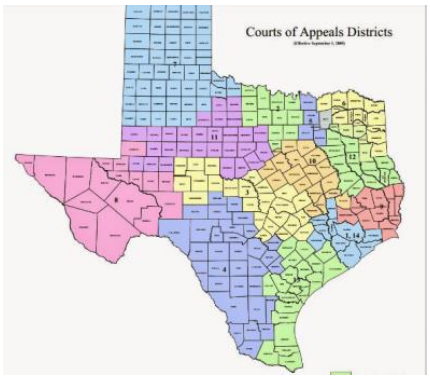

RECENT STATE CASES OF INTEREST TO CITIES

Presented to:
TCAA Summer Conference
San Antonio, Texas
June 18, 2019

Presented by:
LAURA MUELLER, ASSOCIATE
BOJORQUEZ LAW FIRM

Paper by:
TML LEGAL DEPARTMENT
Ryan Henry, Law Offices of Ryan Henry
Laura Mueller, Associate, Bojorquez Law Firm

LAURA MUELLER
ASSOCIATE
The Bojorquez Law Firm, P.C.

Laura, originally from Yukon, Oklahoma, graduated summa cum laude from the University of Oklahoma in 2001 with a liberal arts degree. She attended the University of Texas School of Law and worked as a law clerk for TML and as an intern for the Travis County Juvenile Public Defender's Office while there. After graduating with honors in 2004, Laura clerked for the Supreme Court of Texas. She joined the TML legal staff as legal counsel in November 2006. Laura became Assistant General Counsel in November 2010. Laura became an associate of the Bojorquez Law Firm in April 2016. Laura specializes in employment law, sign regulation, and open government. Besides serving Texas cities, Laura also enjoys spending time with her husband Chris, her two sons, Johnathon and Joshua, and her daughter, Emma.

TML LEGAL DEPARTMENT
Austin, Texas

The Texas Municipal League (TML) Legal Services Department provides legal assistance to TML member cities. The attorneys answer general questions, participate in educational seminars, prepare handbooks, magazine articles, and written materials, including legal opinions and amicus briefs, and provide support services for the Legislative Department. The Staff also assists with trainings and the TCAA newsletter which contains articles and the case summaries presented in this paper.

RYAN HENRY
Law Offices of Ryan Henry, PLLC
1380 Pantheon Way, Suite 215
San Antonio, Texas 78232
Phone: 210-257-6357 • Fax: 210-569-6494
www.rshlawfirm.com

We would like to give a shout out to Ryan Henry, whose timely summaries on all cases of interest to cities makes everyone's job just a little bit easier. If you have not had a chance to sign up to be placed on his free email list for case summaries, you should check it out at www.rshlawfirm.com.

Table of Contents

RECENT STATE CASES

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.

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.

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's fees 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 court's judgment 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.

***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.

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.

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.

***Ex parte City of El Paso*, 563 S.W.3d 517 (Tex. App.—Austin 2018, pet. filed)**. 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 Judgments 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 judgment did not adjudicate or affect the claims asserted in the El Paso suit. The city and Grossman filed motions to modify the judgment, but the district court denied the motions. Grossman had asked the trial court to modify its judgment 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.
***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.

***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.

***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.

***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 judgment. The trial court held a hearing (at which Thompson did not appear) and eventually signed a final judgment granting the City Attorney Office's motion for summary judgment 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 judgment 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 judgment. The trial denied the motions. Thompson appealed the trial court's judgment 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 judgment.

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 judgment 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 judgment, 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 judgment under Rule 329b, which provides that the judgment 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 judgment. Thompson filed her motion 69 days after the trial court signed its judgment. As a result, the court may not review the trial court's decision to deny the motion.

***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.

***City of Granbury v. Thunderbolt Air, LLC*, No. 07-18-00027-CV, 2018 WL 3966443 (Tex. App.—Amarillo Aug. 17, 2018) (mem. op.)**. 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 judgment 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

***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.

CRIMINAL TRESPASS

***Castro v. State*, No. 08-16-00354-CR, 2018 WL 3629380 (Tex. App.—El Paso July 31, 2018) (mem. op.) (not designated for publication)**. 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.

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. In response, the City of Lancaster filed a motion for rehearing. The court of appeals denied the motion, withdrew the initial opinion, vacated the judgment, 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.

***Pressley v. Casar*, 567 S.W.3d 327 (Tex. 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.

***In re Turner*, 558 S.W.3d 796 (Tex. App.—Houston [14th Dist.] 2018, no pet.).** 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 that 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.

EMPLOYMENT

***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.

***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.

***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.

***City of Houston v. Houston Mun. Emps. Pension Sys.*, 549 S.W.3d 566 (Tex. 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.

***DeFrancesco v. Memorial Village 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.

***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.

***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 *McDonnell 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.

***Stacks v. Burnet Cty. Sheriff's Office,* 565 S.W.3d 860 (Tex. App.—Austin 2018, no pet.).** 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.

***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 judgment and a no-evidence motion for summary judgment 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 that was not disputed with competent evidence. As a result, the court affirmed the trial court's judgment.

***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 judgment 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 judgment.

***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.

***Texas Ass'n of Bus. v. City of Austin,* 565 S.W.3d 425 (Tex. App.—Austin 2018, no pet. h.).** 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 intervener, 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.

***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.

***Wernert v. City of Dublin*, 557 S.W.3d 868 (Tex. App.—Eastland 2018, no pet.)**. 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.

***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 Judgment 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 judgment against the city and rendered judgment 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 judgment 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 judgment 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 Judgment Act, and affirmed the award.

***Butler v. City of Big Spring*, 556 S.W.3d 897 (Tex. App.—Eastland 2018, no pet.)**. 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.
***Jefferson Cty. v. Jackson*, 557 S.W.3d 659 (Tex. App.—Beaumont 2018, no pet.).** 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.

***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.

***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.

***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 judgment 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 judgment, and a motion for no-evidence summary judgment, 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.

***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.

ETHICS

***City of Forest Hill v. Benson*, 555 S.W.3d 284 (Tex. App.—Fort Worth 2018, no pet.)**. 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 Sections 141.033–.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.

GOVERNMENTAL IMMUNITY – CONTRACT

***Owens v. City of Tyler,* 564 S.W.3d 850 (Tex. 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.

***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.

***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.

***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.

***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 tenfold. 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.

***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 judgment 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 judgment 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.

***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.

***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.

***Tri-Stem, Ltd. v. City of Houston*, 566 S.W.3d 789 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.).** 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.

***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.

***M.E.N. Water Supply Corp. v. City of Corsicana*, 564 S.W.3d 474 (Tex. App.—Waco 2018, pet. filed)**. 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.

***CHW-Lattas Creek, L.P. v. City of Alice,* 565 S.W.3d 779 (Tex. App.—San Antonio 2018, pet. filed).** 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.

***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 judgment. 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 judgment 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 judgment 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

judgment 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.

***City of Merkel v. Copeland*, 561 S.W.3d 720 (Tex. App.—Eastland 2018, pet. denied)**. 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.

***Ray's Drive Inn Inc. v. Angelina Cty. & Cities Health Dist.*, No. 12-18-00076-CV, 2018 WL 4474054 (Tex. App.—Tyler Sep. 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.

***Triple BB, LLC v. The Village of Briarcliff,* No. 03-17-00149-CV, 2018 WL 3863252 (Tex. App.—Austin Aug. 15, 2018) (mem. op.)**. 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 judgment, 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 judgment. 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.

***City of Westworth Village v. City of White Settlement,* 558 S.W.3d 232 (Tex. App.—Fort Worth 2018, pet. filed).** 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 its 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.

***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 judgment 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.

GOVERNMENTAL IMMUNITY – TORT

***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.

***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.

***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 plant, 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.

***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 "judgment" 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.

***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.

***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.

***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.

***City of San Antonio v. Rocha,* No. 04-18-00367, 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.

***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 judgment was affirmed.

***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.

***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.

***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.

***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.

***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.

***City of Beaumont v. Mahmood*, 558 S.W.3d 712 (Tex. App.—Beaumont 2018, no pet.)**. 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 Facilities Comm'n v. Speer*, 559 S.W.3d 245 (Tex. App.—Austin 2018, no pet.)**. 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. Speer 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. Speer 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 Speer failed to establish that the commission had actual or constructive notice of the dangerous condition. As a result, the plea should have been granted.

***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.

***Hinojosa v. Metro. Transit Auth. of Harris Cty.*, No. 01-17-00824-CV, 2018 WL 4131890 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018) (mem. op.).** 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.

***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.

***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.

***City of Houston v. Ellis*, No. 01-17-00423-CV, 2018 WL 4087415 (Tex. App.—Houston [1st Dist.] Aug. 28, 2018) (mem. op.)**. 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.

***City of San Antonio v. Smith*, 562 S.W.3d 75 (Tex. App.—San Antonio 2018, pet. denied)**. 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.

***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.

***Roche v. City of Austin*, No. 03-17-00727-CV, 2018 WL 3978333 (Tex. App.—Austin Aug. 21, 2018) (mem. op.)**. 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.

***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, Svadlenak attempted to walk down the same stairs but fell and was injured. According to Svadlenak, Ricks stated that the city had installed step lighting in 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.

***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.

***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.

***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.

***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.

***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.

***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.

***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.

***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.

***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.

LAND USE

***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 judgment hearing. The district court granted summary judgment 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 judgment motion. However, because the city and the board did not appeal the denial of the summary judgment motion, and because EMF did not move for summary judgment, the court did not render judgment in EMF's favor. Accordingly, the court reversed the trial court's judgment and remanded the case for further proceedings.

***City of Pearsall v. Correa*, No. 04-18-003310-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 Judgment 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.

***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 judgment 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 judgment on its Uniform Declaratory Judgment Act (UDJA) claims. While the summary-judgment 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 judgment, the Board's motion for summary judgment, 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.

***City of Fort Worth v. Rylie*, 563 S.W.3d 346 (Tex. App.—Fort Worth 2018, no pet.).** 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.

***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.

***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.

***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.

***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.

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.

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 judgment 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.

PREEMPTION

***City of Laredo v. Laredo Merchants Assoc.*, 550 S.W.3d 586 (Tex. 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.

PREMISES 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.

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.

***Texas Tech Univ. v. Dolcefino Comm., LLC*, 565 S.W.3d 442 (Tex. App.—Amarillo 2018, no pet.)**. 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.

***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.

REAL PROPERTY

***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.

***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 judgment. 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 judgment 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 judgment 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 judgment 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 judgment disposing of the school district's takings claim against the city and remanded the case because a party may not be granted judgment as a matter of law on a cause of action not addressed in a summary judgment proceeding.

RED LIGHT CAMERAS

***City of Richardson v. Bowman*, 555 S.W.3d 670 (Tex. App.—Dallas 2018, pet. filed).** 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.

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.

***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.

***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.

***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.

***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.

***City of Crowley v. Ray,* 558 S.W.3d 335 (Tex. App.—Fort Worth 2018, pet. denied)**. 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.

TAXATION

***Ward Cty. Appraisal Dist. v. EES Leasing LLC*, 563 S.W.3d 203 (Tex. 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.

***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.

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.

***State ex rel. Best v. Harper*, 562 S.W.3d 1 (Tex. 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.

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 Section 13.2475, 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 Section 13.2475 unconstitutional.

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.

UTILITIES

***City of Tyler v. Liberty Util. Corp.*, No. 01-17-00745-CR, 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.

***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.

VESTED RIGHTS

***Village of Tiki Island v. Premier Tierra Holdings, Inc*., 555 S.W.3d 738 (Tex. App.—Houston [14th Dist.] 2018, no pet.).** 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.

WORKERS' COMPENSATION

***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.

***Martinez v. State Office of Risk Mgmt.*, No. 04-14-00558, 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 judgment. 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 judgment and granted SORM's motion for summary judgment. Martinez appealed.

The court of appeals found that the trial court had erred in granting SORM's motion for summary judgment because SORM's statutory violations argument was never presented for consideration in the administrative review process, and as such, the trial court lacked summary judgment. 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 judgment. 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 judgment in SORM's favor.