RECENT STATE & FEDERAL CASES

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Ryan Henry graduated with honors from New Mexico State University with dual bachelor's degrees in Criminal Justice and Psychology in 1995. He attended law school at Texas Tech School of Law and graduated in May of 1998.

While attending law school, Ryan began clerking for the Lubbock City Attorney's Office. He received his third-year practice card and began prosecuting municipal court complaints and appearing in justice of the peace court for the City. As a result, he began defending governmental entities even before he graduated from law school and so began his career supporting local governments. Upon graduation, Ryan began working in Brownsville, Texas, with the same focus. In June of 2002, Ryan moved to San Antonio and joined a local law firm doing the same type of law. In 2012, Ryan started the Law Offices of Ryan Henry, PLLC. In June 2016 and this coming Ryan was listed as one of the best lawyers in municipal law by S.A. Scene Magazine in the San Antonio area. Ryan is also on the board for the State Bar Section - Government Law Council.

RECENT STATE AND FEDERAL CASES

Federal:

U.S. Supreme Court holds officer entitled to qualified immunity for shooting suspect after arriving late to an altercation with other officers. *White v. Pauly,* 137 S. Ct. 548 (2017).

This is an excessive force, police shooting case where the United States Supreme Court granted an officer's qualified immunity defense.

Through a serious of events, three officers became involved in an incident which started with a road rage encounter between motorists. While Officers Mariscal and Truesdale left the roadway to confront a suspect (Daniel Pauly) who had left the scene, Officer White remained behind in case the suspect returned. Officer White would later be called to assist Officer's Mariscal and Truesdale at the home of the Pauly brothers. The Court went into detail about how Officers Mariscal and Truesdale tracked down the Pauly brothers at a location and had approached the house with caution. The end result of the description is the Pauly brothers presented evidence they did not hear Officer's Mariscal and Truesdale identify themselves and thought trespassers were trying to enter their house. The confrontation escalated, but had not resulted in gunfire… yet. As Officer White arrived on scene, he witnessed Officer's Mariscal and Truesdale under cover, heard someone he did not know yell from the house "[w]e have guns" and saw someone point a weapon in his direction (i.e. Samuel Pauly) from the house. Officer Mariscal fired a shot which missed, but two to three seconds later Officer White shot and killed Samuel Pauly. The trial court and 10th Court of Appeals denied his qualified immunity defense.

The U.S. Supreme Court first noted that it must examine the facts as they were known to Officer White at the time, not any other evidence of facts which may have occurred but which he was unaware. Qualified immunity attaches when an official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." It protects "'all but the plainly incompetent or those who knowingly violate the law.'" The Court reiterated the longstanding principle that "clearly established law" should not be defined "at a high level of generality." It must be "particularized" to the facts of the case. Clearly established federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one White confronted here. As a result, the trial court and court of appeals improperly analyzed the qualified immunity defense. The order of denial was vacated, but the case was remanded.

U.S. Supreme Court holds trial court must consider affidavit from juror regarding deliberations when it indicates another juror expressed anti-Hispanic bias during deliberations Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

This is a U.S. Supreme Court case which is a criminal conviction for sexual assault of two teenage sisters. While a criminal case, the part of importance for all governmental lawyers is the preemption issue on jury misconduct.

Miguel Angel Peña-Rodriguez was convicted of harassment and unlawful sexual contact. After a 3-day trial, the jury found him guilty. After the jury was released two jurors approached Peña-Rodriguez's counsel and stated during deliberations, another juror had expressed anti-Hispanic bias toward petitioner and petitioner's

alibi witness. The juror in question, H.C. made such statements as "his experience as an ex-law enforcement official is Mexican men had a bravado which caused them to believe they could do whatever they wanted to women" and "I think he did it because he's Mexican." After receiving the jurors' affidavits who came forward, the trial court denied the Defendant's motion for new trial. Colorado's rules of evidence prevent jurors from testifying as to any statements made during deliberations, similar to the federal counterparts. As a result, the affidavits could not be considered. The Colorado Supreme Court affirmed the conviction. Peña-Rodriguez appealed to the U.S. Supreme Court.

In this 55 page collection of opinions and dissents, the Court analyzed the competing interests of the common law no-impeachment rule and the Court's decisions seeking to eliminate racial bias in the jury system. In the end, the majority opinion held "that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." Before the no-impeachment bar can be set aside to allow further judicial inquiry, there must be a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. The case was reversed and remanded.

In dissent Justice Thomas does not believe the majority's opinion can be read with the original understandings behind the Sixth and Fourteenth Amendments. Justice Alito's dissent holds the majority's opinion is incompatible with the text of the Sixth Amendment.

U.S. Supreme Court holds state statute regulating charging and/or advertising credit card surcharges to customers implicates protected First Amendment speech *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017).

In this First Amendment commercial speech case, the U.S. Supreme Court held a pricing system used by a merchant with different prices depending on the use of a credit card or cash and which displayed more than simply a single price is protected commercial speech.

For merchants, whenever they accept payment via a credit card, the merchant is charged a transaction fee by the credit card company. Some merchants pass on the extra fee to the customers using the card while others offer a reduction in price for the use of cash. This results in the credit card customer paying more than a cash customer. New York law, specifically N. Y. Gen. Bus. Law §518, regulates a single price advertisement for merchandise and the surcharge method violates this provision if explained this way. Merchants are allowed to advertise multiple price systems, but advertising a single price with a caveat is prohibited. Section 518 regulates the relationship between "(1) the seller's sticker price and (2) the price the seller charges to credit card customers," requiring that these two amounts be equal. Several merchants sued the New York Attorney General seeking to hold §518 unconstitutional as improperly regulating speech. They asserted the law did not regulation price, but is limited to advertising and stickers so was speech. The trial court agreed with the merchants and struck down the law. The Second Circuit Court of Appeals disagreed holding the law merely regulated the relationship between two prices, not speech. The merchants appealed.

The U.S. Supreme Court first noted that due to the procedural history of the case, the only matter before them was an "as-applied" challenge to §518. Next the Court explained that a normal price being conveyed by a sticker or tag is, by itself, not speech protected by the First Amendment. However, §518 is different. "The law tells merchants nothing about the amount they are allowed to collect from a cash or credit card payer. Sellers are free to charge $10 for cash and $9.70, $10, $10.30, or any other amount for credit. What the law does regulate is how sellers may communicate their prices." In regulating the communication of prices rather than prices themselves §518 regulates speech. Because the Court of Appeals analyzed §518 as a non-speech

case it's holding is improper. The Court remanded the case to reconsider it in light of §518 being a regulation in speech.

Justice Breyer concurred in the judgment but cautioned that simply because the statute regulates expression of a price does not mean it is speech. He focused on whether the statute affects an interest that the First Amendment protects instead of simply the methods of conveyance. He wanted the Court of Appeals to be sure and apply the proper standard of review given the impact on protected speech may be limited.

Justices Sotomayor and Alito concurred in the judgment. They would vacate the judgment and certify the case to the New York Court of Appeals for a definitive interpretation of the state statute. The 2nd Circuit Court of Appeals chopped up the case by rejecting certification, abstaining in part, and deciding on one part only, which the Justices did not appear to like. This concurrence does a more expansive job of explaining why speech is implicated in §518 and why it may be more of an advertising restriction than a price only restriction. But, they would certify to the state court for it to weigh in on its own statute since, depending on how it ruled, it could avoid the constitutional question all together.

US Supreme Court remands redistricting case to determine if state improperly used race as a basis for redistricting lines. *Bethune-Hill v. Virginia State Bd. of Elections,* No. 15-680 (U.S. March 1, 2017)

In this U.S. Supreme Court redistricting case, the Court held the lower courts misapplied the standard for determining whether race was an impermissible factor in redrawing district lines.

This case addresses whether the Virginia state legislature's consideration of race in drawing new lines for 12 state legislative districts violated the Equal Protection Clause of the Fourteenth Amendment after the 2010 census. Certain voters challenged the new districts as unconstitutional racial gerrymandering. The trial court panel held 11 of the 12 districts did not deviate from traditional criteria so were constitutional. It also held the 12th, did deviate, but the state had a compelling interest which was narrowly tailored.

It is undisputed that the boundary lines for the 12 districts at issue were drawn with a goal of ensuring that each district would have a black voting-age population (BVAP) of at least 55%. In order to make the 12th district work, non-traditional criteria were used and justified as not wanting to dilute the black vote and to avoid diminishing the ability of black voters to elect their preferred candidates, which at the time would have violated §5 of the Voting Rights Act of 1965. The citizen's suit was dismissed.

The Supreme Court went through a lengthy analysis. It first held the district court used an incorrect legal standard regarding the first 11 districts. The proper inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications that the legislature could have used but did not. A legislature "could construct a plethora of potential maps that look consistent with traditional, race-neutral principles, but if race is the overriding reason for choosing one map over others…" unjustified race considerations may be present. The trial court erred in considering the legislature's racial motive only to the extent that the challengers identified deviations from traditional redistricting criteria. The "ultimate object of the inquiry is the legislature's predominant motive for the district's design as a whole, and any explanation for a particular portion of the lines must take account of the districtwide context. A holistic analysis is necessary to give the proper weight to districtwide evidence, such as stark splits in the racial composition of populations…" The Court remanded the determination of the first 11 districts to the trial court to reconsider in light of the Court's rulings. However, as to the 12th district, the Court held Virginia had a compelling interest to comply with the Voting Rights Act applicable at the time. The State does not have to show its action of race consideration was actually necessary to avoid a statutory violation, but only that the legislature had " 'good reasons to believe' " its use of race was needed in order to satisfy the Voting Rights Act. Virginia established its use of race for the 12th district was narrowly tailored and necessary under §5, and the result reflected the good-faith efforts of legislators to achieve an informed bipartisan

consensus. The Court affirmed the dismissal as to the 12th district and remanded the remaining 11.

Justice Alito concurred in part and in the judgment. He concurred as to the 12th district because he believed the law applicable should be the case law from 2012 and not to consider the Court's holding in *Shelby County v. Holder*, 570 U. S. ___ (2013). He concurred with the remand of the 11 districts but believes strict scrutiny should apply to them.

Justice Thomas concurred in the judgment but dissented in part. He concurred with remanding the 11 districts and would hold they must satisfy strict scrutiny requirements. As to the 12th district, he disagrees Virginia satisfied a strict scrutiny analysis. Since he has previously held §5 of the Voting Rights Act is unconstitutional, using §5 as a reason to consider impermissible grounds does not qualify as a compelling interest. He also believed Virginia did not narrowly tailor its application. And while he sympathizes with the legislature and appears to believe they were trying to comply with §5, he equates the action to "state sponsored race discrimination."

U.S. Supreme Court holds Texas can use total population for voting districts vs voter-eligible population *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

This is a voter rights case where the U.S. Supreme Court affirmed that Texas can utilize total state population in drawing district lines instead of voter-eligible population.

Texas draws its legislative districts on the basis of total population. Plaintiffs/appellants are Texas voters; they challenge this uniform method of districting on the ground that it produces unequal districts when measured by voter-eligible population. Plaintiffs argue voter-eligible population must be used to ensure that their votes will not be devalued in relation to citizens' votes in other districts. A three-judge District Court dismissed the complaint for failure to state a claim on which relief could be granted. Plaintiffs appealed.

This is a long set of opinions. I say again, this is a very long set of opinions, totaling 56 pages worth. However, the bottom line is the Court held consistent with constitutional history States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations. The Court went through a long history of events dating back to the debates of the first Constitutional Congress as well as the federal courts' tradition of abstaining from interfering with legislative districting calculations. The Court analyzed the fierce divergence between proponents of total population districts and voter-registration proponents citing the public policy reasons for each. Ultimately, the Court held "[a]s the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible to vote. Nonvoters have an important stake in many policy debates and in receiving constituent services. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation." Because constitutional history, precedent, and practice support a total population usage, the dismissal of the Plaintiffs' claims was proper.

U.S. Supreme Court holds PLRA does not have a "special circumstance" exception, but does require analysis of "available" administrative procedures for relief *Ross v Blake*, 136 S. Ct. 1850 (2016).

This is a §1983 excessive force case, but its main focus is on the Prison Litigation Reform Act ("PLRA") compliance.

While transporting an inmate (Blake) to a segregation unit, a prison guard (Madigan) assaulted Blake. Blake sued for excessive force and sued both guards transporting him (Madigan and Ross). A jury found for Blake. Ross had raised the affirmative defense that the PLRA required exhaustion of administrative remedies,

which were not performed. Ross argued that Blake had filed suit without first following the prison's prescribed procedures for obtaining an administrative remedy, while Blake argued that the internal affairs investigation was a substitute for those procedures. The trial court sided with Ross and dismissed the suit. The Fourth Circuit reversed, holding that "special circumstances" can excuse a failure to comply.

The United States Supreme Court held the Fourth Circuit's unwritten "special circumstances" exception is inconsistent with the text and history of the PLRA. The Court went into a history of the PLRA and utilized statutory construction principles to analyze the words and phrases including the mandatory nature of the word "shall" and the lack of any wording relating to "special circumstances." It held "[t]oday, we reject that freewheeling approach to exhaustion as inconsistent with the PLRA. But we also underscore that statute's built-in exception to the exhaustion requirement: A prisoner need not exhaust remedies if they are not 'available.' The briefs and other submissions filed in this case suggest the possibility that the aggrieved inmate lacked an available administrative remedy. That issue remains open for consideration on remand, in light of the principles stated below." An administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates. So, exhaustion of administrative remedies is mandatory, but only if such remedies are actually present. Since the availability issue remains unresolved, the case is remanded.

Justice Thomas' concurring opinion simply chastised Blake's attorney for attempting to submit new evidence on appeal. Justice Breyer's concurring opinion states he would not preclude situations where "special circumstances" could occur, but agrees that is not necessary to resolve in this case.

U.S. Supreme Court holds Taser/Stun Guns entitled to 2nd Amendment Protection *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016). The United States Supreme Court declared that "stun guns" are protected "arms" under the Second Amendment.

Jaime Caetano became in fear for her life after ending a relationship with an abusive boyfriend. For her protection, she obtained a stun gun. After another altercation with the ex-boyfriend in which she threatened use of the weapon, she was arrested, tried and convicted for having an illegal weapon under Massachusetts law. Massachusetts bans all electrical weapons emitting a current designed for incapacitation. She challenged the conviction asserting a Second Amendment right to bear arms. However, the Massachusetts Supreme Judicial Court held a stun gun "is not the type of weapon that is eligible for Second Amendment protection" because it was "not in common use at the time of [the Second Amendment's] enactment." The Massachusetts Court analyzed the weapon and, utilizing three factors, determined the weapon was "unusual" in its technological nature and therefore distinguishable from protection of traditional firearms.

The per curiam opinion made very short work of the Massachusetts Court opinion holding its prior opinions established "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." However, the concurring opinion provided a more detailed analysis. The Court seemed very concerned the Massachusetts Court focused on the type of weapons in use in the 1780s. Justice Alito noted the Supreme Court's prior opinions found that reasoning "not merely wrong, but 'bordering on the frivolous.'" Second Amendment guarantees the right to carry weapons "typically possessed by law-abiding citizens for lawful purposes." Citizens may lawfully possess stun guns in 45 States and are widely owned and accepted as a legitimate means of self-defense across the country. They are neither unusual nor dangerous under a Second Amendment test. In fact, they are less dangerous than traditional hand guns and citizens should not be put in a position of lawfully using more force than necessary vs unlawfully using less force. As

a result, the case was remanded for further processing consistent with the opinion.

U.S. Supreme Court holds City not entitled to attorney's fees for defending §1983 lawsuit *James v. Boise*, 136 S. Ct. 685 (2016).

This is a case involving attorney's fees for suits under 42. U.S.C. §1983 (constitutional violations mainly). Essentially, the U.S. Supreme Court held the test for determining a "prevailing party" is dictated by federal, not state, law. While mainly of interest to litigators, it is an important one to keep in mind under a cost/benefit analysis for government general counsel.

The opinion is 1 ½ pages long and does not list any facts. Essentially, after the City was successful in defending a §1983 lawsuit, it sought attorney's fees. The trial court awarded attorney's fees under §1988 without first determining that "the plaintiff 's action was frivolous, unreasonable, or without foundation." The Idaho Supreme Court upheld the award, noting that the U.S. Supreme Court's standard for when a defendant can receive fees is not binding on the state under §1988. The court expressly awarded fees under federal law and declined to award under state law. The U.S. Supreme Court made short work of the opinion holding state courts were bound by the U.S. Supreme Court's interpretation of federal statutes. Otherwise, federal law would have different meanings in different states. The award of attorney's fees for the City was reversed but remanded for a determination of the frivolous nature of the original suit.

U.S. Supreme Court holds government contractor not entitled to derivative immunity; also, full offer of settlement does not moot Plaintiff's claims Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016).

The United States Supreme Court issued this opinion on derivative sovereign immunity for contractors.

The United States Navy contracted with Campbell-Ewald Company ("Campbell") to develop a multimedia recruiting campaign that included the sending of text messages to young adults, but only if those individuals had "opted in" to receipt. Gomez, who alleges that he did not consent to receive text messages and, at age 40, was not in the Navy's targeted age group. He brought a national class action suit. Campbell utilized an offer for judgment strategy and argued it mooted Gomez' claims. Also, Campbell argued it was entitled to derivative sovereign immunity as a government contractor. The trial court granted Campbell's motion for summary judgment but the Ninth Circuit Court of Appeals reversed. Campbell appealed.

The Telephone Consumer Protection Act prohibits any person, absent the prior express consent of a telephone call recipient, from "mak[ing] any call . . . using any automatic telephone dialing system…" which includes text messages. The Supreme Court first analyzed the offer of judgment argument under Rule 68 and determined that an unaccepted Rule 68 offer that would fully satisfy a plaintiff's individual claim is insufficient to render that claim moot. This ruling resolved a split in the circuits. The Court then analyzed the immunity issue. [Comment: while it is federal immunity at play, the analysis can be very helpful to local and state government attorneys arguing state derivative immunity.] Unlike sovereign immunity, derivative immunity is not absolute. When a contractor violates both federal law and the government's explicit instructions, as here alleged, no "derivative immunity" shields the contractor. In other words, the contractor exceeded its authority under its government contract because it contacted individuals who had not "opted in" to receiving such messages. As a result, no immunity can be given for exceeding such authority. Justice Thomas concurred in the judgment.

The dissent asserts that Rule 68 does moot the Plaintiff's claims if the offer of judgment provides all the relief the Plaintiff is entitled to get thereby eliminating the constitutional case-or-controversy element. The dissent asserts no case-or-controversy exists so the lawsuit is moot. The dissent does not address the immunity issues at all.

Officers potentially liable for forcibly removing driver from car after he stopped to

feed a stray cat *Alexander v. City of Round Rock,* 854 F.3d 298 (5th Cir. 2017).

This is a §1983 unlawful arrest/excessive force case where the U.S. Court of Appeals for the Fifth Circuit affirmed-in-part and reversed-in-part an order granting the arresting officers' motion to dismiss.

While Alexander was staying in a hotel, he was returning from a grocery run when he saw and attempted to feed a stray cat. Upon returning to his car he attempted to proceed to a parking lot. While in motion, a police cruiser, driven by Officer Garza, initiated a stop. Garza inquired what Alexander was doing when he initially stopped his car, got out, and proceeded to look in the nearby bushes. Alexander provided his driver's license but informed the officer he would not answer any questions. Garza called for backup and ordered Alexander to exit his vehicle. When Alexander asked why he was being instructed to exit, the officers forcibly removed him from the vehicle. Alexander cursed at the force used and was then informed he was being arrested for uttering an expletive in public, which Garza asserted amounted to disorderly conduct. In Garza's report, he did not list Alexander as being arrested for disorderly conduct, but for resisting a search in violation of Texas Penal Code §38.03(a). Alexander was never charged with a crime and thereafter sued the officers and the City. The officers moved to dismiss all claims, asserting that they were entitled to qualified immunity which the trial court granted. Alexander appealed.

Under the unlawful detention claims, if a law enforcement officer can point to specific and articulable facts that lead him to reasonably suspect that a particular person is committing, or is about to commit, a crime, the officer may briefly detain the individual for investigation. This standard still requires at least a minimal level of objective justification for making the stop. Taking all of Alexander's well-pleaded allegations as true and drawing all inferences in his favor under a Rule 12(b)(6) standard, the 5th Circuit held Alexander properly articulated a potential claim for unlawful detention. Under an unlawful arrest claim, Penal Code §38.03(a) provides that a person commits an offense if he intentionally prevents or obstructs a law enforcement officer from effecting an arrest, search, or transport, by means of force against the officer or another. However, the allegations assert Alexander was entirely passive and did not physically resist. Refusing to answer questions does not qualify. Further, using a vehicle as a barrier to a search "both strains credulity and runs counter to Texas precedent." Under the facts alleged, there was no probable cause to arrest Alexander for resisting a search under Texas law and no objectively reasonable officer would conclude that such probable cause exists. Further, the injuries sustained were not *de minimus* and exceeded the reasonable force necessary under the circumstances. However, since Alexander was never tried, his 5th Amendment right against self-incrimination was not violated. Additionally, by the time Alexander used his 1st Amendment right to utter a curse word, he had already been removed from the car and was being placed under arrest. Therefore, the officers could not retaliate against him for exercising such right. The 5th Circuit made it a point to state the Rule 12 standards are based only on the allegations and the officers have the right to file further motions and evidence to dispute the facts alleged.

Officer not entitled to qualified immunity for striking suspect who only provided passive resistance *Hanks v. Rogers,* 853 F.3d 738 (5th Cir. 2017).

This is a qualified immunity/excessive force case where the U.S. Fifth Circuit Court of Appeals reversed the granting of a police officer's motion for summary judgment.

Hanks was stopped by Officer Rogers for going 20 miles-per-hour below the posted speed limit. Hanks asserts he had left is cell phone on top of the car, drove away, then was returning to look for it. Officer Rodger and Hanks had several sets of discussions during the stop. At one point Officer Rodgers ordered Hanks out of the car. When Rodgers attempted to place Hanks under arrest, Hanks did not comply with the commands initially and requested to know the charges. Rodgers did not identify the charges and

continued to command compliance. At one point, Officer Rodgers delivered a blow to Hank's upper body/neck area (referenced as a "half-spear") which forced Hanks onto the trunk of his car. He was then arrested without further incident. Officer Rodgers was later subject to an indefinite suspension for the arrest where the department's investigation concluded the "half spear . . . was not objectively reasonable to bring the incident under control." Hanks sued Officer Rodgers for excessive force. Rodgers asserted qualified immunity in a motion for summary judgment, which the trial court granted. Hanks appealed.

The court's analysis centered on whether the force used was objectively reasonable in light of the situation. Hanks received medical treatment for his injuries and was prescribed pain medications by a physician. His injuries were more than *de minimus*. When considering the reasonableness of the law enforcement response, factors to consider include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Hanks was stopped for a minor traffic offense of going too slow. The court felt it unlikely a reasonable officer would have considered Hanks an immediate threat to the officer or others. For almost a ½ minute before the half-spear was initiated, Hanks was facing with his back to Officer Rodgers, as directed with Rodger's taser trained on his back. He was in a passive position. At most he may have demonstrated passive resistance by asking for the charges before complying and made no attempt to flee. Prior case law dictates an officer violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation. As a result, the trial court errored in granting Rodger's summary judgment motion.

Deputy denied qualified immunity after he misidentified an innocent man by name in his report *Melton v. Phillips,* 837 F.3d 502 (5th Cir. 2016), *reh'g granted*, 2017 WL 629267 (5th Cir. 2017).

This is a qualified immunity case where the U.S. Court of Appeals for the 5th Circuit held a sheriff's deputy was not entitled to immunity.

The plaintiff, Michael David Melton, spent sixteen days in county jail in connection with an assault he did not commit apparently because he shared the same first and last name (but not middle) with the true assailant. In June 2009, Phillips, then a deputy with the Hunt County Sheriff's Office, interviewed the victim of an assault. The victim identified the attacker as his wife's boyfriend at the time, a man named Michael Melton, apparently without providing the assailant's middle name. Phillips then prepared an offense report and submitted it to the Sheriff's Office. The report specifically identified the Plaintiff, Michael David Melton, as the suspected assailant but the true assailant was named Michael Glenn Melton. After he submitted his report, Phillips had no further involvement with the case. The Plaintiff was later arrested under an arrest warrant and incarcerated. The complaint expressly stated that it was based upon Phillips's offense report and provided no other basis for the information contained therein. After charges were dismissed, the Plaintiff sued Phillips. In support of his allegations, the Plaintiff submitted an affidavit from a former Sheriff's Office employee, who opined that Phillips likely used a computer database to identify the Plaintiff entering the name "Michael Melton" and conducted no further investigation as to whether the PID generated result matched the person identified by the victim. Phillips filed a motion for summary judgment based on qualified immunity, which the trial court denied.

The court first held that simply because Phillips did not sign the affidavit in support of the arrest warrant does not mean he escapes liability. The affiant based his information on Phillip's report. A "governmental official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in [the] affidavit." A government official who merely provides information that leads police to seek a warrant is not necessarily in a position to "fully assess probable cause questions" and

therefore he or she does not bear liability. In contrast, an officer who deliberately or recklessly provides false or misleading information for use in an affidavit can be liable. In denying Phillips's motion for summary judgment, the district court found that there was a genuine dispute of fact as to whether Phillips was reckless in identifying the Plaintiff as the suspected assailant. The 5th Circuit held it lacks jurisdiction to review the district court's finding of a genuine fact dispute as to Phillips's recklessness. As a result, the denial of qualified immunity is affirmed.

Deputies entitled to qualified immunity, even though he testified his actions may be unconstitutional *Pratt v. Harris County,* 822 F.3d 174 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1121 (2017).

This is a §1983 excessive force case where the trial court granted the officer's qualified immunity motions. The 5th Circuit affirmed.

Pratt was involved in a minor traffic accident. Upon arriving at the scene, deputies observed Pratt "running in circles . . . imitating a boxer." When deputies attempted to interact with him he was uncooperative and started to walk away. After several warnings the deputies deployed their Tasers. Pratt continued to resist but was eventually handcuffed and restrained. EMS arrived, but Pratt did not have a pulse. The autopsy report noted the examiner could not "definitively separate[]" the effect of Pratt's ingestion of cocaine and ethanol, from the other possible contributing factors—which, at least, included Pratt's car accident, various altercations, tasing, and hog-tying—that culminated in his asphyxiation. At the time of Pratt's arrest, the County had a policy which prohibited officers from using hog-tie restraints. The results of the County's internal investigation were presented to a grand jury, and the deputies were no-billed. Pratt's mother sued the individual deputies and the County. Both filed dispositive motions which were granted.

The 5th Circuit first analyzed the deputies qualified immunity claims. The court listed various facts including Pratt's continued resistance and the escalation of force techniques used before the deputies were finally able to subdue him. The record shows that both officers responded "with 'measured and ascending' actions that corresponded to [Pratt's] escalating verbal and physical resistance." Additionally, the court held "[a]lthough hog-tying is a controversial restraint, we have never held that an officer's use of a hog-tie restraint is, *per se,* an unconstitutional use of excessive force." And even though one deputy testified his belief was the practice of hog-tying may be unconstitutional, "the constitutionality of an officer's actions, is neither guided nor governed by an officer's subjective beliefs about the constitutionality of his actions or by his adherence to the policies of the department under which he operates." The question for the court was whether the actions of the deputies was excessive in the specific circumstances. Ultimately the court held it was not.

The concurring opinion did not analyze the situation as deeply and simply stated the actions of this nature should not be second guessed if it is a close call. The dissent asserts that the hog-tying technique and the policy prohibiting it should be sufficient to overcome qualified immunity. Additionally, while he failed to comply with requests, the dissent asserted Pratt posed no immediate danger to the officers which would justify the tasing or hog-tying technique.

Pro se Plaintiff unable to establish his car was searched at all after he was arrested, let alone without a warrant, so his claims were properly dismissed *Taite v. City of Fort Worth Texas*, No. 16-10538, 2017 WL 892445 (5th Cir. Mar. 6, 2017).

This is an unconstitutional search case brought by a *pro se* plaintiff where the U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of all claims.

Taite brought this unlawful search claim § 1983 against the City of Fort Worth, Texas, asserting police performed an allegedly unlawful search of his vehicle. Taite was arrested at his place of employment for allegedly removing his son from his estranged wife earlier in the month. Taite alleges that one of the officers stayed behind and searched his unlocked car without a warrant. The City and officers filed various motions for

summary judgment which the trial court granted. Specifically, the trial court concluded that Taite failed to state a claim because he pleaded no facts showing that they searched his vehicle at all, let alone without a warrant. Taite appealed.

Upon reviewing the record, the 5th Circuit agreed with the trial court noting no evidence or even any proper pleadings existed to establish the car was searched at all after Taite was taken from the scene. Additionally, the trial court did not error in its discovery rulings as sufficient time to conduct discovery was provided and Taite pointed to no error constituting an abuse of discretion. As a result, all of Taite's appellate issues were overruled and his claims were dismissed.

U.S. 5th Circuit holds invocations at school board meetings are permitted under legislative-prayer exception *American Humanist Association v. Birdville Independent School District*, 851 F.3d 521 (5th Cir. 2017).

This is a First Amendment/invocation/school prayer case which sets forth the standards adopted for invocations at the beginning of a legislative body's called session.

Birdville Independent School District and its seven board members (collectively, "BISD") adopted policies inviting students to deliver statements, which can include invocations, before school-board meetings. The Plaintiffs (American Humanist Association ["AHA"] and Isaiah Smith) alleged the policies violated the First Amendment. BISD's board held monthly meetings in the District Administration Building, which is not located within a school. They were open to the public and typically populated by adults, but with students invited. At the beginning of each meeting students were invited to lead the Pledge of Allegiance, followed by some form of statement. Some read poems, but others provided invocations. BISD officials did not direct the students on what to say but did tell them to make sure their statements were relevant to school-board meetings and not obscene or otherwise inappropriate. At a number of meetings, the student speakers presented poems or read secular statements. But according to AHA and Smith, they are usually an invocation in the form of a prayer, with speakers frequently referencing "Jesus" or "Christ." AHA and Smith sued under §1983. The Defendants filed motions to dismiss. The district court granted BISD's motion, finding that the legislative-prayer exception applies but denied the individual defendants' qualified immunity defense.

The 5th Circuit first noted in 2014 the U.S. Supreme Court in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827–28 (2014), unequivocally held the legislative-prayer exception extends to prayers delivered at town-board meetings. "The principal audience for these invocations is not . . . the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." This standard is different than the typical school prayer standard which implied the Establishment Clause test. The question is whether this case is essentially more a legislative-prayer case or a school-prayer matter. The court noted the BISD board is a deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative. After analyzing the history of school boards and other circuit holdings the court held the BISD meetings are more akin to a legislative body. The legislative-prayer exception therefore applies.

U.S. 5th Circuit holds henceforth, a clearly established constitutional right exists to video tape police and their facilities *Turner v. Driver***,** No. 16-10312 (5th Cir., February 27, 2017)

This is a §1983 case where the U.S. Court of Appeals for the Fifth Circuit affirmed in part and reversed in part an order dismissing three officers from a suit alleging First and Fourth Amendment violations.

Turner was seen videotaping the Fort Worth Police Station from a public sidewalk across the street. He was unarmed and posed no apparent signs of immediate threat. Police Officers Grinalds and Dyess approached him and requested ID. Turner asked the officers whether he was being detained, and Grinalds responded that Turner was being detained for investigation and that the officers were concerned about who

was walking around with a video camera. However, neither officer could respond when ask the crime under investigation. When Turner refused to provide ID, he was handcuffed and the video camera was taken. Lieutenant Driver approached Grinalds and Dyess. Driver requested ID and Turner responded he did not have to provide it since no crime was committed. Driver responded that Turner was correct, ordered his release and return of the camera. Turner sued Driver, Grinalds, and Dyess in their individual capacities. The officers moved to dismissed based on qualified immunity which the trial court granted. Turner appealed.

The 5th Circuit first analyzed qualified immunity under the First Amendment. The U.S. Supreme Court has "repeatedly" instructed courts "not to define clearly established law at a high level of generality." At the time, no case had determined a First Amendment right exists to videotape a police station. The First and Eleventh Circuits have held that the First Amendment protects the rights of individuals to videotape police officers performing their duties. However, no precedent places the constitutional question "beyond debate." As a result, there was no clearly established First Amendment right at the time which prevents the granting of the officers' qualified immunity on that claim. However, the court did hold from henceforth, a First Amendment right to record the police does exist, subject only to reasonable time, place, and manner restrictions. News-gathering and other methods of receiving and collecting information and ideas is an undoubted right under the First Amendment. Film creation is also protected. And, when combining the two, filming the police "contributes to the public's ability to hold the police accountable, ensure that police officers are not abusing their power, and make informed decisions about police policy."

Under the Fourth Amendment detention claim, because Lt. Driver did not arrive on scene until after the arrest, he was entitled to dismissal. As to Grinalds and Dyess, an initial detention and inquiry is valid if the officers had reasonable suspicion. The initial inquiry with Turner was not objectively unreasonable. The Fourth Amendment is concerned with ensuring that the scope of a given detention is reasonable under the totality of the circumstances. Nothing in the amended complaint suggests that Turner was videotaping an arrest, a traffic stop, or any other action or activity. On the contrary, Turner's complaint states that he was filming only "the routine activities at the Fort Worth Police Department building." Grinalds and Dyess reference several attacks on police officers and police stations in Dallas and Austin in recent history resulting in an increase of security. Turner's filming in front of the police station "potentially threatened security procedures at a location where order was paramount." An objectively reasonable person in Grinalds's or Dyess's position could have suspected Turner was casing the station for an attack, stalking an officer, or otherwise preparing for criminal activity, and thus was sufficiently suspicious to warrant questioning and a brief detention. As a result, they were entitled to qualified immunity for the wrongful detention claim. The parties dispute whether Turner's detention amounted to an arrest. When determining whether an investigative stop amounts to an arrest, "[t]he relevant inquiry is always one of reasonableness under the circumstances," which must be considered on a case-by-case basis. After analyzing the facts alleged the court held Grinalds's and Dyess's actions—handcuffing Turner and placing him in the patrol car—were disproportionate to any potential threat that Turner posed or to the investigative needs of the officers. As a result, it was an arrest. Based on the allegations of Turner's amended complaint, the officers lacked probable cause to arrest him. The police cannot arrest an individual solely for refusing to provide ID. As a result, at this stage of the litigation, Grinald and Dyess are not entitled to qualified immunity. Finally, Lt. Driver is not liable for the actions of Grinald and Dyess. Personal involvement of supervising personnel generally includes giving a "command, signal, or any other form of direction to the officers that prompted" the detention or arrest. Turner's complaint alleges Driver investigated the situation and promptly ordered Turner's release. As a result, Driver was properly dismissed.

Deputies entitled to dismissal for false arrest where property owner failed to remove his truck after being instructed *Childers v. Iglesias,* No. 16-10442, (5th Cir. February 9, 2017)

This is a false arrest/§1983 case where the U.S. Court of Appeals for the Fifth Circuit affirmed the dismissal of claims against the arresting officers.

Childers owns a ranch and was at the gate preparing to leave. He had attempted to evict an individual he asserts was living at the ranch. Sheriff's deputies were called and deputies Hollis and Iglesias arrived. Childers truck was parked in front of the gate blocking access. While Childers was attempting to provide an explanation of the situation to Hollis, Deputy Iglesias ordered him to remove his truck so they could access the property. Childers asserts he was attempting to complete his conversation with Hollis before complying, but Iglesias arrested him for interfering with an officer's duties. The charges were eventually dropped. Childers sued Hollis and Iglesias for false arrest and violating his freedom of speech. The deputies filed a motion to dismiss which was granted. Childers appealed.

Childers asserts interference consisting of speech only, is a complete defense to Texas Penal Code §38.15 (interfering with a police officer's official duties) pursuant to *Carney v. State*, 31 S.W.3d 392, 396 (Tex. App.—Austin 2000, no pet.). Therefore no probable cause existed for the arrest. However, Childers was not simply expressing his version of events, he failed to remove his truck which was blocking access. This instruction was made within the scope of the official duty Deputy Iglesias was performing: trying to access the ranch through the gate. In making the arrest, the deputies were concerned more with the moving of Childers's truck rather than the content of his speech. Texas courts have found that failure to comply with an officer's instructions under similar circumstances violates Texas Penal Code § 38.15 and is not protected speech. Based on this precedent, a reasonable officer could have believed there was a fair probability Childers violated Texas Penal Code §38.15 by failing to comply with Iglesias's instruction. Probably cause therefore existed for a possible crime committed in the officer's presence. As a result, the motion to dismiss was properly granted.

Pretrial detainee properly plead a deliberate indifference claim to medical needs against corrections guard says U.S. 5th Circuit
Alderson v. Concordia Parish Correctional Facility, No. 15-30610, (5th Cir. Feb 9, 2017

This is a pretrial detainee constitutional suit against a state correctional facility and several employees. The U.S. 5th Circuit Court of Appeals affirmed the dismissal of all claims except one, which was a personal claim against an employee who was allegedly deliberately indifferent to Alderson's medical needs.

Alderson, a pretrial detainee, alleged he was brutally attacked and stabbed in the Concordia Parish Correctional Facility ("CPCF"). When Alderson raised concerns about his safety and his medical condition after the attack, Lieutenant Harvey Bryant sent him to lockdown in a cell with convicted inmates. This was a misclassification as pretrial detainees were not to be housed with convicted inmates. After considerable time had passed, Bryant took Alderson to the hospital. Upon return, when Alderson asked Bryant for the medications prescribed, Bryant refused. Bryant did not provide the prescriptions for over ten days. Alderson sued Bryant and CPCF and other department heads. The trial court dismissed all claims asserting Alderson failed to state a claim.

The court first held for a plaintiff to succeed in a § 1983 action based on "episodic acts or omissions" in violation of Fourteenth Amendment rights, a pretrial detainee must show subjective deliberate indifference by the defendants. The trial court properly dismissed the claims against the warden and all supervisors as no direct intent or knowledge was plead against them. The court also properly dismissed all claims for misclassification since the pleadings do not indicate it was done with subjective deliberate indifference. However, Alderson properly plead a sufficient claim against Bryant for failure to provide necessary medical care. A plaintiff must show deliberate indifference to serious medical needs that resulted in substantial harm. The pain suffered during a delay in

treatment can constitute a substantial harm and form the basis for an award of damages. Fifth Circuit precedent does not limit substantial harm to lifelong handicap or permanent loss. As a result, Alderson properly plead a claim against Bryant. Finally, the panel noted that even though the trial court properly dismissed the supervisors and warden, such dismissal is without prejudice based on several procedural grounds.

Judge Graves wrote a concurring opinion. Essentially, he wrote separately because he felt the Supreme Court's decision in *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), calls into question the Fifth Circuit's holding in *Hare v. City of Corinth*, 74 F.3d 633 (5th Cir. 1996). The *Hare* decision focused on the "subjective" deliberate indifference standard while *Kingsley* implicates an objective standard (at least for excessive force cases). However, he agreed the result was proper, so concurred with everything except one footnote in the majority opinion.

Citizen thrown out of city council meeting allowed to go forward with some, but not all claims against presiding council member and police officer. *Heaney v. Roberts*, No. 15-31088 (5th Cir. January 23, 2017)

This is a First Amendment retaliation/discrimination case where the Plaintiff, Heaney, was ejected from a city council meeting allegedly due to his statements at the meeting.

On September 18, 2013, Tom Heaney attended a regularly scheduled Jefferson Parish council meeting in Gretna, Louisiana. He requested to speak and the rules allowed five minutes to address the City Council. Heaney wished to speak about the legality of council members accepting campaign contributions from contractors who received no-bid contracts. Roberts was the presiding officer at the meeting. Three minutes into his statements, Roberts interrupted and asked Heaney to yield the floor to the City Attorney. After the City Attorney advised he felt the council members' actions were legal, Roberts did not allow Heaney the remaining two minutes of his time. However, Roberts had allowed prior speakers their allotted time after interruption. When Heaney became agitated, Roberts ordered his removal. Officer Ronald Black approached and removed Heaney. Heaney sued Black for negligence, assault and for the removal under the Fourth Amendment right to be free from seizure and First Amendment. Heaney sued Roberts for violating his First and Fourth Amendment rights. He also sued the City. All defendants filed summary judgment motions. The trial court granted in part and denied in part the summary judgment motions. The court denied Roberts' motion on the First Amendment and state constitutional claims. It denied Black's motion on the state law battery and negligence claims. The trial court granted summary judgment on the free speech claims as to Black, the Fourth Amendment claims as to Black and Roberts, the punitive damages claim, and the false arrest claims as to all. Everyone appealed something.

In a qualified immunity analysis under the Fourth Amendment, an officer is entitled to immunity if the law was not clearly established at the time. Viewpoint discrimination is a form of First Amendment discrimination which was been clearly established for some time. The government can restrict or regulate speech in a limited public forum "as long as the regulation '(1) does not discriminate against speech on the basis of viewpoint and (2) is reasonable in light of the purpose served by the forum.'" The trial court denied Robert's claim of immunity because it determined a factual dispute exists regarding whether Robert's conduct was viewpoint-based. If Heaney were to have violated a reasonable restriction, such as a topic or time constraint, there would be no constitutional violation. However, Heaney was speaking on an approved topic and within his allotted time. Because Heaney was not silenced for violating a reasonable restriction, the First Amendment claim turns on Roberts' motive or intent in silencing and ejecting Heaney from the meeting. Due to the factual dispute, Robert's immunity from First Amendment claims was properly denied. However, the trial court dismissed the punitive damages claims as it was persuaded no evil intent existed. "Although in many instances a factual dispute as to a constitutional violation will preclude summary judgment on punitive damages, it will not when there is no material question of fact as to the reckless nature of the defendant's conduct." The trial court also

properly granted immunity to Black on the First Amendment claims as Black followed the orders of his superior in effectuating the removal. While an officer cannot blindly follow orders and always be immune, no evidence exists to inform Black he was violating Heaney's First Amendment rights by following Robert's orders at the time. "Black was not required to cross-examine and second-guess Roberts regarding his First Amendment motives before acting." Black is entitled to qualified immunity on the First Amendment claim "because his actions as sergeant-at-arms were not objectively unreasonable…" Likewise, Black is entitled to qualified immunity for the Fourth Amendment seizure claims as he reasonably believed he had legal authority to keep the peace at meetings and in the building. Further, since Black never arrested Heaney, the false arrest claim was likewise properly dismissed. However, the 5th Circuit noted it lacks jurisdiction over the state law battery and negligence claims through the appeal mechanism used by Black.

U.S. 5th Circuit holds officer who was present but did not perform roadside body cavity search can potentially be liable for §1983 claim under bystander liability theory. *Hamilton v. kindred*, No. 16-40611(5th Cir. January 12, 2017)

This is an interlocutory appeal in a suit involving alleged unlawful body cavity searches of two women and the trial court's denial of a Deputy Sheriff's claim of qualified immunity.

Two women, Hamilton and Randle were pulled over by DPS Officer Turner for speeding. Turner smelled marijuana and asked the women to exit the vehicle. Both were wearing bikini bathing suits with shorts. Turner believed he saw one of the women stick something into the front of her shorts. Turner did not allow the women to cover themselves before exiting the vehicle. He used his radio to request help from local law enforcement and a female officer to conduct a search of the women. A female Sheriff's deputy, Bui, and another male deputy, Kindred, arrived on scene. Bui searched the women while the male officers stood behind the patrol car. Other than being present, Kindred did not engage with the women. No drugs were found. Both women sued all three officers under §1983. Kindred moved for summary judgment, arguing that he was entitled to qualified immunity because, at the time of the incident, bystander liability was not clearly established in the Fifth Circuit in cases not involving excessive force. Kindred argued only a search occurred, which, even if improper, does not attribute bystander liability to him. The trial court denied the motion and Kindred filed this interlocutory appeal.

The excessive force claim is the center of the opinion as it ties the bystander liability aspects to Kindred for his presence. For an excessive force claim, a plaintiff must then "show that she suffered (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was objectively unreasonable." The 5th Circuit agreed both women properly plead sufficient facts that, if taken as true, could qualify as excessive force. Excessive force is unconstitutional during such a seizure and a strip or body cavity search can fall within the Fourth Amendment. The court also held the Plaintiffs did not waive their bystander claims in any of the pleadings. "[A]n officer may be liable under § 1983 under a theory of bystander liability where the officer '(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." The district court found that "there [was] a serious dispute as to the material facts" regarding each element of bystander liability. Since this is an interlocutory appeal, the court held it does not have jurisdiction to review a determination factual disputes exist. Therefore, the appeal was dismissed.

5th Circuit holds Texas statutes and regulations regarding the practice of psychology unconstitutional. *Serafine v. Branaman,* 810 F.3d 354 (5th Cir. 2016).

This is a First Amendment/Professional Speech case where the U.S. 5th Circuit invalidated as unconstitutional part of the Texas statute regulating psychologists.

Mary Serafine ran for a Texas Senate seat and described herself as a "lawyer and psychologist." She was not licensed to practice as a psychologist. However, she possesses a

four-year post-doctoral fellowship in psychology from Yale, and the dissertation for her Ph.D. in education was published in Genetic Psychology Monographs. Serafine was a professor in the psychology departments at Yale University and Vassar College, where she taught a variety of psychology courses and spoke to various psychology groups. However, the Texas State Board of Examiners of Psychologists (the "Board") sent her a letter to cease and desist using the "psychologist" designation. She sued alleging the statute and regulations, in various parts, were unconstitutional. The trial court dismissed many of her claims, tried several, and found the statutes were a valid exercise of police power. Serafine appealed.

The 5th Circuit first held that while it has never adopted the "professional speech" doctrine, if it were to be adopted it must be limited to matters which address the profession only. The court drew a distinction noting "[t]here is a difference, for First Amendment purposes, between . . . professionals' speech to the public at large versus their direct, personalized speech with clients." "Any interest the government can claim in protecting clients from manipulation or exploitation by a psychotherapist fails when the psychotherapist is no longer speaking to the client…" "In other words, the professional speech doctrine is properly limited to the actual practice of the profession." The court held Serafine's speech on her campaign website were far removed from speaking to a client. She simply identified herself with her earned degrees and experience. The Board did not order Serafine to cease and desist because she used the word "psychologist" on a promotional flyer seeking clients, or on official business letterhead, or in a phonebook advertisement. The board "directed her to cease describing herself as a psychologist on her political campaign website. Yet Serafine was seeking votes, not clients." Serafine's speech on her campaign website was not professional or commercial speech; it was political speech of the highest form—a candidate seeking election to public office. Texas Occupation Code §501.003(b)(1) is a content-based restriction on speech. "Though protecting mental health may be a compelling interest, the state has not narrowly tailored its laws to further that interest where it regulates outside the context of the actual practice of psychology." "Although she may not be able to practice as a psychologist under Texas law, that does not bear on whether she is a psychologist by reputation or training." Likewise, after going through a long standard of review then substantive analysis the court held §501.003(b)(2) is also overbroad since it applies to offers to provide services but where no pecuniary gain is involved or no service is actually rendered. Further, under subsection (c), if read literally, golf coaches, weight-loss services, and smoking-cessation programs would be within the "practice of psychology." The court held "[w]e decline to give it an additional extra-textual limiting construction in a frantic attempt to rescue it." The regulations encompass far more than legitimately permitted and are unconstitutional. However, the court did hold that Serafine's prior-restraint claim fails since prior-restraint deals with orders forbidding future action not enforcement actions penalizing past speech. The statue and regulations penalize past speech in this case. The court reversed in part and affirmed in part.

U.S. 5th Circuit holds the "loss of chance" doctrine is not applicable in a §1983 context and this wrongful death action *Slade v. City of Marshall*, 814 F.3d 263 (5th Cir. 2016).

This is a §1983 wrongful death case where the 5th Circuit affirmed the dismissal of the Slade constitutional claims by the trial court.

When City officers were dispatched to a disturbance they found a naked and agitated Marcus Slade having a physical altercation with a man who was seated in a car. When Slade approached the officers aggressively, Officer Johnson deployed his Taser. It took several officers to handcuff Slade and put him in the patrol car where he was transported to the jail which was five minutes away. The officers noted Slade was speaking throughout the drive. However, upon arriving at the jail they noticed he was non-responsive. They performed CPR and

summoned paramedics, but Slade died. The death was later determined to be from a PCP overdose. Slade's mother sued. The City won on summary judgment based on a lack of causation and Slade's mother appealed.

Under the applicable law, a plaintiff seeking to recover must demonstrate that the defendant's wrongful actions more likely than not caused the decedent's death—not just that they reduced the decedent's chance of survival by some lesser degree. Slade first argues the standard does not apply if there is an obvious need for medical treatment which is ignored. The court held the 6th Circuit opinion relied upon by Slade is not applicable since it was not a case of causation. Slade asserts that the Court should apply the "loss of chance" doctrine as a matter of federal common law. Under this doctrine, "[i]t is not necessary to prove that a [plaintiff] would have survived if proper treatment had been given, but only that there would have been a chance of survival." However, the 5th Circuit held §1983 seeks to deter abuses of power that have *actually* occurred and compensate victims who have *actually* been injured by such abuses. The traditional causation requirement is a reasonable way to identify when liability is appropriate. Therefore, the "'loss of chance' doctrine is 'not relevant' in the § 1983 context." Summary judgment is affirmed.

Texas Voter ID statute held unconstitutional by U.S. 5th Circuit *Veasey v. Abbott,* 830 F.3d 216 (5th Cir. 2016).

This is a Voter Rights Act case where the U.S. 5th Circuit Court of Appeals invalidated SB 14 from 2011 which required several forms of photographic identification in order to vote.

When you add the majority opinion, concurring opinions and dissents this is 203 pages worth of analysis. A summary would still take several pages just to encapsulate the reasoning. As a result, this summary is simply hitting the bottom line. The district court held that SB 14 was enacted with a racially discriminatory purpose, has a racially discriminatory effect, is a poll tax, and unconstitutionally burdens the right to vote. The State appealed from that decision, and a panel affirmed in part, vacated in part, and remanded the case for further findings. The State sought *en banc* review, which was granted. The full U.S. Court of Appeals for the 5th Circuit held that while some of the evidence relied upon by the district court was "infirm" other evidence supported a discriminatory purpose, so the matter was remanded for an evidence weighing analysis, especially in light of pretextual evidence under a disparate treatment claim. The court then adopted the two-part framework employed by the Fourth and Sixth Circuits to evaluate Section 2 "results" claims (i.e. disparate impact claims). Under this test, the court found the trial court did not error in holding SB 14 imposes significant and disparate burdens on the right to vote. The court remanded for a determination of an appropriate remedy given the severability clause contained within the statute. However, the court rendered a determination that SB 14 does not impose a poll tax. Given direction from the U.S. Supreme Court, the 5th Circuit instructed the trial court to evaluate an intermediate remedy in light of the November 2016 election, and address full relief after the election.

U.S. 5th Circuit holds it was not unconstitutional for office to use non-deadly punches to gain control of the arms of a drunken, actively resisting suspect *Griggs v. Brewer,* 841 F.3d 308 (5th Cir. 2016).

This is a qualified immunity/excessive force claim where the U.S. 5th Circuit affirmed the granting of the officer's qualified immunity defense.

Officer Charley Brewer conducted a routine traffic stop of a vehicle driven by Tanner Griggs after Griggs ran a red light. After examining Griggs, Officer Brewer attempted to arrest him for driving while intoxicated. Griggs immediately resisted the arrest attempt and a long struggle ensued, captured on audio and video recording. Even while handcuffed, Griggs kicked and struggled when officers attempted to put him in the patrol car. During the struggle, detailed in the opinion, Officer Brewer punched back in order to subdue Griggs. After finally getting Griggs into

the patrol car he was transported to the jail facility where officers determined he had a blood-alcohol level of three times the legal limit. Griggs later brought these claims against Officer Brewer in his individual capacity under 42 U.S.C. §1983 asserting he used excessive force in effecting the arrest. The trial court granted Officer Brewer's summary judgment motion based on qualified immunity. Griggs appealed.

When analyzing qualified immunity, Courts ask whether "the allegedly violated constitutional rights were clearly established at the time of the incident; and, if so, whether the conduct of the defendants was objectively unreasonable in light of that then clearly established law." While Griggs argued a jury could believe he was not actually resisting arrest, the court determined that was not the proper inquiry. The evaluation must be based on what a reasonable officer would perceive was happening, not what is ultimately determined to have happened. After analyzing the facts the court determined a reasonable officer could perceive Griggs was resisting and restraint techniques were needed. Further, the court held "Officer Brewer's conduct in executing the initial takedown was not constitutionally unreasonable in the light of clearly established law. Or, stated differently, our precedent does not clearly establish that this 'takedown' maneuver—against a drunken, erratic suspect who is resisting arrest—is constitutionally unreasonable." Brewer's actions "may not have been as restrained as we would like to expect from model police conduct, but qualified immunity 'protect[s] officers from the sometimes hazy border between excessive and acceptable force.'" Finally, the Court held "Griggs points to no authority establishing that it was unreasonable for an officer to use non-deadly punches to gain control of the arms of a drunken, actively resisting suspect." As a result, the trial court did not error in granting Brewer's summary judgment motion.

City's towing ordinance not preempted since it still centers on public safety *Houston Professional Towing Ass'n. v. City of Houston*, 812 F.3d 443 (5th Cir. 2016).

Houston Professional Towing Association ("HPTA") brings its third lawsuit challenging SafeClear, the freeway towing program run by the City of Houston. In 2004, the city contracted with eleven towing companies to patrol various freeways around the clock and to remove wrecked and disabled vehicles. In 2005, HPTA, which represents tow operators in the Houston area (none of which was awarded a SafeClear contract), sued in federal court asserting the ordinance was preempted by federal law. The City amended the ordinance to bring it into compliance with federal regulations on motor carriers. In 2006, HPTA sued again asserting the ordinance infringed upon commercial speech. Federal courts issued an opinion the ordinance was not preempted. In May 2011, the City again amended the SafeClear program to required vehicle owners to pay for the SafeClear tows of vehicles stalled on the shoulder; previously the city had paid for those tows. HPTA brought this suit saying the change was preempted. The trial court issued a summary judgment in the City's favor and HPTA appealed.

Federal law 49 U.S.C. §14501 prohibits a state from regulating the price, quote, or services of certain motor carriers transporting property, but has a public safety exception. This exception for public safety is what allowed the prior suits to be dismissed in the City's favor and sustain the ordinance. In this third suit, the change in who pays does not affect the public safety elements of the ordinance. No significant changes to the ordinance occurred which would take it outside the realm of the public safety exception. To adopt HPTA's argument would mean that if a government program is modified to cut costs, it is impossible for it to fulfill its original purpose. "Although the goal of the 2011 amendments may have been to cut costs (and to make SafeClear fiscally sustainable over the long term), there is no doubt that the continuing purpose of the program is to promote safety by expeditiously clearing stalled and wrecked vehicles." After going through the various claims raised by HPTA, the 5th Circuit affirmed the order granting the City's summary judgment.

City not required to adopt formal criteria for non-consent tow list and may consider intangible/subjective factors *Integrity Collision*

Center v. City of Fulshear, 837 F.3d 581 (5th Cir. 2016).

This is an injunction case where a tow-truck company sued to compel the City to include it in the City's non-consent tow list. The U.S. Court of Appeals for the Fifth Circuit reversed the injunction and dismissed the claims against the City.

The City created a non-consent tow list of private companies it calls upon to tow vehicles that are to be impounded. The police chief included only two companies but excluded Integrity and Buentello. There was no formal process or requirements for reaching that decision. Integrity and Buentello sued the city alleging that the City's refusal to include them on the non-consent tow list violated the Equal Protection Clause. Integrity and Buentello contended that the city had no rational basis for excluding them despite being similarly situated to companies on the list. The city maintained that the plaintiffs had no legal claim (because creating the list was a discretionary decision that was not subject to a class-of-one equal protection claim) and that there was a sufficient rational basis. Both parties filed opposing summary judgment motions. The trial court ruled in favor of the tow-truck companies and the city appealed.

The 5th Circuit first addressed its own jurisdiction and determined that what the trial court ordered (i.e. the City must include Integrity and Buentello on the non-consent list) qualified as an injunction appealable under Section 1292(a)(1). Next, a class-of-one equal-protection claim lies "where the plaintiff alleges that [it] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." "Typically, a class of one involves a discrete group of people, who do not themselves qualify as a suspect class, alleging the government has singled them out for differential treatment absent a rational basis." However, a class-of-one equal-protection claim "is unavailable in a 'public employment context.'" That conclusion logically applies as well to a local government's discretionary decision to include or not include a company on a non-consent tow list, where "allowing equal protection claims on such grounds 'would be incompatible with the discretion inherent in the challenged action.'" Further, no discriminatory intent is evident anywhere in the record. And while a non-consent tow list criteria can have measurable factors (such as insurance levels and proximity) there are also equally important factors that are not reasonably measurable, such as reputation, personal experience, and the particularities of how the City wishes to operate its non-consent tow program. The police chief's considerations as he drew up the non-consent tow list demonstrate this well. As part of the selection process, he considered previous experience working with the chosen companies on non-consent tows. He thought it important that the towing companies be able to "work together" and "support each other" in completing towing assignments. He concluded that two companies were enough to satisfy the city's non-consent needs. Those considerations are a reasonable part of a purchasing decision which means some companies will inevitably be excluded. Cities are not constitutionally required to develop a formal process with constitutionally measurable criteria for determining from whom they will purchase towing services. "Furthermore, it is impractical for the court to involve itself in reviewing these countless discretionary decisions for equal-protection violations." As a result, the court reversed the trial court's order and rendered a decision for the City.

Jailer found liable for excessive force used on inmate *Cowart v. Erwin,* 837 F.3d 444 (5th Cir. 2016).

This is a §1983 and Prison Litigation Reform Act ("PLRA") case where the U.S. 5th Circuit affirmed a jury award for excessive force.

Former prisoner Mark A. Cowart filed suit against four Dallas County Jail detention officers, including Special Response Team Officer Erwin, pursuant to 42 U.S.C. § 1983 and state law, claiming that the officers beat him without justification. The jury found Erwin liable as to all claims, awarding both compensatory and punitive damages. At trial, the jury heard sharply divergent testimony regarding the altercation between Cowart and the detention officers. All parties agree several detention officers conducted a "shakedown" of the tank in which Cowart was

housed. The officers ordered the inmates to line up against the wall on their knees, hands behind their heads, and elbows touching the wall. Cowart attempted to stand to adjust position and when he was forced down by two other officers he "mouthed off." Immediately after, a "swarm" of officers took Cowart to the ground and began beating him; officers kicked, punched, and stomped upon Cowart, and sprayed him with mace. While the officers deny the punching and kicking, at this phase, every fact which is in support of the judgment and supported by evidence is taken as true. Cowart was later assaulted by an unidentified guard en route to the infirmary. It is undisputed Cowart was transported to Parkland Hospital. An emergency room physician diagnosed Cowart with contusions of the face, scalp, and neck, a neck sprain, and a ruptured eardrum, and severe trauma. Erwin appealed arguing Cowart failed to exhaust PLRA requirements and the trial court failed to grant her post judgment motions.

The PLRA requires prisoners to exhaust "such administrative remedies as are available" prior to filing a § 1983 action. Because "exhaustion is an affirmative defense, the burden is on [Erwin] to demonstrate that [Cowart] failed to exhaust available administrative remedies." It is undisputed that the Dallas County jail provides a two-step grievance procedure: First, a prisoner must submit a written grievance to any staff member at the jail (Step 1); second, a prisoner must appeal an adverse decision to the Detention Service Manager (Step 2). Cowart filed a grievance but was transferred before any findings were issued. Erwin contends Cowart was required to appeal, or take some other action, when he failed to receive a timely interim response. However, the jail's Grievance Plan provides that "[i]f an inmate is not satisfied with a Board's findings, the inmate may appeal to the Detention Service Manager, Quality Assurance Unit." An interim response does not contain "findings" that a prisoner may appeal. Essentially, Erwin reads an additional requirement into the policies so the PLRA does not preclude suit in this case.

Next Erwin contends that insufficient evidence supports the jury's verdict on his § 1983 claims for excessive force. Erwin's position is that the "objective evidence" offered at trial, which included photographs, medical records, and testimony from medical professionals, cannot be contradicted by Cowart's or other witnesses' testimony. However, even if that were law, in the present case, the objective evidence is not necessarily inconsistent with eye witness accounts. There were material factual disputes to be resolved by a factfinder, and the courts "apply the long-standing principle of deference afforded to verdicts rendered by a jury." The evidence in this case supports the jury's verdict finding Erwin liable for excessive force. She punched him in the face at least twice and he had bruising and injuries to his face. The court noted the questions put to the jury did not differentiate between Erwin's punches and the subsequent melee en route to the infirmary. The jury was simply asked whether the officers used excessive force. The jury's $14,000 award against Erwin is also supported by the evidence. Finally, the trial court corrected any confusion by the jury prior to responses to jury questions. Judgment was affirmed.

Suspect unable to dispute officer's evidence suspect reached towards waistband and perceived weapon so officer is entitled to immunity *Salazar-Limon v. City of Houston,* 826 F.3d 272 (5th Cir. 2016).

This is a §1983 excessive force case where the U.S. 5th Circuit affirmed the granting of an officer's qualified immunity.

Salazar was driving with three other men in his truck and had been drinking. Officer Thompson observed Salazar's truck weaving between lanes and speeding in excess of the posted limit so initiated a traffic stop. While the basis for the next series of events is disputed, the undisputed evidence established 1) Officer Thompson tried to handcuff Salazar; 2) Salazar resisted; 3) a brief struggle ensued (in which neither party was injured); and 4) after the brief struggle, Salazar pulled away, turned his back to Officer Thompson, and walked away. However, when Salazar reached towards his waistband covered by a shirt, Thompson feared he was retrieving a weapon and shot him. Salazar became partially paralyzed. Thompson found out afterward Salazar

was not armed. Salazar was charged with, and pleaded *nolo contendere* to, resisting arrest and driving while intoxicated. Salazar sued but his claims were dismissed by Thompson's and the City's motion for summary judgment. Salazar appealed.

"In order to overcome a qualified immunity defense, a plaintiff must allege a violation of a constitutional right, and then must show that 'the right was clearly established . . . in light of the specific context of the case.'" Moreover, "[t]his [plaintiff's] burden is not satisfied with 'some metaphysical doubt as to the material facts,' by 'conclusory allegations,' by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." "The '[u]se of deadly force is not unreasonable when an officer would have reason to believe the suspect poses a threat of serious harm to the officer or others.'" Unless Salazar presented competent summary judgment evidence that he did not reach toward his waistband (for what Officer Thompson perceived to be a weapon), Officer Thompson's decision to shoot was not a use of unreasonable or excessive deadly force. Salazar did not present any such evidence. Therefore, Thompson was properly granted qualified immunity. And since Salazar has not shown a violation of his constitutional rights, all of his *Monell* claims against the City of Houston fail as a matter of law.

Border Patrol Agent entitled to qualified immunity after shooting fleeing suspect
Mendez v. Poitevent, 823 F.3d 326 (5th Cir. 2016).

This is a §1983/excessive force case where the 5th Circuit affirmed dismissal based on qualified immunity of the individual officer.

After receiving a radio report of smuggling near the Mexico border, Border Patrol Agent Taylor Poitevent pursued a suspect truck into a residential cul-de-sac, where the truck's two passengers bailed out and began to run towards a fence. On the other side of the fence was the Rio Grande and border to Mexico. One passenger escaped over the fence, but Poitevent caught Mendez, who struggled against the arrest. The court went into great detail regarding the struggle. During the struggle Mendez —later revealed to be high on cocaine and marijuana— overpowered Poitevent, struck him in the temple causing severe disorientation (and later revealed a concussion). Believing his life was in danger Poitevent drew his pistol and fired two shots, killing Mendez. At the time Mendez was shot, he had run about 15 feet away from Poitevent after Agent Poitevent became disoriented. The Texas Rangers investigated the shooting and concluded that Poitevent "was clearly within his right to protect himself and others." Mendez's relatives sued Poitevent for excessive force, but the trial court granted Poitevent's motion for qualified immunity. The court dismissed the United States as well for the tort claims.

The court analyzed the record and held an officer's use of deadly force is not excessive, and thus no constitutional violation occurs, when the officer reasonably believes that the suspect poses a threat of serious harm to the officer or to others. This is an objective standard. The court held a reasonable officer in Poitevent's situation could have believed that Mendez posed a serious threat of harm. The court went through the detailed fight to show Mendez, as an aggressive opponent, "…had proven his dangerousness." "…the question here is not, as plaintiffs assert, whether an officer violates the Fourth Amendment by shooting a suspect who is running away. Rather, it is whether an officer violates the Fourth Amendment by shooting a suspect who just fought the officer at length; disarmed him of his baton; prevented him from using his radio to call for backup; potentially attempted to obtain his gun; concussed and disoriented him; and broke free of his grasp; at the precise moment the officer's vision is impaired and he fears losing consciousness—and the evidence indicates that it was not apparent to Poitevent that Mendez was running away." Poitevent's disorientation may have prevented him from discerning whether Mendez was fleeing, regrouping, going for dropped baton, or even whether Mendez was in fact running away. As a result, the trial court properly granted Poitevent's motion for qualified immunity. The court then held the United States was also properly dismissed.

STATE:

HIGH COURTS

Texas Supreme Court rules on electrical transmission utility's appeal involving rate calculations. *Oncor Elec. Delivery Co. LLC v. Pub. Util. Comm'n of Texas*, 507 S.W.3d 706 (Tex. 2017).

This is a Texas Supreme Court case which held several things, but the main issue of interest to local governments is factors used in determining rates as well as the validity of certain franchise fee agreements.

Oncor Electric Delivery Co., LLC ("Oncor") is the largest transmission and distribution utility in Texas and the sixth largest in the United States. Oncor is regulated by the Public Utility Commission ("PUC"), even after deregulation of certain parts of electric utility operations. In June 2008, Oncor initiated a ratemaking proceeding with the PUC, its first request for a comprehensive rate increase since deregulation. Several parties intervened during the administrative matter. After extensive hearings, the administrative law judges recommended only an increase of 1/7th of the requested rate increase. Oncor and other parties to the administrative proceeding sued for judicial review and then appealed to the court of appeals. Various parties appealed to the Texas Supreme Court, which granted all petitions and consolidated the cases.

The Court first held that while the Public Utilities Regulatory Act ("PURA") requires an end-user electrical utility to discount rates to a state funded university, Oncor cannot sell to end-users. It can only charge for transmission and distribution. As a result, it does not have to provide any such discount. Next, the Court held that when Oncor's parent corporation sold 19% of the ownership to other investors, it could not file an "affiliated group" consolidated tax return with the parent corporation. Filing under a consolidated tax return can affect the tax liability in a calculation for long term expenses. Long term expenses is one element the PUC reviews in determining rate changes. Oncor filed its return individually, not consolidated and the Court held it was proper. Next, the Court held municipalities are entitled to franchise to utilities the use of streets, alleys, and other public areas. The Court then held that the PUC's determination Oncor could not pay a negotiated franchise fee to the cities was improper. Section 33.008(f) of PURA does not restrict renegotiated franchise charges to only those agreed to on the expiration of franchise agreements existing on September 1, 1999. The provision simply precludes the inference that §33.008(b) is exclusive.

Texas Supreme Court holds, in matter of first impression, that sovereign immunity only "implicates" subject matter jurisdiction and does not equate to jurisdiction in all things – therefore entity cannot collaterally attack final judgment on grounds of immunity. *Engelman Irrigation Dist. v. Shields Bros., Inc.*, 514 S.W.3d 746 (Tex. 2017).

The Texas Supreme Court issued this opinion holding a governmental entity's sovereign immunity does not protect it from a monetary judgment which has become final, even if the judgment allowed claims for which the entity is immune.

In 1992, Shields Brothers, Inc. sued the Engelman Irrigation District ("Engelman"), a governmental entity, alleging Engelman had breached a contract to deliver water to Shields. Engelman contended the trial court lacked subject-matter jurisdiction because Engelman had sovereign immunity and the "sue and be sued" language in its incorporation authorization did not waive immunity. The "sue and be sued" language dispute was not ultimately decided in the courts at that time. After going up and down the court of appeals, Engelman lost at trial and the jury awarded damages. This became the *Engelman I* judgment. Engelman did not pay the judgment but sought permission to declare bankruptcy under the Texas Water Code. The Texas Commission on Environmental Quality denied the request and the district court judgment resulting from that denial is the *Engelman II* judgment. While *Engelman II* was on appeal, the Texas Supreme Court issued its opinion in *Tooke v. City of Mexia* holding the "sue and be sued" language in many statutes and incorporation documents is insufficient to waive sovereign immunity. In 2010, Engelman brought the pending suit, *Engelman III*, seeking relief that since it was always immune and the trial court

always lacked subject matter jurisdiction, Engelman should not have to pay the *Engelman I* judgment arguing it was void. The trial court and court of appeals disagreed, holding the final judgment could not be collaterally attacked, and Engelman appealed to the Texas Supreme Court.

The Texas Supreme Court starts out by analyzing long held judicial principals including that a judicial decision, like *Tooke*, generally applies retroactively. But retroactive application of a judicial decision does not generally extend to allow reopening a final judgment where all direct appeals have been exhausted. The principles of *res judicata* precluded collateral attacks on final judgments. "The reason for not allowing collateral attack on a final judgment is that such an attack would run squarely against principles of *res judicata* that are essential to a rational and functioning judicial system." "For any rational and workable judicial system, at some point litigation must come to an end, so that parties can go on with their lives and the system can move on to other disputes." However, the Court also analyzed the fact that *res judicata* does not normally apply when the original tribunal lacked subject-matter jurisdiction. In order to resolve these competing issues, the Court held sovereign immunity only "implicates" subject-matter jurisdiction, not that it involved subject-matter jurisdiction for all purposes. Immunity may implicate, yet does not necessarily equate, to an absence of subject-matter jurisdiction, because "sovereign immunity includes concerns about both subject-matter and personal jurisdiction but is identical to neither." Adopting provisions of the Second Restatement of Judgments the Court held "[w]hen a court has rendered a judgment in a contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation." It is one thing to recognize immunity as equating to jurisdiction when dealing with a defense of an existing claim and preventing the waiver of that defense, and quite another to jettison the principles behind the finality of a judgment as a whole. Next, the Court addressed Engelman's separation of powers argument and held its decision does not preclude the Legislature from waiving immunity, but merely cements the judicial process of ending litigation through a final judgment not subject to attack. In fact, the Court held the reverse of Engelman's argument is true in that if the Legislature had passed a statute adopting *Tooke* and making it retroactive in a way which allowed collateral attack on final judgments, such a statute would cross the separation of powers line into the judicial process. Finally, the Court addressed Engelman's equity arguments and held "recognizing the continuing validity of the *Engelman I* judgment is hardly so inequitable or contrary to the public interest as to compel abandoning principles of *res judicata* and allowing Engelman to avoid that judgment." As a result, Engelman cannot collaterally attack a final judgment on the basis of immunity.

Texas Supreme Court holds lawyers and courts should not use Wikipedia for important issues. *D Magazine Partners, L.P. v. Rosenthal*, 15-0790, 2017 WL 1041234 (Tex. Mar. 17, 2017).

This is not necessarily a case for governmental lawyers, but a cautionary tale from the Texas Supreme Court to all lawyers about relying on *Wikipedia: The Free Encyclopedia* as an authoritative source for any controverted, decisive, or critical issue.

This is a defamation case where the Plaintiff asserts the publisher and author published false and defamatory statements about her giving the impression she was illegally obtaining food stamps. There are many issues to this case, but the reason it is included in this summary is the strong language in the majority opinion and Justice Guzman's concurring opinion dedicated entirely to emphasize the "perils" of lawyers and courts relying on Wikipedia as a source.

The trial court denied the Defendant's motion to dismiss based on Texas Citizens Participation Act ("TCPA") which protects First Amendment speech. A divided Dallas Court of Appeals affirmed the denial. In its opinion, the court relied on a Wikipedia-supplied definition of "welfare queen" to determine the meaning of the term contained in the article's title. The Texas Supreme Court ultimately affirmed the denial and allowed the Plaintiff's defamation claims to go forward based on other arguments which avoided

the Wikipedia supported arguments. Wikipedia is a self-described "online open-content collaborative encyclopedia." This essentially means anyone can write and supply content. References to Wikipedia in judicial opinions began in 2004 and have increased each year, although such references are still included in only a small percentage of opinions. The Court noted most of the cites refer to non-dispositive matter or are included in string cites. But, some courts "have taken judicial notice of Wikipedia content, based their reasoning on Wikipedia entries, and decided dispositive motions on the basis of Wikipedia content." After a lengthy analysis, the bottom line is the Court does not like it, do not trust it's accuracy, believes it is improper, and that lawyers and courts should avoid Wikipedia supported content for any important matter. The Court noted researchers can use it as a starting point, but must avoid citing it as the sole source on anything of significance.

Justice Guzman wrote separately to expressly emphasize the problems of using *Wikipedia* for central issues. She noted that "Wikipedia has many strengths and benefits, but reliance on unverified, crowd-generated information to support judicial rulings is unwise." She pulled directly from Wikipedia's own disclaimer noting it makes no guarantees of validity or accuracy. She notes that while Wikipedia has its place and may be good for certain purposes, it "simply lacks the necessary safeguards to prevent abuse and assure the level of certainty and validity typically required to sustain a judgment in a legal proceeding." While she agrees it can be a starting point for research, she states it should never be an "end point." In short, do not use it for anything important.

Texas Supreme Court holds attorney/client privilege, by itself, is a compelling reason not to release under the PIA even if an entity blows a deadline. *Paxton v City of Dallas,* 509 S.W.3d 247 (Tex. 2017)

This is a Texas Public Information Act ("PIA") case where the Texas Supreme Court holds the attorney/client privilege, in and of itself, is a compelling reason to prevent disclosure under the PIA, even if an entity untimely requests an AG opinion. Case of first impression, long opinion, so long summary.

The City of Dallas received two PIA requests for information, but failed to timely notify the Texas Attorney General within the ten-business day deadline of its intent to seek an AG opinion. The City did seek an opinion and asserted the documents are protected by the attorney/client privilege. The AG determined that since the City failed to timely request an opinion, it waived the privilege and all documents must be released. When an entity fails to timely request an opinion, the documents are presumed public *unless there is a compelling reason to withhold the information.* The AG did not consider the privilege a compelling reason. The City filed suit under the PIA to obtain judicial rulings but received conflicting results at the trial courts. The City and AG appealed respectively. At the different court of appeals levels, both courts held the privilege was a compelling reason to withhold the information. Summaries found here and here. The AG filed a petition for review for both cases.

The Court went into great detail and history (39 pages worth) discussing the balance between the attorney/client privilege (which is for the public's benefit for governmental advice) and the public's right to information (which is also for the public's benefit). It noted the AG has determined through agency precedent that the mere ability to waive the attorney-client privilege automatically and categorically precludes the privilege from constituting a compelling reason even when the privilege has not actually been waived. The Court rejected this argument and held "[b]ecause failing to meet the PIA's deadline to assert a statutory exception to disclosure does not, in and of itself, constitute waiver of the attorney-client privilege, requested information does not automatically lose its confidential status." It further rejected the AG's interpretation for all exceptions under the PIA, "that something more is always required to rebut the presumption that arises from a governmental body's failure to timely request an attorney general decision." The Court held the certain exceptions (not all but some) can be compelling reasons *in their own right*. The AG's interpretation alters the plain language of the PIA. "To require public disclosure of confidential

attorney-client communications as an automatic—and irremediable—sanction for missing a statutory deadline is not necessary to achieve the PIA's objective of an open government and would be a jurisprudential course fraught with peril." Finally, Justice Guzman puts an accurate but humorous summary on the entire thing by writing "[r]obotic perfection by a governmental body's public information officer is a statutory ideal, not an absolute requirement. To err is human, but to conduct a City's legal affairs without the occasional error would require divinity."

The dissent writes for 37 pages but essentially states the attorney/client privilege, by itself, is not enough to overcome the presumption of openness which attaches when the PIA deadlines are not met. The dissent would require an additional showing of a compelling reason for the non-release.

Texas Supreme Court changes the standards for terminating police officers under Chapter 614. *Colorado County, et al., v Marc Staff*, 510 S.W.3d 435 (Tex. 2017).

This is a Chapter 614 law enforcement termination case where the Texas Supreme Court changed some of the standards for investigating, disciplining, and terminating police officers. The Court reversed the judgment of the court of appeals and rendered judgment in favor of the employer County. This is a significant case with a detailed analysis so the summary is a bit long.

Colorado County Deputy Sheriff Marc Staff was terminated from the Sheriff's Department. While an at-will employee his termination notice listed incidents were Staff's behavior with members of the public was improper. The focus of the notice detailed a complaint where the County Attorney advised the Sheriff of Staff's behavior during a traffic stop. The video behavior was investigated and the investigating lieutenant recommended termination. Staff was listed as "argumentative" and abusive. He further unnecessarily arrested an otherwise cooperative motorist. Staff was provided the recommendation by the lieutenant and told he had thirty days to appeal the termination recommendation to the Sheriff for a final order. Sheriff Wied advised Staff to "articulate all of his responses to his termination and the reasons for his appeal." Each incident had been identified in the recommendation with factual details. Staff appealed but rather than contesting the substantive grounds for termination or attempting to contextualize his behavior, Staff's appeal complained of procedural irregularities in the process leading to his discharge. Sheriff Wied upheld the termination and Staff sued the County and Sheriff for declaratory relief, injunctive relief and monetary damages. He asserted the County and Sheriff violated Chapter 614 of the Texas Government Code with the procedure used for termination. The central theme of Staff's argument was that an internal report based on an external complaint alleging misconduct is insufficient to satisfy the statutory requirements. Sheriff Wied asserted Staff was terminated as an employee-at-will, but in the alternative, the process utilized satisfied Chapter 614. The trial court granted the County and Sheriff's motions for summary judgment. The court of appeals reversed and asserted the Sheriff violated Chapter 614. Summary found here. The Texas Supreme Court granted Sheriff Wied's petition for review.

Texas Government Code §614.023 states "(a) A copy of a signed complaint against a law enforcement officer…shall be given to the officer or employee within a reasonable time after the complaint is filed. (b) Disciplinary action may not be taken against the officer or employee unless a copy of the signed complaint is given to the officer or employee…" The Court first held that "[a]lthough Sheriff Wied could have discharged Staff for any reason or no reason, Chapter 614, Subchapter B nevertheless applies when an at-will employer terminates for cause that derives from allegations in a complaint of misconduct instead of terminating at will for no cause.." In other words, if no complaint was filed against Staff, the Sheriff could simply fire him for no reason. However, since a complaint was filed, Chapter 614 applies and the procedures must be followed. The "caused based" process "helps ensure that cause-based removals of a specified nature bear a modicum of proof and that the affected employee has notice of the basis for removal." The Court then considered, "as a matter of first impression, the kind of 'complaint'

and 'person making the complaint' that is necessary to both activate and satisfy the statute's procedural safeguards." After applying various statutory construction principles, the Court held the person making the complaint does not need to be the "victim" of the alleged conduct; it may be an investigator or supervisor. The Court noted in a separate section that some courts of appeals improperly connected the definition of "complaint" in Chapter 614 with a "complaint" under the civil service laws in Tex. Loc. Gov't Code chapter 143. However, they are not the same. Under the Court's definition of "complaint" for Chapter 614 it determined Sheriff Wied followed the requirements. [Comment: For attorneys practicing in this area, the Court's definition and explanation of what qualifies as a proper and sufficient complaint can be extremely helpful.]. In this case, Staff received the signed Deficiency Notice within two days of the initiation of an internal investigation. He suffered no disciplinary action until the complaint was in hand. However, the Court noted "[n]othing in the statute requires the complaint to be served before discipline is imposed or precludes disciplinary action while an investigation is ongoing. Nor does the statute require an opportunity to be heard before disciplinary action may be taken." Staff had ample opportunity to marshal any evidence and provide his explanation to the Sheriff. As a result, the Sheriff complied with Chapter 614. The Court reversed and rendered in favor of the Sheriff.

Texas Supreme Court rules on electrical transmission utility's appeal involving rate calculations. *Oncor Electric Delivery Company LLC., et al., v Public Utility Commission et al,* 507 S.W.3d 706 (Tex. 2017)

This is a Texas Supreme Court case which held several things, but the main issue of interest to local governments is factors used in determining rates as well as the validity of certain franchise fee agreements.

Oncor Electric Delivery Co., LLC ("Oncor") is the largest transmission and distribution utility in Texas and the sixth largest in the United States. Oncor is regulated by the Public Utility Commission ("PUC"), even after deregulation of certain parts of electric utility operations. In June 2008, Oncor initiated a ratemaking proceeding with the PUC, its first request for a comprehensive rate increase since deregulation. Several parties intervened during the administrative matter. After extensive hearings, the administrative law judges recommended only an increase of $1/7^{th}$ of the requested rate increase. Oncor and other parties to the administrative proceeding sued for judicial review and then appealed to the court of appeals. Various parties appealed to the Texas Supreme Court, which granted all petitions and consolidated the cases.

The Court first held that while the Public Utilities Regulatory Act ("PURA") requires an end-user electrical utility to discount rates to a state funded university, Oncor cannot sell to end-users. It can only charge for transmission and distribution. As a result, it does not have to provide any such discount. Next, the Court held that when Oncor's parent corporation sold 19% of the ownership to other investors, it could not file an "affiliated group" consolidated tax return with the parent corporation. Filing under a consolidated tax return can affect the tax liability in a calculation for long term expenses. Long term expenses is one element the PUC reviews in determining rate changes. Oncor filed its return individually, not consolidated and the Court held it was proper. Next, the Court held municipalities are entitled to franchise to utilities the use of streets, alleys, and other public areas. The Court then held that the PUC's determination Oncor could not pay a negotiated franchise fee to the cities was improper. Section 33.008(f) of PURA does not restrict renegotiated franchise charges to only those agreed to on the expiration of franchise agreements existing on September 1, 1999. The provision simply precludes the inference that §33.008(b) is exclusive.

Texas Supreme Court holds public officers not immune from acts of discretion under ultra vires doctrine. *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154 (Tex. 2016).

This is an *ultra-vires* case where the Texas Supreme Court holds acts can be *ultra-vires* and without legal authority even if they involve some level of discretion.

The City of Houston enacted a drainage-fee ordinance. Charges are calculated based on a specified rate per "square [foot] of impervious surface on each benefitted property." The ordinance gives the city's Director of Public Works and Engineering—in this case, Daniel Krueger—authority to administer its provisions, subject to the terms of the ordinance itself. Petitioners (collectively, the "railroads") received notices of proposed charges of about $3 million annually based on Krueger's determination that all of the railroads' properties within Houston were "benefitted" and that the surfaces of nearly all of those properties were also "impervious." Krueger made his determination based upon aerial images—looking to see if the properties appeared green or brown—rather than digital map data. Generally, under this method, if the property appeared brown, Krueger determined it was impervious; if it appeared green, he determined it was pervious. The railroads filed suit alleging *ultra vires* claims against Krueger and seeking prospective injunctive relief. The City and Krueger filed a plea to the jurisdiction which the trial court granted. The court of appeals affirmed in part and reversed in part. The parties cross-appealed.

The parties dispute the meaning of "exercise of discretion" and "without legal authority" as used in *Heinrich* for *ultra vires* determinations. To the city, "exercise of discretion" means any decision made in which the officer has the authority to use his personal judgment, and "a mistake in exercising his judgment is not an *ultra vires* act." The railroads assert discretion means absolute discretion—discretion where no specific, substantive, or objective standards govern the exercise of judgment. *Heinrich*'s claim was against the officers for acting pursuant to, yet outside the limits of, a statutory grant of authority. Heinrich alleged that the officers, making the type of determination which they had authority to make, made that determination in a way the law did not allow. That is the proper standard. The Court then analyzed several cases since *Heinrich* and determined none could be read to shield unlawful action simple because the action was discretionary. And while "the protections of governmental immunity remain robust, they are not absolute." Accordingly, "the principle arising out of *Heinrich* and its progeny is that governmental immunity bars suits complaining of an exercise of absolute discretion but not suits complaining of either an officer's failure to perform a ministerial act or an officer's exercise of judgment or limited discretion without reference to or in conflict with the constraints of the law authorizing the official to act. Only when such absolute discretion—free decision-making without any constraints—is granted are *ultra vires* suits absolutely barred." [Comment: That gets into an "unbridled discretion" problem.] And, as a general rule, "a public officer has no discretion or authority to misinterpret the law." However, the court emphasized that this opinion is not to be interpreted as a way "to allow a new vehicle for suit to masquerade as an *ultra vires* claim" and that the exception still remains extremely narrow in application.

The Court then analyzed the ordinance in question and determined Krueger's determinations did not meet the definitions found in the ordinance. The railroad properties are not "benefitted properties" under the ordinance's definition and while Krueger may have some authority with respect to determining which properties are benefitted, he does not have authority to make that determination in a way that conflicts with other provisions of the ordinance, including its definition and usage of "benefitted property." Further, "Impervious surface" is defined and Krueger's determinations did not meet the ordinance definitions either. And while he may rely on "reliable data" to make a determination, the data must be similar to the types of data described in the ordinance. The railroads properly alleged an *ultra vires* claim so the case is remanded for further proceedings.

Texas Supreme Court holds if County Court has no jurisdiction for suit, it has no jurisdiction for Rule 202 pre-suit discovery. *In re City of Dallas*, 501 S.W.3d 71 (Tex. 2016).

This is a mandamus matter in relation to an underlying tortious interference claim between various cities and the county. In the Waco Court of Appeals opinion, summary found here, the court found the City of Corsicana and Navarro County properly asserted a claim for tortious

interference with a business contract involving Home Depo because the City of Dallas allegedly wooed away the company to relocate. The Court of Appeals held the interference with an existing business contract, i.e. business recruiting, by the City of Dallas was a proprietary function and no immunity applied. However, the aspect before the Texas Supreme Court was not related directly to the proprietary function holding. Instead, the Court conditionally granted mandamus and ordered the Navarro County Court to reconsider its damages jurisdiction.

The underlying suit was not yet a suit for damages, but was a Rule 202 petition for pre-suit discovery. If a claim was found to exist, the City of Corsicana admitted the damages may exceed the $200,000 jurisdictional limit of county court. However, the Corsicana argued that since the matter was simply a Rule 202 petition for discovery, the County Court did have jurisdiction. The Supreme Court disagreed and held that unless the County Court had jurisdiction of the underlying claims, it could not have jurisdiction over a Rule 202 petition. The Court was not persuaded that the pleadings affirmatively negated jurisdiction and the damages could still fall under the cap. Therefore, it ordered the County Court to evaluate its jurisdiction based on the likely damages of the underlying suit.

Texas Supreme Court holds general law city cannot extend building codes into ETJ. *Town of Lakewood Vill. v. Bizios*, 493 S.W.3d 527 (Tex. 2016).

This is an interlocutory appeal from a temporary-injunction order regarding whether a Type A general-law municipality has authority to enforce its building codes and building-permit requirements within its extraterritorial jurisdiction ("ETJ"). The Texas Supreme Court held it could not.

The Town's ETJ encompasses part of the Sunrise Bay subdivision (the "Subdivision"). Harry Bizios purchased a lot in the Subdivision which is located entirely within the Town's ETJ. The Town's ordinances adopt building codes and make them enforceable within its ETJ. Bizios obtained all permits from the County and all other entities except the Town. The Town filed this suit after Bizios ignored its orders to stop construction. The trial court granted the Town's injunction but the Court of Appeals reversed holding the Town did not have the legal authority to enforce its building codes in the ETJ.

The Texas Supreme Court first determined it had jurisdiction to hear the case since the Town presented an inconsistent opinion and split in the courts of appeals on the subject. Next the Court went into an analysis of the differences between a general law and home-rule municipality. The Court held without statutory authority, a general law municipality cannot extend its building codes into the ETJ. Texas Government Code §§212.002 and 212.003 allow the extension of certain ordinances in to the ETJ that deal with plats and subdivisions. However, after a lengthy discussion of statutory construction principles, the Court held "building codes" do not relate to plats and subdivisions so cannot be part of that extension. The Court went through several other statutory references and determined none provide authority for a general law city to extent building codes into the ETJ. Additionally, the Court rejected the Towns' argument that it had implied authority to extend such codes. Finally, the Court discounted the public policy arguments by holding "[w]e cannot judicially confer authority on general law municipalities, even if we believe there are compelling public policy reasons for doing so. We must leave that choice to the policymaking branch of government." As a result, the Town cannot legally extend building codes into the ETJ.

Texas Court of Criminal Appeals holds no intermediate court of appeals has mandamus jurisdiction over county courts at law. *Powell v. Hocker*, 516 S.W.3d 488 (Tex. Crim. App. 2017).

I do not normally include criminal cases in these case summaries, however, this one has larger implications for all governmental entities in both the civil and criminal context. Further, for those jurisdictions which do criminal matters (including municipalities which host municipal courts), the second part of this opinion can be important.

In a county court misdemeanor case, the criminal district attorney sought a mandamus against the county court judge involving a criminal discovery dispute. Under the recently enacted Michael Morton Act, contained within Article 39.14 of the Texas Code of Criminal Procedure, the defense attorney sought copies of records contained within the prosecutor's file. The prosecutor allowed her to view the records, but Subsection (f) prohibits copies from being made. The defense attorney sought a court order to allow copies, which the county court at law judge granted. The district attorney filed a mandamus petition directly with the Texas Court of Criminal Appeals, completely circumventing the court of appeals in Amarillo.

The Texas Court of Criminal Appeals first and foremost agreed with the DA that courts of appeals do not have mandamus jurisdiction over county courts at law. This includes civil as well as criminal applications as the writ power derives from the same source. Section 22.221 of the Government Code defines the writ of mandamus authority for the courts of appeals. Subsection (b) states the writ power includes power over "county courts" but does not specify whether it includes constitutional county courts only, or whether court courts at law are included within the definition. Given the placement of §22.221(b) is within Title 2 of the Government Code, which the Court held implicates it is limited to constitutional county courts, §22.221 does not provide such power to statutory county courts (i.e. county courts at law). The Court also analyzed the legislative history of §22.221 and determined the intent was to exclude county courts at law from the courts of appeals' mandamus power. The Court did state that because mandamus jurisdiction is purely legislative, and direct appeal jurisdiction has foundations in the common law and constitution, its interpretation does not interfere with direct appeal jurisdiction of the courts of appeals over county courts at law. Therefore, only the Court of Criminal Appeals (for criminal matters) has mandamus jurisdiction over county courts at law. Once the Court determined it was proper to file the mandamus petition with the Court, it went on to analyze the mandamus standards. Ultimately it determined the plain language of the Michael Morton Act prohibits copies of the identified sections of the prosecutor's file from being copied. It ordered the trial court to rescind its order and if it fails or refuses to rescind, the Court will issue mandamus.

COURTS OF APPEALS

Beaumont Court of Appeals agrees with San Antonio Court of Appeals – constables cannot collectively bargain and no waiver-by-conduct. *Jefferson County, Texas v. Victor Stines,* 09-16-00058-CV, 2017 WL 2698094 (Tex. App—Beaumont, June 22, 2017)

This is a collective bargaining case to compel arbitration where Beaumont Court of Appeals reversed the denial of the County's plea to the jurisdiction and dismissed the case. Warning, if you want to read this opinion, its 74 pages long, including the dissent. However, it provides an in-depth analysis of Chapter 174 language regarding contracting power, "police department" and governmental immunity. So the summary is also very long.

The Jefferson County Deputy Constables Association ("Association"), Jefferson County ("County") and various constable precincts entered into a collective bargaining agreement ("Agreement") set to end in September 2014. Article 25 of the Agreement governs disciplinary actions taken by the Constable against deputy constables. Stines, a former deputy constable, filed suit against the County after he was later terminated. Stines attempted to compel binding arbitration. The County refused. Stines sought a declaratory judgment and mandamus action to compel arbitration. The County filed a plea to the jurisdiction which the trial court denied. At the same time the trial court granted Stines's motion for summary judgment and ordered arbitration. The County appealed.

The court first noted that a trial court's prejudgment letter (which occurred in this case) is not necessarily competent evidence of the basis for its judgment. However, the trial court in the present case did not enter formal findings of fact and conclusions of law specifically relating to its ruling on the County's plea to the jurisdiction so

did not disclaim the basis set forth in the letter ruling. As a result, it will hold the trial court to the basis of the judgment spelled out in the letter.

Next, the court held a governmental entity such as the County retains immunity from suit even after entering into a contract, absent a statutory waiver. The Uniform Declaratory Judgment Act ("UDJA") is not a blanket waiver of immunity. Claims, including those for declaratory judgment, that seek to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities are claims that attempt to control state action by imposing liability on the entity. Such claims are barred by governmental immunity. Stines's UDJA claims "as to the applicability of Chapter 174 of the [Texas Local Government Code] to deputy constables" are actually claims for a declaration of the parties' contractual rights and obligations under the Agreement. They are therefore barred. Likewise, Stines's mandamus claim seeks to compel the County to perform its alleged contractual obligations and are therefore barred.

Chapter 174 of the Texas Local Government Code, titled the Fire and Police Employee Relations Act ("FPERA"), waives immunity for proper claims brought within its scope. As a general rule, "Texas law prohibits a state political subdivision from collective bargaining with public employees" unless there is express statutory authority. So, the question becomes whether FPERA encompasses the constables. The FPERA specifically permits "fire fighters, police officers, or both . . . to organize and bargain collectively with their public employer …" upon the adoption of the FPERA by a political subdivision. For a claim to be brought under §174.251 of FPERA, it must, among other things, be asserted by "a party aggrieved by an act or omission of the other party that relates to the rights or duties under [the FPERA.]"

The County asserts constables are not "police officers" under the definition of FPERA. The FPERA defines the term "police officer" to mean "a paid employee who is sworn, certified, and full-time, and who regularly serves in a professional law enforcement capacity in the police department of a political subdivision." There is a current split in the Texas circuits as to whether constables are a "police department" of the political subdivision. Most courts acknowledge that a sheriff's office is a "police department" as the wording notes a single entity with a department of enforcement. However, as to constables, the San Antonio Court of Appeals says they are not a "police department" [summary found here] and the Corpus Christi Court of Appeals says they are [summary found here]. After an extremely lengthy statutory construction analysis, the court held the term "the police department of a political subdivision" refers only to the department of law enforcement officers of a political subdivision who provide "essential and emergency" services to the public and whose absence due to strikes, lockouts, work stoppages, or slowdowns would cause injury to "the health, safety, and welfare of the public." The sheriff's department is the department charged with such duties and obligations and is a "police department" but a constable's office is not. While constables are law enforcement individuals, the county constable's office is not a department of a county that provides the critical, emergency services to the public that are contemplated by the FPERA. Given the statutory duties of a constable's office, in comparison with the sheriff's department, a strike of the constable's would not pose a health and safety hazard to the general public. Stines's claims under FPERA are therefore barred by governmental immunity. The court recognized that its holding essentially means the County entered into a contract it was not legally allowed to sign. But that does not waive immunity. Even if the language in the Agreement on which Stines relies could properly be construed as an agreement between the parties to waive the County's immunity from suit, it does not constitute a waiver of immunity by the Legislature. Only the Legislature, not contracting parties, may waive immunity. Therefore, the court declined to recognize the "waiver-by-conduct" exception to immunity from suit. However, even if that were not the case, and jurisdiction existed, Subchapter E's arbitration provisions of FPERA apply only to arbitration for collective bargaining impasses; they do not apply to arbitration of disputes pursuant to the contractual terms of a fully-negotiated collective bargaining agreement. As a result, Stines would

still lose as the arbitration provision does not apply to termination disputes.

Business not entitled to lost profits in takings analysis since profitability is factor in determining market value. *The State of Texas v. Luby's Fuddruckers Restaurants, LLC*, 13-16-00173-CV, 2017 WL 2608296 (Tex.App—Corpus Christi, June 15, 2017, no pet. h.)

State filed this condemnation suit to take a strip of the cafeteria's parking lot for purposes of a project to widen U.S. 290. Both parties agreed that the taking also rendered the cafeteria incapable of operating in its current form; with a substantial amount of parking gone, the cafeteria could not comply with a Houston parking ordinance. Luby's further contended that the parking situation was inadequate to meet customer demand and would also breach a restriction in the cafeteria's deed which set minimum parking requirements. The special commissioner's court awarded $1,795,853 and both parties appealed. The State asserted Luby's could not obtain lost profits but the court order ruled the objection. Both parties objected to the jury charge for different reasons. A jury returned an award of $1,334,183, which was the amount proposed by the State and its experts. Separately, the jury also awarded $480,000 for lost profits, which was the amount proposed by Luby's.

If a governmental entity condemns only part of a tract, adequate compensation is required for both the part taken and any resulting damage to the remainder, but not all types of damages are compensable. Texas law allows income from a business operated on the property to be considered in a condemnation proceeding in two situations: (1) when the taking, damaging, or destruction of property causes a material and substantial interference with access to one's property, lost profits may be awarded as damages and (2) when only a part of the land has been taken, evidence relating to lost profits is admissible, not as a separate item of damage, but as a means of demonstrating the taking's effect on the market value of the remaining land and improvements. The State argued since this was a full taking, instead of a partial taking, the lost profit analysis was inapplicable. A property's ability to foster profit is "an inherent factor [in comparable sales approach] because a willing buyer will normally pay more for a tract containing a profitable enterprise than for a similar tract containing an unprofitable enterprise. Thus, '[t]he ability of a business to make a profit is reflected in its market value.'" Because "the profitability of [the] restaurant was a factor in arriving at the 'market value' of the property, it cannot also recover for lost profits." The court reversed the jury award for lost profits. Luby's challenges to the jury charge were also not sustained. Not all statements of law belong in a jury charge and broad statements are preferred to avoid improper comments on the weight of the evidence.

Austin Court of Appeals holds alleviating street flooding is a "benefit" qualifying as a public use in flooding case. *City of Rollingwood, Texas v. Owen Brainard and Sally Brainard,* 03-17-00077-CV, 2017 WL 2417388 (Tex. App. – Austin, May 31,2017, no pet. h.)

This is a flooding/takings case where the Third Court of Appeals affirmed the denial of the City's plea to the jurisdiction.

As part of a condition for approval of a plat application, the City required Andrews to dedicate a drainage easement on his property and install a "flume" to convey storm water down an adjoining street, Pickwick Lane. Before the City approved the application, Andrews sold part of his property to the Brainards. The Brainards' property is situated downhill from what remained of the Andrews property and from Pickwick Lane. The City approved Andrews's application with respect to the remaining Andrews' property. The Preheims then purchased the Andrews lot uphill from the Brainards. Preheims' plans to build a large house would increase the impervious cover. The Preheims' engineers called for the construction of a detention pond to hold the excess runoff, which the City approved. Brainards allege that, after the construction of the Preheims' system, their yard frequently flooded and became unfit for their desired purposes. The Brainards sued the City for a takings (inverse condemnation) and nuisance. The City filed a

plea to the jurisdiction, which the trial court denied.

While the City asserted it took no affirmative action other than approving a permit (which cannot attribute liability by itself), the Brainards alleged the City and Preheims colluded in a conspiracy to intentionally diver water onto the Brainards' property. According to the City, the record demonstrated it relied on engineers' reports when it granted the Preheims' permit applications. The City contends the reports show the detention pond would prevent flooding, not cause it. However, the Brainards submitted an affidavit from an engineer stating the report actually indicated the runoff would impact the Brainards. He then discussed another engineering report the Preheims submitted to the City in October 2012 indicating the broken/altered curbs would cause a drainage impact. In other words, the Brainards created a fact question as to the City's intent and knowledge as to causing the flooding. Further, there is evidence that the City actually altered the curb to allow more water to flow out of Pickwick Lane to the Brainards' property. They concluded alleviating street flooding is a "benefit" qualifying as a public use under a takings analysis. As a result the plea was properly denied.

TABC license holder allowed to file pre-enforcement suit under APA only if agency rule is capable of being applied, but not for its actual application. *The Texas Alcoholic Beverage Commission v. D. Houston, Inc. d/b/a Treasures,* 03-13-00327-CV, 2017 WL 2333272 (Tex. App— Austin, May 25, 2017, no pet. h.)

This is a state agency/ exhaustion of remedies case where the Third Court of Appeals held the license holder did not yet have standing to challenge the applicability of an agency regulation.

The Texas Alcoholic Beverage Commission ("TABC") issued an alcohol license to Treasurers, a gentlemen's club. Later it initiated an enforcement action to impose civil penalties (including potential revocation of permits) based on alleged violations of TABC rules by Treasurers' dancers and entertainers (specifically alleged sexual solicitation, sexual contact, and exposure of genitalia.) Treasurers' initiated this declaratory judgment suit seeking a ruling on the applicability of specific TABC rules based on the argument the dancers/entertainers were not "employees" but independent contractors. TABC filed a plea to the jurisdiction. The trial court granted the plea as to Treasurers' challenge to the applicability of TABC Rule 35.31. However, it granted judgment for Treasurers which enjoined the TABC's ability to "suspend" a provision of the state statute requiring a criminal prosecution before it could impose a civil penalty. Both parties appealed.

Under the Administrative Procedures Act found in Chapter 2001 of the Texas Government Code, a rule "applicability" challenge authorized by §2001.038 is limited to determining whether a rule is capable of being applied to or is relevant to a factual situation, as distinguished from a challenge to the rule's application. TABC Rule 35.31 is clearly applicable to Treasurers as a license holder who has employees, but the rule's application to the particular facts cannot be challenged through §2001.038. Regarding Tex. Alco. Bev. Code § 11.641(c), which allows civil penalties imposed on the basis of a criminal prosecution, Treasurers argued the TABC was attempting to use an administrative penalty as a way to avoid having to wait for a prosecution or conviction for sexual solicitation and other state law crimes. However, the TABC rule includes the provision and merely restates the state law. It therefore cannot be a "rule" which falls under the preemptive suits allowed under §2001.038. Further, using statutory construction principles, the court held the statute does not bind the civil penalties to a required criminal prosecution. The TABC asserted it cannot impose civil penalties on a permittee without proving that a violation of the code or a rule has actually been committed after notice and a hearing at the administrative level. This requires Treasurers to complete the administrative process before proceeding to district court. Since no such completion occurred, the plea should have been granted as to the challenge to §11.641(c).

Plaintiff did not properly allege *ultra vires* claims to invalidate contract between city and developer. *Becky, Ltd. v. The City of Cedar Park,*

et al, 03-15-00259-CV, 2017 WL 2224527 (Tex. App— Austin, May 19, 2017, no pet. h.)

Becky owns a landlocked tract of land in Cedar Park and Milestone sought to develop an adjacent lot. The City entered into a Unified Development Agreement with Milestone which included a dedicated and partial construction of a right-of-way roadway extension. Becky brought suit in May 2014 against Milestone, the City, and the City Council members challenging the validity of the agreement. The City Defendants filed pleas to the jurisdiction which the trial court granted. Becky appealed.

Becky asserts that pursuant to local ordinance, the City and its council members "waived" Milestone's obligation to comply with the City's Subdivision Ordinance and circumvented the Planning and Zoning Commission ("P&Z") and its ability to grant variances for plat approval. Becky seeks a declaration that this alleged *ultra vires* act renders the Agreement void. However, the agreement concerns the public right-of-way extension and does not directly address the platting process for Milestone's planned development. The terms state that the approval of the construction plans for Phase 1 of the right-of-way was not a condition precedent to Milestone proceeding with its construction of the subdivision development. The ordinances have an express exception for acquisition of public right-of-way. After utilizing statutory construction principles to define "acquisition" the court held the agreement falls squarely within the exceptions listed in the ordinances. The ordinances also do not restrict public improvement decisions to the P&Z only and the commission acts only as an advisory board to the City Council. Additionally, none of the Plaintiffs' "declarations" for relief involve the validity of an ordinance, so immunity is not waived under the Uniform Declaratory Judgment Act.

Austin Court of Appeals holds trial court lacks jurisdiction to hear businesses' challenge to cooler ban on the river. *City of New Braunfels, Texas v. Stop The Ordinances Please, et al,* 520 S.W.3d 208 (Tex. App.—Austin 2017), reh'g denied (June 5, 2017)

The Austin Court of Appeals dismissed a challenge to a City ordinance which prohibited the use of coolers and containers while utilizing the Guadalupe and Comal Rivers.

This is the third appellate opinion generated around the underlying dispute. In essence, the City, whose municipal limits encompass long stretches of both rivers, passed a series of ordinances limiting the use of drink coolers and containers while citizens floated down either river on tubes or other flotation devices. The plaintiffs are primarily made up of business owners who sell coolers and containers or cater to river tourists. The court went through, briefly, the holdings in the first two opinions, which principally focused on the pleadings. After remand, the parties conducted discovered and filed opposing motions for summary judgment. The trial court granted STOP's motion and denied the City's motion. The district court also permanently enjoined the City from enforcing, spending public funds, or collecting fines or any other penalties. The City appealed.

Historically, Texas courts are only to consider constitutional challenges to penal enactments within the context of a criminal proceeding. There is no dispute the ordinances under challenge are considered to be "penal" in nature. An exception to this principal is a civil challenge the ordinance is 1) unconstitutional and 2) said to threaten "irreparable injury to vested property rights." "A right is 'vested' when it 'has some definitive, rather than merely potential existence.'" And while citizens may have a property right in the physical coolers, this right does not automatically translate to a "vested property right" to use said property a particular way or in a particular location. A vendor who owns such property as inventory retains the property right, but not the vested right to sell such property in any particular manner he sees fit. Texas courts have found, in the past, that an adverse economic impact on a business constitutes harm to a vested property right, at least in circumstances where the business lacks an adequate remedy through criminal proceedings due to the deterrent effect on customers. However, interpreting subsequent Texas Supreme Court precedent, the court held "irreparable injury

to vested property rights" must flow from the actual or imminent enforcement of the penal statute against the claimant. It is questionable whether the owners' businesses could ever meet the requirement, considering that the ordinances do not directly criminalize their trade in coolers or disposable containers. The summary-judgment evidence conclusively established that the district court did not have subject-matter jurisdiction over the claims. There is a lot more to the opinion and many nuances, but cramming all of that into a case summary defeats the purpose of it being a summary.

Inmate cannot sue county for failing to give him a blanket. *James Wilkins v. Nueces County, Texas,* 13-14-000570-CV,2017 WL 2180695 (Tex.App— Corpus Christi, May 18, 2017, no pet. h.)

This is an inmate tort case where the Corpus Christi Court of Appeals dismissed all of the inmate's claims under a plea to the jurisdiction.

Wilkins, an inmate, sued Nueces County *pro se* in district court claiming he suffered emotional distress and mental anguish when he was, among other things, allegedly not given a blanket, a sheet, and a mattress while in the county jail's holding cell for ten days on four separate instances. He sued for negligence, gross negligence, fraud, violations of the Texas Commission on Jail Standards policies and rules and a host of other tort claims. The County filed a plea to the jurisdiction which the trial court granted and Wilkins appealed.

Wilkins filed an amended petition, attempting to add negligent misrepresentation. However, the petition included only that claim. Filing an amended petition that does not include a cause of action effectively nonsuits or voluntarily dismisses the omitted claims as of the time the pleading is filed. This essentially non-suited all of Wilkins' other claims. However, even if that were not the case, Wilkins' claims under the TTCA are based on the non-use of tangible property. Such does not waive the county's immunity. Moreover, in the case of fraud, immunity cannot be waived under the TTCA for intentional torts. The trial court properly granted the plea.

Vested rights notice to one agency is not automatic notice to another under Chapter 245 says Austin Court of Appeals. *Charles N. Draper v. Greg Guernsey, et al,* 03-16-00745-CV, 2017 WL 2224540 (Tex. App— Austin, May 18, 2017, pet filed)

In 1985, Travis County approved a site-development permit for a three-story office development on real property currently owned by Draper. In 2011, Draper filed what he termed a Chapter 245 Determination seeking to develop the Property with an exemption from the City's current development regulations based on a plat recorded in 1872 and the 1985 Travis County permit. The City denied the application. Draper filed suit seeking a declaration he possessed a vested right under chapter 245 of the Local Government Code to develop the property under regulations in effect in 1985. His petition also sought damages for allegations of fraudulent misrepresentation, perjury, breach of contract, and a host of other claims. The trial court granted the City's summary judgment motion and Draper appealed.

Under chapter 245 of the Local Government Code, once an application for the first permit required to complete a property-development project is filed with a regulatory agency, the agency's regulations applicable to the project are effectively "frozen" as they would relate to that project. However, an application filed with one agency does not provide "fair notice" to a different agency and is thus not sufficient to establish vested rights from the second agency's regulations. Filing an application for a permit with Travis County prior to annexation did not entitle him to chapter 245 rights with respect to City's requirements after the property was annexed. As a result, his vested rights claims fail. To avoid this, Draper argued Tex. Loc. Gov't Code §43.002 states a municipality may not, after annexing an area, prohibit a person from continuing to use land in a manner previously authorized prior to annexation. According to Draper, this requires his vested rights to be recognized. However, §43.002 was not enacted until 1999, well after Draper's property was annexed by the City in 1985. Statutes are presumed to be prospective in their operation

unless expressly made retrospective. See Tex. Gov't Code § 311.022. As a result, the argument fails and the court did not need to address whether the term "use" in §43.002 applies to an undeveloped use. Further, the court held Draper may not assert *ultra-vires* claims against Guernsey, the planning director, under the circumstances alleged because an official's exercise of discretion does not constitute an *ultra vires* act. The City retains immunity from any remaining claims. The remaining non-claim issues raised by Draper, including breaching a Rule 11 agreement and perjury, are not properly before the court. The case was dismissed.

Non-Profit does not have correct membership to grant associational standing to sue for ordinance validation. *City of Westworth Village, Texas v. Texas Voices for Reason and Justice, Inc.,* 02-16-00106-CV, 2017 WL 2178870 (Tex.App— Fort Worth, May 18, 2017, pet. filed).

This is an appeal from the denial of a plea to the jurisdiction. The underlying case involves an association attempting to hold a City ordinance invalid.

The City adopted an ordinance prohibiting any person required to register as a sex offender from establishing a residence within 1,000 feet of any location where children commonly gather. A violation of the ordinance constitutes a misdemeanor. The plaintiff Texas nonprofit corporation known as the Texas Voices for Reason and Justice, Inc ("TVRJ") sued the City on behalf of its members, claiming the ordinance violates the state constitution. The City filed a plea to the jurisdiction which was denied. The City appealed.

Texas law provides that in certain circumstances, an association may have standing to sue on behalf of its members. However, no Texas court has addressed the precise question of what analysis applies to determine whether an organization has members for purposes of associational standing. Borrowing from federal case law, the court held the question turns on whether the organization is a traditional voluntary membership organization. If it is then no further inquiry into the issue of membership is necessary. If not, the association must establish it is the functional equivalent of a traditional voluntary membership organization. TVRJ's certificate of formation affirmatively reflects that it was formed as a Texas nonprofit corporation that would have *no* members. Therefore, the certificate of formation conclusively proves that no person had membership rights in it at the time it filed this suit. The burden rests with TVRJ to establish it is the functional equivalent of a traditional membership organization. An organization is a functional equivalent if (1) it serves a specialized segment of the community; (2) its constituents possess all of the "indicia of membership" in an organization; and (3) its fortunes are closely tied to those of its constituency. The evidence TVRJ provided are its amended bylaws and an affidavit of its purpose. TVRJ's general members do not have any direct influence or control over who its directors are. TVRJ's general members are not required to contribute financially to the organization; rather, any financial contributions they make are purely voluntary. The court analyzed the evidence and the involvement of the general member and determined they possessed none of the indicia of membership. As a result, the association has no standing to challenge the City's ordinance. Given the premise, no amendments to the pleadings can cure this defect. The court reversed the denial, granted the plea, and rendered judgment for the City.

Stakeholder group unable to invalidate utility system agreement between city and district through ultra vires claims. *Chisholm Trail SUD Stakeholders Group v. Chisholm Trail Special Utility District et. al.,* 03-16-00214-CV, 2017 WL 2062258 (Tex. App—Austin, May 11, 2017, no pet. h.)

This is an appeal from the granting of various pleas to the jurisdiction where the Austin Court of Appeals affirmed the granting of the pleas and dismissal of the plaintiffs' claims.

Chisholm Trail Special Utility District ("District") acquired a water supply and distribution utility system that served customers in several counties. The City of Georgetown

("City") entered into an asset transfer and utility system consolidation agreement. As part of the agreement, the parties were to seek a transfer of the District's certificate of convenience and necessity ("CCN") to the City. In July 2015, the contested case hearing on the CCN transfer application occurred. The Stakeholders Group, a nonprofit corporation organized to advocate for residents and landowners sued the District and Public Utilities Commission ("PUC") and various officials alleging *ultra vires* conduct and sought declaratory and injunctive relief. The District filed a plea to the jurisdiction. Afterward, the PUC issued an order granting the transfer then filed its own plea to the jurisdiction. The trial court granted all pleas and the Stakeholders appealed.

Section 52(a) of article III of the Texas Constitution holds the Legislature cannot require gratuitous payments to individuals, associations, or corporations, but a political subdivision's paying public money is not "gratuitous" if the political subdivision receives return consideration. The agreements between the City and District are supported by consideration. The evidence also conclusively established that the agreements were for public purposes. The claims against the PUC and the Commissioners are premised on the argument the PUC lacked jurisdiction to consider the CCN transfer application because the PUC only had authority to exercise economic regulation over water utility services. However, the Legislature specifically granted the PUC the authority to grant, revoke, and amend CCNs and provided the right to judicial review of a PUC decision concerning a CCN. See Tex. Water Code §13.241. Therefore, the PUC's final order is not void on its face such that it would be subject to collateral attack. Since the Stakeholders did not appeal the order through the statutory process, the trial court was without jurisdiction to hear such a collateral attack. Additionally, since the *ultra vires* claims against the directors are predicated on the same arguments, no *ultra vires* claims demonstrating action outside of any official's authority is present. They also seek retrospective relief, which is an invalid relief under the doctrine. The pleas were properly granted.

Plaintiff's assault claims properly fell within TTCA §101.106(e) requirement for dismissal says Tyler Court of Appeals. *Christina Catoe v. Henderson County, Texas and Adam Slayter,* 12-16-00259-CV, 2017 WL 1908645 (Tex.App—Tyler, May 10, 2017, no pet. h.)

This is an appeal from the granting of a motion to dismiss and a plea to the jurisdiction by a detention officer and the County for tort claims. The Tyler Court of Appeals affirmed the granting of the trial court orders.

Catoe sued Slayter, a detention officer, and Henderson County for an alleged assault committed while she was in custody. The County filed a motion to dismiss under Tex. Civ. Prac. & Rem. Code §101.106(e) asserting the claims against Slayter were for actions taken in the course and scope of his employment. The trial court granted the motion. The County then filed a plea to the jurisdiction asserting it was immune from intentional torts, which the trial court likewise granted. Catoe appealed.

Section 101.106(e) of the Texas Tort Claims Act ("TTCA") provides that when a claimant files suit "under this chapter," against both a governmental unit and its employee, the employee shall immediately be dismissed from the suit upon the filing of a motion to dismiss by the governmental unit. While Catoe argues her lawsuit is not brought "under this chapter" and that §101.106(e) did not apply, the TTCA is the only avenue for common-law recovery against the government, all tort theories fall under its umbrella. Catoe sued Slayter for assault, intentional infliction of emotional distress, and sexual harassment. These are intentional torts that are not within the TTCA's limited waiver of immunity. Her negligent hiring, supervision, and training claims against the County arise out of Slayter's alleged intentional conduct and likewise fall within the exclusion for intentional torts. Slayter was entitled to immediate dismissal and the claims against the County did not establish a waiver of immunity. The motions were properly granted. In a footnote, the court noted Catoe's assertion that she was bringing a §1983 claim was not persuasive as a proper pleading must implicate and identify the deprivation of a federal right. Her

pleadings fail to make such an implication, even under a notice pleading standard.

Officer's motion focused on "discretionary action" but failed to address "good faith" element of official immunity, so motion was properly denied. *Tumlinson v. Carolyn Barnes,* 03-15-00642-CV, 2017 WL 1832488 (Tex. App—Austin, May 5, 2017, no pet. h.)

This is an interlocutory appeal from the denial of a law enforcement officer's claim of official immunity. The Austin Court of Appeals affirmed the denial of immunity.

Officer Tumlinson worked at the Travis County Criminal Justice Center. He arrested Carolyn Barnes for assaulting him at a security-screening area in the Center. While she was out on bond Barnes was arrested by Williamson County Sheriff's Office deputies for shooting at a United States Census worker, found guilty and sentenced to three years. Barnes sued all officers involved in both arrests for various claims and did so multiple times, but continued to have the claims dismissed. In March 2015, Barnes filed the underlying lawsuit against Officer Tumlinson and approximately 78 other individuals asserting more than 200 causes of action. Regarding Officer Tumlinson, she asserted Tumlinson attacked her from behind in order to prevent her call to 911 to report his drunken state and abusive behavior. Tumlinson filed a motion to dismiss and plea to the jurisdiction. The trial court denied the motions and Tumlinson appealed.

Official immunity is an affirmative defense that protects government employees from personal liability. A law-enforcement officer's decision regarding "if, how, and when to arrest a person" is a discretionary function, but the officer must still establish he acted in good faith. A police officer acts in good faith in connection with an arrest if a reasonably prudent police officer, under similar circumstances might have reached the same decision. Tumlinson focused on the discretionary nature of his actions but failed to address the good faith requirement. A conclusory assertion of good faith in pleadings is insufficient. While Tumlinson may ultimately establish he is entitled to official immunity, his failure to address it in his motions required the trial court deny them.

Dangerous dog determination reversed because State used deemed admissions to establish merits. *Terry Swanson v. State of Texas and County of Travis*, 03-16-00729-CV, 2017 WL 1832492 (Tex. App. – Austin, May 2, 2017, no pet.)

This is a dangerous dog determination case where the Austin Court of Appeals reversed the determination and ordered a new trial.

In 2016 the Travis County Sheriff's Office responded to a call and discovered a dead process server at a local property. Six dogs were on the property and the body was covered in bite marks, scratches, and abrasions. The justice court conducted a dangerous dog hearing pursuant to Tex. Health & Safety Code § 822.003(a) then issued an order of disposition. Swanson appealed that determination to county court and a trial *de novo* was scheduled. The State submitted proof in a summary judgment motion it propounded requests for admissions to Swanson, who did not respond. Based on the deemed admissions, the county court ruled in favor of the state and order the dogs destroyed. Swanson moved to amend/withdraw the admissions but such request was denied. Swanson appealed.

Contractor properly asserted jurisdiction for breach of contract against City for providing temporary employees. *Romulus Group, Inc. v. City of Dallas*, 05-16-00088-CV, 2017 WL 1684631 (Tex. App. – Dallas, May 2, 2017, no pet. h.)

This is a breach of contract case where the Dallas Court of Appeals reversed an order granting the City's plea to the jurisdiction.

Romulus won a bid for a thirty-six-month contract to provide temporary clerical and professional labor. Romulus provided employees within 25 categories of job types. Romulus asserts the City began redesignating employees into a catch-all category of "clerical not listed" and paying a lower rate below the contracted rate for the true category. The City eventually terminated the contract under the termination

clause. Romulus made a demand for $1.6 million in underpayment due to the unauthorized redesignations. When the City refused to pay Romulus sued for breach of contract under Chapter 271 of the Texas Local Government Code. The City filed a plea to the jurisdiction which the trial court granted. Romulus appealed.

The City argued Romulus provided employees who did not fit into any of the 25 categories willingly so could not complaint they were not paid under the contract. Romulus asserts the employees did fall under the contract and it was the City's redesignation which gives an appearance of extra-contractual services. The court found the City's argument does nothing more than create a fact issue on the merits of the underlying claim. Further, Romulus plead that when it came time to pay for services provided, the City paid at a lower rate than allowed by contract. By way of example, a Coordinator II position was bid at $23 per hour, but the evidence submitted shows the City modified the pay to $21.92 an hour, which was calculated by paying $18 an hour times 21.8% as a mark-up. Such indicates the City underpaid as to what was due and owed in order to establish jurisdiction. The City also asserted Romulus failed to provide timely notice of a claim. However, the Court of Appeals has previously concluded the notice provision in §271.154 is an affirmative defense to the merits of the suit, not a matter that deprives the trial court of subject matter jurisdiction. The order granting the plea was reversed and the case remanded.

County Immune from breach of contract case involving settlement agreement says Austin Court of Appeals. *Hughes v. Tom Green County*, 03-16-00132-CV, 2017 WL 1534203 (Tex. App.—Austin Apr. 20, 2017, pet. filed)

This is a breach of contract case where the Austin Court of Appeals affirmed the granting of the County's plea to the jurisdiction.

Hughes's uncle, Duwain E. Hughes, Jr., by his will, gave the County his home and remainder estate in order to establish a branch of the Tom Green County Library, and required it be named after him. He also gave Southern Methodist University ("SMU") certain mineral interest in order to establish an endowment chair in the English Department. The mineral interests exceeded the amounts needed to maintain the chair. The County intervened in a probate application asserting it was entitled to the excess funds since it was bequest the residuary estate. Charles Hughes, as heir, intervened alleging the "residuary estate" bequest had lapsed. The parties entered into a mediated settlement agreement ("MPA") where Hughes and the County agreed to split equally the excess proceeds. The County used its funds to remodel the current library, but did not name it after Duwain Hughes. Charles Hughes sued alleging a breach of the MPA. The County filed a plea to the jurisdiction, which the trial court granted. Hughes appealed.

The court first held the City did not waive immunity by intervening in the SMU litigation. The voluntary litigation "exception" to immunity is limited to claims related to and defensive to claims asserted by the governmental entity. In other words, a governmental entity waives its immunity only as to claims asserted by the party it has sued. Here, the County did not make a decision to seek affirmative relief from Hughes and asserted no claims to which Hughes filed related defensive claims. The County filed its plea in intervention against SMU before Hughes was a party. When Hughes did become a party, it was only against SMU, not the County. Therefore the MPA is not related to an underlying claim for which immunity is waived. The County also did not waive immunity by conduct. The trial court properly granted the plea.

City had no subjective awareness that pond posed a risk which went beyond what a reasonable recreational user would expect. *Jackson v. City of Texas City*, 13-16-00179-CV, 2017 WL 1455091 (Tex. App.—Corpus Christi Apr. 20, 2017, no pet.)

This is a wrongful death action where the Corpus Christi Court of Appeals affirmed the granting of the City's plea to the jurisdiction under the Recreational Use Statute.

Plaintiffs and their daughter Kaloni attended a family reunion at a City park. During the event, Kaloni wandered into the pond and drowned. It

was undisputed that Texas City had posted at least one warning sign near the ponds which read "No Swimming, Beware of Snakes." The parties also agreed there were no barriers or fences along the edge of the pond nearest to the playground. The parents sued the City alleging negligence and gross negligence. The City filed a plea to the jurisdiction and later supplemented. The trial court granted the plea and the Plaintiffs appealed.

To defeat immunity in a premises case, it must also be established that the government-defendant had a duty to warn or protect the injured party. A landowner has no duty to warn or protect recreational users from open and obvious defects or conditions. Under the gross negligence theory, there must be legally sufficient evidence that Texas City had actual, subjective awareness that conditions at the pond involved an extreme degree of risk but nevertheless was consciously indifferent to the rights, safety, or welfare of others. After analyzing the facts, the Court held the City carried its initial burden by presenting evidence which negated the subjective-awareness component. A pond is open and obvious as a possible danger. The City was unaware of any risk which went beyond that a reasonable recreational user would be aware. Further, the posting of warning signs is usually sufficient to avoid a finding of conscious indifference. As a result, the trial court properly granted the plea

After detailed analysis, 13th Court of Appeals holds Rule 91a is not a plea to the jurisdiction, 45-day deadline is not jurisdictional and fair notice of standard controls. *Hayden Reaves and Billy Rochier v. City of Corpus Christi,* 518 S.W.3d 594 (Tex. App—Corpus Christi 2017, no pet.).

This is a Texas Tort Claims Act police chase case where the Thirteenth Court of Appeals reversed the granting of a Rule 91a motion to dismiss based on immunity. This is a 35 page opinion which goes through a detailed analysis of Rule 91a.

A City police officer initiated a high-speed chase against a suspect, Balboa, who eventually ran a stop sign and collided with Plaintiff's vehicle. Instead of filing a plea to the jurisdiction, the City filed a Rule 91a Motion to Dismiss based on immunity, which the trial court granted. Reaves appealed.

The City's motion is based on the assertion it was Balboa who collided with the Plaintiff's vehicle, so there is no nexus with any City employee's operation of a motor vehicle. The court may not consider evidence in ruling on a 91a motion and must decide the motion based solely on the pleading. Rule 91a declares that the trial court "must" grant or deny the motion within 45 days after it is filed. The court first considered the Plaintiff's argument the order was signed by the court 159 days after the filing of the motion, well beyond the 45 days. However, even though the words "must" and "shall" are mandatory, failure to comply does not equate to jurisdiction. While other circuits have held Rule 91a issues are not jurisdictional, the 13th agreed based on different reasoning. The Legislature prescribed no consequence for non-compliance. Unlike other rules which overrule a motion as a matter of law, Rule 91a remains silent. The court felt this was a clear indication non-compliance is non-jurisdictional to the movant. Additionally, correction by mandamus was an effective way to serve the purpose of Rule 91a. Next, the court held that since the trial court could not consider evidence in considering the motion, the fact the trial court engaged in evidentiary inquiries relating to the motion was error. After a detailed analysis and review of other court holdings, the court ruled a Rule 91a motion is not a plea to the jurisdiction. While some similarities in the standards exist, they are separate procedures. After analyzing the Plaintiff's petition under the standard the court adopted (retaining a fair notice standard and rejecting a factual standard), it held the pleadings, taken as true and liberally construed, were sufficient to allege an appropriate causal connection to trigger jurisdiction.

Taxpayer has jurisdiction to challenge Tax Code Constitutionality, but must exhaust tax code prepayment requirements to sue for *ultra vires* and related claims. *Office of Comptroller of Pub. Accounts v. Farshid Enterprises, L.L.C.*, 03-16-00291-CV, 2017 WL 1404731 (Tex. App.—Austin Apr. 13, 2017, no pet.).

This is a constitutional challenge to sections of the Texas Tax Code in which the Austin Court of Appeals affirmed in part and reversed in part.

Farshid Enterprises owns and operates convenience stores. After an audit for sales tax payments, the Comptroller assessed a 50% penalty under Tex. Tax Code §111.061(b)(1) (authorizing penalty if failure to pay tax was "a result of fraud or an intent to evade the tax"). At a hearing at the State Office of Administrative Hearings ("SOAH"), the audit amounts were affirmed. Farshid sued seeking to declare the administrative rules used in determining and calculating the amounts and implementing H.B. 11 invalid and that the Comptroller engaged in ultra vires activities. This included the Comptroller allegedly adopted AP 134 without going through the APA process, AP 134 is an invalid rule, and the Comptroller improperly made an irrebuttable presumption of gross underreporting to impose a 50% penalty without allowing the SOAH court review the agency decision, and that Tex. Tax Code sections of Chapter 112 were unconstitutional. The Comptroller filed a plea to the jurisdiction, which was denied. Comptroller appealed.

Because Tex. Civ. Prac. & Rem. Code § 37.006(b) requires the governmental entity to be a party to a declaratory judgment action, its immunity to declare a statute, rule, or law unconstitutional is waived. Jurisdiction exists for claims seeking to hold the Tax Code sections unconstitutional. However, as to all remaining claims, since Farshid did not follow the taxpayer procedures for a refund and to contest a tax suit, no jurisdiction exists to examine the remaining claims. So, while Chapter 112 can be constitutionally challenged, Chapter 112 provides exclusive remedies for relief from assessed taxes on *any* basis. The taxpayer must submit payment under protest, then challenge the assessment. This process includes any suit (*ultra vires*, injunction, etc.) when the result is relief from the tax assessment other than a direct constitutional challenge. Since Farshid did not provide prepayment of taxes, no other claims are allowed to go forward.

County not liable for inverse condemnation due to adopting FEMA changes to 100-year flood maps. *Guadalupe County v. Woodlake Partners, Inc. and Woodlake Partners, L.P.,*04-16-00253-CV, 2017 WL 1337650 (Tex. App—San Antonio, April 12, 2017, pet filed).

This is a takings case where the San Antonio Court of Appeals reversed the denial of the County's plea to the jurisdiction holding the County is not liable for property values affected by FEMA flood plain adjustments.

In 2007, FEMA revised its 100-year Flood Insurance Rate Maps for Guadalupe County. After the revisions, several lots owned by Woodlake Partner Defendants became encompassed in a floodway and floodplain. The Woodlake Partners later submitted a development permit application. However, the County asserted the applicant was now required to submit No-Rise documentation from an engineer and that federal regulations required the construction to have the lowest floor elevated to or above the base flood level. Woodlake Partners filed suit asserting a taking and that the new regulations would require new homes to be built 8-12 feet above ground, which was against their restrictive covenants. They also asserted it would negatively affect home values. The County filed summary judgment motions, asserting immunity. Both were denied by the trial court and the County appealed.

The court first held the County's no-evidence motion for summary judgment is improper as such motions should not be utilized to establish a lack of jurisdiction given the change in burden shifting. However, in the traditional summary judgment motion, Guadalupe County challenges the existence of jurisdictional facts, including causation. Woodlake Partners based their takings claim on the portions of the County's Order requiring them to obtain a No-Rise Certificate and construct the houses eight to twelve feet above ground level. However, these same requirements appear in the federal regulations setting forth flood plain management criteria for flood-prone areas, specifically 44 C.F.R. §60.3. Additionally, uncontested evidence established that if the County had not adopted the FEMA maps, neither flood insurance nor financing would be available for homes built on the lots.

Woodlake Partners was required to follow the same federal standards regardless, so the County's adoption of the FEMA maps did not cause any damage. And since the inverse condemnation claim was the only pled waiver of sovereign immunity, the trial court should have dismissed the claims.

Austin Court of Appeals holds a fact question exists on whether identities of research subjects is embarrassing under PIA, so AG's MSJ reversed and remanded for trial. *University of Texas System, et al. v Ken Paxton, Texas Attorney General*, 03-14-00801-CV, 2017 WL 1315374 (Tex. App. – Austin, April 7, 2017, no pet.)

This is a Texas Public Information Act ("PIA") case where the Austin Court of Appeals reversed a summary judgment granted to the Texas Attorney General ("AG") and remanded the case back to the trial court.

The University received a PIA request seeking several categories of information related to three separate social-science research studies being conducted by a tenured faculty member regarding terrorism. The University released some information but requested an AG opinion for the remainder of the responsive information. Specific to this lawsuit, the University asserted the identities of the human research subjects who participated in the study are protected from disclosure by §552.101 (matters confidential as a matter of law – constitutional and common-law privacy). The AG disagreed and determined the identities must be released, noting no highly embarrassing facts exist within the information to keep private. The University filed suit against the AG under the PIA. The parties filed cross-motions for summary judgment. The trial court granted the AG's motion. The University appealed the granting of the AG's motion but did not appeal the denial of its motion. Instead, it sought a remand for trial.

The court noted the AG's arguments were not that of a traditional summary judgment, but that once the AG determined no embarrassing facts exist, the University must completely negate the lack of embarrassing facts, not simply raise a fact question on the subject. The court rejected this argument outright. The Texas Supreme Court has not limited the type of information that is highly intimate or embarrassing and such a status may be fact driven. The studies were designed to explain and predict individual actions related to terrorism and counterterrorism by using laboratory experiments with human subjects. The experiments captured feelings and behaviors of individuals that they may not otherwise share with the public and their participation could lead to negative inferences about why they were selected, chose to participate, or what their responses may have been. In a footnote the court also noted in the context of common-law privacy, a party's expectation of privacy (encapsulated in a confidentiality agreement) before choosing to participate in a study is relevant to whether a reasonable person of ordinary sensibilities would find disclosure to be an embarrassing fact. Fact-specific questions related to the research study exist, including whether details in the results could be tied to the subjects' identities, whether a reasonable person would view participation in the study embarrassing and the potential consequences. While the University bears the burden a trial to establish the exception, its burden of proof to counter a summary judgment is merely to raise a fact question. The order granting the AG's motion is reversed and the case is remanded.

Beaumont Court of Appeals holds subsequent purchaser of real property has no standing to sue for demolition order issued prior to purchase. *City of Beaumont, et al. v. Tammy Ermis,* 09-15-00451-CV, 2017 WL 1178348 (Tex.App— Beaumont, March 30, 2017, no pet.)

This is a demolition/takings case where the Beaumont Court of Appeals reversed the denial of the City's plea to the jurisdiction and dismissed the case.

Ermis acquired her property interest in 2002 Park Street in 2008. However, in 2007 the City found the structure to be a dangerous structure and scheduled it for demolition. The notice the structure was dangerous came at multiple levels including an initial order by a field supervisor, an ordinance signed by the acting mayor declaring the property dangerous and a public nuisance, formal mailed notice to the owners of the

property in 2007 (the Seymours) that the building must be demolished within 10 days, and a signed certified mail return receipt from the Seymours noting it was received within one week of being mailed. In 2008, the Seymours conveyed the property to Brian Muldrow by special warranty deed. The City submitted evidence Muldrow and Ermis were married at the time of the conveyance. In 2010, Ermis filed suit challenging the ordinance and declaration for demolition. The City filed a plea to the jurisdiction, which the trial court denied. Afterwards, Ermis sued several city officials including the assistant city attorney who had done work on the matter. They appeared, joined the City's plea which was already denied, and requested the court rehear the plea. The court denied their requests and the City defendants appealed.

The court first declared the City's actions were governmental not proprietary, although they assert Ermis did not argue they were proprietary, so it's unclear why they brought it up. Ermis did not own the structure at 2002 Park Street when the City declared it dangerous and ordered that it be repaired or demolished. Her pleadings must establish she had standing to pursue her claims against the City for issuing ordinance number 07-105 and for the decisions she alleged the City made afterwards. Ermis' pleadings state she knew the City had declared the property a dangerous structure and ordered it demolished before she and her husband acquired the property. Under Texas law, the injury occurred when the City declared the structure on the property dangerous and ordered it demolished. At that time, Ermis did not own it and nothing indicates she acquired such a claim from the Seymours as part of the purchase. Her standing cannot rest on rights owned by the Seymours in the absence of an express assignment. Subsequent purchasers of a property cannot recover for injuries to the property that were committed prior to their purchase. Further, given the facts alleged by Ermis, the standing deficiencies cannot be cured by repleading. But even if they could, she was already given ample opportunities to replead and did not. As a result, the plea should have been granted. The remainder of the opinion deals with whether the court had jurisdiction over the individual City defendants' appeals. The court holds it did not so dismissed the appeals to await an appealable order.

Justice Johnson concurred but wrote separately as she felt the proper analysis was to examine the language of Chapter 214 of the Texas Local Government Code, the mechanism used by Ermis to sue originally. Section 214.0012(a) states that "[a]ny owner, lienholder, or mortgagee of record of property…" may sue to declare an order illegal. Ermis does not qualify under the statute since she did not own the property at the time of the injury and therefore has no standing. Additionally, the owner has 30 days to seek judicial review, which did not happen. Further, §214.001(e) expressly provides notice of a demolition order is binding on subsequent grantees and lienholders if filed in the public records office, which occurred.

In police pursuit case, 13th Court of Appeals held deputy was not deliberately indifferent when he pursued suspect, therefore county is immune from wrongful death claim. *Hidalgo County, Texas v. Dora Herrera, et al,* 13-15-00167-CV, 2017 WL 2570823 (Tex.App—Corpus Christi, March 30, 2017, no pet.)

This is a wrongful death claim brought under the Texas Tort Claims Act where the Thirteenth Court of Appeals reversed the denial of the County's plea to the jurisdiction and dismissed the case.

This is a companion case, of sorts, to one the 13th Court of Appeals issued on March 14. (Case summary found here.) The family of Reynaldo Herrera sued various entities resulting from a vehicle accident. A City of Pharr police officer attempted to make a traffic stop for violations of the Transportation Code, only to have the suspect vehicle flee. Various entities joined the pursuit as the fleeing vehicle went through different jurisdictions. The Pharr officer eventually disengaged his pursuit but the other agencies continued. While being pursued by law enforcement, including sheriff's deputies of Hidalgo County, the suspect vehicle struck Herrera's vehicle, killing him. The companion case was against the City of Pharr and resulted in the City Defendants' plea being granted since the Pharr officer disengaged the pursuit prior to the

collision with Herrera. This case encompasses the sheriff's deputy who followed the suspect vehicle until it struck Herrera's vehicle. The County filed a plea to the jurisdiction which the trial court denied. The County appealed.

The court first held that for purposes of analysis, it assumed, without deciding, that Herrera's death "arises from" the deputy's operation of a motor vehicle and that the need to apprehend the suspect presented an "emergency situation" under Tex. Loc. Gov't Code §101.055(2). The County's immunity remains intact unless Deputy Ortega acted with reckless disregard for the safety of others. The court noted that any pursuit by police invariably creates some degree of risk to the public of a collision. Therefore, the mere fact a pursuit exists is not *ipso facto* evidence of reckless disregard. Next, Deputy Ortega's affidavit established undisputed evidence of key facts including the grounds on which the pursuing officers believed it was a possible narcotics transport, the high speed at which the suspect vehicle was being driven, the fact Ortega did not know the Pharr police had disengaged pursuit, the distance the suspect was from Ortega and the road configurations preventing Ortega from quickly overtaking the suspect vehicle, at one point the suspect eluded Ortega who lost track of him, Ortega followed a trail of dust on a dirt road which was likely to be the suspect, the traffic conditions Ortega observed, that when he entered the dirt road he slowed down due to the rough terrain and pot holes, and that he came to a complete stop at each intersection while he searched for the suspect on the dirt roads. While searching for the suspect vehicle Ortega came upon the accident scene after the collision had occurred. Witness affidavits established the collision occurred at least two minutes before Deputy Ortega arrived at the scene. To counter this evidence, the Plaintiffs only submitted the report of a police expert stating Deputy Ortega should not have joined the pursuit if he knew it was only based on a minor traffic offense. However, the court determined the expert report offered only conclusory opinions regarding Ortega's deliberate indifference. Based on this uncontroverted evidence, the court held Ortega was not deliberately indifferent, but operated his vehicle with due regard for the safety of the public. As a result, the County retains its immunity and the plea should have been granted.

Former school district employees unable to establish constitutional claims after the superintendent published investigation results regarding misconduct. *Mable Caleb, et al v. Richard A. Carranza, Superintendent of the Houston Independent School District,* 01-15-00285-CV, 518 S.W.3d 537 (Tex. App—Houston [1st Dist.] March 30, 2017, no pet.)

This is a wrongful termination case where the First District Court of Appeals affirmed the granting of the school district's plea to the jurisdiction.

The Houston Independent School District ("HISD") began an investigation into several school employees for misconduct. The HISD superintendent, Grier, started an investigation into Caleb, a high school principal. The investigation centered on allegations the teachers at Caleb's former middle School where she was principal provided students with actual test problems to practice for standardized tests in order to increase their scores. Grier shared the investigation report with the media, public and the Texas Education Agency. Based on the report, Grier terminated Caleb. He proposed termination for several other employees who were connected with Caleb in different regards. Several employees followed the administrative procedures, including termination hearings, which held no termination was warranted. The employees filed suit against numerous defendants, including Grier in his official capacity. They assert Grier violated their constitutional rights by terminating them or attempting to terminate them based on a commissioned investigation without giving them due process, a name clearing hearing, in retaliation for not falsely accusing Caleb of misconduct, and not giving them the ability to refute any findings. Grier filed a plea to the jurisdiction asserting he was immune from all claims, which the trial court granted. The Plaintiffs appealed.

The court first noted Grier was replaced as the superintendent by Carranza, who was substituted in the case based on the fact the claims were against Grier in his official capacity only.

Additionally, Caleb settled her claims and was dismissed, so the remaining claims apply only to the Caleb-connected employees. "An *ultra vires* action requires a plaintiff to 'allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act.'" "[A] government officer with some discretion to interpret and apply a law may nonetheless act 'without legal authority,' and thus *ultra vires*, if he exceeds the bounds of his granted authority or if his acts conflict with the law itself." The Plaintiffs alleged that "the sole reason for the termination of their employment" was their unwillingness to comply with a request by Grier and his investigators to falsely implicate Caleb. He also did not give them the opportunity to rebut the report before Grier published it to the public. As to the Plaintiffs' equal protection claims, there is a fundamental inconsistency between the legal standard for an equal protection claim and a single public employee's allegation that he has been wrongly terminated from employment. "[E]mployment decisions are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." Class-of-one equal protection claims are not viable in the employment context. As a result, the equal protection claims were properly dismissed. Next, the Plaintiffs assert they had constitutionally protected right to refuse to "testify falsely" against other employees under the free-speech clause. To establish an initial free-speech claim, the Plaintiffs would have to establish they were acting as citizens and not as part of their employment. However, when public employees make statements pursuant to their official duties, the employees are not speaking as citizens. Further, assisting in an employer's investigation into workplace misconduct is ordinarily within the scope of an employee's job duties. As a result, they have not established a free-speech claim. As to their due-course-of-law claims, all of the plaintiffs requested and were granted a name-clearing hearing by way of their administrative termination hearings. Most of the employees provided evidence they were successful. One asserted she was hired by another school after her resignation. To qualify as a claim, public charges must be so stigmatizing that they create a "badge of infamy" that destroys plaintiffs' ability to obtain other employment. As a result, all Plaintiffs failed to establish a valid claim. Since there are no facially valid constitutional claim among the Plaintiffs, there are no actionable claims to remove the Defendant's immunity.

Fort Worth Court holds when City Manager adopted on-call pay policy in policy manual it created a unilateral contract and waived immunity. *City of Denton v. Brian Rushing, Calvin Patterson, and Kevin Marshall,* 02-16-00330-CV, 2017 WL 1103530 (Tex.App— Fort Worth, March 23, 2017, pet filed)

In this breach of contract case, the Fort Worth Court of Appeals affirmed the denial of the City's plea to the jurisdiction and held the City's policy manual waived immunity for the Plaintiff's claims for unpaid on-call time. The implication being when a city manager creates a policy, regardless of whether city council sees it, that creation can waive immunity from suit and bind the city in contract.

The City, by ordinance, delegated to the City Manager the ability to create policies. The City Manager's office created a policy manual including Policy No. 106.06 which defined and established the City's pay practices and administrative procedures for response time and on-call duty. It sets forth the pay the City will provide employees for on-call services and includes charts setting forth specific examples of how on-call pay is calculated. All three Plaintiffs worked week-long on-call shifts in addition to their normal work hours at least one week per month for several years. Plaintiffs allege a unilateral employment contract was created when the City, as the employer, created the policy and agreed to pay them a specific rate in exchange for working on-call shifts. The City filed a plea to the jurisdiction and alternative summary judgment arguing it retained immunity because the policy cannot create an authorized contract and its disclaimers preclude a determination of a contract. The trial court denied the plea and the City appealed.

The court analyzed the language of Tex. Loc. Gov't Code Ann. §271.152, which waived

immunity for written authorized contracts for goods or services in certain situations. It went point-by-point and element-by-element. It held a unilateral contract is created when a promisor promises a benefit if a promisee performs. The policy, according to the court, created such a contract notwithstanding the disclaimer. The reason being the unilateral contract was not a contract altering the employment-at-will or employment relationship, but was a contract only to pay a certain amount for on-call time if such on-call time was worked. So, it's a limited contract only to on-call payment for performance. The court also determined the contract was "executed" because the City Manager had authority to create it, after approval by an executive committee, and put the policy in the policy manual. It was therefore properly approved and adopted by the City. The court then held the constitutional prohibition against paying additional compensation for services already performed does not apply because it promised to pay prior to performance. As a result, it is not immune from a breach of contract claim and the plea was properly denied.

San Antonio Court of Appeals holds even though EDC is not immune from suit, it was immune from liability after jury trial. *City of Economic Development Corp. v. Larry Little,* 04-15-00488-CV, 2017 WL 1066829 (Tex. App— San Antonio, March 22, 2017, pet filed)

This is a breach of contract case where the 4th Court of Appeals reversed a jury award against an economic development corporation, holding it was immune from liability.

This is the second appellate case involving this dispute. Case summary on substituted opinion found here. The Leon Valley Economic Development Corporation ("LVEDC"), which is a Type B EDC, agreed to purchase certain land from Little as part of a project if the EDC could obtain some specific financing terms from the Governor's loan program. When the EDC was unable to obtain the financing under the conditions and time frame it desired it did not purchase and Little sued claiming a breach of contract. The EDC originally filed a plea to the jurisdiction, but the Court of Appeals eventually determined that because it is a non-profit creature of statute, it was only entitled to immunity from liability, not immunity from suit. The interlocutory opinion remanded the case for trial. The jury found that Little and LVEDC "intend[ed] to be bound by agreements relating to the Larry Little-Leon Valley Town Center project without the execution of a written agreement" and that LVEDC "fail[ed] to comply with the agreement." The jury awarded over $100,000 for expenditures Little made in performance of the agreements, and over $1,400,000.00 in lost past and future profits. The LVEDC appealed.

The court reiterated a Type B EDC is not immune from suit for breach of contract. However, Tex. Loc. Gov't Code §505.106(a) states an EDC is not liable for damages arising from pursuing a project. Actions taken pursuant to the Development Corporation Act of 1979 to develop projects authorized by the Act are governmental functions. While the LVEDC approved the Governor's loan commitment component as part of the project, the Act requires such projects also be approved by the City Council by resolution. The City Council did not approve the project in time for the loan amount to be authorized by the State program. After analyzing the project and undisputed actions of the LVEDC, the court held it was performing the governmental functions of a Type B corporation in its dealings with Little and the project and proposed expenditures were authorized by the Act. As a result, it is immune from liability for all damages. While Little argued the acts of the LVEDC were not for public benefit, but his own private benefit, the court did not find the argument persuasive. The project was intended and expected to revitalize the specific town center area, create jobs, and expand the tax base. Moreover, the Act expressly provides that a corporation may provide direct financial incentives to a private business enterprise, provided there is a performance agreement. As a result, the jury award is reversed and judgment was rendered in favor of the LVEDC.

City immune from breach of contract claims since creation of TIRZ is a governmental function says 4th Court of Appeals. *JAMRO Ltd. v. City of San Antonio,* 04-16-00307-CV, 2017 WL 993473 (Tex. App— San Antonio, March 15, 2017, no pet.)

This is, in essence, a breach of contract of contract claim against the City of San Antonio where the Fourth Court of Appeals affirmed the granting of the City's plea to the jurisdiction.

The City created a tax increment reinvestment zone ("TIRZ") to finance public improvements in the Palo Alto Trails Development (the "Project"). The City Clerk received an application from JAMRO seeking the use of TIF for the Project, and the application proposed public improvements for the Project. The ordinance included findings that the improvements in the TIRZ will significantly enhance the value of all the taxable real property in the TIRZ and was in compliance with the Texas Tax Code chapter 311. However, before the City signed any agreements with developers or the TIRZ board, the City terminated the zone. JAMRO sued for breach of contract and a host of other claims asserting the City was performing a proprietary function, that city officials were the ones who originally approached JAMRO about the zone and it relied upon the City's initial actions in creating the zone to its detriment. JAMRO made changes to its plans and specifications at the City's request and completed the construction but was never notified the TIRZ had been terminated. The City filed a plea to the jurisdiction which the trial court granted. JAMRO appealed.

Governmental functions are "functions enjoined on a municipality by law . . . to be exercised by the municipality in the interest of the general public." JAMRO argues the City's actions were proprietary because it sought out a specific private developer "to spur development in a specific area of town for the benefit of only those inhabitants and the City itself." Chapter 311 of the Texas Tax Code also known as the Tax Increment Financing Act enjoins on the City the authority to create reinvestment zones to promote development or redevelopment of an area that would not occur solely through private investment. The City's ordinance allowed the use of TIF for proposed public improvements for the Project including streets, drainage, water, sewer, etc. which are statutorily defined as governmental acts. The City's ordinance contained express findings that the TIRZ met the criteria for a reinvestment zone contained within the Tax Code. After analyzing the Tax Code provisions and the definitions of governmental and proprietary functions contained within the Texas Tort Claims Act, the court held the City's actions were directed at financing public improvements and are governmental functions. The City was entitled to immunity and the plea was properly granted.

13th Court of Appeals holds no causal nexus under Tort Claims Act exists when officer disengaged pursuit prior to suspect colliding with plaintiff. *The City of Pharr v. Dora Herrera et, al.,* 13-15-00133-CV, 2017 WL 929483 (Tex. App— Corpus Christi, March 9, 2017, no pet.)

This is an interlocutory appeal from the denial of a plea to the jurisdiction for a wrongful death claim under the Texas Tort Claims Act. The Thirteenth Court of Appeals reversed and rendered judgment for the City.

The City's police officer, Emilio Gonzalez, attempted to conduct a traffic stop. When the vehicle driven by Rafael Quintero failed to stop on command, Officer Gonzalez pursued the vehicle into the City of Alamo. Other law enforcement agencies joined the pursuit. Sometime afterwards, Gonzalez disengaged his pursuit but others did not. While two Hidalgo County Sheriff's deputies were continuing pursuit, Quintero struck Reynaldo Herrera's vehicle. Herrera later died due to the injuries. His family sued the City for initiating the chase. The City filed a plea to the jurisdiction asserting governmental immunity which the trial court denied. The City appealed.

For waiver of immunity, the vehicle's use "must have actually caused the injury." In addition, "a government employee must have been actively operating the vehicle at the time of the incident." Herrera's expert provided testimony that Officer Gonzalez "got the momentum going" by initiating the chase when such a chase was not appropriate based on weak, legally faulty, or non-existent justification for the pursuit. He believed Gonzalez was at fault. However, the court disagreed. "The actual cause of the collision was Quintero's decision to flee from police officers." Officer Gonzales had ended his pursuit and was not present when the accident

occurred. The evidence in this case does not support a casual nexus between Officer Gonzalez's use of his vehicle and the plaintiff's injuries. As a result the plea should have been granted.

Since no report indicated bus driver was at fault, entity had no actual knowledge under notice provision of Texas Tort Claims Act says 13th Court of Appeals. *Donnie Doyle Brown v. Corpus Christi Regional Transportation Authority,* 13-15-00188-CV 2017 WL 2806775 (Tex. App.—Corpus Christi June 1, 2017, pet. filed)

This is an appeal from the granting of a plea to the jurisdiction in a Texas Tort Claims Act case. The Thirteenth Court of Appeals affirmed the granting of the plea.

A Corpus Christi Regional Transportation Authority ("RTA") bus stopped at a bus stop to load and unload passengers. Brown did not initially board as he had fallen asleep while waiting. As the RTA bus began to move again, one passenger asked the driver to stop so he could get off. The bus driver stopped and the passenger departed. As the bus began to move again, Brown woke up and attempted to board the bus. He lost his balance, fell to the ground, and the bus's rear tire ran over Brown's left arm. The investigating police report attributed fault solely to Brown. RTA's own investigation did not find any fault on the part of the bus driver. Two years later, Brown sued for negligence. RTA filed a plea to the jurisdiction asserting a lack of statutory and actual notice under the Texas Tort Claims Act ("TTCA"). The trial court granted the plea and Brown appealed.

It is undisputed Brown failed to provide a written notice within six months under §101.101 of the TTTCA. To succeed, Brown must establish RTA had actual notice of the claim. Texas law has rejected the theory a governmental entity must have actual knowledge *only* of an injury. To qualify as actual knowledge under the notice provision of the TTCA, an entity must have a subjective awareness of its fault in producing or contributing to the injury or damage. RTA provided an affidavit establishing how RTA conducted the internal investigation, what it was told, what it discovered, and that nothing indicated RTA was at fault. A certified copy of the police report indicated Brown was solely at fault. The Texas Supreme Court has held that "when a police report does not indicate that the governmental unit was at fault, the governmental unit has little, if any, incentive to investigate its potential liability because it is unaware that liability is even at issue." As a result, no subjective awareness of fault existed and the plea was properly granted.

The dissent by Chief Justice Valdez argued Brown created a fact issue on actual notice. Brown produced evidence the same bus driver had prior accidents. The bus driver also admitted seeing Brown running after the bus, grab the bus and fell. If the bus driver knowingly dragged Brown with the bus, there would be no question of the bus driver's fault. He would also have considered Brown's affidavit which the majority refused to consider. Therefore, he would have denied the plea.

Officer and Police Chief entitled to dismissal under §101.106(f) of Texas Tort Claims Act after alleged assault during arrest. *John M. Donohue v. City of Boerne Chief of Police James Koehler, Officer Pablo Morales, and Martha L. Donohue,* 04-16-00190-CV, 2017 WL 943427 (Tex. App.—San Antonio Mar. 8, 2017, no pet.)

This is a Texas Tort Claims Act case where the San Antonio Court of Appeals affirmed the granting of a plea to the jurisdiction to a police officer and chief of police after an arrest.

Donohue's assertion that his claims are brought under the Texas Penal Code for assault, not the Texas Tort Claims Act are not supportable. The Penal Code does not provide for citizens to file civil suits, but authorizes the state to seek defined punishments for criminal violations. To the extent Donohue intended to assert a civil assault claim, such a claim is an intentional tort. The TTCA does not waive governmental immunity for intentional torts. Further, even though the TTCA does not waive immunity for any intentional tort claims brought by Donohue, those claims are still subject to Section 101.106(f) of the Act. After a rather dizzying walkthrough of subsection (f), the

court ultimately held Morales and Koehler were entitled to dismissal. Their alleged actions occurred in their official capacities as law enforcement officials and the claims could have been brought against the City even though the City would be entitled to immunity. Further, the Texas Constitutional claims seek monetary damages, which are not allowed. There is no private cause of action against a governmental entity or its officials for money damages relating to alleged violations of Texas constitutional rights. As a result, the trial court properly granted their plea. The court then held the dismissal of Martha Donohue was in error, but notes the explanation is contained in a separate lawsuit between the same parties and possessed the same plea arguments. Such arguments were not adopted by the court of appeals so the claims against Martha Donohue were revived and remanded.

State immune from suit for mineral interest relating back to Spanish land grant. *Galan Family Trust v. State of Texas, et al*, 03-15-00816-CV, 2017 WL 744250 (Tex. App.—Austin Feb. 24, 2017, pet. denied)

This is an inverse-condemnation/trespass-to-try-title case where the Austin Court of Appeals affirmed the dismissal of the Plaintiff's claims.

The Galan Family Trust ("Trust" or "Plaintiff") sued the State of Texas for mineral interests the Trust asserts they own due to a 1767 Spanish land grant. A patent in favor of the Galan heirs was issued in 1852 by the Texas Legislature, but the patent was cancelled by the State of Texas in 1874. In this context, "patent" is an instrument by which the State conveys land to a private person. The State filed a plea to the jurisdiction and a Rule 91a motion to dismiss, asserting that the State is immune to trespass-to-try-title claims and, further, that the Trust's claims are barred by limitations. The trial court dismissed the Trust's suit and the Trust appealed.

The court first reaffirmed long-standing case law that governmental entities are immune from trespass-to-try-title claims. Additionally, while individual officials in their official capacities may not be immune from trespass-to-try-title claims, the Trust's pleadings negate the right of possession. This right is necessary to establish a trespass-to-try-title claim against an official. Once the State canceled the patent, the State became the titleholder. Further, the Trust did not sue for a takings claim until more than 140 years after the cancellation. This delay in filing far exceeds the ten-year limitations period established for takings claims. The State was only required to establish when the cause of action accrued to establish limitations, not to provide uncontroverted evidence of every element of the defense. Given the elements for the statute of limitations defense are contained within the pleadings. And, when taken as true for purposes of the Rule 91a motion, the State established it is entitled to dismissal. The trial court's order is affirmed.

Dallas Court of Appeals dismisses referendum/mandamus claims against council but allows mandamus claims to go forward to trial against City Secretary. *City of Plano, Texas, et al. v. Elizabeth Carruth, et al.* 2017 WL 711656 (Tex. App.—Dallas Feb. 23, 2017, pet. filed)

This is a referendum case where the Dallas Court of Appeals dismissed all but one of the Plaintiffs' claims under a plea to the jurisdiction. It held the trial court had jurisdiction to consider the merits of the remaining mandamus/ultra-vires claim against the City Secretary.

The City adopted a comprehensive plan and zoning ordinance. The City Charter permits qualified voters to submit a referendum petition seeking reconsideration of and a public vote on any ordinance. Citizens submitted a referendum petition to change the ordinance adopting a change in the comprehensive plan to the City Secretary. The City Secretary did not act on the referendum petition. The City took the position that zoning and comprehensive plans have been removed from the referendum scope by state law. So no action is required. The citizens filed a writ of mandamus seeking a court order directing the City Secretary to present the petition to the City Council and directing the City Council to reconsider the Plan and submit it to popular vote if the council did not entirely repeal it. In

addition, they sought a declaratory judgment that pending approval by the voters in a referendum the Plan is suspended. The City filed a plea to the jurisdiction which the trial court denied. The City appealed.

The Court of Appeals first held the Plaintiffs properly plead jurisdiction against the City Secretary. The court held there is a difference between the merits of whether mandamus should be issued with whether the trial court has jurisdiction to hear those merits. "Whether the trial court should ultimately grant or deny the petition for mandamus is not the issue before [the court]. "Based on the language in the pleadings, the trial court has jurisdiction to hear the merits of the mandamus claim. However, no mandamus can be issued against the remaining officials since the City Secretary has not submitted the petition to the Council. Their duty is not triggered unless and until the petition is submitted, therefore the claims are not ripe. Finally, the court dismissed the declaratory judgment claims noting the charter does not provide that an ordinance is suspended immediately upon the filing of a referendum petition. The Charter is clear that a suspension applies only upon the subject being submitted to popular vote. Until the Council is presented with the petition and acts on it, any declaration about the effect of that action would be advisory. The trial court's order was affirmed in part and reversed in part.

Driver who told City he was "shaken up" but "OK" did not provide actual notice of personal injury claim says Fourth Court of Appeals. *City of San Antonio v. Charles Cervantes,* 04-16-00569-CV, 2017 WL 685718 (Tex. App.—San Antonio Feb. 22, 2017, no pet.)

This is an automobile accident case under the Texas Tort Claims Act where the San Antonio Court of Appeals reversed the denial of the City's plea to the jurisdiction which was based on a lack of notice.

Cervantes worked for the Bexar County Sheriff's Office and was driving his County vehicle in a City parking lot. A San Antonio police officer, driving a city-owned vehicle, allegedly failed to yield the right of way and struck Cervantes. He sued under the Texas Tort Claims. Act. The City filed a plea to the jurisdiction asserting Cervantes did not provide the required statutory notice under Tex. Civ. Prac. & Rem. Code §101.101 and it did not have actual knowledge notice. The trial court denied the plea and the City appealed.

Cervantes first asserts the City waived its right to appeal since the City's attorney signed the order denying the plea "Approved as to form and substance." However, "[t]he phrase 'Approved as to Form and Substance', standing alone, is insufficient to establish a consent judgment." Nothing in the record indicates the City agreed to a consent judgment so it is entitled to appeal. The statutory notice requirement is satisfied if the governmental unit receives formal notice within six months of the incident that "reasonably describe[s]: (1) the damage or injury claimed; (2) the time and place of the incident; and (3) the incident." Tex. Civ. Prac. & Rem. Code §101.101(a). The City's risk manager and custodian of records affidavit established the City did not receive formal written notice under §101.101 and Cervantes did not present any evidence to contradict the testimony. As to actual notice, the evidence submitted included Texas Peace Officer's Crash Report, the San Antonio Police Department Vehicle Accident Report and Loss Notice, and excerpts from the depositions of Cervantes and his supervisor. Both reports note damage to the County vehicle is sustained but no injuries were reported. Cervantes' supervisor, Lt. Garza, testified he spoke with Cervantes shortly after the accident who told him Cervantes was not injured in the collision. Further, Cervantes did not take any time off from work due to the accident. There is no suggestion in the evidence before the trial court that Cervantes was visibly injured. Cervantes argues the City had actual notice he received some injury because he told the City supervisor of the PD officer that he was "kind of shaken up" and other general references. The San Antonio Court of Appeals held "[w]e decline to hold that a person who states he is feeling 'shaken up' or 'kind of numb,' but thinks he is 'all right' and 'okay' has by those words given any notice that he has received some injury." Finally, simply because the City knew of the car accident does not mean it knew of the injury. Required notice relates to the claim (i.e. personal injury vs property damage) and separate notice is required

for both. Cervantes failed to establish he provided either statutory notice or that the City had actual notice of all required elements. The plea should have been granted.

Charter Amendment on ballot held misleading… again. *The City of Houston and its Current Mayor, Sylvester Turner v. Allen Mark Dacus and Elizabeth C. Perez*, 14-16-00123-CV 2017 WL 536647 (Tex. App.—Houston [14th Dist.] Feb. 9, 2017, pet. denied)

This is an election case involving posting of an alleged misleading charter amendment where the law of the case doctrine required the trial court to rule against the City.

The Texas Supreme Court already issued one interlocutory opinion in this matter, and held the drainage charges to be imposed on benefitting real property was among the Ballot measure's chief features, and that Proposition 1 was misleading because it failed to mention the charges. The Court remanded the case for trial because only the City moved for summary judgment, not the Contestants. Summary found here. On remand, the Contestants sought summary judgment on the grounds that (a) the Texas Supreme Court already had decided the issue in Dacus II, which became the law of the case; or (b) even if Dacus II did not constitute the law of the case, the trial court should reach the same result for the same reasons. The trial court granted the motion and the City appealed.

First, the First District Court of Appeals rejected the City's argument the case is a challenge to "the post-election implementation of the charter amendment" instead of an election case. The trial court is not deprived of jurisdiction over this election contest merely because additional steps were taken after the election to implement the measure, and the City cited "…no authority that voters can bring an election contest challenging the sufficiency of a ballot description only in the rare case in which the measure itself is self-executing." Second, the case is governed by the questions of law decided in Dacus II, but only if the questions of law were answered by the Supreme Court. Texas Supreme Court explained that even voters already familiar with the measure to be voted on can be misled by ballot language that fails to sufficiently describe the measure. The Court then compared the ballot's language (which is undisputed) to the proposed charter amendment's language (which also is undisputed). From that comparison, the Court determined that "[t]he ballot did not identify a central aspect of the amendment…" Such holdings are not dictum but are explicit findings by the Court. "The question of whether the ballot language misled voters by omitting one of the measure's chief features calls for a yes-or-no answer, and the state's highest civil court has answered that question in the affirmative." As a result, the law of the case required the trial court to rule against the City.

Minor harmed after being thrown forward when bus driver had to stop suddenly qualifies under TTCA immunity waiver. *Arlington Independent School District v. T.P. as next friend of R.T., a minor,* 02-16-00249-CV 2017 WL 526311 (Tex. App.—Fort Worth Feb. 9, 2017, no pet.)

This is a Texas Tort Claims Act vehicle accident case involving a school bus and a minor where the Fort Worth Court of Appeals affirmed the denial of the District's plea to the jurisdiction.

R.T. (minor) was standing in the aisle of a school bus that was traveling at approximately five miles per hour when the driver suddenly applied the brakes to avoid colliding with another bus. R.T. was thrown forward and injured. The parent/guardian ("T.P") sued on behalf of the minor. The Arlington Independent School District ("AISD") filed a plea to the jurisdiction and motion for summary judgment, which the trial court denied. AISD appealed.

To demonstrate a waiver under this part of the TTCA, a plaintiff must show a nexus between the operation or use of the motor-driven vehicle and the plaintiff's injuries. This nexus requires more than mere involvement of property; rather, the vehicle's operation or use must have actually caused the injury. The problem "with AISD's approach is that, contrary to the standard of review, it strictly construes T.P.'s pleadings and disregards her overall intent instead of liberally construing T.P.'s pleadings with an eye toward

her intent." The pleadings and evidence show R.T. was thrown forward due to the bus driver having to apply the brakes suddenly. This is the operation and use of a motor vehicle and the bus did more than merely furnish the condition or location of the injury. The plea was properly denied.

City held to be acting both in a proprietary capacity and a governmental capacity involving lease for mineral interests says Dallas Court of Appeals. *The City of Dallas v. Trinity East Energy, LLC,* 05-16-00349-CV 2017 WL 491259 (Tex. App.—Dallas Feb. 7, 2017, pet. filed)

This is an interlocutory appeal from the granting-in-part and denial-in-part of a plea to the jurisdiction involving an inverse condemnation claim for mineral interests. The Dallas Court of Appeals affirmed-in-part, reversed-in-part, and remanded.

The City was suffering a budgetary shortfall and decided to seek an additional source of revenue by leasing the minerals on City-owned property to a private party for developing the oil and gas. Trinity asserted, if it bid, it would need surface access to two City sites. Trinity and the City entered into two leases for mineral interests. Afterwards, Trinity began the long process of preparing to drill, including geological and engineering tests, designing drill sites, roads, and pipelines, and multiple City meetings. Trinity sought permits to drill on the designated sites. However, in the spring of 2013 the Planning Commission voted to deny the applications. Trinity appealed to the City Council. But because the Planning Commission had denied the applications, the Council was required to override that denial by a vote of three-fourths of its members; the vote to approve received only a majority of the votes of the Council members. Consequently, the applications were denied. Later, the City passed new ordinances changing setback requirements and making the sites impossible for Trinity to use for drilling. The leases then expired. Trinity sued. The City filed pleas to the jurisdiction in which it asserted it was immune from suit with regard to Trinity's claims for breach of contract, tort, and declaratory relief, and that Trinity had not alleged a viable claim for inverse condemnation. Trinity responded that the City's actions were proprietary for which immunity did not apply. The trial court granted parts and denied parts. Both parties appealed.

Citing the Texas Supreme Court's expansion in *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016) of the proprietary-governmental dichotomy to contracts the Dallas Court of Appeals held the City was acting in its proprietary capacity. Mineral leases, even if on park or flood plains, are proprietary as to the ownership use or lease. Further, since immunity does not already exist, Chapter 271 of the Texas Local Government Code (waiving immunity for goods or services) does not apply. The City was acting as a property owner as to the lease, however, the City was also acting as a regulatory agency as to the permits. Thus, the denial of the permit can also act as an inverse condemnation of a property interest. Given the change in ordinances making drilling impossible, Trinity presented evidence the City denied all economically viable use of the mineral leases. As a result, the trial court erred in granting the plea as to Trinity's claims for breach of contract, tort, and declaratory relief but properly denied it as to the takings claim.

Town entitled to enforce mediation agreement against property owner over sand dispute. *Doyle Wells, Sea Oats Investments I, L.P. f/k/a Lamkin Properties Limited Partnership, and Quixote Dunes, Inc. v. Texas Department of Transportation and Town of South Padre Island,* 13-15-00175-CV 2017 WL 1380531 (Tex. App.—Corpus Christi Feb. 2, 2017, no pet.)

This is a takings case involving allegations the City took sand from the Plaintiff's property without due process or just compensation. However, this opinion focuses on a subsequent settlement and its enforceability.

Wells purportedly owns various properties along Park Road 100 on South Padre Island. The Texas Department of Transportation ("TxDOT") maintains Park Road 100, including keeping the roadway clear of sand. Wells filed suit against the Town of South Padre Island ("SPI" or "Town") and TxDOT alleging TxDOT removed

sand from his property adjacent to the Road and transported it to SPI beaches. The Town filed a summary judgment asserting, amongst other things, that it only provided trucks via a subcontractor and did not actually remove or take anything. After granting the Town's motion (which was interlocutory), the trial court ordered the parties to mediation. At mediation the parties settled and sign the mediated settlement agreement ("MSA"). However, one month later Wells withdrew his consent asserting it was not a knowing and willful consent. The Town counterclaimed to enforce the MSA and filed an additional summary judgment motion. The trial court denied the Town's enforcement motion, but severed the case so the original MSJ could become final. The parties appealed and cross-appealed.

The central issue for the appeal is the Town's right to enforcement of the settlement agreement. SPI produced conclusive evidence to establish a valid contract. The terms of the MSA state that in consideration of $10,000 paid by SPI to Wells within twenty-one days Wells agreed to execute a full and final release and would dismiss SPI with prejudice. The MSA states it is enforceable as a Rule 11 agreement. Wells did not establish the lack of an essential term (i.e. the ownership disposition of the sand) as his own affidavit states the ownership interest was transferred to TxDOT, not the Town. So the Town could not agree on the ownership of property it does not own. Second, despite Wells' complaints about his own counsel, he signed the MSA and the Town conclusively established it complied with the terms by tendering payment by the deadline. As a result, the trial court should have granted the summary judgment motion on the Town's counterclaim.

Austin Court of Appeals grants TABC plea to the jurisdiction in PIA lawsuit by requestor. *McLane Company, Inc. v. Texas Alcoholic Beverage Commission, et al.,* 514 S.W.3d 871 (Tex. App.—Austin 2017, pet. filed)

This is a Texas Public Information Act ("PIA") request lawsuit where the Austin Court of Appeals affirmed the granting of several pleas to the jurisdiction by a state official and the Texas Alcoholic Beverage Commission ("TABC").

In 2015 McLane Company, Inc. ("McLane") submitted a PIA request to the TABC. The TABC sought an opinion from the Texas Attorney General's Office under the PIA procedures. The AG determined most of the information must be released, but allowed two exceptions. The TABC filed suit against the AG and McLane intervened. McLane seeks a writ of mandamus ordering TABC to produce the requested information. McLane also seeks declarations under the Texas Uniform Declaratory Judgments Act ("UDJA"). It further sued Sherry Cook, TABC's Chief Administrative Officer and Officer for Public Information asserting her failure to release the information as an *ultra-vires* activity. TABC filed a plea to the jurisdiction contending sovereign immunity deprived the trial court of jurisdiction over McLane's UDJA and *ultra-vires* claims. Cook also filed a plea to the jurisdiction asserting that sovereign immunity barred McLane's suit against her. The trial court granted the pleas and McLane appealed.

The Texas Supreme Court has explained that "the UDJA does not enlarge the trial court's jurisdiction but is 'merely a procedural device for deciding cases already within a court's jurisdiction.'" *Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 (Tex. 2011) (*per curiam*). To the extent McLane's petition seeks the trial court to order "the PIA requires the TABC and Cook to promptly search for and produce" responsive documents, and the method in which they are to search, such a suit falls outside of the confines of the declaratory judgment action authorized by the PIA. Instead, such relief seeks a declaration of McLane's rights under the statute. As articulated in the *Sefzik* case, immunity is not waived under the UDJA except where the invalidity of an ordinance or statute is at play. The UDJA does not waive sovereign immunity for "bare statutory construction" claims. As a result, the UDJA claims raised in the plea were properly dismissed. Further, while sovereign immunity does not bar a true *ultra-vires* claim against a public official, McLane's claims stem from the belief Cook was not performing a reasonably comprehensive

search. The PIA does not authorize a declaration as to the search performed. Further, even if a proper *ultra-vires* claim was factually pled, the redundant remedies doctrine precludes McLane pursuing it. The legislature created an explicit waiver of sovereign immunity in the PIA, and neither TABC nor Cook has challenged McLane's right to intervene in the underlying PIA suit. McLane has a right of potential recovery under the PIA and therefore cannot sue for the same thing under an *ultra-vires* theory. As a result, the trial court property granted the plea.

14th Court of Appeals holds police officer is entitled to official immunity in police chase case after providing detailed affidavits. *City of Houston v. Paula Collins,* 515 S.W.3d 467 (Tex. App.—Houston [14th Dist.] 2017, no pet.)

This is a Texas Tort Claims Act vehicle accident case involving official immunity where the 14th Court of Appeals reversed and rendered the denial of the City's plea to the jurisdiction.

Houston Police Department Officer James Brown responded to a dispatch for assistance where another officer was pursuing a motorcycle whose driver was standing up, driving recklessly and traveling at a high rate of speed. Collins's vehicle exited a parking lot and turn right onto the road in front of Officer Brown. She then changed lanes into the left lane, then back to the right lane in front of Brown. Brown struck Collins's vehicle while attempting to go around. Collins sued claiming Brown recklessly operated his vehicle. The City filed its first plea to the jurisdiction, which the trial court granted but the 14th Court of Appeals reversed noting the record did not contain sufficient evidence to establish Brown's good faith immunity. On remand, the City filed a second plea with new evidence which the trial court denied.

In the first appeal the 14th Court of Appeals held the City established Brown was acting in the course and scope of his employment and was performing discretionary actions. It remanded based on a lack of record evidence that no reasonable officer would have acted the way Brown did under similar circumstances. For this appeal, the court held the officer must assess "both the need to which an officer responds and the risks of the officer's course of action, based on the officer's perception of the facts at the time of the event." The City's second plea produced various affidavits from officers and dispatchers. The supervising sergeant on duty who overheard the radio exchange regarding the pursuit noted the pursuing officer had stress and urgency in his voice, made it clear the suspect was not stopping and endangering lives, and that a reasonable officer would conclude an emergency existed. Various officers provided affidavits that such situations require immediate responses from law enforcement for the safety of motorists and the public. The circumstances reasonably qualify as evading arrest which is a state jail felony under §38.04 of the Texas Penal Code. The Court of Appeals went into specific detail regarding the testimony supporting each of these statements. The Court felt it was important to note the affidavits proffered by the City in support of the first plea stated that the suspect evaded arrest; they did not explain how a reasonable officer could have determined from the radio broadcast that the suspect was fleeing. The evidence for the second plea provided a great deal more detail and specific evaluations which go through an officer's mind. The Court analyzed the "need" and "risk" assessment under the detailed statements and what alternative actions Brown could have used. In response to Collin's assertions that the new affidavits are conclusory because they analyze things differently than the first set of affidavits, the Court held "[t]he new affidavits do not change the underlying factual assertions, but instead provide additional context to explain Officer Brown's response considering what he reasonably understood to be the situation. The new affidavits were substantiated with facts showing that Officer Brown assessed the need for his response against the risks to the public" and "provide[d] the missing link explaining that reasonable officers" mindset. After going through the analysis, the Court held the City established Officer Brown was entitled to official immunity. Therefore, the City's plea should have been granted. Reversed and rendered.

Dallas Court of Appeals holds taxpayer suit to prevent payment to Paxton special prosecutors was moot and not ripe. *Jeffory Blackard v. Kent A. Schaffer, et al.,* 05-16-00408-CV, 2017 WL 343597 (Tex. App.—Dallas Jan. 18, 2017, pet. filed)

A taxpayer sued Collin County, various County officials and the special appointed prosecutors assigned to represent the state in criminal matters against the current Texas Attorney General, Ken Paxton over payment of fees in the criminal matter. The Dallas Court of Appeals affirmed the dismissal of the suit.

After the Collin County Criminal District Attorney recused himself and his office from the criminal cases against the Texas Attorney General, several special prosecutors were brought in and appointed to represent the state. The court refers to them collectively as the Attorneys Pro Tem. They were to be paid set fees of $300 per hour for work performed in the Paxton cases. One invoice from April to December of 2015 collectively totaled $254,908.85. Blackard, an individual who pays property taxes in Collin County, originally filed a civil suit to enjoin the payments of fees at that rate, instead arguing the fees to be paid should be those paid to lawyers representing indigent defendants under the local rules. However, before obtaining any injunctive orders, the trial judge appointed in the Paxton cases signed an order approving payment for the Attorneys Pro Tem at the $300 rate. The Collin County Commissioner's Court, by majority vote, issued payment. The Attorneys Pro Tem and County (including officials) filed pleas to the jurisdiction which the trial court granted. Blackard appealed.

Taxpayers normally do not have a right to bring suit to contest government decision making without an individualized injury. However, Texas has a list of long-standing exceptions to the general rule, including the illegal expenditure of public funds. A taxpayer may maintain an action solely to challenge proposed illegal expenditures, but may not sue to recover funds previously expended or challenge expenditures that are merely "unwise or indiscreet." Since the December 2015 invoice was paid, claims based on it are moot. There are two exceptions to the mootness doctrine that confer jurisdiction regardless of mootness: (1) the "capable of repetition, yet evading review" exception; and, (2) the collateral consequences exception. Blackard posited that the Attorneys Pro Tem continue working on the Paxton cases and therefore will submit invoices in the future. However, that does not mean future invoices could evade review. The timing for authorization and payment is not something so traditionally set that it is expected to consistently evade review. As a result, the issue remains moot. Blackard asserts the "threat of future payments is sufficiently certain" that the taxpayer civil suit is not premature and is. However, a case is not ripe if its resolution depends on contingent or hypothetical facts or upon events that have not yet come to pass. On the record, no further invoices have been submitted and the aspects of the Paxton cases are uncertain. The timing of future requests for compensation by the Attorneys Pro Tem, the hourly rate that may be requested, the future amount the judge would approve as reasonable compensation, the action the Auditor would take in response to an order approving a future request, and the action the Commissioners Court would take are all purely hypothetical and speculative at this time. As a result, the claims for future payments are not yet ripe. The trial court properly granted the pleas.

Service of process deadline for election contest deemed non-jurisdictional by First Court of Appeals in Houston. *City of Houston and Annise D. Parker v. Phillip Paul Bryant and James Scarborough,* 516 S.W.3d 47 (Tex. App.—Houston [1st Dist.] 2017, pet. filed)

This is an election contest case where the First Court of Appeals out of Houston held Texas Election Code §233.008 (requiring process be served within 20 days) is not jurisdictional.

Petitioners challenge a ballot measure concerning term limits for City of Houston elective offices. The City filed a plea to the jurisdiction asserting that while the petition was timely filed and the City received service to the correct person, it did not receive service within the 20 days mandated by §233.008. Therefore, the trial court was without jurisdiction. The trial court denied the plea and the City appealed.

The Court of Appeals held the thirty-day deadline by which the petition must be filed under §233.006(b) is jurisdictional and non-waivable. It is undisputed the election contest was filed within that deadline. Thus, according to the court, the trial court obtained subject-matter jurisdiction at that time. Section 233.008 is clearly mandatory, in that it provides that a citation issued in an election contest "must direct" the officer to return the citation unserved if it is not served within twenty days after it was issued. However, "just because a statutory requirement is mandatory does not mean that compliance with it is jurisdictional." Section 233.008 does not require a time to effectuate service and is not expressly jurisdictional. It does not prohibit the reissuance of a citation or preclude a party from making a second attempt. It also does not list a specific consequence for non-compliance. As a result, it is not jurisdictional. And while "other consequences" may be the result of failing to follow a non-jurisdictional deadline, such is not for evaluation under a plea to the jurisdiction.

City established right to temporary injunction regarding historic festival. *Vera v. City of Hidalgo, 13-16-00088-CV,* 2017 WL 56380 (Tex. App.—Corpus Christi Jan. 5, 2017, no pet.)

This is a dispute between the City of Hidalgo and the BorderFest Association as to who owns the rights and ability to control the BorderFest annual cultural festival.

The BorderFest festival has been held in the City of Hidalgo, Texas for the past thirty-nine years. The Association determined that in 2016 the festival would be held in the neighboring city of McAllen, Texas. Hidalgo sued the Association and Joe Vera, the Assistant City Manager of McAllen for a declaratory judgment and injunctive relief regarding ownership of the festival. Vera was the former City Manager of Hidalgo. The City was counter-sued for federal trademark infringement and unfair competition. the Association claimed sole ownership and rights to the BorderFest brand and sought its own injunctive relief against Hidalgo from using the BorderFest mark, name, and goodwill. After a two-day temporary injunction hearing, the trial court granted Hidalgo's temporary injunction and prohibited the Association from using the BorderFest name or utilizing the event in McAllen. The Association filed this interlocutory appeal.

The preliminary record shows BorderFest has been held exclusively in Hidalgo for the previous thirty-nine years and has brought the city "fame" over these years. The City had paid the cost of the festival each year, although the Association provided some funds to "defray" the full cost to the City. The City also contributed a large number of personnel and man hours to the festival. The record further shows that the 40th anniversary of the festival being held in Hidalgo was threatened by the actions of the Association agreeing to hold the BorderFest festival in McAllen. Based on these facts, the Court of Appeals held the trial court was within its discretion to grant Hidalgo's temporary injunction application because Hidalgo plead and proved it had (1) a cause of action against Vera and the Association; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. The trial court's rulings show that it sought to preserve the status quo because these orders were issued approximately a month prior to BorderFest's 40th anniversary, while the underlying ownership issues would be resolved later at trial. The court of appeals expressly disclaimed any aspects of the opinion are meant to address the ultimate resolution of the case and is limited only to a temporary injunction standard of review.

Court of Appeals holds it does not have interlocutory jurisdiction over reinstatement order, even though immunity is involved. *West Travis County Public Utility Agency v. CCNG Development Co., L.P.,* 514 S.W.3d 770 (Tex. App.—Austin 2017, no pet.)

This opinion will mainly be of interest to litigators for procedural precedent, but the underlying case is a breach of a utility agreement and whether governmental immunity is waived. Essentially, the court of appeals lacks interlocutory jurisdiction in this case over an order reinstating a case from the dismissal docket for want of prosecution.

CCNG Development Co., L.P. ("CCNG") sued West Travis County Public Utility Agency ("WTCPU") for breaching a utility agreement. The WTCPU filed a plea to the jurisdiction. However, no ruling was issued for two years (while negotiations were going on) and the trial court judge dismissed the case for want of prosecution on a standard drop docket setting. CCNG then timely filed a motion for new trial and motion to reinstate the case and WTCPU asserted the trial court lacked jurisdiction to reinstate because it lacked jurisdiction over the underlying case and the case was moot. CCNG asserted it should be given the opportunity to respond to the plea and asserted the claim was moot. The trial court granted CCNG's motion for new trial and WTCPU filed an interlocutory appeal asserting such an order was the equivalent of the denial of the underlying plea to the jurisdiction.

The Court of Appeals held it has jurisdiction over an interlocutory appeal only to the extent such jurisdiction is expressly granted by §51.014(a) of the Texas Civil Practice and Remedies Code. The reinstatement order does not expressly address WTCPU's challenge to the trial court's jurisdiction on either immunity or mootness grounds. A review of the record demonstrates that the trial court did not otherwise expressly deny or grant the Agency's jurisdictional challenge. In essence, the reinstatement order simply put the case back on the docket in order to allow the parties to brief and the court to rule on the plea. The trial court expressly stated on the record that CCNG should have an opportunity to respond to the WTCPU's argument and evidence, that it was reinstating the case, and that after reinstatement WTCPU could present its jurisdictional challenge for the court's consideration. [Comment: In other words the trial court always has jurisdiction to determine whether it has jurisdiction of the underlying case.] Since no denial of the plea is present, and all indications are the court intended to rule on the plea in the near future, the court of appeals does not have interlocutory jurisdiction over the order to reinstate.

"Wet floor" warning sign sufficient as a matter of law to warn of dried but slippery wax on floor under TTCA says Beaumont Court of Appeals. *Montgomery County v. David Lanoue,* 09-16-00195-CV, 2016 WL 7473896 (Tex. App.—Beaumont Dec. 29, 2016, no pet.)

This is a Texas Tort Claims Act ("TTCA") slip-and-fall case where the Beaumont Court of Appeals reversed the denial of the County's plea to the jurisdiction and dismissed the case.

When Lanoue entered the Montgomery County Courthouse, the floor had recently been mopped and waxed. The County placed a sign in the area noting the floor was wet. Lanoue asserted the sign was confusing since the floor looked dry, and the sign did not say he should watch out for wax, only that the floor was wet. The undisputed evidence included a still photograph of Lanoue in mid-fall, right next to the warning sign. When he entered onto the floor he slipped, fell and was injured. The County filed a plea to the jurisdiction asserting it met is duty to warn of the dangerous condition. The plea was denied and the County appealed.

Premises owners have a duty to either "warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not." Lanoue asserted the "wet floor" warning sign was inadequate because the floor was actually dry, but was covered with a slippery wax. However, "[a] warning of the specific material causing a condition is not required, so long as the existence of the condition itself is conveyed." The warning need not identify the specific substance that made the floor wet. Therefore, the court held that the "'wet floor' sign inches from the location where Lanoue fell was adequate as a matter of law to warn Lanoue that the floor was slippery." The plea should have been granted.

Trial court in error for denying defendant's designation of responsible third party even after SOL deadline says San Antonio Court of Appeals. *In re Cleo Bustamante, Jr.*, 510 S.W.3d 732 (Tex. App.—San Antonio 2016, no pet.)

This is a mandamus case of interest to litigators primarily who deal with proper designations for responsible third parties. The Fourth Court of Appeals, sitting *en banc*, determined it was error

to deny the Defendant the ability to designate a responsible third party beyond the statute of limitations. Long opinion so the summary is a bit long.

Plaintiff Fernandez sued Cleo Bustamante, Jr. for injuries he sustained while working for Cleo Bustamante Enterprises, Inc. ("CBE"). A vehicle driven by Irasma Riojas struck Fernandez in front of the Cleo Convention Center. Fernandez received worker's compensation benefits from CBE and settled with the driver, Riojas for $300,000. However, he sued the owner of the convention center, Cleo Bustamante, Jr. one day before the statute of limitations expired. After the case, had been progressing for some time, Bustamante filed a motion for leave to designate Riojas and CBE as responsible third parties pursuant to §33.004 of the Texas Civil Practice and Remedies Code. Fernandez opposed the designation and argued Bustamante had not disclosed CBE and Riojas as potential responsible third parties in response to the request for disclosure or before the statute of limitations expired. The trial court denied the designation. Bustamante sought mandamus while simultaneously filing an interlocutory appeal.

Bustamante pointed out Fernandez was already aware of the existence and potential liability of CBE and Riojas. Bustamante further argued the purpose of disclosure in regards to the designation of responsible third parties is to allow plaintiffs an opportunity to sue third parties before limitations expire, but that had already occurred. He did not have time to designate responsible parties since Fernandez sued the day before the statute expired.

A defendant in a tort claim may designate as a responsible third party "any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these." Tex. Civ. Prac. & Rem. Code § 33.011(6). Bustamante's motion for leave to designate responsible third parties was filed prior to the 60th day deadline before the trial date. Under § 33.004(d) a defendant cannot designate a responsible third party if the statute of limitations has expired. However, Fernandez was made aware of these potential responsible third parties (and settled with them) prior to the limitations period expiring. Fernandez' position is inconsistent with Texas Rule of Civil Procedure 193.6(a), which allows a party who fails to respond to discovery to introduce the undisclosed material or information into evidence if the party shows either (1) good cause existed for the failure to respond to the discovery or (2) the other party will not be unfairly surprised or unfairly prejudiced by the failure to timely respond. Tex. R. Civ. P. 193.6(a). "To hold as the Fernandezes suggest would convert Rule 194.2(l) into a technical trap." In this case, "Bustamante did not fail to comply with his obligation to timely disclose Riojas and CBE as potential responsible third parties because it was impossible for Bustamante to make a disclosure before the statute of limitations ran." Fernandez knew Riojas and CBE were potential responsible third parties and, "..even if [the court] indulge[d] in the legal fiction that the Fernandezes did not know Riojas and CBE were potential responsible third parties, their existence was disclosed when Bustamante was deposed and responded to the co-defendant's requests for disclosure."

Once a motion for leave to designate is filed, a court shall grant leave to designate a named person as a responsible third party, unless a timely objection is filed establishing "the defendant did not plead sufficient facts concerning the alleged responsibility of the person to satisfy the pleading requirements of the Texas Rules of Civil Procedure" and the defendant fails to plead sufficient facts after being given leave to replead. Tex. Civ. Prac. & Rem. Code § 33.004(g) (West 2015). Fernandez did not plead or establish Bustamante failed to plead sufficient facts concerning CBE's and Riojas' alleged responsibility to satisfy the pleading requirements. Under the Texas "fair notice" standard, the trial court errored in denying the designation. The court then "revisited" its prior opinions which had held mandamus relief is not available for the denial of a motion for leave to designate a responsible third party because the moving party has an adequate remedy by appeal. Instead the court held the Texas Supreme

Court and other sister courts of appeal have held the better approach to the erroneous denial of a motion for leave to designate a responsible third party is to recognize that an appeal is inadequate and mandamus relief is proper.

Justice Chapa dissented asserting *In re Prudential Insurance Company of America*, 148 S.W.3d 124 (Tex. 2004) requires a court conduct a case-by-case benefits-and-detriments analysis and not adopt rigid rules to determine whether an appeal is an inadequate remedy. She would hold the mandamus record in this case does not show that the benefits of mandamus relief outweigh the detriments. Justice Martinez dissented and would have denied the request to review *en banc* as being inconsistent with TEX.R. APP. P. 41.2(c).

Trial court improperly issued injunction requiring customer to continue paying for City water under contract at higher rate. *G-M Water Supply Corporation v. City of Hemphill, Texas,* 12-16-00129-CV, 2016 WL 6876499 (Tex. App.—Tyler Nov. 22, 2016, no pet.)

This is an injunction case where the Tyler Court of Appeals reversed an injunction requiring a purchaser of City water to make payments at a specific rate until otherwise ordered by the court.

G-M is a nonprofit water supply company which had a contract to purchase a minimum level of City water each month. The less they purchased, the more per gallon they paid. G-M later built a treatment plant and started purchasing less water. The City adjusted the rate and demanded payment, which G-M refused. In 2014-15, the City charged G-M $2.8333 per 1,000 gallons of water, but raised the rate in 2015-16 to $5.2137 per 1,000 gallons of water. The City filed an application for temporary injunction requesting that G-M pay the accrued arrearages into the trial court's registry, along with the full amount of future monthly invoices all calculated at the higher rate. The trial court granted the injunction and G-M appealed.

To establish an irreparable injury, the applicant must make "a clear and compelling presentation that without the injunction, it would suffer an actual irreparable injury resulting in extreme hardship, or that the injunction is extremely necessary to prevent an actual irreparable injury." The record shows G-M had sufficient funds in its accounts, so the City did not establish it would not be able to satisfy a monetary judgment if obtained. Additionally, the last, actual, peaceable, non-contested status between the parties that preceded the controversy was when the parties operated under the contract rate for 2014-2015. However, the trial courts order used the 2015-2016 rates, which altered the status quo. And while this dispute has no doubt affected the City's short term ability to make all the budgeted capital purchases at the preferred time, the evidence shows that the City maintains capital reserves of over $1,000,000.00, it can negate the effects of its postponed capital expenses, and that it is still able to provide all services until this matter can be resolved at trial. Finally, the City did not establish it would be required to sue for each month of non-payment and the court believes any breach of contract suit could encompass everything in a single action. Therefore, it was error to issue the injunctive relief.

Trial court properly denied injunctive request to prohibit City from relocating administrative offices. *Leslie E. Barras and Historic Orange Preservation Empowerment, Inc. v. The City of Orange, Texas, et al,* 09-16-00073-CV, 2016 WL 6809226 (Tex. App.—Beaumont Nov. 17, 2016, no pet.)

This is an appeal from the denial of an injunctive request to prevent the City from relocating its administrative offices.

In 1996, within the City's Comprehensive Master Plan, the City determined its administrative offices should be centralized in the Old Town Center of the City. In 2016 the City purchased and made plans to move some of its offices outside of the Old Town Center. Historic Orange Preservation Empowerment, Inc. ("HOPE") sued for injunctive relief to prevent the move. The trial court denied the injunctive relief and HOPE appealed.

HOPE argues the CITY is required to amend the City Charter because it requires that "[n]o subdivision, street, park, or any public way, ground or space, public building or structure or public utility, whether publicly or privately owned which is in conflict with the

comprehensive plan shall be constructed or authorized by the City." HOPE asserts this makes the comprehensive Plan mandatory and not simply a guide. However, the Plan expressly provides that it is "a guide to the physical development of Orange [,]" and it states that it is "a tool for elected and appointed officials and city staff to guide decision making for growth and development issues." After analyzing the Plan, the court held it is a guiding document only. Additionally, the parts of the Plan relating to the location of the City's administrative offices were never adopted by ordinance. The Charter applies only to legislation through ordinance, not resolution. The resolution passed by City Council to move its facilities is therefore not in conflict with the Comprehensive Master Plan. As a result, the trial court properly denied the injunctive relief.

City loses its suit to hold Tax Code provisions unconstitutional. *City of Austin v. Travis Central Appraisal District, et al,* 506 S.W.3d 607 (Tex. App.—Austin 2016, no pet.)

This is an appraisal case involving vacant land and commercial real property where the City sought to declare parts of the Tax Coder were unconstitutional. The Austin Court of Appeals affirmed the trial court's dismissal of the suit.

City filed a petition challenging the Travis Central Appraisal District's appraisals for the 2015 tax year on certain categories of real property. The City challenged certain Tax Code provisions which "have incentivized taxpayer protests and led to widespread diminution of appraised property values to a 'median value' that is below market value." According to the City, the reduction in appraised values to median values "has resulted in unequal taxation in violation of the Texas Constitution." See Tex. Const. art. VIII, § 1. Essentially, according to the City, the Appraisal District's application of §§41.43(b)(3) and 42.26(a)(3) to resolve taxpayer protests has resulted in a reduction of property value making an unconstitutional and unequeal tax. Several commercial and residential property owners intervened. The intervenors then moved to dismissed the City's claims, which the trial court granted. The City appealed.

"[E]xcept for certain specifically circumscribed rights," the Tax Code's comprehensive legislative scheme generally excludes taxing units, like the City, from the appraisal process. Chapter 41, subchapter A, of the Tax Code provides taxing units, like the City, with a mechanism for challenging certain actions by their local appraisal districts. Chapter 41 also provides property owners a mechanism for appealing appraisals. The Austin Court of Appeals analyzed the City's standing to bring such a claim and ultimately determined the City failed to establish an injury sufficient to confer standing. Further, the Tax Code is a pervasive regulatory scheme, vesting appraisal review boards with exclusive jurisdiction to decide protests and challenges as permitted under chapters 41 and 42. The record reflects that even though the City attended the Review Board hearing, the City did not present a case on the merits of its challenge at the hearing and, in truth, requested the challenge be denied so it could pursue other avenues of attack. The City's position that it sufficiently exhausted its administrative remedies because it was present at the administrative hearing and requested the denial of its own challenge, if accepted, would thwart the intent of the administrative process and of the exhaustion requirement. The Court held that by affirmatively requesting the Review Board deny its challenge petition, the City failed to "appear," as required under the law. The trial court did not error in dismissing the City's case.

Petitioner did not conclusively establish charter amendment petition was valid; but city did not prove invalidty so case remanded. *City of Galena Park, Et Al. v. Barry Ponder,* 503 S.W.3d 625 (Tex. App.—Houston [14th Dist.] 2016, no pet.)

In this suit to compel a charter amendment election, the 14th Court of Appeals reversed the granting of a summary judgment which favored the election.

Barry Ponder delivered a set of papers to Galena Park City Secretary Mayra Gonzales that purported to be a petition in support of city charter amendments proposed by a local group. The amendments concerned, respectively, (1) the creation of four new commissioner positions to act as liaisons from the city commission to certain

departments of the city government; (2) appointment and duties of fire chief, fire marshal, and police chief; (3) a detailed procedural system for voter initiative, referendum, and recall petitions; and (4) changes to the general powers of the mayor and the commission. According to the City Secretary, there were no proposed charter amendments attached to the signature pages. She reviewed the signature pages to determine the validity of the signatures. The number of valid signatures exceeded the charter requirements. However, the City Attorney asserted the petition did not constitute a proper petition primarily because (1) the signature pages did not include the text or a description of any proposed amendment to the charter so there was no way to tell what amendments were being presented, (2) there were no amendments attached to the signature pages as referenced, and (3) the proposed amendments covered multiple subjects, which he asserts is not permitted under the law. The City refused to call the election and Ponder filed suit. Both sides filed motions for summary judgment and the trial court ruled for Ponder. The City appealed.

The court first analyzed Ponder's summary judgment and determined that enough qualified voters signed the petition. However, that does not mean the petition itself is proper. The gap in Ponder's logic is the papers do not conclusively establish that the four amendments presented are the actual amendments that the signatories were demanding be placed on the ballot. Further, the City Secretary's letter only stated that the number of signatures exceeded the required number for an amendment petition, but was not an acceptance of the rest of the petition. The trial court errored in granting Ponder's motion. The court then considered the City's motion. The court narrowed the issues by listing several City issues as abandoned or not preserved. The court then determined that while Ponder did not conclusively establish entitlement to summary judgment, the City's arguments on the form of the petition did not establish the charter section (§9.004) were not met. Further, nothing in the text of section §9.004, expressly prohibits an election petition from proposing more than one amendment. Further, proposed changes to a city charter may seek broader schematic changes to city government that may make sense only as an all-or-nothing proposition. In other words, broad categories for amendments are fine. Thus, the City did not establish entitlement to summary judgment. The case is remanded back to the trial court.

Falling item in room was a premise defect case, not a tangible personal property case under TTCA says Dallas Court of Appeals. *Laura Constantino v. Dallas County Hospital District d/b/a Parkland Health & Hospital System a/k/a Parkland Memorial Hospital,* 05-15-01273-CV, 2016 WL 6161748 (Tex. App.—Dallas Oct. 24, 2016, no pet.)

This is the second appellate decision regarding this negligent case where the Court of Appeals held this was a premise defect case only and dismissed the case.

Dallas County Hospital District ("Parkland Hospital" or "Parkland") provides televisions in patient rooms secured to the wall by a mount. Constantino's shoulder was injured when a television detached from the mount and fell on her. Her original petition sued for premise defect and negligent use or condition of tangible personal property. This court, in an interlocutory opinion (summary found here) held the facts alleged a premise defect only. It dismissed the tangible personal property claims and allowed Constantino the ability to amend to address better the premise defects claims. After she amended, Parkland filed a plea to the jurisdiction, which the trial court granted. Constantino appealed.

The evidence indicates this television and bracket had been mounted on the wall for fifteen to twenty years. Parkland used the same mounting system in other rooms during that time period and had no reports of televisions falling from the wall. Constantino contended the television and bracket were defective because they did not include a set screw (or the set screw was improperly tightened), a lock washer, a lock nut, and other parts. Finally, Constantino invoked the integral-safety-component doctrine, alleging that the missing items were integral safety components. It then fell to Constantino to show an express waiver of immunity under the TTCA. She remained committed to arguing the television was

both a premise defect and the negligent use of tangible personal property. However, the Texas Supreme Court determined in *Univ. of Texas at Austin v. Sampson*, 488 S.W.3d 332, 335 (Tex. App.—Austin 2014), *aff'd,* 500 S.W.3d 380 (Tex. 2016) that a claim cannot be both a premises defect claim and a claim relating to a condition or use of tangible property. A plaintiff may not avoid the heightened standards for a waiver of immunity for premises defect claims by alleging her injury was caused by a condition or use of tangible personal property. The issue is not whether some items of personal property were involved, but whether the personal property created a dangerous condition on real property. After analyzing the alleged facts, the court held, Constantino was injured as a result of the static placement of the television and bracket. This placement allegedly created the dangerous condition of the room, in this case a falling hazard. Additionally, like the improperly secured extension cord in *Sampson*, the alleged inadequacy or absence of safety components here created a condition on the premises. Therefore, the "lack of an integral safety component" argument, which applies to tangible personal property cases, does not fit here. Because Constantino's pleadings failed to state a waiver of immunity under either a premise defect or tangible personal property claim, the plea was properly granted.

City's summary judgment reversed and remanded under failure to address *Patel* due-course-of-law analysis; dismissal of all other constitutional challenges to utility late fee ordinance affirmed. *Gatesco Q.M. Ltd d/b/a Quail Meadows Apartments, a Texas Limited Partnership v. City of Houston,* 503 S.W.3d 607 (Tex. App.—Houston [14th Dist.] 2016, no pet.)

In this case the 14th Court of Appeals affirmed-in-part and reversed-in-part the granting of the City's summary judgment motion in this constitutional challenge to the City utility charging late fees and shutting off a customer's water service. It's a 21-page opinion so the summary is a bit long. However, the case is good analysis of constitutional ordinance challenges and the new *Patel* due-course-of-law test.

Gatesco owns an apartment complex known as the Quail Meadows Apartments. The only available supplier of water for the Apartments comes from the City. Gatesco, a longtime water customer, paid its water bill to the City one day late. The City assessed a ten-percent late fee of $1,020.03 (the "Late Fee") pursuant to an adopted ordinance. Gatesco did not want to pay the Late Fee and challenged it in an administrative proceeding. Though unsuccessful in this proceeding, Gatesco still did not pay the Late Fee. To avoid having its water shut off, Gatesco obtained a temporary restraining order but the trial court denied Gatesco's request for temporary injunction. Within two hours Gatesco paid the Late Fee, although the City says Gatesco paid the fee at the wrong location. The City shut off the water to the entire complex 17 minutes after Gatesco paid the fee, but turned the water on later that afternoon. But, because the water had been turned off, the City required a cash security deposit of $35,200.00, an estimate of three months of water bills to turn it back on. After the case went up and back to the court of appeals on a plea to the jurisdiction, the trial court granted the City's summary judgment motions. Gatesco appealed.

Gatesco first sought a declaratory judgment the Late Fee is an excessive fine under the Texas Constitution. Whether the constitutional prohibition has been violated is a question for the court to decide under the facts of each particular case. Generally, prescribing fines is a matter within the City's discretion. A fine is not unconstitutionally excessive "'except in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the sense of mankind.'" This ordinance applies a bright-line, ten-percent late charge to all people paying late, subject to a few exceptions. The charge is proportional to the unpaid amount owed and is thus proportional to the amount of water and sewer services consumed. The City has discretion to prescribe fees to be assessed for late payment for the City's water and sewer services with the object of incentivizing timely payment for these services. There are no "extraordinary circumstances" here to justify an excessive fee under the Texas Constitution, so the summary judgment is

affirmed in that regard. Gatesco also asserts the Houston Ordinance is an unconstitutional tax. In order to determine whether the Late Fee is a regulatory charge or a tax, the court applies the "primary purpose" test. Under this test, the court does not examine the specific regulatory costs incurred by the City as to this one delinquent payment by Gatesco; instead, its looks at whether the aggregate late fees collected exceeds the amount reasonably needed for regulation. The court examines the regulation as a whole to determine whether the late fees imposed are intended to raise revenue or compensate the reasonable costs for regulation. In analyzing the facts and admissions, the court held whether the City incurred any collection costs before charging Gatesco the Late Fee is not material. The record does not show the fees were unreasonable in relation to overall costs of the system. As a result, the trial court did not err in granting summary judgment on this question. As to Gatesco's equal protection claims, Gatesco bears the burden of showing that it has been treated differently from others similarly situated and that the treatment is not rationally related to a legitimate governmental interest. The summary-judgment evidence does not address how the City treated similarly situated customers, so the trial court did not error in grating summary judgment. Next, the City violates federal Substantive Due Process if it exercises its power in an arbitrary and unreasonable way. Since no suspect class or fundamental right is involved, the analysis is under the rational basis test. The summary-judgment evidence does not raise a genuine fact issue as to whether it is not at least fairly debatable that each component of the challenged conduct was rationally related to a legitimate governmental interest. The trial court did not error in granting summary judgment on this issue.

The court, however, utilized a different standard for the substantive-due-course-of-law violation under the *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015). The high court held that the proponent of an as-applied challenge to an economic-regulation statute under article I, section 19's substantive-due-course-of-law protections must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest. However, since the timing of the *Patel* opinion is so new, the City's no-evidence summary judgment evidence did not address or incorporate the "oppressive" arguments or elements, which are essential to a no-evidence determination. Accordingly, the court reversed the trial court's judgment as to these claims and remanded. Since the substantive-due-course-of-law claims are remanded, so too must the claim for injunctive relief and attorney's fees.

Plaintiff's expert created fact issue as to officer's recklessness preventing the granting of City's plea to the jurisdiction. *Bay City, Texas v. Wade McFarland,* 13-15-00122-CV, 2016 WL 5941891 (Tex. App.—Corpus Christi Oct. 13, 2016, no pet.)

This is a Texas Tort Claims Act case involving an automobile accident where the Corpus Christi Court of Appeals affirmed the denial of the City's plea to the jurisdiction.

Officer Kunz was dispatched to the scene of a residence where two siblings had been reported fighting with deadly weapons. While in route, Officer Kunz collided with a motorcycle driven by McFarland. The evidence is undisputed Officer Kunz proceeded through the intersection without stopping at a stop sign. McFarland sued the City alleged it was vicariously liable for Officer Kunz negligent and for negligently hiring him. The City filed a plea to the jurisdiction asserting the emergency responder protections and Officer Kunz' official immunity. In response McFarland's expert testified the dash cam contradicted Kunz's affidavit testimony regarding her slowing before entering the intersection. The expert concluded that Officer Kunz's operation of her vehicle was reckless and that no reasonably prudent officer could believe that her conduct was necessary. The trial court denied the plea and the City appealed.

While the evidence is undisputed Officer Kunz was responding to an emergency call and had her lights and siren on, the evidence before the trial

court contained a material fact issue as to whether she slowed before entering the intersection. So the plea was properly denied as to the emergency responds defense. Additionally, the issue regarding whether Officer Kunz slowed down is material to the third "need-factor" under official immunity defense concerning whether a safer alternative course of action was available. As a result, the plea was properly denied as to the official immunity defense.

Trial court ordered to rule on plea to the jurisdiction within one day of order by Court of Appeals since it failed to rule for ten months. *In Re: Texas Health Resources*, 05-16-01135-CV, 2016 WL 5937790 (Tex. App.—Dallas Oct. 12, 2016, no pet.)

This is a mandamus matter and helpful to any litigators who have had difficulty getting a judge to rule on a dispositive motion.

Texas Health Resources ("THR") was sued (the opinion does not say for what) and filed a plea to the jurisdiction. The court took it under advisement. The THR filed a motion for ruling, provided the trial court with supplemental briefing requested, and set the motion for a hearing. The trial court rescheduled the hearing twice with the final date set the day before a special trial setting of October 18th. THR filed the mandamus to try and force the trial court to rule on the plea prior to trial. While the Court of Appeals opinion comes a bit late (only 5 days before trial) it nonetheless, issued an opinion requiring a ruling the day after the opinion by 5:00 p.m. (October 13th).

Jurisdictional determinations should be made "as soon as practicable." Here, "… the trial court is aware of the plea and of THR's motion for ruling on the plea. The plea has been 'under advisement' for nearly ten months and has, thus, been pending for a reasonable time. THR requested a ruling on the motion verbally and through a motion for ruling, and has attempted to schedule the motion for hearing. Those efforts have been thwarted by the trial court's refusal to rule, cancellation of scheduled hearings, and setting the hearing for the day before trial. A ruling the day before trial is insufficient and unreasonable because a plea to the jurisdiction should be heard and determined well before the trial date…" The Court of Appeals commanded the trial court rule within one day.

Since volunteer firefighter is not an employee, no waiver of immunity exists for his car accident. *Freer Volunteer Fire Department v. April Wallace, Individually and Next Friend of Gabriella Wallace*, 04-16-00373-CV, 2016 WL 5795164 (Tex. App.—San Antonio Oct. 5, 2016, no pet.)

This is a Texas Tort Claims Act case where the involving a volunteer fire department and whether an individual is a volunteer or employee. The San Antonio Court of Appeals reversed the denial of the department's plea to the jurisdiction and dismissed the claims.

Martin Martinez, Jr. was driving an ambulance owned by the Freer Volunteer Fire Department ("FVFD") in the course of transporting a suspected heart attack patient to a hospital. Martinez and a vehicle driven by April Wallace collided in an intersection. Wallace sued FVFD and Martinez. FVFD filed a motion to dismiss Martinez under §101.106(e). FVFD filed an answer and a plea to the jurisdiction asserting Martinez was acting in the course and scope of his employment as a volunteer fireman for FVFD and immune; therefore, FVFD was immune from suit. Wallace dismissed Martinez. FVFD then asserted Martinez was a volunteer and was not in the paid service of FVFD despite a $7 to $8 stipend. Wallace asserted Martinez was a paid employee and therefore his actions waived immunity. Further, Wallace asserted FVFD could not go back on its assertion Martinez was an employee and not a volunteer made in initial motions. The trial court denied the plea and FVFD appealed.

As a volunteer fire department, FVFD is an emergency service organization included within the Act's definition of governmental unit. Tex. Civ. Prac. & Rem. Code Ann. §101.001(1)(A), (3)(C) (West Supp. 2016). A governmental unit's immunity is waived for personal injury proximately caused by the negligence of an employee acting within his scope of employment if the injury arises from the operation or use of a motor-driven vehicle. However, a volunteer is not

an employee. Under the Fair Labor Standards Act, "[v]olunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers." 29 C.F.R. § 553.106(a). The court held Martinez is a volunteer and his acts do not waive immunity. The original assertions he was an employee for §101.106 may lead to an estoppel argument, but does not change the character of his employment. In the instant case, the joint motion to dismiss referred to Martinez as both a volunteer employee and an employee. The court held that it does not condone the tactics used by FVFD, but such tactics do not equate to a waiver-by-conduct for immunity purposes. Given the facts, no employee was present to waive immunity so the trial court should have granted the plea.

City not liable in jail suicide for metal grate used by inmate who hung himself says U.S. 5th Circuit. *Roggie, et al v. City of Richmond,* 506 S.W.3d 570 (Tex. App.—Houston [1st Dist.] 2016), reh'g overruled (Jan. 10, 2017)

This is a jail/suicide case under the Texas Tort Claims Act ("TTCA") where the First District Court of Appeals affirmed the granting of the City's dispositive motion.

Richard Hollas Rogge was arrested for driving while intoxicated and placed in a holding cell at the City of Richmond Police Department. He was left alone for three hours. Rogge committed suicide by using his shirt to hang himself from a metal grate covering an air vent. Rogge's parents sued alleging the use or condition of the metal crate was an unreasonable risk of harm and/or a premise defect. The City filed a summary judgment motion which the trial court granted. The Rogges appealed.

The Rogges assert (1) their son's death was caused by the City's use of tangible personal property, (2) his death was caused by a condition of tangible personal property, (3) the discretionary-function exception to the waiver of immunity did not apply, and (4) their cause of action for a premises defect was not addressed by the motion for summary judgment. The majority opinion analyzed the facts alleged and determined that the heart of the claims are all premise defect claims, not general negligent or negligent use of tangible property claims. It held a claim cannot be both a premises-defect claim and also a claim relating to a condition or use of tangible property, so it determined the facts only allege a premise defect. A governmental unit "does not 'use' tangible personal property . . . within the meaning of section 101.021(2) by merely providing, furnishing, or allowing . . . access to it." [This is the primary issue taken by the dissent noting that the majority repled the claims for the Rogges instead of ruling based on the wording in their actual pleadings.] When waiver of immunity is premised on a condition of property, "there must be a nexus between the condition of the property and the injury." There is no evidence that the metal grating was inherently dangerous in its intended use as a cover for the air vent. None of the jurisdictional facts show that the condition of the grate actually caused the suicide. Finally, the court notes, in response to the dissent, that the Rogges already had the opportunity to amend and cure any defects. Therefore, the summary judgment was properly granted.

The dissent's seventeen-page opinion first complains the majority reclassified the case as a premise defect case when it should not have. Additionally, he would hold the Rogges properly pled a premise defect case anyway.

Since trooper entitled to official immunity in car accident case, DPS also immune from care accident says Austin Court of Appeals. *Texas Department of Public Safety v. Anisty Mirasol,* 03-15-00300-CV, 2016 WL 5770255 (Tex. App.—Austin Sept. 29, 2016, no pet.)

The Texas Department of Public Safety ("DPS") appeals from the trial court's order denying its plea to the jurisdiction in a vehicle collision case with a DPS officer under the Texas Tort Claims Act ("TTCA").

DPS Trooper Goodson spotted a pickup truck without a front license plate and attempted a traffic stop. After the pickup pulled into a parking lot, Trooper Goodson attempted a left turn to do the same. Mirasol's vehicle collided with the rear passenger door of Trooper Goodson's patrol car while in mid-turn. Mirasol sued DPS under the TTCA. DPS filed a plea to the jurisdiction and

summary judgment motion and attacked the DPS dash-camera video and the accident report. DPS argued the it was immune because Trooper Goodson retained official immunity for his action. The trial court denied the plea and DPS appealed.

The first and third requirements for official immunity are whether Trooper Goodson was (1) performing a discretionary act (2) within the scope of his authority. An on-duty officer in his squad car pursuing a suspect is performing a discretionary duty within the scope of his authority. The fact that the specific act that forms the basis of the suit may have been negligent does not mean that an officer acted outside the scope of his authority. The evidence established that when the accident occurred, Trooper Goodson was on duty in his DPS-issued patrol car, pursing a suspect in a pickup truck for the purpose of making a traffic stop to enforce a traffic regulation so met these requirements. Next the court examined the officer's objective good faith. An officer acts in good faith if "a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit." The court analyzed the "need" requirement and "risk" requirements in detail. Trooper Goodson testified he was unsure if the driver was going to pull over or "flee or bail" and he explained his considerations in making the turn when he did. In assessing the risks, he described the clear weather, dry pavement, light traffic, lack of pedestrian traffic, daylight conditions, unobstructed view, low-speed pursuit, his belief that it was clear for him to make the turn, and his subsequent realization that Mirasol was traveling "too fast." The court held Trooper Goodson conclusively established that a reasonable officer, under the same or similar circumstances, could have balanced the need and risk as he did and was entitled to official immunity. As such, the trial court should have granted the plea.

City immune from delay in zoning approval due to City Attorney's mistaken understanding of municipal boundary line. *City of Floresville, et al. v. Starnes Investment Group, LLC,* 502 S.W.3d 859 (Tex. App.—San Antonio 2016, no pet.)

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a case where a city employee mistakenly informed a property developer they were outside city limits. The San Antonio Court of Appeals reversed the denial and dismissed the claims.

Starnes Investment Group, LLC ("Starnes") began looking at property to develop as a commercial recreational vehicle park. Starnes filed a rezoning application to allow for the RV park. The City Attorney advised the property was outside of the City limits and not subject to zoning restrictions. However, after Starnes purchased the property and the City completed a map digitization initiative, it discovered the property was partially inside and partially outside of the City limits. The City ultimately approved a zoning change application to allow the RV park. However, Starnes still sued. The premise of Starnes's lawsuit is that it was harmed by the City's delay in approving its zoning application and delay in providing water and sewage due to the misunderstanding. The City filed a plea to the jurisdiction which the trial court denied. The City appealed.

The first issue the court resolved was procedurally, the trial court granted the City's special exceptions and denied the plea in the same order. While Starnes filed an amended petition, it did so after the denial of the plea. However, since the plea is jurisdictional, the court considers all of the matters during the appeal, including those which were not before the trial court at the time of the original order. Next, a governmental entity does not have immunity from a valid takings claim. In a takings case, "the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." A taking cannot rest on the mere negligence of the government. Moreover, "[w]hen damage is merely the accidental result of the government's intentional act, there is no public benefit and the property cannot be said to have been taken or damaged for *public use*." Starnes's amended petition alleges no facts that the information was the result of

anything more than either a mistake or negligence on the City Attorney's part. As a result, there is no takings claim. Next, to state a valid due process or due course of law claim, a plaintiff must first allege the existence of a protected right. Starnes's zoning application merely sought a governmental benefit to which it was not already entitled. As such, Starnes only had an expectation of the governmental benefit which is not a protected property right. To assert an equal protection claim, the deprived party must establish two elements: (1) that it was treated differently than other similarly-situated parties; and (2) it was treated differently without a reasonable basis. Other than a conclusory statement that it was treated differently from others similarly situated, Starnes failed to allege any facts describing similarly situated parties. As a result, there is no equal protection violation. Chapter 245 of the Texas Local Government Code (often referred to as a vested rights/grandfather statute) creates a narrow exception enforcing changing regulations stating, after receiving a development application or plan, a regulatory agency changes its land-use regulations, the agency cannot enforce such a change. Starnes does not point to any change in the City's existing "orders, regulations, ordinances, rules, expiration dates, or other properly adopted requirements" that occurred after Starnes filed its zoning application. The property was always partially in and partially outside of the City limits. An employee's mistaken belief of the location of the boundary line is not a change in adopted regulation. Additionally, Chapter 245 is enforceable only through mandamus, injunctive or declaratory relief, none of which Starnes sought. Finally, Starnes had the opportunity to, and did in fact, amend its pleadings in the trial court after the City filed its special exceptions. The court need not provide any further opportunity to amend. The court reversed and rendered in favor of the City.

County immune from accident due to gap in cattle guard on county road says San Antonio Court of Appeals. *Joseph Gonzalez v. Bandera County,* 04-16-00142-CV, 2016 WL 5172654 (Tex. App.—San Antonio Sept. 21, 2016, no pet.) This is an appeal from the granting of the County's plea to the jurisdiction based on a single vehicle accident. The San Antonio Court of Appeals affirmed the granting of the plea.

Gonzalez was injured while operating his motorcycle and alleges that as he crossed a cattle guard, he "lost control of his motorcycle and violently crashed." Bandera County was responsible for maintaining the cattle guard. Gonzalez alleged the cattle guard posed an unreasonably dangerous risk of harm because an "unreasonably dangerous drop" exists when transitioning from the paved road to the cattle guard. In addition, Gonzalez alleged "the metal bars of the cattle guard were not welded together correctly resulting in a gap of one to three inches wide with sharp edges being exposed." Gonzalez sued. The County filed a plea to the jurisdiction which the trial court granted. Gonzalez appealed.

The court first held the conditioned alleged, even if true, is not a special defect. The Texas Supreme Court has held a two-inch drop-off is "not in the same kind or class as an excavation or obstruction," noting "there is nothing unusually dangerous about a slight drop-off between traffic lanes in the roadway." Further, the court provided photos within the opinion of the "gaps" between metal bars and held they occurred only in the center of the guard and outside the normal path of traffic. As a result, the gaps do not constitute a special defect. As to the premise defect claims, the County established it did not have actual knowledge of any dangerous condition. The County presented affidavit testimony that no reports of problems with the guard were reported and no accidents involving the guard have ever occurred at that location. In addition, the fact that a cattle guard had been repaired on three dates in 2007, two dates in 2008, and two dates in 2012 is no evidence that Bandera County had actual knowledge there were gaps in the cattle guard on January 20, 2013, the day of Gonzalez's accident. The possibility that a dangerous condition involving the cattle guards could develop over time is insufficient to show actual knowledge. As a result, the plea was properly granted.

City waived immunity in breach of contract case for solid waste disposal services. *City of*

Rio Grande City, et al. v. BFI Waste Services of Texas, LP d/b/a Allied Waste Services of Rio Grande Valley, 511 S.W.3d 300 (Tex. App.—San Antonio 2016, no pet.)

This is an appeal from the denial of a plea to the jurisdiction regarding a breach of contract claim arising from a solid waste disposal contract. The court affirmed in part and reversed in part.

In 2011, Allied entered into a contract with the City to be the exclusive provider of solid waste disposal services within the City's limits through September 2018. In April 2015, the City notified Allied that it had failed to perform its obligations under the contract and also improperly billed the City for services Allied did not perform. According to the City, when Allied failed to cure the breach it terminated the contract. Allied contracted with Grande to take over solid waste disposal. Allied sued the City and Grande. Allied obtained a temporary restraining order prohibiting the City and its agents from taking actions inconsistent with Allied's contract rights. The City counterclaimed, then removed the case to federal court. While the case was removed the City passed a resolution terminating the contract in an attempt to correct an alleged Texas Open Meetings Act problem. The federal court then remanded the case, sanctioned the City for improper removal, then the state trial court signed a second TRO. The City filed a plea which the trial court denied. The City filed this appeal as to the plea and TRO.

The court first held that Grande is not entitled to derivative governmental immunity. In *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 124 (Tex. 2015) the Texas Supreme Court noted governmental immunity was designed to guard against "unforeseen expenditures" associated with the government defending lawsuits and paying judgments "that could hamper government functions" by diverting funds from their allocated purposes. Immunizing a private contractor does not further this purpose. Further, the allegations against Grande interfering with an existing contract occurred prior to it obtaining the contract with the City, so immunity still would not apply for acts within that time period. Next the court held the allegations against the officials, in their official capacity, were sufficient to trigger an *ultra vires* claim.

As to the City, in order for the trial court to have jurisdiction over a contract claim asserted against a local governmental entity, the plaintiff must establish "a demand for certain kinds of damages" as limited by §271.153 of the Texas Local Government Code. Allied requested the "balance due and owed" under the contract, which is recoverable under §271.153. Allied also requested additional damages, including actual and consequential damages, as well as pre- and post- judgment interest, costs of court, reasonable and necessary attorneys' fees, injunctive relief, and declaratory judgment. Some of these additional damages are not recoverable under §271.153. Allied responds that the City waived immunity from breach of contract damages by filing counterclaims. That argument only applies to an offset for claims which are germane or connected with the counterclaims. Allied's breach of contract claim and the City's breach of contract counterclaim arise from the same facts and controversy. As a result, the trial court has jurisdiction over the controversy. To the extent Allied requests declaratory judgment relief, Allied's claims do not fall within the narrow waiver of immunity since the validity of an ordinance is not being challenged. Next the court held the claims brought under the Texas Open Meetings Act were not moot even after the City moved to correct any alleged mistake in the notice at a subsequent meeting. Allied also alleged the City's actions were in violation of the contracts clause and Fourteenth Amendment of the United States Constitution. To prevent interference with its constitutional rights, Allied seeks only injunctive relief. Since the constitutional claim is only seeking injunctive relief and not monetary damages, it is not barred by immunity. [Comment: This seems contrary to the line of cases noting a party cannot disguise a claim for monetary damages in a contract through equitable claims.] The court found Allied alleged a due process violation based on a constitutional contract claim. However, Allied's claim the City abused the removal process is not the same facts and controversy as the City's counterclaims and does not fall under the Texas Tort Claims Act. Therefore, the declaratory judgment and abuse of

process claims should have been dismissed, but all other claims can properly go forward.

Homeowners properly pled a taking by flooding due to channel reconstruction and temporary embankments says El Paso Court of Appeals. *City of Socorro v Samuel Campos, et. al.* 510 S.W.3d 121 (Tex. App.—El Paso 2016, pet. denied)

This is a takings/flooding case where the El Paso Court of Appeals held the Plaintiffs properly pled a takings case.

The residents contend that the City of Socorro intentionally caused flooding by constructing a ditch, and later two embankments, that were intended to protect one subdivision (Valley Ridge) at the expense of their neighborhood (Patti Jo Neighborhood). In 2006 El Paso and it surrounding area suffered a historic rain event. To remedy the flooding in the Valley Ridge Subdivision, the City of Socorro in 2009 built a diversion channel designed to intercept water and mud coming down the Sparks Arroyo and redirect it towards another existing drainage channel. These channels would redirect the flow around the Valley Ridge Subdivision and deposit it onto a tract of land to the east. In 2010, the United States Army Corps of Engineers issued a report noting that Socorro's actions had diverted water from its original flow path. That same year, the El Paso Water Utilities, El Paso County, and the Texas Water Development Board released a master storm water plan that recognized Socorro's efforts were "intended to relocate the arroyo flow path." The storm water plan made detailed recommendations to address the risk of flooding to downstream communities caused by Socorro's actions, but the City did not implement them. In a three-day period in September 2013, the area received over six inches of rainfall. Socorro's diversion channel worked in the sense that the Valley Ridge subdivision was spared any flooding from the upstream direction, but the water and mud from the Spark's arroyo collected on the east side of Thunder Road to such an extent that the Valley Ridge subdivision was once again threatened with flooding. So the City created two temporary sand embankments to stop the flooding. Unfortunately, the redirection of water poured onto the Patti Jo Neighborhood, flooding the Plaintiffs' homes. Plaintiffs asserted both through the original 2009 diversion channel, and the 2013 Thunder Road embankments, Socorro purposely redirected the flow of water from the Valley Ridge subdivision towards the Patti Jo Neighborhood. They allege that the City of Socorro was "substantially certain" these actions would cause flooding and damage to their homes. The City filed a plea to the jurisdiction which the trial court denied.

A takings claim consists of three elements: (1) an intentional act by the government under its lawful authority, (2) resulting in a taking, damaging, or destruction of the plaintiff's property, and (3) for public use. The intent element requires those seeking redress to show that the government "intentionally took or damaged their property . . . or was substantially certain that would be the result." It is not enough that the act causing the harm is intentional; the governmental entity must know to a substantial certainty that the harm complained of would occur. Accordingly, a takings claim cannot rest on mere negligence. The court held that the mere possibility of future flooding would not rise to the level of a constitutional taking. However, the petition as a whole alleges that the diversion of water and mud from the 2009 ditch plus the funneling of that water across by the sand embankments is what extensively damaged their property. The pleadings allege the City was substantially certain the embankments combining of the diversion water from the channels would result in flooding of their homes. And while the court held the case law supports that a single flood event is not usually the basis of a taking, the court held multiple floods are not a requirement. As a result, the Plaintiffs properly pled that the City was substantially certain that the combined channel plus temporary embankments equates to an intentional taking. The court did note that such a determination was limited to analyzing the four corners of the pleadings only and should this case ever return on a factual record the court may determine a taking is not supported under the facts. But, from a pleadings standpoint, the Plaintiffs are permitted to go forward.

Court holds officer responding to emergency call was not reckless when he lost control of patrol vehicle and collided with oncoming car. *Norma Torres v. City of Corpus Christi,* 13-14-00506-CV, 2016 WL 4578392 (Tex. App.—Corpus Christi Sept. 1, 2016, no pet.)

This is a Texas Tort Claims Act ("TTCA") case involving a car accident with a police officer. The Thirteenth Court of Appeals affirmed the granting of the City's plea to the jurisdiction.

Corpus Christi police officer Robert Walker was responding to a fleeing stolen vehicle. He responded and activated his emergency lights and sirens. On his way to an intercept location in order to set up road spikes, he rounded an "S" curve in the road and lost control. Officer Walker admitted he was traveling faster than the posted speed limit. He explained that his police cruiser's brakes did not respond as he expected and he lost traction as he entered the curve. He slid sideways into oncoming traffic and Walker's and Torres' vehicles collided. Torres sued. The City filed a plea to the jurisdiction which was granted. Torres appealed.

The court first held that a TTCA claim may not be brought against the governmental entity when the claim arises from an employee responding to an emergency call or reacting to an emergency situation, unless the action was taken with conscious indifference or reckless disregard for the safety of others. This is an objective, not a subject standard. Officer Walker's subjective belief that he was or was not driving in a reasonable and prudent manner does not change the nature of the call to which he was responding. After analyzing the evidence and testimony, Torres was not able to dispute Walker was responding to an emergency call. Section 546.001(3) allows emergency vehicle operators to exceed a maximum speed limit as long as the operator does not endanger life or property. Torres offered no evidence showing Officer Walker's speed before he entered the curve and immediately before the accident. Moreover, Officer Walker testified that he did slow down once he entered the curve, though not enough to avoid entering Torres's lane. So he was not consciously indifferent to the situation. Officer Walker testified that he activated his vehicle's lights and sirens. He explained that he recognized his speed was too fast for the curve and attempted to slow the vehicle. The cruiser did not respond to Officer Walker's braking efforts as anticipated and he was unable to effectively control his vehicle. The accident report indicated that both vehicles drove away from the accident. Torres's airbag did not deploy as a result of the accident and she did not request an ambulance after the collision. There is no evidence or expert testimony estimating the speed of the vehicles prior to the collision based on the amount of damage each vehicle sustained. Given that Torres presented no evidence to create a fact issue as to what Walker did and why, there is no evidence of recklessness. As a result, the plea was properly granted.

Austin Court of Appeals holds OIG investigation is open to the public since it did not concern health care fraud. *Ken Paxton, Attorney General of the State of Texas v. Texas Department of State Health Services,* 500 S.W.3d 702 (Tex. App.—Austin 2016, no pet.)

This is a Public Information Act ("PIA") case where the Austin Court of Appeals reversed the granting of a summary judgment for the Department of State Health Services ("DSHS").

Iris, a Department employee, filed a complaint against Angel, another Department employee. The OIG investigated the complaint but found that the allegations of misconduct against Angel could not be substantiated. Both Iris and Angel filed open-records. DSHS sought to withhold information collected by the Office of the Inspector General (OIG) during the investigation under a Government Code provision that makes information and materials "compiled by the [OIG] in connection with an audit or investigation" confidential and not subject to disclosure under the PIA. The AG noted this provision is found in the OIG's enabling provisions regarding fraud and abuse and the underlying OIG investigation did not concern "Medicaid or other health and human services fraud, abuse, or overcharges." After opposing summary judgments, the trial court ruled for DSHS. The AG appealed.

The Department maintains that, on its face, the text of §531.1021(g) places no limits on or requirements for the subject matter of an OIG audit or investigation to which confidentiality attaches. But such an interpretation fails when the provision is considered in the context of the OIG's enabling provisions. When considered in its proper context, the Legislature intended for confidentiality to extend only to those OIG audits and investigations concerning "fraud, waste, and abuse in the provision and delivery of all health and human services in the state." It does not apply to just any subject investigation. The Department also suggests that not protecting all OIG investigations would impair the OIG's ability to obtain sensitive information and carry out its investigative responsibilities, and that persons and companies would feel insecure in reporting to the OIG. However, information which does relate to fraud in health care services is still confidential. And the other difficulties described by the DSHS are no different than those experienced by all other governmental entities faced with public-information requests. The Legislature has determined that, unless the information requested is excepted from disclosure, governmental entities must release any such records. As a final point, the Department points out that previous Attorney General letter rulings construed section 531.1021(g) to grant confidentiality to all OIG audits and investigations regardless of the subject matter. Attorney General concedes that he has applied this section differently in the past but maintains that his position since 2012 has been that section 531.1021(g) does not apply unless it is a health service fraud or abuse situation. The court simply noted that its decision is based on the statutory language, not the AG's prior decisions. The court reversed the summary judgment for DSHS and rendered judgment for the AG.

Austin Court of Appeals holds parts of Texas Highway Beautification Act unconstitutional. *Auspro enterprises, LP v. Texas Department of Transportation*, 506 S.W.3d 688 (Tex. App.—Austin 2016, pet. filed)

In this case the Austin Court of Appeals held unconstitutional part of the Texas Highway Beautification Act ("Act") in light of the U.S. Supreme Court's decision last term in *Reed v Town of Gilbert*. It is a twenty-nine-page opinion.

Auspro Enterprises, LP, placed a sign supporting Ron Paul's 2012 presidential campaign on its property on State Highway 71 West in Bee Cave, Texas. Texas Department of Transportation ("TxDOT") sent a letter to Auspro explaining that its sign was "illegal" because all outdoor signs must be permitted and, although there is a specific exemption under Department rules for political signs, the exemption only allows political signs to be displayed 90 days before and 10 days after an election. After Auspro failed to remove the sign, the Department brought an enforcement action for injunctive relief and civil penalties. In response, Auspro asserted that the Act and TxDOT's implementing rules violate, both facially and as applied, Auspro's right to free speech under the U.S. and Texas constitutions. The trial court found for TxDOT and Auspro appealed.

The Austin Court of Appeals performed an analysis of the *Reed* case and determined it "refined its framework for analyzing 'content based' regulations of speech" and holding, "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus." This framework marks a significant departure from the content- neutrality analysis used by the Texas Supreme Court.

The government regulation of speech addressed in *Reed* was a sign ordinance that banned the display of outdoor signs in any part of the Town of Gilbert, Arizona without a permit. The ordinance included exemptions from the permit requirement for 23 different categories of signs including political speech signs and ideological signs. The Supreme Court, explained that a law can be content based in either of two ways: (1) by distinguishing speech by the topic discussed; and (2) where the government's purpose or justification for enacting the law depends on the underlying "idea or message expressed." "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."

Born from a mid-1960s initiative to clean up the nation's roads, the federal Highway Beautification Act of 1965 requires states to regulate "outdoor advertising" "in areas adjacent to the Interstate System" or risk losing ten percent of their federal highway funding. The Texas Legislature passed the Texas Highway Beautification Act in 1972 to comply with the federal act's mandate. Analyzing the Act's exemptions, the court held the Act was content based. Several of the exemptions are the same as those analyzed in *Reed*. The Act is therefore subject to a strict scrutiny analysis. To survive such an analysis TxDOT has to demonstrate that the Act's differentiation between types of signs furthers a compelling governmental interest and it is narrowly tailored to that end. The Department acknowledges that it cannot do this and the court agreed. Additionally, TxDOT's adopted rules regarding the exemptions likewise cannot withstand the holding in *Reed*. Finally, the court analyzed the problematic portions of the Act and invoke the Texas severability statute found in the Code Construction Act. Essentially the court found Subchapters B and C unconstitutional and carved out the remaining sections of the Act as being untouched by the opinion.

No waiver of immunity where County provided pain medication to pretrial detainee before hearing which allegedly caused detainee to misunderstand guilty plea. *Lloyd Landon Sorrow v. Harris County, Et Al,* 14-15-00571-CV, 2016 WL 4445037 (Tex. App.—Houston [14th Dist.] Aug. 23, 2016, pet. denied)

Sorrow was a pretrial detainee housed in the Harris County Jail. Sorrow asserts that during pre-trial detention he received medical treatment that included anti-psychotics and narcotics. He claims that he was given a narcotic just before a court date and that the medication kept him from understanding the consequences of pleading "guilty". Sorrow contends that as a result of his "guilty" plea, he was thrown out of the jail and forced to spend the night on the street. He asserts he was without his medication and suffered withdrawal symptoms including headaches, confusion, and sleeplessness. Sorrow sued Harris County and various departments and officials asserting cruel and unusual punishment, violations of Texas Health and Safety Code sections 611.006(a)(4), (a)(7), and (a)(11), 611.006(b), and 614.017(duty to disclose medical information), as well as his right to due process of law. The Harris County Defendants filed a motion for summary judgment which the trial court granted. Sorrow appealed.

The Plaintiff bore the burden of pleading facts demonstrating a waiver of immunity. Sorrow's argument the defendants waived their immunity defense is misplaced since immunity from suit cannot be waived. For §101.021(2) to waive sovereign immunity and trigger claims under the Health and Safety Code, a condition or use of tangible property must have proximately caused personal injury or death. Sorrow's complaint under §611.005 is that the Harris County Parties failed to disclose his medical records and the failure to disclose the records caused him to suffer injury. But that is not the use of tangible property but a failure to take action. So no waiver of immunity exists. The Defendant's claims of immunity are broad enough so that the defense automatically encompasses the newly added claims by Sorrow without the need for the Defendants to amend their answer. Finally, findings of fact and conclusions of law have no place in summary judgment orders so the court did not error in refusing to issue any. As a result, the order granting summary judgment is affirmed.

Austin Court holds redacted video of traffic stop subject to release under PIA. *Randy Travis v. Texas Department of Public Safety and the Texas Attorney General,* 03-14-00314-CV, 2016 WL 4429931 (Tex. App.—Austin Aug. 18, 2016, pet. denied)

This is a Public Information Act case where the Austin Court of Appeals affirmed the release of police video information.

Randy Travis seeks to withhold from public disclosure a redacted version of the dashboard recording of his August 2012 arrest for driving while intoxicated. DPS received a PIA request and sought an opinion to withhold part or all of the recording (along with other documents). The Attorney General determined that after certain redactions were made, the recording was subject to release. Travis sued to prevent the release. The

trial court granted summary judgment for the Attorney General. Travis appealed.

First the court rejected Travis' argument that video have a greater ability to harm so a different standard should be applied to their release.Next, Travis argued that since the state agreed in the protective order in his criminal case that Travis had a common law privacy interest preventing the release of the video, it was estopped from arguing differently now. The court noted the interest in the redacted video in the PIA case is now different than the unredacted version in the criminal matter. Further, since the protective order in the criminal case was dissolved, there is not final judgment on that subject which would prevent an adjudication in the PIA matter. Next, Travis put himself into public view by driving naked while drunk. Anyone on the road could have seen him, so he has no expectation of privacy in the video. Finally, nothing in the redacted version indicates any medical or prescription information. So, since the required release is only for the redacted version, no privacy issues remain to prohibit its release. The summary judgment order is affirmed.

City plastic bag ban ordinance held preempted by Solid Waste Disposal Act. *Laredo Merchants Association v. City of Laredo, Texas,* 04-15-00610-CV, 2016 WL 4376627 (Tex. App.—San Antonio Aug. 17, 2016, pet. filed)

This is a statutory construction case in the San Antonio Court of Appeals determined §361.0961 of the Solid Waste Disposal Act ("the Act") preempts a checkout bag ordinance enacted by the City of Laredo.

The City implemented a strategic plan aimed at creating a "trash-free city." As part of this strategic plan, the City adopted the Ordinance designed to "reduce litter from discarded plastic bags," and makes it unlawful for commercial establishments to provide checkout bags to customers. Merchants filed suit against the City, seeking declaratory and injunctive relief. The trial court granted the City's motion for summary judgment and the Merchants appealed.

The Act governs the management and control of solid waste materials. Section 361.0961 of the Act states a local government may not adopt an ordinance that "prohibit[s] or restrict[s], for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law." The court held the language of §361.0961 of the Act unmistakably expresses the Legislature's desire to preempt any such ordinance. Under the rules of statutory construction, a plastic bag is a "container" for purposes of the Act. After analyzing the ordinance, the court held it was enacted for the purposes of solid waste management. Therefore, the ordinance is preempted. The City's summary judgment was reversed and judgment is rendered for the Merchants. The case is remanded for a determination of attorney's fees.

City immune from suit for reverter given language of deed says 4th Court of Appeals. *The City of Laredo v. Northtown Development, Inc. and Gateway Centennial Development, Co.,* 04-15-00736-CV, 2016 WL 4211825 (Tex. App.—San Antonio Aug. 10, 2016, pet. denied)

This is a takings case based on an alleged reverter in public property where the Fourth Court of Appeals reversed the denial of the City's plea to the jurisdiction and dismissed the case.

Northtown Development, Inc. and Gateway Centennial Development Co. ("Northtown") conveyed land to a utility district to build a wastewater treatment plan. It contained a reverter that if the property was ever stopped being used for a public purpose, the property would revert back to Northtown. The utility district was eventually annexed by the City which assumed the waste water treatment plant and the property with the reverter. By 2011, the City had constructed a new wastewater treatment plant on the Property. The original plant was built on the western side of the Property, while the new plant was built on the eastern side. Northtown took the position the City had abandoned the old plant on the western side which therefore reverted back to Northtown. The City asserted it had a force main, transmission lines, and other facilities still on the western side, it has plans to build a bigger plant by 2030 on the western side to accommodate growth as well as the fact the reverter language was only triggered if the entire parcel was

abandoned. Northtown sued for declaratory judgment and for a taking under the Texas Constitution. The City filed a plea to the jurisdiction which was denied. The City appealed.

The court first held Northtown's declaratory judgment claim was nothing more than a recasting of its takings claim. A plaintiff cannot circumvent immunity by recasting a claim for monetary value as a declaratory judgment. Because Northtown's sole purpose for obtaining a declaration that the possibility of reverter in the deed was triggered was to obtain a money judgment, the City's immunity is not waived. Next, the court focused on only one of four arguments made by the City – the fact the reverter language is only triggered by complete abandonment of the property. The court analyzed the language within the deed carefully. Reading the plain language of the deed, the possibility of reverter addresses the use of the "tract" of land and upon the expiration of the use as to the "tract" of land, the determinable fee terminates and "title to the entirety" of the "tract" reverts to Northtown. The court held the deed only provides for a possibility of reverter of the "entirety" of the Property in the event none of the Property is used for purposes of operating a wastewater treatment plant or public purpose. Since it is undisputed the eastern portion of the property operates the new plant, Northtown's takings claim fails as a matter of law. The trial court should have granted the plea. The order is reversed and the court rendered judgment for the City.

Neither appraisal district nor religious organization established entitlement to MSJ on tax exemption question regarding elderly housing, so full case remanded says 1st Court of Appeals. *National Church Residences of Alief, TX v. Harris County Appraisal District,* 01-15-00900-CV, 2016 WL 4199148 (Tex. App.—Houston [1st Dist.] Aug. 9, 2016, no pet.)

This is a tax exemption case where the First District Court of Appeals reversed the trial court's order denying a religious organization's exemption from taxation because it helped senior citizens with their housing as part of a federally-subsidized housing program.

This is a 28-page opinion, so the summary is a bit long. National Church Residences ("NCR") is a non-profit 501(c)(3) which owns a 62-unit apartment complex. NCR obtained financing from the Department of Housing and Urban Development ("HUD") to develop the Property into low-income rental housing for either elderly or disabled persons. Pursuant to the program, a tenant would pay a portion of the monthly rent, calculated under HUD's formulas depending on the tenant's income, and HUD would pay the remainder. NCR had a published eviction policy, providing that, if a tenant fails to pay his non-subsidized portion of the rent they could be evicted. NCR applied for an ad valorem exemption from taxation. HCAD took the position that NCR was not providing its residents with housing or other services without regard to the residents' ability to pay because tenants were required to pay some rent and security deposits. NCR filed suit in district court, seeking judicial review of HCAD's denial of its request for a property-tax exemption. The trial court granted HCAD's motion for summary judgment, denied NCR's summary judgment and NCR appealed.

Amarillo Court of Appeals overrules AG opinion and holds civil service video examinations are excepted from public disclosure under collective bargaining agreement. *Hilburn v. City of Houston*, 07-15-00158-CV, 2016 WL 269164 (Tex. App.—Amarillo Jan. 21, 2016), *reh'g overruled* (Mar. 23, 2016) (mem. op.).

This is a Public Information Act ("PIA") case involving promotional examination documentation.

The City conducted the Houston Fire Department Senior Captain examination. Included within this examination, for the first time, were two new exercises: the Subordinate/Organizational Problem Exercise (SP) and the Oral Tactical Exercise (OT). The SP and OT exercises were video recorded and reviewed by anonymous assessors. The City received a PIA request for various information, including the SP and OT videos. After going through the administrative process, the AG determined some of the testing information was subject to release. The City filed suit under PIA to withhold the information.

Hilburn intervened. The City and Hilburn filed opposing summary judgments. The trial court granted the City's motion and denied Hilburn's.

The court first determined the City complied with Tex. Gov't Code §552.3221 allowing the filing of responsive documents *in cameria*. It also noted that such filing is permissive, not mandatory, so failing to follow this provision does not equate to a waiver of arguments. The court then determined the City properly raised §552.101 exception and did not waive any arguments. Tex. Loc. Gov't Code §174.006 states the City's collective bargaining agreement supersedes the civil service statute. The City's collective bargaining agreement specifically noted that video exams were permitted, therefore Tex. Loc. Gov't Code §143.032 (which makes it a criminal offense to knowingly or intentionally reveal part of a promotional examination) was properly raised. The court then held that properly raising the exceptions does not automatically equate to entitlement. The court then held that even though the AG determined the video portions were not a "written" exam entitled to protection, the record clearly indicates video exams were intended to be confidential under the collective bargaining agreement. Further, §552.122 makes test questions developed by a licensing agency excepted. However, the assessor's names do not fall under any of the designated exceptions to disclosure, so neither do the rating forms. So, in the end, the questions and videos were excepted, the rating forms of anonymous assessors were not.