these, the court found that it was legally insufficient evidence of the City's actual knowledge. "[T]he evidence is equally consistent with mere knowledge of risks inherently associated with open-water swimming. As such, it is no evidence of subjective awareness of and conscious indifference to the enhanced marine hazards alleged to have caused or contributed to the drowning deaths ...." The court cited, among other precedent, *Ford Motor Co. v. Ridgway,* 135 S.W.3d 598, 601 (Tex. 2004). ("An inference is not reasonable if it is susceptible to multiple, equally probable inferences, requiring the factfinder to guess in order to reach a conclusion.").

B. Premises Liability.

***City of League City v. LeBlanc*, 467 S.W.3d 616, 619 (Tex. App.—Houston [1st Dist.] 2015, no pet.).**

Issue:

Whether the City could be liable in a premises liability suit for a storm drain covered only by a grate, located approximately eight feet from the paved road surface.

Facts:

LeBlanc, while attending a holiday parade in League City, was injured when she stepped into a storm sewer drain. The court of appeals succinctly states the facts as follows:

> The storm sewer drain was located about eight feet from the curb of F.M. 518 and was near, but not in, a worn path that pedestrians use along F.M. 518. It is undisputed that the storm sewer drain was designed and built by the Texas Department of Transportation (TxDOT), and was located in TxDOT's easement. The storm drain did not have a solid cover, but was instead covered with a grate, through which LeBlanc stepped thereby breaking her ankle. It is also undisputed that the drain and grate in place are in the condition and location as specified and installed by TxDOT around 1985. The lighting in the area was similarly designed and placed by TxDOT.

LeBlanc and her husband sued the City alleging that the City was liable for:

a) not warning Ms. LeBlanc and those similarly situation of the defective and/or inadequate condition of the street caused by the absence of the storm drain cover;

b) not conducting a reasonable, diligent inquiry that would have informed the City of the fact that the storm drain was not covered and located in a pedestrian sidewalk;

c) not performing a reasonable, diligent inspection or inquiry that would have informed the City of the defective condition of the street caused by the absence of the storm drain cover and the location of the storm drain;

d) not properly maintaining the storm drain; and

e) not correcting and/or repairing the defective condition of the sidewalk on F.M. 518 caused by the absence of a storm drain cover and its location on F.M. 518.

The City filed a plea to the jurisdiction. The trial court denied the plea, and the City appealed.

Analysis:

The Court concluded that there was no waiver of immunity for the LeBlancs' claims. First, the City asserted that the LeBlancs' complaint was not about a lack of maintenance. Uncontroverted evidence, including TxDOT's original plans for the highway and related improvements, showed that the drain was designed to be covered with a wide grate, rather than a solid cover. The court noted that maintenance is "the preservation of existing conditions." The LeBlancs' specific allegations and answers to interrogatories indicated that they alleged LeBlanc was injured due to the absence of a solid cover, rather than a mere grate. That, however, was a design decision made when the highway was built. But the Tort Claims Act does not waive sovereign immunity for the discretionary actions of a governmental unit. Tex. Civ. Prac. & Rem. Code Ann.§ 101.056(2). Therefore, the City's immunity was not waived for using a grate rather than a solid covering.

The LeBlancs also alleged that the storm sewer constituted a "special defect" under the Tort Claims Act. The Act does not specifically define special defects but likens them to "excavations or obstructions on highways, roads, or streets." Tex. Civ. Prac. & Rem. Code Ann.§ 101.022(b). "The statutory test for a 'special defect,' for purposes of the [Act], is simply whether the condition is of the same class as an excavation or obstruction on a highway, road, or street, and there is no requirement that the condition pose an unexpected and unusual danger." The court noted that the location of the drain was far enough from the road that it did not pose a danger to an ordinary user of the road. Furthermore, the court noted that a "longstanding, routine, or permanent condition is not a special defect." Because the drain was in the same condition that it had been since its construction in 1985, it was a longstanding, routine, or permanent condition, and the court concluded that it was not a special defect.

C. Election of Remedies.

***Molina v. Alvarado*, 463 S.W.3d 867, 869 (Tex. 2015).**

Issue:

Whether the election-of-remedies provision of the Tort Claims Act barred suit against employee in his individual capacity when the plaintiff's original petition named the City as defendant, based on employee's actions.

Facts:

Alvarado sued the City of McCamey for negligence and negligence per se, claiming that Molina was driving a city vehicle under the influence of alcohol when he struck Alvarado's vehicle. Alvarado's original petition alleged generally that (1) Molina "was operating a City vehicle in the course and scope of his employment, agency, and/or governmental function" with the City of McCamey, and (2) the City, "through its employee, agent and/or servant [Molina], operated the vehicle in question in a negligent manner."

Alvarado later amended his petition, adding Molina as a defendant. The amended petition alleged that Molina "was operating a City vehicle in the course and scope of his employment, agency and/or governmental function" with the City. Alvarado reasserted that the City "through its employee, agent and/or servant Molina, operated the vehicle in question in a negligent manner." Alvarado also added an alternative allegation: "if it is found that Molina was not furthering the governmental affairs of [the City] on the occasion in question, Molina is liable in his individual capacity for operating the vehicle in question in a negligent manner."

Molina sought summary judgment dismissing the suit against him under the Tort Claims Act's election-of-remedies provision. Tex. Civ. Prac. & Rem. Code § 101.006. The trial court denied the motion. The court of appeals concluded that a fact issue regarding whether Molina was operating the vehicle within the scope of his employment precluded summary judgment.

Analysis:

In a short, per curiam opinion, the Supreme Court explained the basics of the election-of-remedies provision.

> Once the plaintiff elects to sue either the employee in his individual capacity or the governmental unit, subsection (a) or (b) will "immediately and forever" bar him from subsequently electing to sue

the other regarding the same subject matter. .... But in light of subsection (f), when the plaintiff has previously filed suit against a government official, the applicability of subsections (a) and (b) "turn[ ] on whether the suit is considered to be against the officers in their individual or official capacities."

Section 101.106(f) provides that if plaintiff's suit is "filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment" and "could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only." Tex. Civ. Prac. & Rem. Code § 101.106(f). .... Conversely, suits against an employee based on conduct outside the scope of employment are suits against an employee in his individual capacity and seek personal liability.

When the suit is considered to be one against the employee in his official capacity, "subsection (f) provides the TTCA plaintiff a window to amend his pleadings to substitute the governmental unit before the court dismisses the suit against the employee." Once the defendant employee files a motion under subsection (f), the plaintiff must either "dispute that [the employee] acted in his official capacity" or "implicitly concede[ ] that he had sued [the employee] in his official capacity only." *Id.* at 360. The election-of-remedies provision therefore "force[s] a plaintiff to decide at the outset whether an employee acted independently ... or acted within the general scope of his or her employment."

"Because the decision regarding whom to sue has irrevocable consequences, a plaintiff must proceed cautiously before filing suit and carefully consider whether to seek relief from the governmental unit or from the employee individually." However, as we have previously noted, a plaintiff "may not be in the position of knowing whether the [employee] was acting within the scope of employment" when he files suit.

....

If at the time Alvarado filed suit he possessed insufficient information to determine whether Molina was acting within the scope of his employment, the prudent choice would have

> **been to sue Molina, and await a factual resolution of that question. Because Alvarado did not do so, he essentially chose his defendant before being required to do so by the election-of-remedies provision. That choice is still an irrevocable election under section 101.106, and the TTCA bars him from later filing suit against Molina.**

(Citations omitted, emphasis added.)

D. Official Immunity Defense.

***Texas Dep't of Pub. Safety v. Bonilla*, No. 14-0694, 2015 WL 7786856, at *1 (Tex. Dec. 4, 2015)**

Issue:

Whether court of appeals applied the proper legal standard for analysis of the good-faith component of an official immunity defense.

Facts:

Bonilla sustained injuries in an automobile accident that occurred when a Texas Department of Public Safety (DPS) trooper ran a red light while allegedly pursuing a reckless driver. Bonilla sued DPS, relying on the Texas Tort Claims Act's waiver of sovereign immunity. In a combined motion for summary judgment and plea to the jurisdiction, DPS claimed it retained immunity from suit based on (1) the trooper's official immunity and (2) the emergency-response exception to the Tort Claims Act's immunity waiver. The trial court denied DPS's motion and plea. On interlocutory appeal, the court of appeals affirmed, holding that (1) DPS failed to conclusively establish the good-faith element of its official-immunity defense, (2) DPS's summary-judgment evidence was incompetent to establish good faith because it failed to address whether the trooper considered alternative courses of action, and (3) Bonilla raised a fact issue regarding applicability of the emergency-response exception.

DPS sought review, contending that the court of appeals erred in its analysis.

Analysis:

The Supreme Court reviewed the basics of official immunity. Official immunity is an affirmative defense for a governmental employee from personal liability. When a governmental employee is protected from liability, the governmental entity is then protected from vicarious liability. *See* Tex. Civ. Prac. & Rem. Code § 101.021 (governmental unit liable if "the employee would be personally liable to the claimant according to Texas law"). Official immunity applies to the good-faith performance of discretionary duties within the scope of the employee's authority.

"Good faith is a test of objective legal reasonableness." "[A] law-enforcement officer can obtain summary judgment in a pursuit or emergency-response case by proving that 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 those actions." "'Need' refers to the urgency of the circumstances requiring police intervention, while 'risk' refers to the countervailing public safety concerns."

Good faith does not require proof that all reasonably prudent officers would have resolved the need/risk analysis in the same manner under similar circumstances. Likewise, evidence of good faith is not controverted merely because a reasonably prudent officer could have made a different decision. "Rather, when the summary-judgment record bears competent evidence of good faith, that element of the official-immunity defense is established unless the plaintiff shows that *no* reasonable person in the officer's position could have thought the facts justified the officer's actions."

The Court further explained that the good faith standard is "analogous to an abuse-of-discretion standard" and protects "all but the plainly incompetent or those who knowingly violate the law."

The relevant test for good faith "is whether any reasonably prudent officer possessed of the same information could have determined the trooper's actions were justified," not what a reasonable person would have done, as in a negligence case. The Court faulted the court of appeals for giving "decisive weight to evidence that a reasonably prudent officer could have made a different decision." Rather than inquiring "whether no reasonable prudent officer could have" reached the same decision.

The Supreme Court also emphasized that "[m]agic words are not required to establish that a law-enforcement officer considered the need/risk balancing factors."

> DPS's summary-judgment evidence detailed the specific circumstances giving rise to pursuit and emphasized the potential danger to the public due to the subject vehicle's erratic and unsafe activity. Although not explicitly addressing alternatives to pursuit, the trooper implicitly discounted the viability of other alternatives based on his stated belief that immediate action was necessary and his inability to identify the driver at that time. The fact that the trooper did not expressly identify "alternatives" that may have been considered does not render the evidence deficient. The court of appeals erred in holding otherwise.

II. Ultra Vires Clams and Claims for Declaratory Relief.

Patel v. Texas Dep't of Licensing and Regulation, 469 S.W.3d 69 (2015).

This case has garnered attention for its discussion (and the discussions in the concurring and dissenting opinions) of "due course of law" under the Texas constitution. However, it merits at least a brief mention in the immunity context. The Supreme Court took the opportunity to clearly state that its opinions such as *Texas Department of Insurance v. Reconveyance Services, Inc.*, 306 S.W.3d 256 (Tex. 2010), and *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370-72 (Tex. 2009), did not represent a departure from its prior immunity opinions. "[S]overeign immunity is inapplicable in a suit against a governmental entity that challenges the constitutionality of a statute and seeks only equitable relief." Although not clearly stated in the *Patel* opinion, I would alter the end of the prior sentence to clarify "... seeks only ***prospective*** equitable relief." In *Patel*, the injunction sought was to "bar[] the state from enforcing the cosmetology scheme...." Furthermore, *Heinrich* contains a discussion of the differences between prospective and retrospective (or retroactive) relief.

Sw. Bell Tel., L.P. v. Emmett, 459 S.W.3d 578, 583 (Tex. 2015).

Issue:

Whether the Commissioners of the Commissioners Court conduct denying relocation costs under Texas Water Code section 49.223 constituted ultra vires actions that falls within the *ultra vires* exception to governmental immunity.

Facts:

The Harris County Flood Control District is a governmental agency created pursuant to the Texas constitution and, among other powers and functions, "[t]o devise plans and construct works to lessen and control floods." The District's governing body is the Harris County Commissioners Court.

The Commissioners Court adopted the Brays Bayou Flood Damage Reduction Plans to widen and deepen the Brays Bayou Channel and reduce flooding around the Bayou. The widening and deepening would result in the destruction of 30 bridges over the Bayou. Necessarily, then, any utilities located on the bridges must be relocated. Southwestern Bell sought to have the District pay for location pursuant to the Texas Water Code, which provides: "In the event that the district ... makes necessary the relocation ... of ... [utility facilities] ..., all necessary relocations

... shall be done at the sole expense of the district ...." Tex. Water Code Ann. § 49.223. The city, at the District's request, Sent Southwestern bell a letter indicating that, if it failed to relocate its facilities, the City would do so and assess the costs against Southwestern Bell.

Southwestern Bell sued the commissioners in their official capacity, alleging *ultra vires* acts and seeking a declaratory judgment that section 49.233 required the District to bear the relocation costs resulting from the Brays Bayou Plan. The trial court granted the Commissioners' plea to the jurisdiction, and the court of appeals affirmed.

Analysis:

The Supreme Court first addressed the Commissioners' arguments that section 49.223 did not apply to the situation before it. In part, the Court relied on the plain language of the statute and concluded that the District's adoption of the Brays Bayou Plan called for the destruction of the bridge, thereby, "mak[ing] necessary" the relocation of the utility facilities on the bridge.

Having determined that section 49.223 applied, the Supreme Court turned to the ultra vires claims against the Commissioners in their official capacities. Noting that that section 49.223 provides that utility relocation "shall" be done at the District's expense, the Court concluded that the duty imposed was mandatory, when the circumstances described by the statute were met. Furthermore, the statute contains "no indication that the District is to conduct any form of review, deliberation, or judgment in exercising its payment obligation." Because section 49.223 imposed a ministerial duty on the District, the Commissioners had no discretion in determining whether the District would pay the relocation costs. Therefore, the attempts to have Southwestern Bell bear relocation costs contrary to the duty imposed by statue were ultra vires acts. As a result, the trial court had jurisdiction under the ultra vires exception to sovereign immunity.

***City of Dallas v. City of Corsicana*, No. 10-14-00090-CV, 2015 WL 4985935, at *1 (Tex. App.—Waco Aug. 20, 2015, pet. filed).**

Issue:

Whether the City of Dallas was immune from a suit by the City of Corsicana for tortious interference with contract.

Facts:

The City of Corsicana and other taxing jurisdictions (collectively Corsicana) entered into tax-abatement agreements with Home Depot in 2009. In 2011, the City of Dallas entered into a tax-abatement agreement with Home Depot. Home Depot then announced it was closing its warehouse facility in Corsicana and moving it to Dallas. Corsicana sued Home Depot for liquidated damages as provided by the tax-abatement agreements, and that suit was settled.

Corsicana then filed a rule 202 petition against Dallas based on an anticipated suit for tortious interference with tax-abatement agreements between Corsicana and Home Depot. Dallas asserted plea to the jurisdiction, which the trial court denied.

Analysis:

The court of appeals noted that, absent a legislative waiver, a municipality is immune from suits for tortious conduct committed while performing governmental functions but not performing proprietary functions. Quoting from *Hudson v. City of Houston*, 392 S.W.3d 714 (Tex. App.—Houston [1st Dist.] 2001, pet. denied), the court explained that governmental functions are "those public acts that a municipality performs as the agent of the State in furtherance of general law for the interest of the public at large." In other words, those functions "mandated by the State." In contrast, proprietary functions "are not integral to its function as an arm of the state." A municipality's proprietary functions are functions "a city performs, in its discretion, primarily for the benefit of those within the corporate limits of the city, rather than for the use by the general public." "Governmental functions are what a municipality must do for its citizens and proprietary functions are what a municipality may, in its discretion, perform for its inhabitants."

Dallas asserted immunity because entering into a tax-abatement agreement is a governmental function: only governmental entities can enter into such agreements. The court noted that neither "entering into a tax-abatement agreement" nor "recruiting a business" are listed in the Tort Claims Act list of governmental functions. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.0215. Furthermore, Corsicana's claim was not that Dallas entered into a tax-abatement agreement, but that Dallas wrongfully interfered with Corsicana's existing tax abatement agreement by offering Home Depot a better deal. Finally, recruiting a business to locate in Dallas, even when done via tax-abatement agreements, was done for the benefit of the Citizens of Dallas, not the general public at large. The court therefore concluded that the trial court did not err by denying Dallas's plea to the jurisdiction.

***Canario's, Inc. v. City of Austin*, No. 03-14-00455-CV, 2015 WL 5096650, at *1 (Tex. App.—Austin Aug. 26, 2015, pet. filed).**

Issue:

Whether the City of Austin was immune for alleged wrongful release of funds it held in escrow to ensure completion of a development project.

Facts:

Canario's was a developer for a project to construct a nightclub. As required by the City of Austin to ensure completion of projects, Canario's deposited $91,897 to be held in escrow. Years later, the City determined that the escrow funds should be released to Canario's. The City received a letter purporting to be from Canario's president and stating that he was "requesting the release of any and all Escrow posted with the City of Austin for the [nightclub] project to Mr. Claudio Cornejo and his wife Maria Rosario Flores. They are my local partners on the project." Relying on that letter, the City released $108,679.91 to Maria Flores on May 15, 2012. About one year later, Canario's informed the City that Flores was not authorized to accept the funds.

Canario's sued the City for breach of fiduciary duty, breach of contract, and negligence, alleging that, in releasing the funds, the City had violated its policies and its duty to verify the identity of a payee. The City filed a plea to the jurisdiction, asserting, among other grounds, that it was immune from suit because it was performing a governmental function when it accepted the escrow funds. The trial court granted the plea.

Analysis:

Much like the Waco Court in the *City of Dallas* case, the court first examined the nature of governmental versus proprietary functions. The court also quoted a law review article from Chief Justice Greenhill: "[G]overnmental functions are those normally performed by governmental units, e.g., police and fire protection, while the proprietary functions are those that can be, and often are provided by private persons, e.g., gas and electric service."

The City argued that in accepting the funds for security to ensure completion, "it was performing the governmental function of ensuring funding in case the City was required to complete the work itself." The City also argued that "any function performed by its Planning and Development Review Department 'qualified as a "planning" function, protected by immunity.'"

The court disagreed, stating it should not focus on the department involved but on the specific acts underlying the claims. In that case, the specific acts were the City's acceptance and holding of escrow funds and its handling of the return of the funds. Because escrow functions can be—and often are—provided by private entities, those functions are proprietary, not governmental. Therefore, the court concluded that the City was not immune from suit.

Without much explanation, the court stated, "This is not a case in which we are splitting out one operation of a government function, contrary to the argument implied by the City's insistence that any act performed by its planning department should be considered a governmental function." The court cited an example of this "splitting" *City of San Antonio v. Butler*, 131 S.W.3d 170 (Tex. App.—San Antonio 2004, pet. denied). In that case, San Antonio operated the Alamodome, a function statutorily defined as "governmental." 131 S.W.3d at 177 (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(16) (defining "civic, convention centers, or coliseums" ads governmental functions)). The plaintiff attempted to "split" out some of San Antonio's decisions and actions in operating the Alamodome—such as contracting for the sale of alcohol (to generate profits)—into discrete, separate proprietary functions. *Id.* at 178. The court, however, held "that all activities associated with the operation of one of the government functions listed in section 101.0215(a) are governmental and cannot be considered proprietary, regardless of the city's motive for engaging in the activity." In distinguishing *Butler*, the Austin court relied on the fact that escrow activities "could easily be handled by a private entity and are discretionary and not essential to or even usually associated with a municipality's planning or zoning functions."

III. Takings Claims.

***City of Houston v. Carlson*, 451 S.W.3d 828, 829 (Tex. 2014).**

Issue:

Whether plaintiffs sufficiently alleged a takings claim to waive the City's immunity.

Facts:

The City of Houston declared a condominium complex uninhabitable and posted notice that the affected owners would have to obtain certificates of occupancy. The posted notice warned that "[f]ailure to comply with this notice may subject you to a municipal court citation." The owners did not seek certificates of occupancy, but the City did not issue citations to the owners for failing to obtain the certificates. Instead, the City ordered all residents to vacate the premises. The owners sued the City for inverse condemnation, asserting that their property was taken when they were ordered to vacate. The City filed a plea to the jurisdiction, which was granted by the trial court.

Analysis:

The Supreme Court concluded that the owners were challenging the procedure used by the City, not a land-use restriction. The owners' complaints were directed at the penalty imposed and the manner in which the City enforced its standards. The Court observed that the owners had not contested any of the City's various codes or property-use restrictions: "In, fact, the [owners'] petition never once refers to the standards impose by the city's building code."

The Supreme Court also noted that neither it nor the U.S. Supreme Court had ever recognized a "purely procedural regulatory taking." The Court acknowledged cases in which the claimant "raised a direct challenge to a physical taking or land-use restriction" and "also objected to the procedure used to facilitate the disputed action." However, in the case before the court, the owners "challenge[d] the latter, but not the former." The Court held that the owners had not alleged a regulatory taking and therefore the City retained immunity.

***County of El Paso v. Navar*, No. 08-14-00250-CV, 2015 WL 4711191, at *5 (Tex. App.—El Paso Aug. 7, 2015, no pet.).**

The El Paso Court has already addressed arguments based on the *Carlson* case. The Court analyzed the pleadings and concluded that, unlike the owners in *Carlson*, the plaintiff had alleged a challenge to a city's action beyond the merely procedural.

> Navar's complaint against the County does not relate solely to the infirmity of the process. Although Navar does complain about the penalty imposed upon him and the manner in which the County enforced its standards, *i.e.,* demanding that he relocate the mobile homes and reconstruct the water, sewage, gas, and electric facilities on the property, he is also arguing that it was unreasonable to require mobile home operators to comply with standards not previously pronounced or enforced to obtain the certificates required by Chapter 232, when those mobile home operators had previously obtained the certificates without issue. In other words, Navar is alleging, in part, that the County affected a regulatory taking by revoking the property's grandfathered status. By proceeding under such a theory, Navar has properly pled a regulatory taking.

***Harris County Flood Control Dist. v. Kerr*, No. 13-0303, 58 Tex. Sup. Ct. J. 1085, 2015 WL 3641517 (Tex. June 12, 2015).**

Issue:

Whether homeowners raised a fact question concerning the elements of a taking based on Harris County Flood Control District's "approving new development without mitigating runoff and drainage issues."

Facts:

In 1976, the U.S. Army Corps of Engineers for the upper White Oak Bayou, noting problems with recurring floods and noting the problems with "continuing increases in suburban development which reduces the infiltration of rainfall and increases and accelerates runoff to the streams." The report also contained a prediction: "Additional residential development is expected to occur with or without an adequate plan for controlling the floods. Although current local regulations require that new structures be built above the level of the 100–year flood, damages will increase substantially in the future with increased rainfall runoff rates."

The Corps proposed a plan to reduce or maintain the hundred year flood plain utilizing mainly federal funds. The County and District agreed to facilitate the project.

However, "federal funding was slow to materialize." Thus, the County and District began developing their own flood-control plans. They hired Pate Engineering to develop a plan, known as the Pate Plan, which was adopted in 1984. The Pate Plan addressed 100-year flood events by calling for channel improvements in the Bayou and other measures, such as regional detention ponds to mitigate continuing development in the upper watershed. The Pate Plan, however, was never fully implemented.

A flood in 1989 led to the commission of another study, by Klotz Associates. The Klotz Plan identified flaws in the Pate Plan's analysis, including "seriously underestimate[ing] the bayou's flood flows and levels." Although the Klotz Plan's was "more extensive in some regards than the Pate Plan, the Klotz Plan was modeled around containing 10–year (as opposed to 100–year) flood events." The County and District adopted the Klotz Plan changes.

After experiencing floods during major storms in 1998, 2001, and 2002, more than 400 homeowners and residents in the upper White Oak Bayou watershed in Harris County. The homeowners sued Harris County and the Harris County Flood Control District, "asserting that they approved new upstream development without implementing appropriate flood-control measures, and they were substantially certain flooding would result." The County and District filed combined pleas to the jurisdiction and motions for summary judgment, asserting that no genuine issue of material fact had been raised on the elements of a takings claim. The trial court denied the motion, and the court of appeals affirmed the denial of the plea to the jurisdiction.

Analysis:

The Supreme Court began by identifying the standard to defeat a plea to the jurisdiction in a takings claim: Because sovereign immunity does not shield the government for liability for a taking, "the homeowners need only raise a fact issue as to each element of their claim": that the government "intentionally took or damaged their property for public use, or was substantially certain that would be the result."

Concerning intent, "the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result. It is not enough that the act causing the harm be intentional–there must also be knowledge to a substantial certainty that the harm will occur." The Court emphasized that the homeowners were not seeking to impose a general duty to prevent all flooding, but instead asserted "that the entities approved private development in the White Oak Bayou watershed without mitigating its consequences, being substantially certain the unmitigated development would bring flooding with it."

The evidence showed that the various reports, beginning with the Corps' report in 1976, showed that the County and District had known for decades that "development in the bayou's watershed exacerbates flooding in the upper bayou." The adoption of the Klotz Plan, which planned for 10-year floods, rather than the previous 100-year floods of the Pate Plan, along with continued development resulting in increased runoff, was some evidence that the County and District were substantially certain that flooding would result. The Supreme Court therefore concluded that the evidence was sufficient to raise a fact issue on intent.

The Court also concluded that the evidence was sufficient to raise a fact issue on whether the County's and District's actions resulted in a "taking" of the homeowners' property, specifically, whether the actions caused the flooding. The Court noted that the Klotz Plan targeted 10–year events, whereas the Pate Plan had targeted 100–year floods. The homeowners' expert also presented data supporting his conclusion that the flooding was caused by water exceeding the bounds of the bayou rather than by the pooling of water in the homeowners' yards. He also opined, after comparing data from 1982 and 1998, that development "without the implementation of proper stormwater management measures (such as detention and/or retention)" was a "but for" cause of the homeowners' properties flooding.

Finally, the Supreme Court concluded that some evidence showed that the homeowners properties were taken for a public use. "To the extent the government entities were substantially certain the homeowners' homes would flood because of unmitigated development, but sacrificed their homes for the sake of new development, this was for a public use. If the homeowners bore the burden of the growing community, then, 'in all fairness and justice, [the burden] should be borne by the public as a whole.'"

IV. Local Government Contract Claims Act (Chapter 271, Local Government Code).

***Damuth v. Trinity Valley Cmty. Coll.*, 450 S.W.3d 903, 904 (Tex. 2014).**

Issue:

Whether the Local Government Contract Claims Act ("the Act") waives a local governmental entity's immunity from suit for a breach of an employment contract.

Facts:

Damuth had a written employment agreement for "services ... as Head Women's Basketball Coach/Professor" with Trinity Valley Community College, a local governmental entity. Five months into the one-year contract, the College fired Damuth. Damuth sued TVCC for breach of contract. On TVCC's plea of immunity, the trial court dismissed the case. The court of appeals affirmed, holding that the Act does not waive immunity from suit for breach of employment contracts.

Analysis:

In a short, per curiam opinion, the Supreme Court reversed the court of appeals. The Act applies to "services." Citing a prior case involving the Act, the Supreme Court noted that, although the Legislature did not define "services" in the Act, "the term is broad enough to encompass a wide array of activities." *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.,* 320 S.W.3d 829, 839 & n.8 (Tex. 2010). "The term is certainly broad enough to include services provided by employees."

***Zachry Const. Corp. v. Port of Houston Auth. of Harris County*, 449 S.W.3d 98, 101 (Tex. 2014).**

Issue:

Whether the damage limitations in the Local Government Contract Claims Act ("the Act") are jurisdictional and whether the Act waives immunity for claims for delay damages not expressly provided for in the contract.

Facts:

Zachry Construction Corporation contracted to construct a wharf on the Bayport Ship Channel for the Port of Houston Authority of Harris County, Texas. The wharf originally was to be approximately 1,700 feet long. Zachry devised an "innovative" plan of building earthen berms and freezing them, to allow the construction to take place "in the dry," resulting in quicker and cheaper completion of the project, among other benefits. Time was of the essence, as the Port required enough of the wharf to be completed by February 2006 to accommodate a ship from China carrying cranes that would be used on the wharf.

However, nine months into the project, the Port realized it would need a 2,000 foot wharf to accommodate the ships it ultimately expected to service. To complete the sections needed for the ship from China and to continue to work "in the dry," Zachry proposed to erect a third berm, a cutoff berm, separating the existing work area in two. That way, Zachry could finish the portion for the ship from China, while continuing to work on the remainder of the wharf in the dry. The Port and Zachry entered into a change order using Zachry's approach. The Port later changed its mind and refused to let Zachry construct the cutoff berm.

Zachry ultimately completed the project long after the contract deadline. The Port had withheld $2.36 million in liquidated damages for failing to complete the project by the deadline.

Zachry sued the Port claiming $30 million for delay damages caused by the Port. After a lengthy jury trial, the jury found that the Port had breached the contract, causing $18.6 million in delay damages.

Analysis:

On appeal, the Port contended that the contract did not expressly provide for delay damages, and therefore the Act did not waive its immunity for a claim for delay damages. The Supreme Court identified two parts to the issue, whether the

Act's limitations on recovery help define and restrict the scope of the waiver of immunity and, if so, whether the delay damages are permitted by the Act, waiving a local governmental entity's immunity from suit.

The Court examined the language of the Act and concluded that section 271.153, providing limitations on damages awards, contained "terms and conditions" that define the waiver of immunity. Therefore, the Court concluded that the Act does not waive immunity from suit on a claim for damages not recoverable under section 271.153. This holding resolved a conflict on the issue. *Compare Tooke v. City of Mexia*, 197 S.W.3d 325, 346 (Tex. 2006) *with City of San Antonio ex rel. San Antonio Water Sys. v. Lower Colorado River Auth.*, 369 S.W.3d 231, 234 (Tex. App.—Austin 2011, no pet.) (disagreed with by *Zachry*) (citing *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 840 (Tex. 2010)).

Next, the Court held that the Act waived immunity for delay damages. Section 271.153 expressly allows recovery of "the balance due and ..., including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration." Tex. Loc. Gov't Code Ann. § 271.153(a)(1). Also, "[g]enerally, a contractor has a right to delay damages for breach of contract." And, the Court explained, "nothing in the Act suggests that the Legislature intended to create a unique and somehow limited standard for measuring direct damages for breach of contract." Therefore, the Court held that the Act waives immunity for delay damages not expressly provided for in the contract.