RECENT CASE UPDATE

By: Ryan Henry
Law Offices of Ryan Henry, PLLC
1380 Pantheon Way, Suite 110
San Antonio, Texas 78232
Phone:(210) 257-6357
Fax: (210)569-6494
Ryan.henry@rshlawfirm.com

Ryan Scott Henry
Law Offices of Ryan Henry, PLLC
1380 Pantheon Way, Suite 110
San Antonio, Texas 78232
(210)257-6357
Fax: (210) 569-6494
Ryan.henry@rshlawfirm.com
Website: rshlawfirm.com

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 JP 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 work. In 2012, Ryan started the Law Offices of Ryan Henry, PLLC. In June 2016, and again in 2017, Ryan was listed as one of the best lawyers practicing municipal law in the San Antonio area by S.A. Scene Magazine. Ryan is also on the board for the State Bar of Texas - Government Law Council.

Supremes:

U.S. Supreme Court holds statutory deadlines are jurisdictional, court rule deadlines are not and may be waived

Hamer v Neighborhood Housing Services of Chicago, 138 S.Ct. 13 (2017).

This is an employment dispute, but the key point before the U.S. Supreme Court was the jurisdictional aspects of the timing for certain deadlines.

Hamer filed an age discrimination suit against her former employer, the Neighborhood Housing Services of Chicago ("NHSC"). The trial court granted NHSC's motion for summary judgment and entered final judgment on September 14, 2015. Hamer's notice of appeal was due, pursuant to the Federal Rules of Appellate Procedure, by October 14, 2015. Hamer's attorneys filed for a 60-day extension but also filed for withdrawal which the trial court granted. Hamer filed an appeal on December 11, 2015, which should have been timely under the extension. However, the Court of Appeals, on its own, questioned its jurisdiction and timeliness of the appeal. At this point the NHSC chimed in with an objection to the timeliness of the notice of appeal, arguing the court could not extend jurisdiction as such extensions, by Rule, were applicable for only 30 days, not 60. Concluding that it lacked jurisdiction to reach the merits, the Court of Appeals dismissed Hamer's appeal. Hamer appealed, and the U.S. Supreme Court granted review.

Section 2107 of Title 28 of the U. S. Code, allowed extensions of the time to file a notice of appeal, not exceeding 30 days, for the lack of notice of the entry of judgment. The U.S. Code does not address the situation, as here, a party has notice of the judgment. But Federal Rule of Appellate Procedure 4(a)(5)(C) does prescribe a limit of 30 days. Rule 4(a)(5)(C) limits extensions of time to file a notice of appeal in all circumstances, not just in cases in which the prospective appellant lacks notice of the entry of judgment. However, the Court of Appeals erred in applying the Rule as a jurisdictional bar equal to that of the statute. Only Congress may determine a lower federal court's subject-matter jurisdiction. Failure to comply with a statutory jurisdictional time prescription, deprives a court of adjudicatory authority over the case, necessitating dismissal. Conversely, claim-processing rules are less stern. If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited and do not implicate subject-matter jurisdiction. Stated another way, if the time limitation is in a statute, it can be jurisdictional. A time limit prescribed only in a court-made rule is not jurisdictional. Since NHSC did not object to the extensions when made, it waived the ability to complain about the extensions on appeal.

U.S. Supreme Court holds officers at scene were not required to belief innocent explanations of suspects given circumstances – probable cause therefore exists for arrests.

District of Columbia v. Wesby, 138 S.Ct. 577 (2018).

This is an unconstitutional false arrest case where the U.S. Supreme Court determined the officers on the scene had probable cause to make arrests of partygoers. The Court's collection of opinions totals twenty-five pages.

D.C. police officers responded to a complaint about noise at a vacant house. Upon arriving and entering, the house was in disarray and

nearly barren. When searching for the source of the noise officers discovered a makeshift strip club with several partygoers and strippers. All pointed to someone named "Peaches" who allegedly gave them permission to use the home. After investigating and contacting Peaches, the officers discovered she had no authority to grant access to the home and the true owner did not give permission. The officers arrested the partygoers for illegal entry. After the charges were eventually dropped, the partygoers sued the officers and D.C. for false arrest. On cross-motions for summary judgment, the trial court awarded partial summary judgment to the partygoers, holding the officers lacked probable cause to arrest. Specifically, the charge required the partygoers to have knowledge they were illegally present. While Peaches may not have had authority to give, no evidence existed the partygoers knew that. The Court of Appeals affirmed the grant of the partygoers' summary judgment and denial of qualified immunity. In other words, the officers needed "some evidence" that the partygoers "knew or should have known they were entering against the will of the lawful owner." The Supreme Court granted review.

A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer's presence. Courts examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. Probable cause is "a fluid concept" that is "not readily, or even usefully, reduced to a neat set of legal rules." The Court went through a detailed review of what the officers knew and could reasonably infer and the totality of the circumstances. The Court ultimately determined a reasonable officer could infer the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party. The U.S. Constitution does not require the officers to believe the partygoers given the circumstances surrounding them. Probable cause "does not require officers to rule out a suspect's innocent explanation for suspicious facts." The condition of the house and the conduct of the partygoers allowed the officers to make several "common-sense conclusions about human behavior." The Court provided an excellent analysis of the record and why each such specific fact helps support probable cause. In holding the contrary, the Court of Appeals engaged in an "excessively technical dissection" of the factors supporting probable cause. The Court had a definite issue with the Court of Appeals analysis which took each fact in isolation, instead of as one part of the totality of circumstances. A factor viewed in isolation is often more "readily susceptible to an innocent explanation" than one viewed as part of a totality. The Court even held that while its merit analysis ends the dispute and case, since the Court of Appeals incorrectly applied qualified immunity and the merits, the Court was going to analyze everything to correct the panel's error anyway. For those dealing with qualified immunity issues, it is a helpful and instructive analysis. The summary judgment for the partygoers is reversed.

Justice Sotomayor concurred, but wrote separately to question the majority's decision to slap the Court of Appeals by analyzing and ruling on matters beyond what is needed to resolve the case.

Justice Ginsburg concurred on the judgement only in part. She was concerned, the majority's opinion sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection. However, she agreed, under a

qualified immunity analysis, no "settled law" exists on the fact specific subject, so the officers were entitled to immunity.

U.S. Supreme Court holds officer entitled to qualified immunity after shooting woman walking towards roommate with a large knife

Kisela v. Hughes, 138 S.Ct. 1148 (2018)

This is an excessive force/qualified immunity case where the U.S. Supreme Court reversed the denial of the officer's qualified immunity.

Tucson police officer Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They viewed Hughes (who matched the description given on the radio) holding a large kitchen knife and advancing towards another woman standing nearby. After commanding Hughes to stop and her failing to comply, Kisela shot Hughes. she was treated for non-life-threatening injuries. The other woman, Chadwick, was Hughes' roommate. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots. Hughes sued Kisela for excessive force. Kisela moved for qualified immunity, which the trial court granted, but the 9th Circuit Court of Appeals reversed.

Excessive force is a fact specific analysis. Specificity is especially important as it is sometimes difficult for an officer to determine how the relevant legal doctrine will apply to the factual situation the officer confronts. In this case, Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911. After his commands to stop were not complied with, he defended Chadwick. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. The Court noted that "…not one of the decisions relied on by the Court of Appeals…supports denying Kisela qualified immunity." The panel's reliance on such prior opinions the way that it did "does not pass the straight-face test." As a result, Kisela was entitled to qualified immunity.

Justices Sotomayor and Ginsberg dissented, noting they felt Kisela acted too hastily. He did not observe Hughes commit any crimes and, other than walking, was not acting hostile towards Chadwick. Kisela did not wait for Hughes to register, much less respond to, the officers' rushed commands. Therefore, they felt the immunity should be denied and to let the facts play out as the facts may not be reasonable. They noted the Majority did not address reasonableness and simply analyzed whether the law was clearly established.

Texas Supreme Court rules court of appeals has interlocutory jurisdiction for denied MSJ even though plea was denied months earlier

City of Magnolia 4A Economic Development Corporation v. Smedley, 533 S.W.3d 297 (Tex. 2017).

This is a flooding case, however, the issue for the Supreme Court is a litigation procedural one. The Court of Appeals held that it did not have interlocutory jurisdiction over claims which were re-raised in a subsequent motion. However, the Texas Supreme Court held the intermediary courts have interlocutory jurisdiction separately for each motion filed.

The underlying claims are Smedley sued the City and the economic development corporations and contracted entities alleging that the defendants caused the Smedley Property to flood and retain standing water, causing damages after they facilitated a Chicken Express going onto the lot next to his. The City was dismissed based on its plea to the jurisdiction. However, the EDCs filed their own pleas/Rule 91a motions which were partially denied. The EDCs later filed summary judgment motions, which were likewise denied. When the EDCs attempted to take an interlocutory appeal of the denial of the MSJ, the court of appeals stated the grounds were identical to those raised in the pleas. Therefore, the court lacked interlocutory appeal jurisdiction under Tex. Civ. Prac. & Rem. Code §51.014. The EDCs filed a petition for review which the Supreme Court granted.

The crucial question is whether the twenty-day period to bring an interlocutory appeal ran from the trial court's denial of the plea/91a motion or the date of denial of the MSJ. See TEX. R. APP. P. 26.1(b) (providing that a timely interlocutory appeal must be filed within twenty days after the challenged order was signed). The court of appeals held the proper trigger date was the denial of the plea. The Texas Supreme Court, citing its own prior precedence, noted that if an amended plea was merely a motion to reconsider, then the twenty-day clock did not reset. *City of Houston v. Estate of Jones*, 388 S.W.3d 663 (Tex. 2012). The Court noted it was compelling that the original plea was a pleadings challenge only and the later motion was an evidence-based motion. The EDCs asserted that in light of the discovered evidence, there was no evidence as to the claims under the Water Code or Takings Clause, and that there was affirmative evidence the EDCs did not own or control the lot, preventing them from being able to provide injunctive relief. The Court cautioned that the procedural mechanisms, alone, is not dispositive and a court must analyze the substance of the motions. However, after doing so, the Court held the EDCs MSJ cannot be considered a mere motion for reconsideration of the initial plea. As the MSJ was a distinct motion from the plea, the court of appeals had interlocutory jurisdiction to hear the appeal. It remanded the case back to the court of appeals for analysis.

Texas Supreme Court holds a change in pleadings cannot defeat a §101.106 motion to dismiss

University of Texas Health Science Center of Houston v Rios, 542 S.W.3d 530 (Tex. 2017).

This is a Texas Tort Claims Act ("TTCA") case involving §101.106(e) where the Plaintiff sued both the entity and employees. The Texas Supreme Court held the employee's right to "immediate dismissal" is triggered upon the filing of the motion to dismiss, regardless of subsequent pleading amendments.

Dr. Rios was a first-year resident whose relationship with the University's faculty physicians became strained. Rios sued the University along with faculty physicians Drs. Fuentes, Patel, Smalling, and four others (the "Doctors"). Attorney General answered for the defendants and moved to dismiss the Doctors under §101.106(e). Before the court ruled, Rios amended his petition and dropped his tort claims against the University, leaving only the Doctors under tort claims. He kept his claims against the University for breach of contract. The trial court dismissed the contract claims but denied the motion as to the Doctors. The University (since it filed the motion), appealed on behalf of the Doctors. The Court of Appeals affirmed, and the

University sought a petition with the Texas Supreme Court.

The Court first held an entity's immunity is not waived for the acts of an independent contractor under the TTCA. Rios alleged as fact that the University acted "through" the Doctors in tortuously interfering with his employment relationships. To establish a waiver, such actions must be done by an "employee" else there is no waiver. Assuming Rios intended to plead a viable claim, his allegation was a judicial admission. Further, the factual allegations in the pleadings are those of employees, not contractors. The subjective intent of the individual acting is not relevant to the determination of whether they are employees; the connection between their job duties and allegedly tortious conduct is what controls and it is an objective analysis. As a result, Rios sued the Doctors as "employees" of the University, so §101.106(e) is applicable. Section 101.106 requires a plaintiff to decide on a theory of tort liability before suit is even filed. A plaintiff must "decide at the *outset*…" who to sue. The decision is "an irrevocable election at the time suit is filed." The Court recognized that under Texas Civil Rule of Procedure 65, an "amended" pleading replaces the original as if it did not exist. However, it is the filing of the motion to dismiss, not its specific content, which triggers the right to dismissal and Rule 65 does not nullify that. Additionally, when a rule of procedure (i.e. Rule 65) conflicts with a statute (§101.106) the statute controls. As a result, the Doctors were entitled to be dismissed at the moment the University filed its motion.

Texas Supreme Court holds leasing of lakefront property is proprietary for purposes of beach-of-contract claim

Wasson Interests, Ltd. vs. City of Jacksonville,17-0198, — S.W.3d. — (Tex. June 1, 2018)

In this companion case, the Court held the contract was entered into as part of the City's proprietary function and immunity is not implicated when the City leased lakefront property.

The City of Jacksonville constructed Lake Jacksonville in the late 1950s to serve as the City's primary source of water. In the 1990s, the Wassons assumed an existing 99-year lease of lakefront property owned by the City of Jacksonville. The lease specifies, among other things, that the property is to be used for residential purposes only. After living on the property for several years, the Wassons moved and conveyed their interest in the lease to Wasson Interests, Ltd. ("WIL"). WIL then began renting the property for terms of less than one week, which the City asserted violated the terms of the lease. This began a series of suits and opinions involving the parties. In its 2016 opinion the Texas Supreme Court held the proprietary/governmental dichotomy applied to contracts and remanded the case to the trial court. In this appeal, the question is whether the City's action of leasing the property was proprietary or governmental. The trial court held the actions were governmental and WIL appealed.

The City argued the function of developing and maintaining the lake was a governmental function. As a result, all aspects, including

the leasing of land to tenants, is governmental. However, the Court went through several prior cases and indicated it is the action committed at the time (i.e. the lease contract) which counts in determining the proprietary/governmental purpose. "We hold that, to determine whether governmental immunity applies to a breach-of-contract claim against a municipality, the proper inquiry is whether the municipality was engaged in a governmental or proprietary function when it entered the contract, not when it allegedly breached …Stated differently, the focus belongs on the nature of the contract, not the nature of the breach. If a municipality contracts in its proprietary capacity but later breaches that contract for governmental reasons, immunity does not apply. Conversely, if a municipality contracts in its governmental capacity but breaches that contract for proprietary reasons, immunity does apply." In making that determination, the court held "we consider whether (1) the City's act of entering into the leases was mandatory or discretionary, (2) the leases were intended to benefit the general public or the City's residents, (3) the City was acting on the State's behalf or its own behalf when it entered the leases, and (4) the City's act of entering into the leases was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary." After utilizing this test to the facts, the Court held the leasing of property is not essential or related to the waterworks operation. Merely because an activity "touches" upon a governmental function does not make it governmental in all things. As a result, it is proprietary in nature. The case is remanded for trial.

Texas Supreme Court holds county commissioner has no authority over plats, so is an improper party to suit by developer

W.A "Andy" Meyers, individually and in his capacity as Fort Bend County Commissioner v. JDC/Firethorne, LTD., a Texas limited partnership; from Fort Bend County; 14th Court of Appeals District (14-15-00860-cv, 514 sw3d 279, 12-22-16)

In this land development suit, the Texas Supreme Court held because an individual county commissioner lacks legal authority to receive, process, or present a completed plat application the developer failed to show a substantial likelihood that the injunction will remedy its alleged injury and therefore no jurisdiction exists.

Firethorne had a subdivision within Commissioner Meyer's precinct. The County's plat application and approval process for proposed subdivisions is governed by chapter 232 of the Texas Local Government Code and the Fort Bend County Regulations of Subdivisions. The County's regulations designated its county engineer as the official charged with receiving and processing plat applications. Firethorne contends certain plan applications were placed on "hold" in an effort to "extract a concession" that Firethorne that it must construct four lanes of West Firethorne Road, a road within the Firethorne development. Firethorne did not wish to construct the lanes. Firethorne filed this lawsuit seeking mandamus relief requiring Stolleis to "submit the completed plat application" and that failing to do so is an ultra vires act. Firethorne presented emails showing the engineer was holding the application based on Meyer's instructions. Firethorne sought an injunction to prevent the County from interfering with Firethorne's construction. Meyers filed a plea to the jurisdiction which was denied. The trial court found Meyer injected himself into the process and therefore was an essential part and subject to suit. The court of appeals affirmed.

The Texas Supreme Court held Meyer's arguments are actually challenges to Firethorne's standing, which Firethorne disguised as an ultra vires claim. Under a standing analysis, the claims asserted must satisfy the redressability requirement of the Texas Constitution. The County's Regulations of Subdivisions designate the county engineer as the sole county official responsible for receiving all documentation and information that must be submitted with the plat application. A sole commissioner has no authority to receive, process, or present a plat to the collective body. Meyer also has no obligation or duty to do so. A sole commissioner also has no authority to fire the engineer. When a plaintiff seeks an injunction, which cannot possibly remedy their situation, the plaintiff has failed to establish standing. Meyer filed the plea, but Firethorne also sought relief from the engineer and the rest of the commissioner's court which are not part of the appeal. If Firethorne received relief from the other defendants no relief from Meyer is possible. If Firethorne does not receive relief from the other defendants, relief as to Meyer would not remedy its situation. The argument that Meyer has some influence over the engineer is a "political reality" but is not a basis for suit. As a result, as to Meyer, no standing exists to sue him in his official capacity.

Texas Supreme Court holds City plastic bag ban preempted under the Solid Waste Disposal Act

City of Laredo v Laredo Merchants Association, 16-0748, — S.W.3d. – (Tex. June 22, 2018)

The Texas Supreme Court held the City's plastic/paper trash bag ban is preempted.

As part of a strategic plan to create a "trash-free" city, the City of Laredo adopted an ordinance to reduce litter from one-time-use plastic and paper bags. The Ordinance makes it unlawful for any "commercial establishment" to provide or sell certain plastic or paper "checkout bags" to customers. The Laredo Merchants Association (the Merchants) sued the City to declare the ordinance preempted by state law. The Solid Waste Disposal Act, specifically Tex. Health & Safety Code §361.0961, precludes a local government from prohibiting or restricting "the sale or use of a container or package" if the restraint is for "solid waste management purposes" not otherwise authorized by state law. The trial court granted the City's summary judgment motion, but a divided court of appeals reversed and rendered judgment for the Merchants. The City appealed.

A statutory limitation of local laws may be express or implied, but the Legislature's intent to impose the limitation "must 'appear with unmistakable clarity.'" The Solid Waste Disposal Act's policy is to reduce municipal waste to the extent feasible. The Act's preemption of local control is narrow and specific, applying to ordinances that "prohibit or restrict, [1] for solid waste management purposes, [2] the sale or use of a container or package [3] in a manner not authorized by state law". The court held "solid waste management" refers to institutional controls imposed at any point in the solid waste stream, from generation of solid waste to disposal. The definition includes the systematic control of the generation of solid waste. The City's argument the bags were not solid waste under the Act's definition because they had not yet been discarded as waste at the point of regulation was rejected. Further, the Court held A single-use paper or plastic bag used to hold retail goods and commodities for transportation clearly falls within the ordinary meaning of "container". Under the

Act's immediate context, the words "container" and "package" are not accompanied by words modifying or restricting the terms. The Act is not concerned solely with discarded materials but also includes regulations applicable to the production, retail sale, and distribution of new consumer goods. Finally, the Court held the preemption provision applies to local regulation when the manner is not authorized by state law. Manner is how something can be done, not merely if it can be done. The Act removes a home-rule city's general power over solid waste but provides limited authority back in certain situations not applicable here. The City's Ordinance does not fall within a manner authorized by another state law. As a result, the Act preempts the City's ordinance.

Justice Guzmon concurred but wrote separately to emphasize the balance needed in such a situation. The City's Ordinance had a valid environmental purpose. "Improperly discarded plastics have become a scourge on the environment and an economic drain." Her opinion highlighted the damage caused by unchecked waste ranging from animals, to ranchers, to the agricultural industry. However, the City's Ordinance listed only a moderate form of impact and had a direct financial impact on the merchants and non-local vendors. She noted a lack of uniform state-wide regulations creates concern and negative impacts, so some preemption is understandable and necessary. In the end the balance of all competing interests is the purview of the legislative branch, not the judicial branch.

Texas Supreme Court holds county official removal statute is subject to Texas Citizens Participation Act and sovereign immunity is waived for attorney's fees of losing party

State of Texas ex Rel. George Darrell Best v Paul Reed Harper, 16-0647, — S.W.3d – (Tex. July 29, 2018).

This is a Texas Citizens Participation Act ("TPCA") case where the Texas Supreme Court held a suit to remove a county official from elected office under chapter 87 of the Texas Local Government Code (the removal statute) is a legal action under the TCPA. Sovereign immunity is also abrogated for certain types of attorney's fees under the TCPA. This is a 30-page opinion, so the summary is a bit long.

Paul Harper was elected to a position on the Somervell County Hospital District Board and allegedly tried to make good on his campaign promises or removing taxes and employees. In response, a county resident named George Best sought to remove Harper under the county removal statute. Best alleged that Harper violated the district's bylaws at a board meeting by moving to set the district's tax rate at zero. Best also alleged that Harper posted a blog that falsely accused the district's administrative employees of violating the law. Best argued these actions were enough to remove Harper for incompetency. The removal statute authorizes a citizen to file suit, but it also requires the county attorney to "represent the state" in any removal proceedings that take place. The Somervell county attorney opted to appear in this case as plaintiff on the state's behalf. The state adopted Best's allegations, and it added an allegation that Harper engaged in misconduct by violating the Texas Open Meetings Act by texting board members. Harper filed a motion to dismiss

the case under the TCPA asserting the removal statute impedes the exercise of the right to petition and right of free speech. After conducting an evidentiary hearing, the trial court denied Harper's motion to dismiss. Harper appealed. The court of appeals reversed, holding that the TCPA applies to the state's removal action and that the state failed to establish a prima facie case for removal. In the interim, Harper lost the last election and no longer sits on the board. The Texas Supreme Court granted the state's petition for review.

The Court first noted the Plaintiffs' claims are not moot. While Harper argues, mootness cannot be addressed because the record does not contain information he lost the election, a court must consider issues affecting its jurisdiction sua sponte. Here, the state filed a "status report" with the court of appeals that included an election canvass confirming that Harper lost his reelection bid. Harper does not dispute that he lost the election or that he no longer holds the position. The Court then analyzed and held the attorney's fees issues and sanctions issues still remain, so the case is not moot. However, the Court cautioned that such applies only if attorney's fees are ordered prior to the case being moot. The court of appeals ordered the trial court to award attorney's fees (since it is mandatory under the TCPA) prior to the election, so this particular case survives. And, since the attorney's fees are required by the TCPA to a prevailing party, the aspects of whether the TCPA applies remain live.

The State asserted a removal suit is not a "legal action" under the TCPA, because it is a specific statute seeking political relief which is controlling over the general TCPA. The term "legal action" is defined within the TCPA. Using rules of statutory construction, the Court held a "remedy" is another word for "relief" and the TCPA authorizes relief as a legal action. As a result, the TCPA applies. Further, the Court held the TCPA's dismissal provisions complement, rather than contradict, the removal statute. The rule that a specific provision controls over a general provision applies only when the statutes at issue are ambiguous or irreconcilable. The Court found no ambiguity or irreconcilable language after analysis.

Next the Court noted that the TCPA "does not apply to an enforcement action that is brought in the name of this state . . . by . . . a county attorney." However, the TCPA's purpose includes a very distinct intent to encourage participation in government to the maximum extent permitted by law. Enforcement action is not defined in the TCPA. Again, using rules of statutory construction, the Court held the term "enforcement action" refers to a governmental attempt to enforce a substantive legal prohibition against unlawful conduct. Under this definition, a removal petition is not an "enforcement action" by itself or in all cases. Instead it is a procedural device, and as such a party cannot initiate a removal action to enforce the removal statute itself. When a removal action has its basis in unlawful conduct, the "enforcement action" exemption renders the TCPA inapplicable. However, when it is not unlawful conduct, it is not an enforcement action. Incompetency and drunkenness are both a basis for removal under the removal statute, but neither is against the law. "Best's incompetency claims are a transparent retaliation against Harper's quixotic political beliefs. … Harper's detractors may disagree with his politics, but no law requires elected officials to support the status quo upon arriving in office. Best's removal petition was a pretext for forcing Harper to cease acting on the beliefs that won him his office in the first place." "We are not fooled. We doubt anyone else is. Harper's refusal to capitulate to Best's demands does not render

him incompetent." Even if a jury agreed that Harper was unfit for office, he would face no criminal or civil penalty other than removal itself. Therefore, Best's claims are not enforcement actions and the TCPA still applies.

However, the removal statute also allows removal for "official misconduct," which may include allegations or evidence that a public official has acted unlawfully. Best did not allege official misconduct against Harper, but the state did in the form of a Texas Open Meetings Act violation. This is sufficient to form the basis of an enforcement action. The Court held Harper may benefit from the TCPA's expedited-dismissal provisions for the grounds that Best's initial removal petition raised, but not for the state's additional ground.

The state then argued the attorney's award and remand were improper against it given its immunity. The Court held the state waived its immunity from liability as it did not raise it. The state only raised immunity from suit. The Court then went through a myriad of arguments back and forth regarding immunity from suit. Ultimately, the Court held "[b]ecause the state should not be suing to prevent its own citizens from participating in government—especially when it lacks even a prima facie case against them—and because when it does sue, it risks paying only attorney's fees (rather than damages or some other uncapped sum), abrogating the state's sovereign immunity in the TCPA context does not present any grave danger to the public fisc. … Because the state was not operating within sovereign immunity's bounds when it joined Best's suit, the TCPA allows Harper to recover costs against the state pursuant to the TCPA's terms."

The dissent argued the majority ignores the governing statute's language and undermines the Court's well-established sovereign-immunity precedent. The dissent asserts the removal statute's application of incompetence and drunkenness apply only to remove an officer from his official duties. A county officer's "official duties" are substantive duties imposed by statutory law and therefore the entire case is an enforcement action exempt under the TCPA. The dissent took great issue with the Court's abrogation of immunity from suit for attorney's fees.

Texas Supreme Court holds TTCA caps are cumulative, inclusive of independent contractors and their employees performing governmental functions

Fort Worth Transportation Authority v. Rodriquez, 61 Tex. Sup. Ct. J. 959 (Tex. April 27, 2018).

This is a statutory-construction case on the damages-cap and election-of-remedies under the Texas Tort Claims Act ("TTCA").

After Peterson, a pedestrian, was struck and killed by a public bus in Fort Worth, her daughter, Rodriguez, sued the Fort Worth Transportation Authority ("FWTA"), its two independent contractors (MTA and MTI), and the bus driver (Vaughn) under the TTCA. Rodriguez pled a single count of negligence against all defendants collectively. FWTA is a regional transportation authority, a governmental unit under the Transportation Code and performs governmental functions. Rodriguez asserted FWTA, MTA, and MTI were engaged in a joint venture and vicariously liable for each other's actions, but Vaughn is only employed by the independent contractor, so cannot take advantage of the election of remedies under §101.106 of the TTCA. The trial court denied Rodriguez's motion and granted summary judgment in favor of the Transit Defendants, ruling that

FWTA, MTI, and MTA should be treated as a single governmental unit under the TTCA, limiting Rodriguez's claim to a maximum recovery of $100,000. The court of appeals reversed in part, holding that FWTA, MTI, and MTA were separate entities—each subject to a separate $100,000 damages cap, for a total of $300,000—and that Vaughn, an employee of MTI, was not an employee of a governmental unit and therefore was subject to unlimited personal liability. The Texas Supreme Court granted the petition for review.

Texas Transportation Code §452.056(d) states an independent contractor of a transportation authority, while not a governmental entity, is liable for damages only to the extent that the authority or entity would be liable if the authority or entity itself were performing the function. The Court first analyzed the damage cap language and held the TTCA does not allow the imposition of liability above $100,000 for a single person. The fact that FWTA delegated its transportation-related governmental functions to independent contractors, as it is statutorily authorized to do, does not somehow expand the potential liability arising from those governmental functions. Next, the Court analyzed §452.056. Since an authority is only allowed to perform governmental functions but is allowed to contract for the performance of those functions under the statute, the contractor, by extension, is performing governmental functions. That does not grant the contractors immunity but does limit their liability in the performance of those functions. Likewise, if Vaughn had been employed directly by FWTA, she would be entitled to protection under the TTCA's election-of-remedies provision. That MTI provided Vaughn's services to FWTA makes no difference. She is permitted to take advantage of §101.106. Finally, the Court held the Defendants were not entitled to attorney's fees.

The dissent focused on the fact §452.056 did not to list independent contractors as governmental units. As a result, Justice Johnson believes that while the caps apply, they are not cumulative, and Rodriguez should be entitled to $100,000 from each defendant.

Texas Supreme Court holds TTCA caps are cumulative, inclusive of independent contractors and their employees performing governmental functions

Fort Worth Transportation Authority v. Rodriquez, No. 16-0542, 2018 WL 1976712 (Tex. April 27, 2018, pet. filed).

This is a statutory-construction case on the damages-cap and election-of-remedies under the Texas Tort Claims Act ("TTCA").

After Peterson, a pedestrian, was struck and killed by a public bus in Fort Worth, her daughter, Rodriguez, sued the Fort Worth Transportation Authority ("FWTA"), its two independent contractors (MTA and MTI), and the bus driver (Vaughn) under the TTCA. Rodriguez pled a single count of negligence against all defendants collectively. FWTA is a regional transportation authority, a governmental unit under the Transportation Code and performs governmental functions. Rodriguez asserted FWTA, MTA, and MTI were engaged in a joint venture and vicariously liable for each other's actions, but Vaughn is only employed by the independent contractor, so cannot take advantage of the election of remedies under §101.106 of the TTCA. The trial court denied Rodriguez's motion and granted summary judgment in favor of the Transit Defendants, ruling that FWTA, MTI, and MTA should be treated as a single governmental unit under the TTCA,

limiting Rodriguez's claim to a maximum recovery of $100,000. The court of appeals reversed in part, holding that FWTA, MTI, and MTA were separate entities—each subject to a separate $100,000 damages cap, for a total of $300,000—and that Vaughn, an employee of MTI, was not an employee of a governmental unit and therefore was subject to unlimited personal liability. (Summary found here). The Texas Supreme Court granted the petition for review.

Texas Transportation Code §452.056(d) states an independent contractor of a transportation authority, while not a governmental entity, is liable for damages only to the extent that the authority or entity would be liable if the authority or entity itself were performing the function. The Court first analyzed the damage cap language and held the TTCA does not allow the imposition of liability above $100,000 for a single person. The fact that FWTA delegated its transportation-related governmental functions to independent contractors, as it is statutorily authorized to do, does not somehow expand the potential liability arising from those governmental functions. Next, the Court analyzed §452.056. Since an authority is only allowed to perform governmental functions but is allowed to contract for the performance of those functions under the statute, the contractor, by extension, is performing governmental functions. That does not grant the contractors immunity but does limit their liability in the performance of those functions. Likewise, if Vaughn had been employed directly by FWTA, she would be entitled to protection under the TTCA's election-of-remedies provision. That MTI provided Vaughn's services to FWTA makes no difference. She is permitted to take advantage of §101.106. Finally, the Court held the Defendants were not entitled to attorney's fees.

The dissent focused on the fact §452.056 did not to list independent contractors as governmental units. As a result, Justice Johnson believes that while the caps apply, they are not cumulative, and Rodriguez should be entitled to $100,000 from each defendant.

Texas Supreme Court holds open enrollment charter schools not subject to Texas Whistleblower Act

Neighborhood Centers INC. v. Walker, No. 16-0897, 2018 WL 1770309 (Tex. April 13, 2018)

The Texas Supreme Court held that an open enrollment charter school is not subject to the Texas Whistleblower Act.

Neighborhood Centers is an open enrollment charter school which hired Doreatha Walker as a third-grade teacher. She had been on the job only a few months when she complained mold in her classroom was making her and the children sick. When the school did not respond the way she desired, she emailed her complaint to the Houston Health Department. She also wrote to the Texas Education Agency, asserting that the School had submitted falsified test scores to the Agency before Walker arrived. The next week, Neighborhood Centers terminated Walker. She filed a WBA claim against the non-profit which holds the TEA charter. The court of appeals ruled the WBA waived immunity for Walker's claims. The Supreme Court accepted the petition for discretionary review.

The Texas Whistleblower Act (the "WBA") prohibits a "local governmental entity", including a public-school district, from retaliating against an employee for reporting a violation of law by the employer. The Texas

Charter Schools Act (the "CSA") authorizes the Commissioner of Education to grant eligible entities—usually private, tax-exempt nonprofits—charters to operate open enrollment schools as "part of the public-school system of this state." Section 12.1056(a) of the CSA states "[i]n matters related to operation of an open-enrollment charter school, an open enrollment charter school or charter holder is immune from liability and suit to the same extent as a school district". Walker argued the WBA waived the school's immunity and since it was part of the public-school system, the WBA applied. The Court went through a historical listing of the WBA. It then went through the history of the CSA. Generally, open-enrollment charter schools are "subject to federal and state laws and rules governing public schools", but they are subject to the Education Code and rules adopted under it "only to the extent the applicability to an open-enrollment charter school . . . is specifically provided." This gives them greater flexibility in providing education. In 2015, the Legislature amended the CSA and added Section 12.1058(c) which states "[n]otwithstanding Subsection (a) or (b), an open-enrollment charter school operated by a tax-exempt entity . . . is not considered to be a political subdivision, local government, or local governmental entity unless the applicable statute specifically states that the statute applies to an open-enrollment charter school." As the WBA does not specifically apply to open enrollment charter schools, the fact a charter school is a governmental entity for other purposes is not relevant. The statutory sections listing charter schools as having the same immunity as a public-school district only means they have immunity from applicable claims, but the WBA is not applicable specifically to charters. The judgement was reversed and rendered.

Texas Supreme Court holds standards in same-sex discrimination cases are distinctly different than opposite-sex standards

Alamo Heights Independent School District v. Clark, No. 16–0244, 2018 WL 1692367 (Tex. April 6, 2018).

This is a workplace same-sex discrimination, harassment and retaliation case where the Texas Supreme Court held that while the actions complained of were vulgar, they were not motivated by an illegal purpose. Warning, this is a 66-page majority opinion. So, the summary is a bit long.

The Alamo Heights Independent School District ("AHISD") employed Catherine Clark as a coach. Clark asserts her fellow female coach, Monterrubio, began sexually harassing her by making continuous comments about her body. Clark filed a charge of discrimination with the EEOC. The principal placed Clark on an intervention plan. Monterrubio was transferred to another campus. However, Clark was ultimately terminated and filed suit. AHISD filed a plea to the jurisdiction which was denied. At the intermediate court of appeals, the panel held the high frequency of the non-severe comments nevertheless created a hostile environment centered around Clark's gender and affirmed. The Texas Supreme Court granted review.

The facts take up a large section of the opinion. However, the key factual points of note are that Monterrubio would often comment about Clark's breasts and appearance. Moterrubio would also comment about her own sex life to male and female employees, including sexual escapades involving three men in three nights. She would send vulgar cartoons intended to be humorous. The Court noted the multitude of

other events were not sexual in nature but were merely rude or crass. Monterrubio's behavior was the same whether it was addressed to a male, female, parent, teach or student. AHISD investigated Clark's complaints each time, either at the campus level or district level. At one point the district did transfer Monterrubio to a different campus. However, Clark continued to have personality conflicts with other employees and her performance was continuously documented as being low. AHISD eventually terminated Clark.

The Court went through a very detailed analysis of same-sex harassment standards under Title VII and the Texas Commission on Human Rights Act ("TCHRA"). Citing the seminal case of *Oncale v. Sundowner Offshore Services, Inc*., the U.S. Supreme Court held Title VII's protection against workplace discrimination "because of . . . sex" applies to harassment between members of the same gender. The Court recognized same-sex discrimination cases are more complicated because of their nature. In addition to sexual desire, the Court noted a same-sex case can be established by showing general hostility to a particular gender in the workplace or direct comparative evidence of treatment of both sexes. However, all of the methods require conduct to have more than offensive sexual connotations, but to be discriminatory <u>because of</u> the gender.

The Court stressed and restressed that the context of the workplace and the individual acts is critical to an analysis of the sexual desire method. Clark never alleged, and no evidence established, Monterrubio was homosexual and none of the contexts demonstrate any sexual desire towards Clark, so the sexual desire method was disposed of. Next the Court noted there was no evidence of a general hostility towards women. None of the record "even hints" that Monterrubio's behavior, characterized as mistreatment of men and women alike, evinces hostility towards women in the workplace. Finally, the Court noted there was no evidence of a comparative discrimination. The Court held comments about gender-specific anatomy, alone, does not create an inference of harassment. Clark made over 100 wide ranging complaints about Monterrubio and only a handful were about gender-specific anatomy. Focusing "only on gender-specific anatomy and ignoring motivation is legally unsound and is a misreading of *Oncale*." Regardless of how it might apply in opposite-sex cases, a standard that considers only the sex-specific nature of harassing conduct without regard to motivation is clearly wrong in same-sex cases. Motivation, informed by context, is the essential inquiry. Under the retaliation claim, the Court held that permitting a retaliation case, predicated on a but-for analysis, to proceed to trial when the prima facie case has been rebutted and no fact issue on causation exists "defies logic." To qualify as a protected activity, complaining of harassment is not enough. The complainer must show some indication gender is the motive. Therefore, none of Clark's internal complaints constitute protected activity. However, the EEOC complaint does qualify as protected. The TCHRA does not protect employees from all forms of retaliation, only those actions which are materially adverse. The only actions taken against Clark which qualified was placing her on an intervention plan and the eventual termination. However, Clark failed to establish causal link between either of these actions and her EEOC complaint. Eight months elapsed between the EEO charge and recommendation for termination. Such is too long in this situation. Further, nothing shows the stated reasons for Clark's termination were false. It is undisputed Clark failed to follow lesson plans, failed to maintain student grades properly and had low performance reviews.

An employer is not forbidden from addressing performance issues involving employees who have engaged in protected activity, including following through on known pre-existing issues. As the jurisdictional analysis for the plea requires a full analysis of the factual issues, and Clark failed to carry her burden, the plea should have been granted.

The Majority's opinion spends the last several pages responding to the dissent's analysis, calling the legal theories flawed and the listing of facts a distortion. The Court held the purported harassment is "repugnant and unacceptable in a civilized society. But we cannot step beyond the words of the statute…" Plaintiff's claims were therefore dismissed.

Texas Supreme Court holds Plaintiff not entitled to remand to try and amend jurisdictional defects

Harris County v Annab, No. 17-0329, 2018 WL 2168484 (Tex. May 11, 2018).

This is a Texas Tort Claims Act ("TTCA") case where the Texas Supreme Court addresses when a Plaintiff is entitled to remand and should be permitted to amend in order to plead a waiver of immunity.

Kenneth Caplan shot Lori Annab in a fit of road rage. Caplan was a Harris County deputy constable, but he was off duty. Despite the fact Caplan fired his personal firearm from his personal vehicle off duty, Annab sued Harris County, Caplan's employer, for the use of tangible personal property. The trial court granted the county's plea to the jurisdiction and dismissed the case. The court of appeals agreed but remanded the case to allow Annab to replead and conduct discovery. The County filed a petition for discretionary review which the Texas Supreme Court granted.

Annab alleges that the County used Caplan's firearm by authorizing Caplan to use or possess the firearm. This allegation fails as a matter of law to trigger the TTCA immunity waiver since merely making property available is not "use" for purposes of the TTCA. Further, no waiver exists under Annab's argument the County should not have hired or should have earlier fired Caplan due to his consistent disciplinary file. Additionally, the County did not make Caplan's private weapon available to him. Annab has not articulated how Caplan's right to possess his personal firearm on his personal time was dependent on the County's approval. If the party who raised the jurisdictional defense can show that "the pleadings or record . . . conclusively negate the existence of jurisdiction," or that the plaintiff did in fact have a "full and fair opportunity in the trial court to develop the record and amend the pleadings," or the plaintiff would be unable to show the existence of jurisdiction, then the case should be dismissed without a remand. Despite multiple opportunities in briefing and at oral argument to articulate a legal or factual theory under which Harris County's use of tangible personal property caused Annab's injuries, Annab's counsel could not do so. "Because no amount of future discovery or rephrasing of the allegations could properly invoke the Tort Claims Act's limited waiver of the county's immunity, remand serves no purpose." As a result, the court of appeals erred by ordering remains.

INTERMEDIARY COURTS

Federal:

U.S. 5th Circuit holds cities cannot use website service fee in calculating hotel occupancy taxes owed

City of San Antonio v Hotels.com L.P., 876 F.3d 717 (5th Cir. 2017).

This is a long and drawn out challenge by 173 municipalities as to the proper payment of hotel occupancy tax. For this appeal, the question was whether the service fee paid to an online hotel company ("OCT"), such as Travelocity, is included in the hotel occupancy tax calculation.

An OCT website allows a traveler to compare the rates for airlines, hotels, and rental-car companies, as well as request reservations. OCTs do not own, operate, or manage hotels; instead, they transmit information and payments between travelers and hotels. The hotel and the OCT enter into a contract by which the OTC agrees to display information about the hotel on the OCT's website, and the hotel agrees to provide reservations at a discounted room rate. Only the hotel can issue a reservation. When a traveler chooses to book a room through an OCT, it requests a reservation on the traveler's behalf. If the hotel chooses not to make a reservation available, the OCT cannot make the reservation. If the hotel issues the reservation, it does so in the traveler's name. The OCT retains its service fee as compensation for its online services by deciding the total amount the traveler pays when booking. The hotel occupancy tax allows a municipality to "impose a tax on a person who . . . pays for the use or possession or for the right to the use or possession of a room that is in a hotel." When a traveler books a hotel through an OCT, they pay a higher amount than the discounted hotel room due to the OCT service fee. The original suit was broader in that it included a claim for the tax, which was initially denied by the hotels and OCTs. A jury awarded millions to the cities in unpaid taxes, but the hotels and OCTs appealed.

Sitting in diversity, the U.S. 5th Circuit held it must follow state law on the issue. The 14th Court of Appeals previously determined the cost of occupancy [the scope of the tax base] is the amount for which three conditions are satisfied: (1) "the consideration at issue must have been paid or charged for the use or possession, or the right to use or possess, a hotel room"; (2) "the amount to be taxed must have been paid 'by the occupant of such room'", which includes "'through the means, work, or operations of' and 'in behalf of'"; and (3) "the amount to be taxed must have been paid 'to such hotel'". The rate paid by the OCT to the hotel and behalf of the customers qualifies, but the higher rate paid by the customer to the OCT (including the service fee) does not. OCTs have websites and provide information, they do not own, manage, or operate hotels. The service fee paid is for the providing of that information, not for the room. Because the only amounts at issue for the appeal were the differences between calculations of using the fee for tax base calculations and not using the fee, the trial court order is reversed, and judgment is rendered for the OCTs.

U.S. 5th Circuit holds disabled individual did not request accommodation from officers performing field sobriety test so cannot sue for disability discrimination

Windham v. Harris County, 875 F.3d 229 (5th Cir. 2017).

This is a §1983 suit where the U.S. 5th Circuit Court of Appeals affirmed the granting of the County and Deputy Sheriff's summary judgment motion.

Windham was arrested on suspicion of driving while impaired after he rear-ended another car. The other vehicle's driver reported Windham appeared to be under the influence of some form of drug or alcohol. The deputy sheriff observed Windham's eyes were bloodshot, that he appeared confused, and that he had not been aware that he had hit another car. Windham explained that he had taken a prescription painkiller at 3:00 a.m. and had been awake for twenty hours due to his condition of cervical stenosis (which causes his head to dip forward abnormally). He presented the deputy with a doctor's note listing the condition. The deputy subjected Windham to a field gaze nystagmus test (eye tracking). The deputy called a certified drug recognition expert, Deputy Matthew Dunn, to gauge Windham's impairment. Dunn concluded that Windham was insufficiently impaired to justify arrest and released him. The entire encounter lasted 90 minutes. Windham sued Deputy Pasket, Dunn, and the County. The trial court granted all the Defendants' summary judgment motions. Dunn appealed.

This is actually a Title II – ADA claim along with a §1983/4th Amendment seizure claim. In order to satisfy a Title II claim, Windham has to establish he was discriminated against "by reason of his disability." Windham attempts to satisfy the third prong on a theory of "failure to accommodate" which is expressly codified in Title I, not Title II. Under Title II, courts have recognized claims in the specific context of police officers who fail reasonably to accommodate the known limitations of disabled persons they detain. However, a critical component of a Title II claim for failure to accommodate is proof "the disability and its consequential limitations were known by the [entity providing public services]." Mere knowledge of the disability is not enough; the service provider must also have understood "the limitations [the plaintiff] experienced . . . as a result of that disability." Otherwise, it would be impossible for the provider to ascertain whether an accommodation is needed at all, much less identify an accommodation that would be reasonable under the circumstances. The court commented that it has not directly addressed what level of knowledge is required, however, in this case, Windham never directly requested an accommodation. His vague, generalized references as to whether he could do the test "… does not constitute the kind of clear and definite request for accommodations that would trigger the duty to accommodate under the ADA." Further, Windhem did not provide any evidence the deputies knew or should have known that Windham's neck condition was such that looking straight ahead would injure him, and that the deputies knew or should have known what accommodation he needed. Knowledge of a disability is different from knowledge of the resulting limitation. And it certainly is different from knowledge of the necessary accommodation. The doctor's note could not reasonably be found to have apprised the officers of Windham's limitation or a necessary accommodation. His disability was not "open, obvious, and apparent" and neither was the accommodation which would have to be provided.

As to the 4th Amendment search, an investigative stop needs only reasonable suspicion. An arrest, on the other hand, demands the greater showing of probable cause. For reasonable suspicion the only relevant information is the information that was available to the officers at the time.

Sheriff and jail administrator were not deliberately indifferent to rights of detainee who was sexually assaulted by jailor

Rivera v. Bonner, No. 16-10675, 691 F. App'x. 234 (5th Cir., 2017).

This is a §1983 case against jail officials alleging a sexual assault in a jail where the U.S. Fifth Circuit Court of Appeals affirmed the granting of the County officials' motion for summary judgment.

Fierros was a jailor in the Hale County Jail when Rivera was placed into custody. Prior to any incident involving Rivera, when Sheriff Mull and Jail Administrator Bonner discovered Fierros may have previously been convicted of indecency with a child when he was fifteen, they investigated to determine if the assertions were true. They were unable to confirm the convictions. After the jail had an incident with a different jailor sexually assaulting an inmate, jail officials purportedly reminded jail staff that sexual exploitation of detainees was prohibited, but they did not implement any additional training. They did post notifications and a poster noting sex with an inmate is a felony. Approximately six months later, Rivera arrived at the jail. During booking Fierros allegedly groped Rivera's breasts and forced her to perform oral sex on him. Rivera was released from the jail the following day. After filing a complaint with state law enforcement, Fierros admitted to the contact. Rivera sued the Sheriff and Jail Administrator for being deliberately indifferent in hiring and failing to properly train. The trial court granted the officials' motion for summary judgment based on qualified immunity and Rivera appealed.

In order to establish supervisor liability for constitutional violations committed by subordinate employees, plaintiffs must show that the supervisor acted, or failed to act, with deliberate indifference to violations of others' constitutional rights. When a plaintiff alleges that a supervisor inadequately considered an applicant's background, deliberate indifference exists only when adequate scrutiny would lead a reasonable supervisor to conclude that the plainly obvious consequences of the decision to hire would be the deprivation of a third party's constitutional rights. There must be a strong connection between the background and the likelihood the hired employee would inflict the particular type of injury suffered. After analyzing the facts known to the Sheriff and Administrator at the time, the court held they were not deliberately indifferent. Fierros's juvenile record provided no detail regarding the alleged offenses, and there was no evidence that Fierros was ever charged or convicted. As to the failure to train, while inadequate in retrospect, the training provided was not due to deliberate indifference. Officers at the jail received at least some state-sanctioned training aimed at sexual assault prevention and jail officials took some limited responsive action following the prior incident of sexual abuse. And while the panel notes the law in the Circuit has been updated, at least one case applicable at the time, may have indicated such minimal responses were permissible. So, the law was not clearly established as to what level of response to prior assaults was necessary. As a result, the jail officials were entitled to qualified immunity.

U.S. 5th Circuit remands excessive force case holding fact question exists as to whether suspect who died during arrest was resisting or not

Darden v. City of Fort Worth, 880 F.3d 722 (5th Cir. 2018).

This is a §1983/excessive force/ wrongful death case where the U.S. 5th Circuit Court of Appeals reversed a trial court order granting the officers' and City' summary judgment.

Fort Worth Police Officers W.F. Snow and Javier Romero arrested Darden, a black man who was obese, using a no-knock warrant. Darden's estate asserts during the arrest the officers assaulted him including taseing him twice, choking him, and punched and kicked him. According to witnesses for the plaintiff, Darden "had no time to react" before "[h]e was thrown on the ground" by the officers. Witnesses testified that Darden never made any threatening gestures and did not resist arrest. The officers assert he did resist arrest requiring the force used. Darden suffered a heart attack and died during the arrest. The court noted video footage of certain parts of the arrest were contained within the record. Darden's estate filed suit against the officers, individually, and the City. The district court granted summary judgment in favor of the officers and the City and dismissed all claims. Darden appeals.

Officers Snow and Romero asserted qualified immunity. The investigating physician determined the force used and taser were contributing factors, but Darden suffered from a coronary arty disease. The 5th Circuit first determined the trial court errored in finding Darden's estate did not establish the death was caused solely by the use of force. A tortfeasor takes his victim as he finds him. Darden's preexisting medical conditions increased his risk of death during a struggle, and in that way, they contributed to his death. The evidence suggests that Darden would not have suffered a heart attack and died if the officers had not tased him, forced him onto his stomach, and applied pressure to his back. There is a genuine factual dispute over whether Darden posed an immediate safety threat to the officers. The warrant was issued because probable cause exists the house occupants were dealing drugs, which is a serious offense, although not a violent one in and of itself. While the video shows Darden apparently surrendering, there are gaps. the circumstances and whether he was resisting cannot be determined from the record. The court was careful to point out that a jury may ultimately conclude that Darden did not comply with the officers' commands and was actively resisting arrest. However, for summary judgment purposes, the facts are in dispute and granting the officer's motions was improper. The court provided a good breakdown of the types of force which are permitted in analyzing the existence of disputed facts. Finally, the court held the trial court did not analyze the claims against the City because it had already (inaccurately) determined the officers were not liable. The trial court needs to re-examine the summary judgment arguments as to the City. The 5th Circuit remanded the case for further proceedings

U.S. 5th Circuit holds 1) IA and CID not required to share evidence and 2) disclosure of exculpatory evidence is a "trial" right, not a right before accepting a plea offer

Alvarez v City of Brownsville, 16-40772 (5th Cir. Sept. 18, 2018)

This is a §1983/jail altercation case where the U.S. Court of Appeals for the 5th Circuit reversed a $2.3 million-dollar jury award and rendered judgment for the City. [Warning, opinion plus concurrences and dissents is a 61-page document.]
Alvarez (who was 19 at the time) was arrested for public intoxication and burglary of a vehicle. He was placed in a holding cell at the Brownsville PD. He became disruptive and violent and officers attempted to transfer him to a padded cell to calm down. During the transfer an altercation occurred which was captured on video. An internal investigation occurred, and the video was reviewed. The IA investigation determined

proper force was used to subdue Alvarez. A simultaneous criminal track investigation also occurred for assault on a police officer. Alvarez did not request the video and the video was not produced to Alvarez voluntarily. The PD has an internal policy where internal affairs information is not shared with the Criminal Investigation Division ("CID"). The grand jury indicted Alvarez for assault on a public servant and he plead guilty to the charge. Upon discovering a video existed, he sued asserting the City violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963)(i.e. compelled release of exculpatory information). The City filed a summary judgment motion, which was denied. A jury awarded Alvarez $2.3 million dollars in damages and the City appealed.

To establish §1983 liability there must be: (1) a policymaker; (2) an official policy; and (3) a violation of a constitutional right whose "moving force" is the policy or custom. Alvarez "must show direct causation, i.e., that there was 'a direct causal link' between the policy and the violation." For purposes of the analysis, the court assumed, without deciding, the police chief was a final policymaker and that a policy existed preventing the sharing of information between IA and CID. However, even with those assumptions, the court held no direct causal link existed between the policy and the constitutional violation. It is undisputed the CID investigator failed to inquire about video recordings and did not possess it when performing the criminal investigation. While that may have been a sloppy investigation, that does not create a causal connection. "This series of interconnected errors within the Brownsville Police Department that involved individual officers was separate from the general policy of non-disclosure of information from the internal administrative investigations. The general policy of non-disclosure was not a direct cause of Alvarez's injury." Further, the general policy of non-disclosure was not implemented with "deliberate indifference." Additionally, "[p]lacing the final decision-making authority in the hands of one individual, even if it makes an error more likely, does not by itself establish deliberate indifference." The court also analyzed the impact of Alvarez's guilty plea on his *Brady* claim. Citing various U.S. Supreme Court cases, the 5th Circuit held exculpatory and impeachment evidence are not required to be released at every stage of a criminal case and not necessary before the defendant takes a plea agreement. "[W]hen a defendant chooses to admit his guilt, *Brady*concerns subside." Essentially, a *Brady* right is a trial right, not a pre-trial right. The court did list the other federal circuits which agree with this approach and those which disagree with this approach. However, the court adopted the "trial right" approach and dismissed Alvarez's claims as a matter of law.

Texas judge's successfully reverse injunction in federal court regarding system for setting bail for indigent misdemeanors

ODonnell v. Harris County, et al., No. 18-20466 (5th Cir. Aug. 14, 2018).

Plaintiffs brought a class action against Harris County and numerous officials, including judges and hearing officers under §1983 asserting the system for setting bail for indigent misdemeanor arrests violates their due process and equal protection rights. They obtained a preliminary injunction preventing the use of the system, which the U.S. 5th Circuit reversed in part and remanded. On remand, the injunction was adjusted. Now the County cannot hold indigent arrestees for the 48 hours preceding their bail hearing if the same individual would have been released had he been able to post bond. The County must release, on

unsecured personal bond, all misdemeanor arrestees who have not had a hearing and individual assessment within 48 hours. Fourteen Judges filed an emergency motion with U.S. 5th Circuit, requesting a stay of only four sections of the injunction dealing with these provisions.

The court analyzed the mandate rule. "[T]he mandate rule compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." Remand is not the time to bring new issues that could have been raised initially. Despite the district court's diligent and well-intentioned efforts Section 7 of the injunction easily violates the mandate, which explicitly found that individualized hearings would remedy the identified procedural violations. The requirement that such a hearing be held within 48 hours is applied to those who cannot afford the pre-scheduled bond. Individualized hearings fix that problem, so immediate release is more relief than required and thus violates the mandate rule. Further, the Due Process and Equal Protection Clauses do not require the release dictated by Section 7. Sections 8, 9, and 16 are likewise not constitutionally required. The Judges have made an adequate showing to satisfy the remaining elements. They and the public are harmed by enjoining the County's bail system. And given their likelihood of success on the merits, any harm to Plaintiffs, standing alone, does not outweigh the other factors.

State:

Home-rule city's franchise contract and right-of-way ordinance trumps pro-forma provision in a tariff, so utility must bear costs of relocation

City of Richardson v Oncor Electric Delivery Company, LLC, 539 S.W.3d 252 (Tex. 2018)

This case involves a dispute between a city and a utility over who must pay relocation costs to accommodate changes to public rights-of-way.

The City of Richardson ("City") negotiated a franchise agreement with Oncor Electric Delivery Company LLC, ("Oncor") requiring Oncor to bear the costs of relocating its equipment and facilities to accommodate changes to public rights-of-way. Richardson later approved the widening of thirty-two public alleys. Oncor refused to pay for the relocation. While the relocation dispute was pending, Oncor filed an unrelated case with the Public Utility Commission (PUC), seeking to alter its rates. That dispute was resolved by settlement, but the settlement included Richardson passing a tariff ordinance. The Court had to decide whether a pro-forma provision in a tariff, which sets the rates and terms for a utility's relationship with its retail customers, trumps a prior franchise agreement, which reflects the common law rule requiring utilities to pay public right-of-way relocation costs.

By nature, a franchise agreement represents the unique conditions a city requires of a utility in exchange for the utility's right to operate within the city. Here, the Franchise Contract incorporated a conventional right-of-way ordinance (the "ROW Ordinance") requiring the utility, upon written notice from Richardson, to remove or relocate "at its own expense" any facilities placed in public rights-of-way. The ROW Ordinance is typical of others throughout Texas. "Tariff" is defined as "the schedule of a utility . . . containing all rates and charges stated separately by type of service, the rules and regulations of the utility, and any contracts that affect rates, charges, terms or conditions

of service." 16 Tex. Admin. Code §25.5(131). A tariff filed with the PUC governs a utility's relationship with its customers, and it is given the force and effect of law until suspended or set aside. However, the PUC's rules also contain a "pro-forma tariff," the provisions of which must be incorporated exactly as written into each utility's tariff. The City and Oncor sued each other over payment of the relocation costs, each citing the differences between the ROW Ordinance/Franchise Contract and pro-forma tariff. The trial court granted the City's motion for summary judgment, but the court of appeals reversed and rendered judgment for Oncor.

Under the common law, a utility's right to use a city's public rights-of-way is permissive and is subordinate to the public use of such rights-of-way. The Texas Supreme Court has traced this principal back at least as far as 1913. The Utilities Code mirrors the common law, but specifically apply to "streets." Oncor argues that the Legislature's use of "street" and not "alley" is significant and precludes these statutes from applying to alleys. Under statutory construction principles, every word included and excluded by the Legislature has significance. Looking to the statutory scheme, the Court found particularly relevant the Legislature's recognition of the broad authority afforded to home-rule cities. As a home-rule city, Richardson has "exclusive original jurisdiction over the rates, operations, and services of an electric utility in areas in the municipality." Furthermore, the Court held that in the context of home-rule cities, the recognition of a specific power does not imply that the other powers are forbidden. The Legislature did not intend to strip municipalities of their common law right to require utilities to bear relocation costs. The language in the Tariff does not unmistakably address the relocation costs. The Tariff addresses Oncor's relationship with end-users, which, in this case, does not include the City. As a result, the City retains the power to address costs through its ROW Ordinance and its Franchise Contract. The Court reversed the judgment of the court of appeals and reinstated the judgment of the trial court.

14th Court of Appeals holds administering drug is the "use" of tangible personal property for immunity purposes.

University of Texas M.D. Anderson Cancer Center v. McKenzie, 529 S.W.3d 177 (Tex. App.—Houston [14th Dist.] August 3, 2017).

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a medical malpractice/Texas Tort Claims Act ("TTCA") matter against a university. The 14th Court of Appeals affirmed the denial and remanded the case for trial.

McKenzie-Thue suffered from cancer and sought treatment at the University of Texas M.D. Anderson Cancer Center ("MDACC"). MDACC utilized two clinical trials of the Wake Forest Protocol for treatment, which included (in oversimplified terms) surgical removal of cancer, sealing of cavities, and flushing of the cavities along with chemical treatments. A total of 9 liters of fluid was perfused into McKenzie-Thue's abdominal cavity. The procedure was performed at MDACC using MDACC personnel and equipment. However, a medical technician called a "perfusionist" perfused—under her surgeon's direction—the chemotherapeutic agent. The procedure and mixing of the agent and drug (D5W) resulted in a drop-in sodium levels and swelling of Mckenzie-Thue's cells. She died two days later. The family sued alleging negligence and the specific negligent use of tangible personal property (i.e. the drug

solutions utilized in the cavity). The family's expert report noted the use of the D5W drug along with the specific chemical agents used deviated from the standard of care, resulting in the patient's death. MDACC filed a plea to the jurisdiction, which the trial court denied. MDACC appealed.

MDACC asserts the drugs and fluids used were administered by an independent contractor (i.e. the perfusionist) as his specific area of expertise, so no MDACC employee negligently used the tangible property. Further, the death was not a foreseeable use of the fluids/drugs, so no proximate cause can be shown. The perfusionist testified he was an independent contractor, but the MDACC surgeon, Dr. Mansfield, specified the use of the D5W, the flow rate for the perfusion, and the temperature for the perfusing fluid during the IPHC procedure. Further, after the initial procedure, Dr. Mansfield washed out McKenzie-Thue's cavity using the D5W. Dr. Mansfield acknowledged the perfusionist made no decisions about the volume or type of fluid used during the perfusion process. He also testified MDACC was aware D5W and mixtures of fluids could cause a drop-in sodium which is why the surgical team used an insulin drip and hypertonic saline drip during the surgery. After analyzing the facts, the court held under the TTCA a governmental unit's immunity is not waived "when it merely allows someone else to use" the property. "Use" in the context of §101.102(2) means "to put or bring into action or service; to employ for or apply to a given purpose." Since Dr. Mansfield utilized D5W to flush the cavity, and MDACC provided the D5W drug, it constitutes legally sufficient evidence of "use." Further, the "use" by MDACC employees was during the part of the procedure when other chemicals were in the body and could cause the deadly mix leading to a drop-in sodium. The court agreed with MDACC that allegations involving the misuse of information, negligent training, or medical judgment, without more, are insufficient to waive immunity. However, the evidence supports more than mere medical judgment was involved since MDACC personnel arguably distributed D5W at a time during the procedure it should not have been distributed under the protocol. Further, no one disputes it was the mixture of drugs and fluids which caused her death, and which was a known risk. From a pleadings standpoint, such is sufficient to survive a plea to the jurisdiction both for the "use" and the "causation" elements.

13th Court of Appeals affirms take nothing judgment in favor of TxDOT for premise liability/flooding death case

Lucker v. Texas Department of Transportation, 2017 WL 3304178 (Tex. App.—Corpus Christi August 3, 2017, pet. denied) (mem. op.).

This is a premise liability case where the 13th Court of Appeals affirmed the granting of jury verdict in favor of TxDOT

TxDOT received information water was likely to flood a number of roads in Lee County and dispatched employees to assist. Throughout the day, the assistant maintenance supervisor, Meinke, put out a number of signs at different locations. One sign was a large temporary "Watch for Water On Road" sign, which also displayed two flags on FM 1624 near a culvert referred to as the "bridge." The sign was placed next to a smaller, permanent sign, with the same message. These signs were located about 2,500 feet from the bridge. Meinke testified that a car traveling at 60 miles per hour would reach the water in about thirty seconds after

passing the two signs on that day. Because the water was rising rapidly, at 7:15 p.m. Meinke ordered that barricades and road closed signs be brought to both sides of the bridge after a visual inspection. However, these did not arrive until after the incident. Meinke left the site to warn nearby oil workers of the danger and rising water. Upon returning to the bridge a short time later, he viewed Sally Lucker's vehicle floating in the water. She died. Lucker's husband sued TxDOT and the case went to a jury trial. The jury returned a verdict for TxDOT and Lucker appealed.

Over the objection of Lucker, the trial court submitted to the jury a charge containing two questions concerning the emergency exception in the Texas Tort Claims Act. Essentially, the first question asked the jury if TxDOT was reacting to a flooding emergency and the second was whether the death was proximately caused by the conscious indifference or reckless disregard of the safety of others on the part. The jury answered in favor of TxDOT for these questions. The jury did fine TxDOT 51% responsible for the accident and Lucker 49% responsible. TxDOT moved for entry of a take nothing judgment which the trial court granted. The 13th Court of Appeals notes the language within the judgment clearly indicates the trial court considered not only the findings of the jury, but arguments of counsel and filings with the court. TxDOT submitted arguments regarding premise liability which were not substantiated with evidence during trial to which Lucker's attorney did not respond. However, the trial court did not specify its grounds for granting the motion. The Court of Appeals specifically noted it could not tell if the trial court found the emergency exception to apply or if the trial court found that there was no evidence on one or more of the elements of Lucker's premise liability claim. Because Lucker briefed only the emergency exception arguments and not the lack of evidence on premise defects, he waived such argument. As a result, the judgment of the trial court must be affirmed.

14th Court of Appeals holds taxpayers have standing to challenge ballot propositions and bring *ultra vires* claims

Turner v. Robinson, 534 S.W.3d 115 (Tex. App.—Houston [14th Dist.] August 17, 2017), pet. denied).

The Fourteenth Court of Appeals in Houston determined the Plaintiffs had taxpayer standing to challenge two propositions filed in the 2004 elections and for ultra vires claims against the Mayor's office.

This opinion is one in a long series of opinions and cases involving the same or similar parties. Plaintiffs sued the City of Houston and the Mayor, in his official capacity, for declaratory and injunctive relief (including ultra vires claims) involving Prop 1 (limiting annual increases in property taxes and utility rates) and Prop 1 (amending the City Charter and requiring voter approval for increase which go beyond inflation and population rates). In the 2004 election, both propositions passed. After the election, for two independent reasons, the City determined Prop. 1 is legally binding and Prop. 2 would not be enforced. Prop. 1 had a supremacy clause over any other propositions if it received more popular votes. Further, the Charter stated any proposition which receives the higher votes prevails. Various suits followed resulting in several appellate opinions already. In this matter, the Plaintiffs filed actions regarding the validity of Prop. 2 and the City's future compliance with both

Prop. 1 and Prop. 2. The City filed a plea to the jurisdiction which was denied. The City appealed.

Standing is a constitutional prerequisite to maintaining suit. Taxpayer standing requires (1) that the plaintiff is a taxpayer; and (2) that public funds are being expended on the allegedly illegal activity. Plaintiffs did not sue to recoup funds but to prevent future expenditures on alleged unauthorized activities. As a result, they have taxpayer standing. The Plaintiffs do not allege the Mayor failed to perform a ministerial act, but instead assert he acted without legal authority. Such is a proper ultra vires claim. And while the Plaintiffs focus on the legal authority of the propositions, their pleadings also seek a declaration as to their validity. As a result, they are proper for declaratory judgment.

Justice Busby's concurrence focused on "a clash among fundamental principles of government." Specifically, he notes immunity/standing vs requiring officials to follow the rule of law. He writes separately to "to explain how the structural principles of government at stake" intertwine because immunity and standing are notoriously complex. He does a good job of explaining the competing interests and ultimately agrees that the taxpayers have standing in order to require a governmental official follow the law.

San Antonio Court of Appeals holds river authority can be compelled to attend contract arbitration

San Antonio River Authority v. Austin Bridge & Road, L.P, No. 04-16-00535-CV, 2017 WL 3430897 (Tex. App.— San Antonio August 9, 2017, pet. filed) (mem. op.).

This is an interesting case where the issue of sovereign immunity impacts whether an entity is a "party' to a contract and bound by an arbitration clause.

The Bexar-Medina-Atascosa Counties Water Control and Improvement District No. 1 ("BMA") sought state funding to repair the Medina Lake Dam. As part of the funding provided by the Legislature, the San Antonio River Authority ("River Authority)" and several other water district entities/authorities entered into a cooperative interlocal agreement to assist with the repair project. This arrangement was dictated by H.B. 1741, which designated the River Authority as the project manager and contract administrator for the project. After bidding was complete, Austin Bridge became the contractor. The bid agreement provided the River Authority would be responsible for paying Austin Bridge in accordance with a project management schedule. The Agreement contained an arbitration clause. Austin Bridge subcontracted with Hayward Baker to perform cement portions of the repair work. Costs ran over and the River Authority declined to pay for some additional work and costs incurred by Hayward Baker. The subcontractor-initiated arbitration proceedings against Austin Bridge for the lack of payment. Thereafter, Austin Bridge initiated arbitration proceedings against the River Authority for breach of contract. The River Authority responded with a motion to dismiss noting its immunity from suit was not waived under Tex. Loc. Gov't Code Ann. § 271.152 (West 2016) because its involvement did not include entering into a contract, it was simply designated as the project manager. If it is not a party to the contract, it is not bound by the arbitration procedures. It also asserted the immunity issue could only be decided by a court of law,

not an arbitrator. After cross-motions for summary judgment, the trial court ruled in favor of Austin Bridge and Hayward Baker. The River Authority appealed.

The San Antonio Court of Appeals first held the determination of whether a valid arbitration agreement exists is a legal question subject to de novo review. One of the universally accepted principles of law is that an individual must be a party to a contract in order to be bound by it. After analyzing the situation, the court held the question of immunity was properly addressed by the trial court. Courts must have jurisdiction in order to stay arbitration and if immunity is not waived, the trial court has no power to compel arbitration. Turning to whether the River Authority retains immunity, the court noted all parties argued around §271.152 as to waiver. In this case, the River Authority, along with BMA and other governmental entities, entered into an interlocal agreement in order to work together and plan, fund, and implement the Medina Lake Dam Project. The River Authority's Agreement with Austin Bridge allowed River Authority to fulfill its duties and responsibilities under both House Bill 1741 and the interlocal agreement. Therefore, the Agreement qualified as "services to a local governmental entity" under the plain meaning of section 271.152's limitations. However, Chapter 271 does not waive immunity from suit on a claim for damages not recoverable under § 271.153. Section 271.153(b) precludes recovery of consequential damages, "except as expressly allowed under Subsection (a)(1)." The court agreed with Austin Bridge that the damages they sought are amounts due and owed under the Agreement. Whether they are correct that those amounts are required to be paid under the Agreement is a question for the arbitrator and such is not a question that pertains to a waiver of immunity. The River Authority next argued §2009.005(c) of the Texas Government Code prohibits it from entering any form of binding arbitration. The Governmental Dispute Resolution Act ("the Act"), which includes Chapter 2009 of the Government Code, was enacted to encourage the peaceable resolution of lawsuits involving governmental bodies in a fair and expeditious manner. The purpose of §2009.005 is to ensure the Act is not interpreted as a waiver of sovereign immunity or as having any effect on the waiver of sovereign immunity under other laws. It is not a prohibition on arbitration by state agencies. As a result, the River Authority must be compelled to participate in arbitration.

References in medical records were insufficient to provide Texas Tort Claims Act notice of claim says Fort Worth Court of Appeals

University of North Texas Health Science Center v. Jimenez, No. 02-16-00368-CV, 2017 WL 3298396 (Tex. App.— Fort Worth August 3, 2017, pet. filed) (mem. op.).

In this Texas Tort Claims Act ("TTCA") notice case, the Fort Worth Court of Appeals held information within medical records was insufficient to qualify as §101.101 actual notice to the entity of its fault.

Pamela Knight was treated at the University of North Texas Health Science Center ("UNT") by Dr. Yurvati. Knight previously underwent weight-loss surgery but developed complications. Dr. Yurvati performed corrective surgery. Within one week of the corrective surgery Knight experienced a severe decline. Tests revealed a leak in her esophagus that, according to Appellees,

resulted from an esophageal perforation which occurred during Dr. Yurvati's corrective procedure. Ultimately Knight died. The family sued UNT for medical negligence. UNT filed a plea to the jurisdiction asserting, among other things, the Appellees failed to provide timely notice under the Texas Tort Claims Act. The trial court denied the plea and UNT appealed.

It is undisputed the Appellees did not give any formal written notice to UNT regarding the claim prior to the 6-month deadline, so the analysis focused on the "actual notice" prong under the TTCA. The Appellees contend Dr. Yurvati's postoperative report written 4 days after surgery contains entries which satisfy Tex. Civ. Prac. & Rem. Code §101.101(c) for notice. Specifically, Dr. Yurvati notes a "tear" did occur but was corrected during surgery. It also notes the tear appeared to already be present and did not occur due to any actions performed during the surgery. The court notes a "tear" and a "perforation" do not appear to be medically identical but held the distinction was one which did not need to be examined in order to rule. For actual notice to be present, the entity must have a subjective awareness of its fault in causing the injury. After reviewing the medical records, the court stated it could not find any references or indications which rose to the level of providing UNT actual notice of its own subjective fault in causing the injuries. [Comment: I personally liked footnote 6 where the court noted "The medical records might imply, at least to laymen like us, that esophageal perforations do not occur without human agency, but that is not the same as the kind of evidence from which actual notice can be fairly assumed…"]. The court went on to analyze whether the knowledge of individual employees can be imputed to the entity. In some situations, such individual knowledge can qualify. However, physicians, by their very nature, do not have a duty to gather facts and investigate incidents, which is a requirement to impute knowledge. As a result, the plea should have been granted.

Court held City immune from Plaintiff's negligent implementation/premise defect claims due to discretion in ordinances

Morgan v. City of Terrell, Texas, No. 05-16-00554-CV, 2017 WL 3484516 (Tex. App.—Dallas August 15, 2017) (mem. op.).

This is a premise liability/negligent policy implementation case where the Dallas Court of Appeals affirmed the granting of the City's plea to the jurisdiction.

Morgan sued the City after she fell on a sidewalk and alleged an unmarked ledge constituted a dangerous condition. The City filed a plea to the jurisdiction asserting the alleged "dangerous condition" was actually the design of the walkway, which is a discretionary function. Morgan asserted the design was negligently implemented. The trial court granted the plea and Morgan appealed.

It is well settled that the design of a public work, such as a roadway, involves many policy decisions, and is a discretionary function. Likewise, the type of safety features to install on a public work is a discretionary function. While immunity can be waived if the claim is for the negligent implementation of the decision, such waiver must be tied to the execution and not the discretionary formation. Morgan claimed the City's ordinances created a nondiscretionary duty to make the sidewalks safe. However, Morgan did not include the ordinances in the record and did not request the court take judicial

notice of the ordinances. Morgan has included in her brief "only the language of portions of provisions she has plucked from the Ordinance[s]." As a result, the court held the issues involving the ordinances were not properly before it. However, even if it were, the selective provisions do not support Morgan's position. The building code section states sidewalks "shall be set at a grade to provide for a certain slope range or as directed by the city engineer." The court felt this language made clear the City made a policy decision to retain discretion to alter the specifications of sidewalks when needed. Further, under the Neighborhood Integrity Code, whenever a sidewalk becomes dangerous, it is a public nuisance. However, those provisions state the chief building official "may" act to remedy the nuisance but leaves the official with discretion to abate or not abate. As a result, nothing relating to a negligent implementation exists and everything points to the discretionary actions of the City. The plea was properly granted.

4th Court of Appeals holds developer properly pled breach of contract claim for wastewater development agreement

NBL 300 Group Ltd v. Guadalupe-Blanco River Authority, 537 S.W.3d 529 (Tex. App.—San Antonio 2017, no pet.)

This is an immunity/breach of contract case where the San Antonio Court of Appeals reversed the granting of Guadalupe-Blanco River Authority's ("GBRA") plea to the jurisdiction.

NBL was developing certain properties known as Legend Pond. As part of the development NBL and GBRA entered into an agreement for the construction of a "wet well" and "lift station" (wastewater systems). NBL was to provide and oversee/arrange for the engineering, design, and construction of various improvements to the properties. GBRA was to apply certain connection fees and charges to reimburse NBL for its initial outlay. After completion of the development, NBL sued GBRA asserting breach and a failure to implement connection rate measures. GBRA filed a plea to the jurisdiction which the trial court granted. NBL appealed.

For a contract to be subject to Tex. Loc. Gov't Code §271.152's waiver of immunity, it (1) must be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to the local governmental entity, and (5) be executed on behalf of the local governmental entity. Under the contract NBL was required to propose a master plan, including design, permitting, acquisition, and construction of the facilities. NBL was responsible for engineering and permitting fees. In return, GBRA was required to approve all plans and specifications and to establish, to collect, and to forward fees to NBL as reimbursement for monies expended. The court held constructing, developing, leasing, and bearing all risk of loss or damage to the facilities provides a "service." NBL plead the contract was for services and all other essential terms. GBRA asserts NBL still does not plead damages via money's due and owed. However, the court held NBL alleges that GBRA: (1) refused to perform obligations under the contract; (2) failed and refused to pay amounts owed under the contract; (3) failed to comply with its obligations under the contract; and (4) that the breach was material because GBRA did not substantially perform a material obligation required under the contract. No other specifics were provided. As for

damages, NBL seeks loss of the benefit of the bargain, loss of investment opportunity, loss of fees, and attorney's fees. Again, no specifics. However, the court held from a pleadings standpoint, such allegations were sufficient to qualify as a properly pled petition. The plea should not have been granted.

City established immunity due to emergency exception doctrine in police vehicle accident case

City of San Antonio v. Reyes, No. 04-16-00748-CV, 2017 WL 3701772 (Tex. App.—San Antonio August 23, 2017) (mem. op.).

This is a Texas Tort Claims Act vehicle accident case where the San Antonio Court of Appeals held the City was immune.

San Antonio Police Officer Ayars was in an automobile accident with the Plaintiffs' vehicle while responding to a "City-wide Emergency Tone that an officer needed assistance." Officer Ayars proceeded through an intersection while in route resulting in the collision. Plaintiffs sued the City under the Texas Tort Claims Act for damages. The City filed a plea to the jurisdiction which was denied. The City appealed.

Under the emergency exception doctrine, the City retains its immunity from suit on a claim arising from the action of an employee while responding to an emergency call. Nonetheless an employee responding to such emergency can still cause liability to attach if their actions are reckless. However, the Plaintiffs did not provide counter evidence to the City's plea and Ayer's affidavit. The undisputed evidence establishes Officer Ayers was responding to an emergency. When he approached the intersection, he slowed, observed the situation, and proceeded through. Assuming, as Plaintiffs allege, the light facing Officer Ayers was red, he was authorized to proceed through the intersection in an emergency. Plaintiffs presented no evidence the actions were reckless. The Plaintiffs make an alternative argument that the City waived the "emergency exception" defense because it waited 11 months before raising it. However, no support exists for the position. Plaintiffs did not request additional discovery or continuances. The City retains immunity and the plea should have been granted.

4th Court of Appeals holds City's "evergreen clause" in collective bargaining agreement does not create unconstitutional debt

City of San Antonio v. San Antonio Firefighters' Association, Local 624, 533 S.W.3d 527 (Tex. App.—San Antonio 2017, no pet.)

This is a permissive appeal, which was allowed by the court, where the City requested the Court of Appeals review the denial of its motion for summary judgment seeking to hold the "evergreen" clause of its collective bargaining contract, void as an unconstitutional debt. The court determined the clause was not an unconstitutional debt.

The City and firefighter union enter into multi-year collective bargaining agreement. Because the contracts require council and union member approval, which takes time, the contracts have contained "evergreen" clauses which state the effective contract would continue in effect until a specified future date unless first replaced by a successor agreement or terminated by agreement. At the time of suit, the Union and City had not adopted a successor agreement or terminated the current collective bargaining agreement ("CBA"). The City

sought a declaration the clause was void as an unconstitutional debt or, in the alternative, as against public policy. The trial court denied the City's summary judgment motion, which prompted this permissive appeal.

Article XI, Section 5 and Section 7 of the Texas Constitution prohibit debts by a city unless a sinking fund with revenue tax commitments are in place. The drafters intended to require local governments to operate on a cash basis and to limit their ability to pledge future revenues for current debts. The court analyzed the term "debt" as referenced in the Texas Constitution. After analyzing case law, the court held a "debt" for constitutional purposes is a pecuniary obligation which cannot be satisfied out of current revenues for the year or savings. A contract can avoid constitutional infirmity if it is conditioned on a yearly appropriation of funds. However, this CBA does not contain such a provision. The City asserts "[w]hen the CBA was created in 2011, an absolute debt was created at once with only the time of payment being postponed." The amount of the "debt" is presumably the total expense of complying with the contract, including the value of all the wages and benefits estimated to be due from 2011 through 2024. According to the Union employee wages and benefits are not "debts" within the meaning of the Texas Constitution because no amount will be owed for a future year's wages and benefits until work is performed by fire fighters and an obligation to pay them is incurred. The CBA sets a schedule of payments for when work is performed but is not a contract for employment. In order to succeed in its claims, the City must establish either that the entire CBA constitutes a debt or that non-severable obligations imposed by the CBA are unconstitutional debt, rendering the CBA void in its entirety. Conversely, if there are any severable provisions of the CBA that are not void for violating sections 5 and 7 of article XI of the Texas Constitution, the entire CBA is not void and the trial court properly denied the motion for summary judgment. After a very long analysis of different provisions of the contract, the court held the contract does not create a debt. The actual amount the City will owe in a given year for operating expenses depends on the number and classification of employees. The contract does not expressly obligate the City to pay wages and benefits and does not contain any minimum staffing or funding requirements. As a result, the trial court properly denied the motion.

Inmate's *ultra vires* suit against DA, courts, and county dismissed due to claim for retrospective relief

Smith v. District Attorney's Office for Smith County,, No. 03-16-00828-CV, 2017 WL 3902615 (Tex. App.—Austin August 23, 2017, no pet.) (mem. op.).

This is an inmate declaratory judgment case relating to the inmate's conviction in which the Austin Court of Appeals affirmed the dismissal of the case by a plea to the jurisdiction.

Plaintiff Smith sued Smith County and Smith DA, who were represented by Mr. Phillip Smith. For ease of reference, I'll refer to Plaintiff, County, and DA. The Plaintiff was convicted of robbery in 2000. He brought suit for declaratory and injunctive relief in order to "redress the deprivation under color of state law of rights secured by the due course of law of the land in conjunction with the Constitution of the United States." The DA and County filed a plea to the jurisdiction which the trial court granted. Plaintiff appealed.

Plaintiff named the District Offices (along with the District Courts) as defendants; however, his claims concern actions taken by certain unnamed persons employed by these offices in the performance of their official duties. Since Plaintiff named the offices, his claims implicate sovereign immunity. The Plaintiff claims "a private party may seek declaratory relief against a state entity or official who allegedly acted without legal or statutory authority." This Court rejected this same argument when considering Plaintiff's 3 prior cases against the District Courts and District Attorney. Compelling an official to follow the law is an *ultra vires* action and immunity is not implicated. However, such claims are available for prospective relief only. Plaintiff seeks retrospective relief regarding his conviction. As a result, the trial court did not err in granting the plea.

Police Officer's failure to secure detainee in seat belt while driving deemed a negligent use of motor driven equipment under TTCA

City of Houston v. Nicolai, 539 S.W.3d 378 (Tex. App.—Houston [1st Dist.] 2017, reh'g denied).

This is an interlocutory appeal where the First District Court of Appeals affirmed the denial of the City's plea to the jurisdiction in this wrongful death case.

City police officer R. Gonzales handcuffed Caroline Nicolai and placed her in the back seat of a patrol car. While transporting Nicolai, Gonzales' vehicle was struck by a vehicle driven by Moser (who was later determined to be intoxicated). The impact ejected Nicolai who ultimately died from her injuries. Apparently, Nicolai was not restrained by a seat belt. The Nicolai family sued the City, which filed a plea to the jurisdiction. The trial court denied the plea and the City appealed.

The City's plea did not challenge any jurisdictional facts and relied upon the pleadings taken as true. The City asserted the pleadings did not allege the negligent use of a motor vehicle but alleged the non-use of tangible personal property (i.e. seatbelt). For a vehicle "use" the employee must be actively using the vehicle at the time of the injury and using the vehicle as a vehicle and not some unintended purpose. Both are present here. The "arising from" language requires a nexus which is something more than actual cause but less than proximate cause. Officer Gonzales was not simply failing to use the seatbelts, she was driving the car while failing to use the seatbelts. It was foreseeable to the court that is someone is not wearing a seatbelt while the car is being driven, an accident could cause the individual to be injured or killed. Since proximate cause is ultimately a fact question, the court held evidence exists to create the question for the jury, precluding the plea. The City argued, in the alternative, that Moser's conduct was intentional under the law and therefore the City is not liable for intentional torts. However, regardless of whether Moser's actions were intentional or not, the claims involve distinct and different negligence claims committed by Officer Gonzales. For the exception to apply, the intentional tortfeasor must be the governmental employee whose conduct is the subject of the claim. There is no allegation in this case that Officer Gonzales acted intentionally in regard to failing to secure the decedent in a seat belt. The City next argues waiver under the TTCA does not apply for negligently providing police protection under TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(3). The purpose of the exception is to "avoid judicial review of the discretionary policy decisions that governments must make in

deciding how much, if any," protection to provide. However, a negligent implementation of policy can subject the entity to liability. The City disciplined Gonzales for failing to follow policy and secure the detainee with a seatbelt. As a result, the plea was properly denied.

Interlocutory appeal mooted by Plaintiff's non-suit, even though Plaintiff refiled similar suit directly after dismissal

City of Sealy, et al. v. Town Park Center, No. 01-17-00127-CV, 2017 WL 3634025 (Tex. App. – Houston [1st Dist.] August 24, 2017, no pet.) (per curiam) (mem. op.).

This is an opinion where the court held the appeal is moot, but where the City asserted mootness was not applicable due to a refiling.

Town Park Center sued the City of Sealy in the first lawsuit, but such claims ultimately were dismissed, without prejudice. Town Park then filed a second lawsuit against the City and the City's mayor, manager, and engineer. While the claims are not in this opinion, the appeal records indicate the claims were for breach of contract, declaratory relief, and injunctive relief regarding an economic development agreement (the same agreement in the first lawsuit). The City defendants filed a plea to the jurisdiction. The trial court granted the plea as to the City but denied as to the officials. The mayor and city manager filed an interlocutory appeal staying all lower court proceedings, but Town Park requested it be lifted in order to non-suit. After a non-suit, without prejudice, was filed, Town Park filed a third lawsuit against the City, mayor, city manager, and finance director regarding the same agreement. Town Park then filed a motion in this appeal to declare the appeal moot. The City defendants opposed the dismissal arguing the claims were not moot given the live controversy upon which Town Park filed its third suit.

The City asserted the order granting the plea as to the City in the second lawsuit, which Town Park did not appeal, precludes joining the City in the third lawsuit. However, Town Park was not required to appeal the interlocutory order dismissing the City in the second lawsuit (the current appeal) since it had the option to wait until a final judgment was entered. Utilizing this process does not extend the appellant court's jurisdiction to hear a moot claim. Plaintiffs have a general right to nonsuit their claims even if interlocutory appeals are pending. As a result, the interlocutory appeal in the second lawsuit has become moot and is dismissed. [Comment: the court noted in footnote #2, that the final judgment for the second lawsuit may become final due to the non-suit and such is a dismissal with prejudice for claims dismissed prior to the non-suit. However, that argument was not before them and is properly raised in the third lawsuit as to the City.]

TxDOT former employee failed to establish disability discrimination or retaliation claims

Ferguson v. Texas Department of Transportation, No. 11-15-00110-CV, 2017 WL 3923510 (Tex. App.—Eastland August 31, 2017, no pet.) (mem. op.).

This is an employment disability discrimination and retaliation case where the Eastland Court of Appeals affirmed a judgment in favor of the employer.

Ferguson was employed with the Texas Department of Transportation ("TxDOT") as an account specialist at the time she was terminated. Prior to termination, Ferguson

was diagnosed with severe clinical depression and requested an accommodation via transfer away from her current supervisors. Ferguson's job duties included paying vendor invoices and providing customer service. Ferguson sued alleging disability discrimination and a failure to accommodate. TxDOT filed a plea to the jurisdiction and a combined traditional and no-evidence motion for summary judgment. After the trial judge recused himself, a retired judge presided over the hearing and granted TxDOT's summary judgments. Ferguson appealed.

The record reflected a tense working relationship between Ferguson and her supervisors for almost a year. HR warned Ferguson she needed to improve communications with her supervisors, which did not appear to occur. The record also reflects Ferguson failed to timely pay certain invoices resulting in contractual consequences to TxDOT and other job-related performance issues. The termination occurred in November of 2012. While Ferguson's discrimination and retaliation claims were timely as to her termination, the alleged failure to accommodate occurred in 2011 and early 2012. As a result, the 180-day jurisdictional window to file a failure to accommodate complaint had passed and no indications exist it was a continuing violation. As a result, jurisdiction only existed for the termination. As to the termination, even if the court assumed Ferguson presented a prima facie case, she failed to create a fact issue as to pretext. Ferguson admitted that the failure to pay other fuel invoices was because she either "forgot" to do them or was "not sure" why they had not been paid. Ferguson acknowledged that she had communication issues with her supervisors. Further, she failed to show a causal link between protected conduct and the adverse employment action taken by TXDOT. As a result, summary judgment was proper. Ferguson failed to object to the assigned judge, in writing within seven days and therefore waived the objection on appeal. Judgment affirmed.

Wrong-sized manhole cover was not a special defect holds Fort Worth Court of Appeals

City of Arlington v. S.C., No. 02-17-00002-CV, 2017 W 3910992 (Tex. App.—Fort Worth September 7, 2017, no pet.) (mem. op.).

This is an interlocutory appeal involving a jurisdictional challenge in a special defect case. The Fort Worth Court of Appeals, acknowledging the case law is murky, held the misplaced manhole cover was not a special defect.

S.C. and her family were moving into a neighborhood in 2015 when she stepped on a manhole cover which was the wrong size for its opening. She fell into the hole, injuring her pubic bone and groin, and spent six days in the hospital. She sued the City under both a special defect and, alternatively, premise defect theory. Her minor children plead bystander injuries. The City filed a partial summary judgment only as to the special defect claim, which the trial court denied. The City appealed.

The Fort Worth Court of Appeals panel admitted the case law was inconsistent. The Texas Supreme Court lists a special defect as the same "kind or class" as an "excavation or obstruction" to ordinary users on or near a roadway. The court listed a series of cases finding a defective cover over a hole satisfies the excavation "class or kind" test; however, the plaintiffs in those cases lost because the defect was too far from the roadway to count.

The court held to qualify an "excavation- or obstruction-like condition [must] be, if not in the roadway itself, at least awfully close—near enough for the ordinary roadway user to encounter it." Achieving ordinary-user status requires "that someone be on or in close proximity to a roadway, doing the normal things that one might expect to do on or near a roadway, whether in some sort of vehicle or on foot." The court noted its prior circuit opinions have listed a distinction between an open excavation as being the cause of an injury and a defectively covered excavation as being the cause, although such an analysis is not always required. It noted Supreme Court precedent requires it to interpret a waiver of immunity narrowly. While the panel listed that hypothetical aspects might qualify, the individual facts of this case, the circuit's prior opinions and direction from the Texas Supreme Court require it to hold the manhole issue is not a special defect. It reversed the denial but remanded for trial as a premise defect case.

Photo provided in opinion and annotated during Plaintiff's deposition.

DA entitled to mandamus relief from district court order recusing his entire office from criminal case

In re State ex rel. Warren, No. 02-17-00285-CV, 2017 WL 4019244 (Tex. App.— Fort Worth September 12, 2017, no pet.) (mem. op.).

This is a mandamus action where the Fort Worth Court of Appeals granted the mandamus, effectively reversing a district court order preventing the Cooke County District Attorney from prosecuting a specific individual.

A Cooke County grand jury indicted Edington with possession of methamphetamine. While the DA, Warren, has assistant district attorneys in his office, he assigned the case to himself. At different times, the record reflected Warren has spoken to different individuals and became angered with Edington refused to take a plea offer, including Edington's wife. However, Edington's wife was a state witness. Edington's attorney made an oral motion to recuse Warren. The district judge, Judge Woodlock, granted the motion stating he did not "like somebody's wife being accosted and talked to about the case" and proceeded to remove Warren's entire office. Warren brought this mandamus action.

The court addressed both recusal and disqualification. The office of district attorney is constitutionally created and protected; thus, a district attorney's authority cannot be abridged or taken away. Warren argued that because no evidence of the statutory grounds allowing for disqualification of a district attorney was admitted and because only a district attorney may recuse himself based on a conflict of interest, he has shown a clear right to relief from the order. He further argues that because the State's right to appeal is limited, he does not have an adequate remedy at law. The Fort Worth Court of Appeals agreed. Disqualification is dictated by statute and no evidence was submitted for any statutory grounds. Tex. Code Crim. Proc. Ann. art. 2.08. The court was also unable to locate or reference authority for such a forced recusal

absent a conflict of interest. Therefore, the respondent's order violated well-settled legal principles, and Warren has shown a clear right to mandamus relief.

Trial court properly denied plea in vehicle accident case since City officer saw Plaintiff rubbing his back noting he had "a slight pain"

City of San Antonio v. Mendoza, No. 04-17-00168-CV, 2017 WL 4014617 (Tex. App.—San Antonio September 13, 2017) (mem. op.).

This is a Texas Tort Claims Act ("TTCA") case involving the alleged negligent operation or use of a motor vehicle in which the San Antonio Court of Appeals affirmed the denial of the City's plea to the jurisdiction.

Officer Gonzales, an on-duty San Antonio City Park Police Officer rear-ended a van driven by Carlos Mendoza. Gonzales's supervisor, Fidencio Herrera, arrived at the scene to investigate and spoke to Gonzales and Mendoza. Herrera prepared investigative reports concerning the accident. Over a year later, Mendoza sued under the TTCA and alleged the City was provided actual notice of its fault in the accident. The City filed a plea to the jurisdiction which was denied. The City appealed.

The sole issue on appeal was whether the City had actual notice that Mendoza was injured as a result of the accident. It was undisputed the reports satisfied all other requirements of the actual notice provisions. Mendoza did not request medical attention at the scene. To establish knowledge of an injury, it is not necessary that the governmental unit be absolutely certain of the nature and extent of the injury. At the scene, Gonzales asked Mendoza if he was "ok" and Mendoza responded, "I got a slight pain" and began rubbing his back and stretching down. Gonzales did not reference the comment in his reports. Neither did Herrera. The City argued either Gonzales did not hear Mendoza or interpreted them to mean he was not injured. However, the court held, under the standard of review, it must presume the facts which support the trial court order, which was a denial. The City next argued Mendoza's statements were "too vague and indefinite" to provide the City with actual notice of his alleged injuries. However, Mendoza did more than simply state he had a slight pain; he rubbed his back and stretched downward to stretch his back. As a result, there was evidence to support the trial court's implied finding that the City had knowledge of Mendoza's injury, requiring a denial of the plea.

Austin Court of Appeals holds Utility Agency was immune from contract dispute regarding water service agreement

West Travis County Public Utility Agency v. Travis County Municipal Utility District No. 12, 537 S.W.3d 549 (Tex. App.—Austin 2017, reh'g denied).

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a case involving immunity from a contract.

The Lower Colorado River Authority ("LCRA") and MUD 12 entered into a water sale contract in which the LCRA agreed to provide MUD 12 with raw water from the Colorado River in exchange for specified payments. As part of the contract the MUD had to install a specific meter to measure the water flow for payments. Later, LCRA assigned the contract to West Travis County Public Utility Agency ("Agency"). Evidence admitted at the hearing demonstrates that

MUD 12 spent over $100,000 to install the Master Meter in two concrete tanks. A dispute arose regarding the fees charged by the Agency and the MUD sued for breach of contract. The Agency filed a plea to the jurisdiction which the trial court denied. The Agency appealed.

The Agency is a governmental entity entitled to sovereign immunity. To be a proper waiver of immunity goods or services must be provided by a contractor to the governmental entity. The MUD asserts immunity is waived under Tex. Loc. Gov't Code §271.152 because it provided goods and services to the Agency by way of the Master Meter. However, the court noted it cannot read the meaning of "services" so broadly that the requirement is read completely out of the statute. Not every "benefit" received by a governmental entity operating within a contractual relationship with another party qualifies as a "service." The governmental entity must have a right under the contract to receive services—even under a broad interpretation of that term—because otherwise the benefits incidentally accruing to it would be too "indirect." The Agency had no contractual right to receive any services from MUD. Had MUD 12 not installed the Master Meter—for whatever reason—there would be no contract upon which to sue. Additionally, an "essential term" to the contract is the amount the governmental entity has agreed to pay the claimant for the "service." No such payment terms were present. As a result, the contract does not fall under the waiver of immunity. The plea should have been granted.

Justice Pemberton concurred and dissented. He believed immunity was waived under the contract, but only for direct damages and attorney's fees. The specific performance claims were barred.

Plaintiff failed to plead ordinary negligence under Recreational Use Statute, but properly alleged gross negligence

City of Midland and Washington Aquatic Center v. Bunch, No.11-16-00276-CV, 2017 WL 4440276 (Tex. App.—Eastland September 29, 2017) (mem. op.).

This is a Texas Tort Claims Act/Recreational Use case where the Eastland Court of Appeals reversed in part and affirmed in part a trial court order denying the City's plea to the jurisdiction.

Bunch alleges he was visiting the Washington Aquatic Center swimming pool run by the City and paid for entry to the premises. After he sat down on a bench, the bench broke causing him to fall backwards to the ground, sustaining injuries. Bunch sued and alleged the City knew the bench needed to be replaced and did not warn him it was rusted. He sued for premise defects and gross negligence asserting he was simply sitting on a bench to watch his son and was not engaged in recreation. The City filed a plea to the jurisdiction which the trial court denied. The City appealed.

Under the Recreational Use Statute "if a person enters premises owned, operated, or maintained by a governmental unit and engages in recreation on those premises, the governmental unit does not owe to the person a greater degree of care than is owed to a trespasser on the premises." Tex. Civ. Prac. & Rem. Code §75.002(f) (West 2015). The court went through various dictionary definitions examining this subsection and determined Bunch entered the premises and was engaged in "recreation" at the time of his

injury. He did not plead he was "spectating" nor did he plead he was parenting. So, he did not plead a proper claim for ordinary negligence. However, he did amend his pleadings and properly allege gross negligence. He alleged that the City was "actually, subjectively aware of the risk involved" due to the rusted bench it knew needed to be replaced "but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others, which constitutes malice." As a result, the plea should have been granted to the ordinary negligence claims but was properly denied as to the gross negligence claims.

Dallas Court of Appeals holds simply because building was having roof repairs does not equate to actual knowledge of dangerous condition due to water at specific location of convention center

City of Dallas v. Leslie Papierski, No. 05-17-00157-CV, 2017 WL 4349174 (Tex. App.—Dallas October 2, 2017) (mem. op.).

This is a Texas Tort Claims Act ("TTCA") case and interlocutory appeal from the denial of the City's plea to the jurisdiction. The Dallas Court of Appeals reversed and rendered in favor of the City.

The Dallas Convention Center hosted a cheerleading competition where Papierski attended with her daughter. While walking down a ramp in the arena, Papierski slipped and fell on a small puddle of water. At approximately the same time and location, another person slipped and fell while walking up the ramp. The incidents were reported to the Convention Center. The reports stated, "building was undergoing water penetration repairs; however, no penetration had ever occurred previously in this area before." A subsequent search of incident reports revealed no reports of past roof leaks or injuries in the area. Papierski sued under a premise defect theory and the City filed a plea to the jurisdiction. The trial court denied the plea and the City appealed.

The 5th District Court of Appeals first held objections to hearsay, best evidence, self-serving statements, and unsubstantiated opinions are considered defects in form which require a formal ruling from the judge. Since the Plaintiff did not obtain a ruling, those objections to the City's evidence are waived. Additionally, the affidavits challenged state the affiants are "personally acquainted" with the facts through center operations and procedures, which meets the personal knowledge requirement. Next, under invitee status which requires actual knowledge for liability, such knowledge on the part of a governmental entity requires knowledge that the dangerous condition existed at the time of the accident. Awareness of a potential problem is not actual knowledge. The City established it did an exhaustive search for records of prior incidents of leakage in that location and were unable to locate any. Simply because the facility was having roof repairs due to leaks in other halls or areas does not mean the City had knowledge a leak created a dangerous condition at this specific location. No repair was occurring over the accident ramp. Additionally, even though some cases hold a condition which exists for a long enough period of time can attribute liability, no evidence exists in the record indicating how long the water was on the ramp. As a result, no fact question exists as to knowledge and the plea should have been granted.

State properly dismissed from suit alleged "falsified sovereignty"

Puentes v. State, No. 04-17-00258-CV, 2017 WL 4413424 (Tex. App.—San Antonio October 4, 2017, pet. denied) (mem. op.).

This is an interlocutory appeal where the San Antonio Court of Appeals affirmed the granting of the State's plea to the jurisdiction in this §1983 case.

Puentes initially alleged she was assaulted, drugged and remove from a bar ("Brass Monkey") and published such statements on social media. She was sued by the Brass Monkey for damages. Puentes filed counter-claims against the City, it's PD, and a specific Officer alleging they violated her civil rights and for "falsified sovereignty." She then filed claims against the State of Texas for failing to train the PD's officers and other purported constitutional violations. The State filed a plea to the jurisdiction which the trial court granted. Puentes appealed.

The court simply noted Puentes has not and cannot show any waiver of immunity for any of her claims against the State. Puentes's claims against the State fall within three broad categories: (1) claims under 42 U.S.C. § 1983 for violations of the Constitution; (2) claims under the Texas Constitution; and (3) intentional torts. With regard to Puentes's §1983 claims, the State has immunity from federal claims pursuant to the Eleventh Amendment. Regarding claims under the Texas Constitution, no fact pattern presented showed or could have showed a waiver of immunity. Finally, the State is immune from intentional torts and expressly excluded from the waiver found in the Texas Tort Claims Act. As a result, the plea was properly granted.

Texarkana Court of Appeals holds the vote and decision not to vote on District business cannot be an ultra vires claim

Kilgore Independent School District v. Axberg, 535 S.W.3d 21 (Tex. App.—Texarkana October 12, 2017, no pet.)

This is an appeal from the denial of a plea to the jurisdiction where property owners brought *ultra vires* and invalidity claims arising from the school district's repeal of a homestead exemption. The Texarkana Court of Appeals reversed-in-part and affirmed-in-part.

Kilgore Independent School District ("KISD") voted to repeal KISD's local option homestead exemption ("LOHE"). That repeal came just fourteen days after Governor Greg Abbott signed Senate Bill No. 1 ("SB1"), which could potentially increase the statewide homestead exemption and forbid a local taxing authority from repealing existing LOHEs. SB1 raised the level of property values on which a school district is not allowed to tax from the first $15,000 to the first $25,000. Property owners sued alleging KISD's repeal was invalid because it violated state law, that taxes subject to the LOHE had been illegally collected, and that KISD officials committed various *ultra vires* actions. KISD and the officials filed a plea to the jurisdiction, which the trial court denied. The KISD Defendants appealed.

It is not an *ultra vires* act for an official to make an erroneous decision while staying within its authority. When an official is granted discretion to interpret the law, an act is not *ultra vires* merely because it is erroneous. It is only when these improvident actions are unauthorized does an official shed the cloak of the sovereign and act *ultra vires*. If the conduct is based on the misinterpretation of the boundaries of his authority, it can give rise to an *ultra vires* claim. As to the superintendent of schools, the Plaintiff failed to plead and support an *ultra vires* claim. The superintendent could

not and did not vote on the repeal and was improperly included merely because she was the head of the district. Additionally, the Plaintiff failed to plead proper *ultra vires* claims against the Trustees. The vote or nonvote of an individual Trustee, by definition, cannot be an *ultra vires* act since their entire authority is to vote on district business. But the Board is the body which makes the determination and it is the collective decision which is the act of KISD. Without the authorization of the Board, a single Trustee lacks the authority to repeal or reinstate the LOHE. The act of voting, or refraining from voting, by the Trustees as a collective body, was not outside the Trustee's authority in this case. However, as to KISD, the court held it was not immune from the Plaintiff's suit. Sovereign immunity does not apply when a suit challenges the constitutionality or validity of a statute or other government enactment and seeks only equitable and/or injunctive relief. And while a party cannot circumvent immunity by disguising a claim for money damages as a declaratory judgment action, immunity will not defeat a claim seeking the refund of illegally collected taxes or fees paid under duress. Further, the Plaintiff was not required to exhaust administrative remedies under the Tax Code because all questions in the lawsuit are questions of law. Finally, the Plaintiff was not barred by an election of remedies because the *ultra vires* claims against the officials and the claims against KISD are distinguishable and separate from one another. As a result, the plea should have been granted as to the officials and denied as to KISD.

Dallas Court of Appeals holds immunity is waived when employees dropped elderly woman while lifting her from wheelchair

Dallas County Hospital District v. Moon, No. 05-17-00538-CV, 2017 WL 4546121 (Tex. App.—Dallas October 12, 2017, reh'g denied) (mem. op.).

This is a Texas Tort Claims Act ("TTCA") case involving the alleged negligent use of tangible personal property (i.e. a wheelchair) in which the Dallas Court of Appeals affirmed the denial of the hospital's plea to the jurisdiction.

Mercado (a 72-year-old woman confined to a wheelchair) was in a Parkland Hospital examination room when three Parkland employees attempted to transfer her from the wheelchair to the examination table. The employees removed the arms of the wheelchair to make the attempt, however, they dropped her in the process, fracturing her ankle. Mercado's estate sued Parkland for personal injuries. In response, Parkland filed a plea to the jurisdiction which the trial court denied. Parkland appealed.

Mercado's attorney contended the wheelchair was lacking an integral safety component when the employees removed the arms and the employees, therefore, misused the wheelchair. Parkland contended Mercado's claims were really the non-use of a "Hoyer lift and sling" as alleged in the pleadings. The court agreed Parkland retains immunity to the extent Mercado alleged Parkland should have used different equipment. The court also agreed Mercado did not properly allege the negligent "use" of the examination table as being the cause of the injury. However, Mercado's counsel did properly allege, from a pleadings standpoint, that the negligent use of the wheelchair caused or contributed to the injury. As a

result, the plea was properly denied as to the wheelchair allegations.

Fort Worth Court of Appeals held trial court was within its discretion to allow Plaintiff time to replead and produce evidence in response to jurisdictional plea

City of Bedford v. Smith, No. 02-16-00436-CV, 2017 WL 4542858 (Tex. App.—Fort Worth October 12, 2017, no pet.) (mem. op.).

This is a Texas Tort Claims Act ("TTCA") case involving a pedestrian falling into a manhole where the Fort Worth Court of Appeals affirmed in part and reversed in part the denial of the City's plea to the jurisdiction.

Smith alleges she was walking across the grass to reach her apartment when she stepped onto a manhole lid which flipped open. Smith fell into the manhole and was injured. Smith sued the City which filed a plea to the jurisdiction. The trial court denied the plea and Smith appealed.

Even though the trial court denied the plea, its order specifically held the manhole was not a special defect. The court performed a cursory analysis citing its own recent precedent and agreed it was not a special defect as it was not excavation-like in nature. Additionally, since Smith did not challenge that finding in the appeal, the plea should have been granted as to the special defect claims. As to the premise defect claims, the court simply stated the pleadings do not support a claim for premise defect. Smith also alleged a general negligence claim. However, Smith did not plead sufficient facts to establish a negligence claim for the negligent condition or use of tangible personal property. But the trial court was within its discretion to provide Smith an opportunity to amend her pleadings since the City's evidence and the pleadings did not affirmatively negate an incurable jurisdictional defect. The trial court also has discretion to postpone its consideration of a jurisdictional plea so that the plaintiff has sufficient opportunity to produce evidence that might raise a fact issue. The City filed its plea and held a hearing two weeks after filing an answer, so no time for discovery had elapsed. And while the court cautioned that a trial court is to make a finding on jurisdiction as soon as practical, it could not say, with the record before it, that the trial court abused its discretion in this case. As a result, the plea as was properly denied without prejudice to allow the Plaintiff an opportunity to replead and produce evidence

Under TTCA, the integral safety component doctrine turns on entity negligently providing personal property missing an integral safety component, not the non-use of property.

City of Houston v. Gutkowski, 532 S.W.3d 855 (Tex. App.—Houston [14th Dist.] 2017).

This is an interlocutory appeal from the denial of a plea to the jurisdiction involving a Texas Tort Claims Act ("TTCA") claim. The Fourteenth Court of Appeals reversed the denial and dismissed the Plaintiff's claims.

Patricia Gutkowski fell out of bed and was unable to move. Her family called 9-1-1 which dispatched Houston Fire Fighters to the scene. Upon arrival, the family of Patricia Gutkowski alleged HFD personnel did not have a portable lifting device, lift board, or lift sling. As a result, HFD personnel were unable to place Gutkowski in a proper position for lifting resulting in an injury and laceration to her leg. The laceration caused significant blood loss which allegedly caused

a heart attack later that day. The Gutkowski family sued the City, which filed a plea to the jurisdiction. The trial court denied the plea and the City appealed.

The court first analyzed the pleadings and evidence and determined the Gutkowski's claim relating to property lacking an integral safety component was actually a claim for the non-use of personal property in disguise. While the Gutkowski family alleged the emergency service vehicle was tangible personal property lacking an integral safety component of a lifting device, they did not allege the vehicle was improperly used. They only alleged it did not have something HFD personnel should have used in the bedroom. Further, the integral safety component doctrine is limited to and turns on the governmental entity negligently providing personal property missing an integral safety component, not the non-use of certain medical equipment over others. Further, the allegation HFD personnel negligently wrapped the laceration with tangible supplies is insufficient to trigger a waiver of immunity. It is not enough that some property is involved; the use of that property must have actually caused the injury. Here, that is not the case. As a result, the plea should have been granted.

City's letter advising of BOA decision was not "the decision filed in the board's office" for purpose of BOA appeal deadlines under Chapter 211 says Austin Court of Appeals

Risoli v. Board of Adjustment of the City of Wimberley, No. 03-17-00385-CV, 2017 WL 4766724 (Tex. App.—Austin October 19, 2017, no pet.) (mem. op.).

This is a board of adjustment appeal where the Austin Court of Appeals remanded the property owner's claims back to the trial court.

Risoli sued arguing the Board of Adjustment of the City of Wimberley and the City of Wimberley had improperly revoked the "grandfathered use status" of Risoli's property, barring her from using it as a short-term rental facility. The City and BOA filed a plea to the jurisdiction, which included arguments she missed the filing deadline. The trial court granted the plea and Risoli appealed.

A person aggrieved by a board of adjustment's decision may seek judicial review by presenting a petition "within 10 days after the date the decision is filed in the board's office." Tex. Loc. Gov't Code §211.011(b). The filing date is jurisdictional. The controlling question is whether the City Administrator's letter was the Board's "decision" that was "filed in [its] office" and triggering the deadline. The BOA held a meeting on September 6, 2016 regarding Risoli's appeal of the City Administrator's decision to revoke her grandfathered use. On September 14, the City Administrator wrote a letter to Risoli stating the Board of Adjustment unanimously voted to uphold the recent determination by the City and that she must immediately cease all such activities. That letter was emailed to Risoli on September 16th and again on October 18th. Risoli filed her petition November 17th but argued the BOA's minutes had not yet been approved, therefore no decision was "filed in the board's office." The City and BOA argued the letter was filed at City Hall, which is the office where the Board of Adjustment's records were kept and maintained by the City Secretary for all purposes. The City Secretary maintains the BOA records and is, by operational design, the BOA's office. However, the BOA did not submit any evidence to the court to back-up or establish

these facts. The BOA did not define what constituted it's "decision" and had not adopted protocols defining its office or filing. Given the absence of evidence, mere argument in pleadings is insufficient to factually support the motion. The order dismissing Risoli's claims is reversed and the case is remanded.

Property Owner Rule entitled representative to testify as to value of damage to remainder of property after road expansion

State v. Speedway Grapevine I, LLC, 536 S.W.3d 858 (Tex. App.—Fort Worth 2017, reh'g denied).

This is a condemnation case where the Fort Worth Court of Appeals affirmed the jury verdict condemnation award, including the admission of valuation evidence by the owner's representative.

Speedway owned real property which included a car wash and an express lube on a specific lot. In connection with a road-widening improvement project the State condemned a portion of the frontage. However, Speedway asserted the condemnation affected the ability to operate the two businesses. The State appealed the commissioner's award but the jury awarded more than the commissioner's award. The State's expert opined Speedway's remainder property had sustained damages in the amount of $0, excluding a total cost to cure of $105,826.00. Adding the value of the part condemned ($159,789.00), it opined Speedway was entitled to total compensation in the amount of $265,615.00. Speedway's experts opined the remainder property suffered a total damage of $2,609,420.00. Adding the value of the part condemned to that figure, Speedway asserted it was entitled to compensation in the total amount of $2,748,822.00. After a jury trial, the jury found the part condemned had a market value of $92,190.00 and that Speedway's remainder property was damaged in the amount of $4,401,028.00. The State appealed.

The State first objected to Speedway's appraisal expert, McRoberts. The State argued he speculated on post-condemnation nonconforming treatment, that Texas law did not recognize his income approach, and that he had improperly relied upon no compensable impairment of access. The trial court excluded McRoberts's income approach but not his cost approach. It also permitted him to testify regarding internal traffic circulation difficulties, unsafe access, and nonconformance with zoning regulations. Mr. High, Speedway's representative as the owner, testified about his experience in the car wash industry, the reasons why Speedway located the car wash where it did, the market value of the whole property, problems with a cure plan devised for the State, and the viability of the car wash after the condemnation. The State acknowledges that a property owner may testify to the value of his property, as High did here, but it argued the owner's valuation testimony must still meet the same requirements as any other opinion evidence. The court rejected this argument in part. The Property Owner Rule "is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values." Based on the presumptions that an owner is familiar with his property and will know its value, the Rule accepts that a property owner is qualified to testify. However, qualification is not the same as the basis of the opinion. The property owner "must [still] provide the factual basis on which his opinion rests." But the burden is not difficult or complex.

"Evidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim." High's testimony covered a range of topics that, taken together, provided some probative evidence to factually support his valuation opinion. Such included his great level of experience in, and knowledge about, the car wash industry and the effects of such property reductions. The testimony was properly admitted. McRoberts testified that the condemnation had affected the property's functionality so greatly that the property had experienced a change in its highest and best use to something like a small veterinary clinic or an office. McRoberts did not base his opinions on only his word, or on mere conjecture; he based it on the issues that began affecting Speedway's property only after the condemnation—unsafe access, internal circulation, and zoning nonconformities. McRoberts thus provided a reasoned basis to support his damage opinions, reinforced by well-established case law, logic, and mathematics. The court held "[b]oiled down, the State's argument is nothing more than an evidentiary sufficiency challenge improperly masquerading as an expert opinion admissibility issue. When the highest and best use of property is disputed, the jury is responsible for deciding which use is appropriate when it determines market value." Sufficient evidence exists in the record to support the jury's verdict. As a result, the verdict is affirmed.

Three years between protected activity and failure to renew contract was too long to establish a causal connection in retaliation case.

Rose v. Houston Independent School District, No. 14-16-00687-CV, 2017 WL 4697889 (Tex. App.—Houston [14th Dist.] October 19, 2017)

This is a retaliation-in-employment case where the 14th District Court of Appeals affirmed the dismissal of the Plaintiff's claims.

Rose was the Magnet Coordinator at HISD's High School for Law Enforcement and Criminal Justice ("HSLECJ"). At the beginning of the school year, Rose received an email from the school's principal stating that the school was denying admission to a student with disabilities. Rose forwarded the email to the student's mother. Five weeks later, HISD transferred Rose to a different high school. Rose filed an EEOC charge for retaliation. HISD eliminated Rose's position as part of a districtwide reduction in force ("RIF") and therefore did not renew Rose's one-year contract. Rose did not seek judicial review of the Commissioner's decision which upheld the RIF. Rose instead filed a separate civil suit against HISD, which was dismissed. Rose filed another charge of discrimination with the EEOC which became the present lawsuit. HISD filed a combined plea to the jurisdiction which the trial court granted. Rose appealed.

Rose presents no direct evidence that HISD retaliated against her. Thus, to avoid dismissal on HISD's jurisdictional plea, Rose was required to present circumstantial evidence establishing a prima facie case of retaliation. "The crucial element of a charge of discrimination [or retaliation] is the factual statement contained" in the administrative complaint. The charge must contain an adequate factual basis so that it puts the employer on notice of the existence and nature of the charges. The court first determined TCHRA's anti-retaliation provision applies to an employer's decision to not hire a prospective employee. It speaks in terms of "a person" not an employee. However, the Labor Code indicates that an employer's alleged decision to hire someone

other than the complainant does not constitute an unlawful employment practice. Nothing in the record indicates HISD deviated from its customary practices or utilized the RIF improperly. Critically, the years-long span between her 2010 protected activity and HISD's failure to hire Rose in November 2013 "is too long to establish that there was a causal connection." As to Rose's constitutional claims, she was unable to establish a protected property or liberty interest as she had not continuing contract. As a result, her claims were properly dismissed.

Amarillo Court of Appeals holds private company contracted to run city buses did not establish it was entitled to derivative immunity

Brown v. Waco Transit System, No. 07-16-00258-CV, 2017 WL 4872801 *(*Tex. App.—Amarillo October 27, 2017, reh'g denied) (mem. op.).

The Amarillo Court of Appeals reversed an order granting a plea to the jurisdiction by the Waco Transit System, Inc. ("WTSI").

Brown alleges he suffered personal injuries while riding a bus operated by WTSI. Specifically, during Brown's ride the door fell open, striking him on the head and causing injury. Brown sued WTSI, but his petition was contradictory alleging in some portions that WTSI is a non-profit doing business with Texas but other sections alleged it is a governmental entity. WTSI filed a plea to the jurisdiction alleging it is immune from suit under governmental immunity because it is the "agent" of the City of Waco. WTSI alleged it contracted with the City of Waco to perform governmental functions, entitling it to derivative immunity. The trial court granted the plea and Brown appealed.

A private entity generally is not entitled to claim governmental immunity unless "'its actions were actions of' the government, 'executed subject to the control of' the governmental entity." Specifically, "[i]f the contractor or agent lacked discretion, its actions were the actions of the governmental unit; if it had discretion, then it may be sued like any other private actor…" The contract shows merely that the City and WTSI agreed to the appointment of WTSI as the City's agent for the limited purpose of operating the City's bus system. Under the contract, while the City agreed to "provide" the buses, WTSI is the employer of the transit system employees, including the drivers and mechanics. The parties' agreement thus does not give the City control over the details of the operation or use of the buses, and the record contains no evidence that the work was performed in a manner giving the City such control. WTSI's ability to assert the City's governmental immunity depends on proof its actions were those of the City, and it exercised no discretion in its activities. Factual evidence may later prove differently, but for plea purposes, WTSI did not shown it is entitled to share the City's governmental immunity. Order granting the plea was reversed.

Plaintiff failed to timely appeal administrative order, so court has no jurisdiction to hear his constitutional claims

Perez v. Physician Assistant Board, No. 03-16-00732-CV, 2017 WL 5078003 (Tex. App.—Austin October 31, 2017, pet. denied) (mem. op.).

This is an appeal from the granting of a plea to the jurisdiction where the Austin Court of Appeals affirmed the order.

Perez was a physician's assistant whose license was revoked by the Physician Assistant Board ("PAB"). Perez sued for a variety of convoluted claims (constitutional and common law) which the Austin Court of Appeals held equated to claims challenging the revocation. At the administrative level, Perez failed to appear at the contested case hearing after receiving notice. The ALJ issued an order against Perez. The PAB found the order meritorious and deemed the assertions in the order as true. Perez sued the PAB and its director, Bentley. The PAB defendants filed a plea to the jurisdiction which the trial court granted. Perez appealed.

Perez listed 36 issues on appeal, but the court considered only the uncontested facts asserted in the record and Perez' pleadings. The substance of Perez's pleaded claims against the Board—that the Board violated the United States and Texas constitutions and the APA—challenges and seeks relief from the 2014 revocation order. However, there is no right to judicial review of an administrative order unless a statute provides a right or unless the order adversely affects a vested property right or otherwise violates a constitutional right. Perez had the potential for appeal, but a petition seeking judicial review in a contested case must be filed "not later than the 30th day after the date the decision. The record conclusively established Perez did not bring suit until 2016, well after the thirty-day deadline. Further, the order is not subject to collateral attack as the PAB was acting within its authority. Factually, the substance of Perez's claims against Bentley were limited to claims against Bentley in her official capacity, even though he asserts they are individual claims. Given that the 2014 order is final and not subject to judicial review, Bentley cannot be acting *ultra vires* and no prospective relief is available at this juncture. As a result, the trial court properly granted the plea.

Notice of non-renewal letter triggered date for EEOC complaint filing, not the date internal grievance was completed says San Antonio Court of Appeals

Alamo Community College District v. Ryan, No. 04-17-00196-CV (Tex. App.—San Antonio November 1, 2017, no pet.) (mem. op.).

This is an interlocutory appeal in an employment discrimination case where the San Antonio Court of Appeals reversed the denial of the District's jurisdictional challenge and dismissed the Plaintiff's claims.

Ryan was a full-time probationary faculty member at Northwest Vista College, which is part of the Alamo Community College District ("District"). In July 2012 Ryan was informed his contract would not be renewed based on performance and disciplinary issues. However, the letter stated Ryan was being offered a "terminal year contract" for the 2012-2013 academic year. The letter advised that if Ryan accepted the terminal year contract his employment would cease Spring of 2013. Ryan accepted the terminal year but appealed the non-renewal. He lost the administrative appeal and filed a complaint with the EEOC on January 31, 2013, then sued after receiving his right-to-sue letter. The District filed a summary judgment asserting Ryan failed to file an EEOC charge of discrimination within 180 days of the adverse employment action, specifically the July 2012 notice of non-renewal. Ryan asserted the date of adverse action was the loss of his administrative appeal in September 2012. The order was granted-in-part and denied-in-part. The District filed this appeal.

Ryan asserted the June 28, 2012, letter was merely a "proposal" or a "notice of an intended adverse action." Ryan argued because he grieved the notice to the chancellor, "[t]he action did not become an adverse action until the Chancellor denied his grievance on September 27, 2012." An unlawful employment practice occurs "when a discriminatory employment decision is made—not when the effects of that decision become manifest in later events." The "180-day limitations period in the TCHRA begins 'when the employee is informed of the allegedly discriminatory employment decision.'" There was nothing tentative or preliminary about the language in the June 2012 letter. The grievance procedure, by its nature, is a remedy for a prior decision, not an opportunity to influence that decision before it is made. The trial court denied the District's motion for summary judgment as to Ryan's contention that the District prevented him from being employed by any other college in the District. Ryan argues this claim did not accrue when he received notice of the employment decision and the dean acted in an *ultra vires* manner by including it in the letter. However, the dean simply notified Ryan of the District Board of Trustees' policy regarding ineligibility for rehire. Thus, Ryan's ineligibility for an adjunct position throughout the District was a decision made by the Board of Trustees and was an automatic consequence of the non-renewal. As a result, the deadline was the same date as the non-renewal. The record conclusively established the trial court did not have jurisdiction and the motion should have been granted in full.

Court considered statements made by bus driver within onboard system as creating a fact issue on "actual notice" of fault in death of student

La Joya Independent School District v. Gonzalez, 32 S.W.3d 892 (Tex. App.—Corpus Christi 207, pet. filed).

This is an appeal in a Texas Tort Claims Act student/bus case where the 13th Court of Appeals affirmed the denial of LJISD's plea to the jurisdiction.

Uranga, a 13-year-old student who was usually picked up at a specific bus stop for school was not there when the bus began departing. When the driver, Rodriguez, saw Uranga approaching the bus stop on foot, he stopped the bus and activated its flashing warning lights, but he had already crossed the expressway. As Uranga crossed the expressway to reach the bus, he was struck by a vehicle and died. The family sued. LJISD filed a plea to the jurisdiction, which was denied. LJISD appealed.

Under the actual notice exception to statutory written notice within 180 days, "actual notice" in this context means that the governmental unit has "knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved." LJISD's police department arrived at the scene of the accident on that day and conducted their own investigation. In Gonzalez' pleadings, she asserts the LJISD's policies expressly state a mandatory drug test of a driver is required only when there is a preponderance of evidence that a District-owned vehicle contributed to an accident. Gonzalez argued since LJISD forced Rodriguez to submit to a mandatory drug test

the District established some actual, subjective awareness it contributed to the accident. The court disagreed, noting merely investigating an accident is insufficient and the policy manual also stated drug testing is mandatory when a death is involved, regardless of fault. However, the bus driver was recorded by the onboard bus system as telling students he was going to call his supervisor and the specific details of how he might have been responsible for the accident. While LJISD asserts it was not aware of any subjective fault, the knowledge of the bus driver and the court's speculation as to a call made to a presumed supervisor creates a fact issue on actual knowledge. Further, "operation" of a motor vehicle refers to "a doing or performing of a practical work." By stopping the bus where he did, Rodriguez used the bus to indicate to Uranga it was safe to cross the expressway when it was not. This is encompassed in the waiver of immunity under the TTCA. The plea was therefore properly denied.

Two-year SOL is independent of 60-day deadline to sue after receipt of right-to-sue letter says 14th Court of Appeals

University of Texas – MD Anderson Cancer Center v. Porter, No. 14-17-00107-CV, 2017 WL 5196146 (Tex. App.—Houston [14th Dist.] November 2, 2017, no pet.) (mem. op.).

In this case, the 14th Court of Appeals reversed the denial order and allowed MD Anderson to utilize a Rule 91a motion to dispose of a suit filed outside the statute of limitations.

Porter filed suit against MD Anderson for race and gender discrimination and for retaliation in employment. MD Anderson filed a motion to dismiss under Rule 91a on the basis that its immunity was not waived because Porter failed to file suit within the two-year statute of limitations. The trial court denied the motion and MD Anderson appealed.

Rule 91a allows a party to move to dismiss a cause of action on the ground that it has no basis in law or in fact. See Tex. R. Civ. P. 91a. The timely filing of an employment lawsuit is a statutory prerequisite to filing suit and as such is jurisdictional when the defendant is a governmental entity. The limitations period for the plead claims is two years. Rule 91a motions to dismiss are analogous to pleas to the jurisdiction, requiring a court to determine whether the pleader has alleged facts demonstrating jurisdiction. Porter's pleadings fail to state any dates applicable to establish a timely suit. However, MD Anderson's motion contained the TWC charge information, noting the complaint was filed August 20, 2013. Porter filed suit on October 10, 2016, more than two years after her complaint was filed. Porter counters that she timely filed her TWC charge, then filed suit within 60 days of receiving her right to sue letter. Therefore, the statute of limitations is tolled. However, the court held the 60-day filing date is independent of the two-year statute-of-limitations. Accordingly, the two-year statute of limitations barred Porter's claims.

TOMA posting inside City Hall with a "cancelled" stamp on an agenda controlled, regardless of other agendas says 13th Court of Appeals

City of Donna v. Ramirez, No. 13-16-00619-CV, 2017 WL 5184533 (Tex. App.—Corpus Christi November 9, 2017, pet. filed).

This is a Texas Whistleblower Act case where the Corpus Christi Court of Appeals affirmed the denial of the City Defendants' plea to the jurisdiction. Ramirez, the City's

former city manager, brought causes of action against the City under the Texas Whistleblower Act and the Texas Open Meetings Act ("TOMA"). He asserts he was terminated after he reported the Chief of Police and municipal judge for ordering him to waive certain municipal fees. He asserts the meeting where the City Council terminated him was not conducted properly under TOMA. He brought suit against the City and individual officials. The City Defendants filed a plea to the jurisdiction, which the trial court denied. The City Defendants appealed.

The 13th Court first addressed the TOMA violations. The City Charter had a special provision for notice and removal of the City Manager. The City Council could act to terminate at a properly posted meeting, but the City Manager had the right to request another meeting with charges. After the first meeting, Ramirez' lawyer requested the charges and the second meeting. After it was scheduled, the lawyer requested it be reset and the City Secretary advised him it was reset. And while she provided texts to the council members about the reset and stamped "cancel" on the agenda inside City Hall, the agenda posted outside City Hall did not change. The meeting proceeded as originally scheduled and the City Council affirmed the termination. The court held Ramirez had standing to sue under TOMA as an interested member of the public. Under TOMA, a stamp of "canceled" tells the public the meeting would not be held. The fact the notices outside City Hall did not change did not save this defect. The language of §551.050 of TOMA specifically states a posting must exist in the City Hall. As a result, the trial court did not err. Under the Texas Whistleblower Act, the elements of a claim must be included in the pleadings so that the court can determine whether they sufficiently allege a violation and therefore waive immunity. The Texas Constitution states, in relevant part, that an entity may not "lend its credit or to grant public money or thing of value in aid of, or to any individual…" Tex. Const. art. III, §§ 50, 52(a). Additionally, while not expressly listed by statute, the factual allegations trigger various penal statutes as well, including abuse of official capacity under Tex. Penal Code §39.02(a)(West 2015). Ramirez asserts he was ordered to waive and/or discount certain bills and/or charges for certain city services, e.g., sewer and water bills, fees for pavilion rental at the city park, and/or cemetery fees. Such actions, if true, could possibly violate both the Texas Constitution and the penal code. Recognizing that Ramirez's burden of proof at this stage does not involve a significant inquiry into the substance of his Whistleblower claim, the court held he properly pled a claim. Ramirez's Whistleblower and TOMA claims were brought solely against the City, while Ramirez's declaratory judgment action was brought solely against certain appellants in their individual capacities. Since the individuals cannot claim the City's immunity as a defense for a plea, their part of the appeal is not authorized under the interlocutory appeal statute raised. Tex. Civ. Prac. & Rem. Code §51.014(a)(8) (West 2015). As a result, the trial court did not err in denying the plea.

City immune from suit for traffic light displaying "walk" signal at same time as green "turn arrow" says 13th Court of Appeals

City of Edinburg v. Balli, No. 13-17-00183-CV, 2017 WL 5184495 (Tex. App.—Corpus Christi November 9, 2017, pet. filed) (mem. op.).

This is a Texas Tort Claims Act case where the Corpus Christi Court of Appeals reversed the denial of the City's plea to the jurisdiction and dismissed the Plaintiff's claims.

Balli asserts she was struck by a vehicle as she used a crosswalk near the Hidalgo County Courthouse. She asserts the pedestrian traffic light displayed a "walk" signal for pedestrians when she began to cross, however, the traffic light displayed a green arrow for turning vehicles, thereby causing the accident. She asserts the City entered into a Municipal Maintenance Agreement with the State of Texas, in which the City undertook the duty "to make changes in the design and operation of the highway traffic signal(s) as it may deem necessary . . .." and to provide and maintain traffic lights at various intersections. According to Balli's petition, the City was aware of the problem with the traffic signals due to a similar collision on January 17, 2012. The City filed a plea to the jurisdiction arguing the lights were not malfunctioning but were operating as designed by TxDOT to display a "walk" and a "turn arrow" at the same time. Vehicles are required to yield to pedestrians in the cross-walks. The trial court denied the plea and the City appealed.

Under the Texas Tort Claims Act ("TTCA"), the Texas Supreme Court has found a waiver of immunity "only in those situations in which the sign or signal was either (1) unable to convey the intended traffic control information, or (2) conveyed traffic control information other than what was intended." The term "condition" under the TTCA refers exclusively to "something 'wrong' with the traffic sign or signal such that it would require correction after notice." Further, under the TTCA, a governmental entity remains immune from suits arising from its discretionary acts and omissions. The City asserts it assumed responsibility for the lights in 2012, and the City has not changed the lights' programming originally inserted by TxDOT since that time. The City reasoned that because the lights "convey[ed] the intended traffic control information," the traffic lights do not qualify as a wrongful condition of real property for which immunity would be waived. Based on testimony attached to the plea, the City utilized its discretion not to change the design or programming of the lights since they complied with TxDOT guidelines. Since the City established the lights were working as intended, Balli had the burden to negate that factual assertion. However, the only evidence Balli provides merely attacks the wisdom of that intent and the discretionary design choices, not the functioning of the lights. Balli has not produced any evidence that would create a fact issue concerning the existence of a "condition" in real property and waive immunity. The trial court should have granted the plea.

Since officer's affidavit did not detail his evaluation as he approached intersection, 4th Court of Appeals holds city did not establish emergency response application to tort suit

City of San Antonio v. Torres, No. 04-17-00309-CV, 2017 WL 5472537 (Tex. App.—San Antonio November 15, 2017, no pet.) (mem. op.).

This is a Texas Tort Claims Act ("TTCA") case involving a vehicle accident where the San Antonio Court of Appeals affirmed the denying of the City's plea to the jurisdiction.

Torres and Dears were passengers in a truck which was struck by Officer Galvan's vehicle after the officer failed to yield at a stop sign intersection. Officer Galvan did not have his emergency lights on but testified he was responding to a call over the radio for "officer

in trouble." Torres and Dears sued, and the City filed a plea to the jurisdiction. In the plea, the City asserted Galvan was responding to an emergency situation and did not act with conscious indifference. The trial court denied the plea and the City appealed.

The laws applicable to emergency vehicles allow the operator of an authorized emergency vehicle to proceed past a stop sign "after slowing as necessary for safe operation." Tex. Transp. Code §546.001(2), (3) (West 2011). Although the operator of an emergency vehicle has a duty to operate the vehicle "with appropriate regard for the safety of all persons," liability is imposed only for reckless conduct The Plaintiffs' pleadings allege Galvan's conduct was reckless or taken with conscious indifference. Because the emergency call analysis is inextricably bound to the merits, the City bears the burden of establishing the elements for the defense. The City was required to present evidence establishing Officer Galvan was responding to an emergency call, complied with the laws applicable to an emergency, and did not operate his vehicle recklessly or with conscious indifference. Officer Galvan's affidavit stated he "decided not to engage his lights or sirens" because he was in "close proximity to the dangerous situation" and did not want to escalate the situation or to spook or frighten the suspect and that he continuously evaluated the traffic conditions. However, the affidavit focused on his response to the emergency and did not establish he followed the laws or any facts as he approached and went through the intersection. Since the affidavit does not provide sufficient facts of what Officer Galvan did, evaluated, considered, and decided, at the intersection the City has not established the applicability of the emergency call exception.

In annexation opposition, Dallas Court of Appeals opinion could result in trial courts using TOMA injunction provision to prevent legislative acts not yet up for vote

In Re City of Mesquite, Texas, No. 05-17-01303-CV, 2017 WL 5559859 (Tex. App.—Dallas November 14, 2017, no pet.) (mem. op.).

In this original mandamus proceeding, the Dallas Court of Appeals held the trial court did not abuse its discretion in granting certain injunctive relief prohibiting annexation in an extraterritorial jurisdiction.

In its request for injunctive relief, the County alleged that the City violated the Texas Open Meetings Act ("TOMA") and Texas Local Government Code by failing to provide proper notice of certain meetings and proper notice of the land sought to be annexed. Essentially, the County, through its authority to bring matters on behalf of the State of Texas, filed this as a *quo warranto* proceeding. The City, as noted in its briefing, was attempting to complete the annexation before the application of recent legislation changing the annexation scheme in Texas. The trial court issued an injunction order prohibiting the City from taking any action until the trial court made a ruling on the merits. The City filed an original mandamus petition in the Dallas Court of Appeals seeking to have the court order the trial judge to vacate the injunctive order.

The City does not address the intervenors' and County's allegations of TOMA and Local Government Code violations or their contention that injunctive relief was properly sought and obtained under TOMA. It does not explain how the allegations of TOMA violations are not likely to reoccur. Finally, the City contends that if it cannot annex the

properties in question today, it will not be able to annex them at all. However, it does not explain how that contention would establish that the trial court abused its discretion. As a result, it has not established the requirements entitling it to mandamus relief. [Comment: the opinion does not address the City's arguments in its brief that the trial court lacked authority to enjoin a legislative function, which addresses the injunctive ability under TOMA and Local Government Code and that the annexation law changes effective December 14th, so no similar occurrence is possible. The State asserted the injunction only prevented the City from holding meetings contrary to state law and that no irreparable injury is necessary to receive a TOMA injunction.]

Austin Court of Appeals holds ex-professor properly alleged disability and age discrimination claim even where there is no legal obligation to renew a term contract

Texas State University v. Quinn, No. 03-16-00548-CV, 2017 WL 5985500 (Tex.App.—Austin November 29, 2017, no pet.) (mem. op.).

This is an interlocutory appeal from the denial of a plea to the jurisdiction in an employment-discrimination dispute where the Austin Court of Appeals affirmed the denial.

Quinn accepted an "emergency hire" professor position for the University's doctoral nursing program when it was just starting the program. When the University made the position permanent, Quinn applied. She had progressive and severe nerve damage to her hands and feet. The pain in her feet made walking difficult. She requested an accommodation while in the temporary position, but nothing was done. The University did not hire Quinn and did not renew her contract the following year. She sued the University claiming disability and age discrimination and retaliation. She cast her case against the University as one coming within the terms of the Texas Labor Code section 21.051. The University filed a plea to the jurisdiction, which was denied. It appealed.

The court held "[c]ontrary to the University's argument, Quinn discharged her pleading requirement in her amended petition by asserting in minute detail the facts supporting her discrimination and retaliation claims. [she] filed a lengthy fact-studded response in which she marshaled evidence in support of each contested element of her discrimination and retaliation claims." Quinn brought forward evidence that she was qualified for the job she had and for the post she sought. Apparently satisfied with her qualifications, the University kept her on for two years in "emergency hire" status. The University argued because there is no legal obligation to renew a term contract, as a matter of law no "adverse action" can occur. However, the court declined to make that holding as a bright line rule. Quinn established she was replaced by a non-disabled, younger female. She also complained to her employers about the failure to accommodate her disability, which can form the basis of her retaliation claim. As a result, the plea was properly denied.

Dallas Court of Appeals hold officer did not establish official immunity because of fact question exists as to whether a reasonable officer would look both ways before entering an intersection

City of Dallas v. Lamb, No. 05-16-01506-CV, 2017 WL 5987777 (Tex. App.—Dallas December 4, 2017, no pet.) (mem. op.).

This is an interlocutory appeal from the denial of the City's plea to the jurisdiction in a police auto-accident case. The Dallas Court of Appeals affirmed the denial.

Dallas police officer Valerie Womack was assigned to a major accident emergency call and was enroot. At a specific intersection, Womack did not see any vehicles posing a danger but recognized some danger exists when entering an intersection where "…visibility can be somewhat obscured by a building." Lamb's vehicle "appeared suddenly in the intersection" and collided with Womack. The City asserted Womack was entitled to official immunity, therefore granting the City immunity. The trial court denied the plea and the City appealed.

The trial court focused on the "good faith" element of official immunity, holding a prudent officer "might well have been concerned" about the obstruction. The trial court held on the record "the video convince[d the trial court] even more that [Womack] stopped at the stop sign, then she proceeded. But she obviously couldn't have looked both ways and proceeded because there's no reaction from her until the impact. If she had slammed brakes because she saw him, something like that. But it appears from the video that she just wasn't looking that way at all." Based on the evidence in the record, the Dallas Court of Appeals held a fact issue exists as to "…whether a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately respond to a Code 1, no lights no siren, call outweighed a clear risk of harm to the public in continuing, without looking for oncoming traffic, through an intersection where her visibility was obscured." The plea was properly denied.

Trial court properly dismissed subsequent purchaser's TTCA and Takings claims after City demolished house

Rodriguez v. City of Fort Worth, No. 07-16-00037-CV, 2017 WL 6459532 (Tex. App. — Amarillo December 8, 2017, no pet.) (mem. op.).

This is a takings/condemnation and TTCA case where the Fort Worth Court of Appeals affirmed the granting of the City's plea to the jurisdiction.

Prior to Rodriguez's ownership of a residential structure, the City's Building Standards Commission found it to be substandard and hazardous to public health. A copy of the order was mailed to the then owner and filed in the deed records of Tarrant County on October 19, 2012. Rodriguez purchased the property on December 12, 2012, without personal knowledge of the Commission's order, but the court found Rodriguez possessed constructive knowledge due to the filing in the deed records. The property was demolished on June 28, 2013 by a contractor hired by the City. Rodriguez brought suit, alleging the City intentionally destroyed the building (takings) or negligently destroyed it under the Texas Tort Claims Act. The City filed a plea to the jurisdiction which the trial court granted. Rodriguez appealed.

As to Rodriguez' tort claims, nothing in the record shows City employees were involved with the demolition by "operating" or "using" motor-driven vehicles or equipment or by exercising any control over the independent contractor or its employees. No City owned motor-driven vehicles or equipment were used in the demolition. As a result, the City has not waived its immunity under the Texas Tort Claims Act. As to Rodriguez' takings claim, Rodriguez did not

allege any facts demonstrating that demolition of his property was for public use. The improvements on the property were found to be substandard and hazardous to public health; however, the owner was given the opportunity to bring those improvements up to code in order to prevent their demolition. When the owner failed to comply, the City removed the public health hazard. As such, Rodriguez's claims do not allege a constitutional taking. Rodriguez also asserted he requested leave to amend his pleadings and was denied. However, Rodriguez was given and took advantage of two prior amendments to address the City's plea and supplemental plea. Because Rodriguez had a reasonable opportunity to amend he cannot now complain about being deprived of an opportunity to amend. Furthermore, even if Rodriguez were afforded an opportunity to amend his live pleading indicates incurable defects – specifically, the use of an independent contractor of the tort claims and lack of a public purpose for takings. As a result, the plea was properly granted.

Austin Court of Appeals holds Medicaid claim information is not protected and potentially subject to disclosure under Public Information Act

Paxton v. Texas Health and Human Services Commission, No. 03-15-00652-CV, 2017 WL 6504084 (Tex. App. —Austin December 14, 2017, pet. filed).

This is a Public Information Act ("PIA") lawsuit where the Austin Court of Appeals reversed the granting of a summary judgment in favor of the Commission and remanded the matter back to the trial court.

Texas Health and Human Services Commission ("HHSC") received a PIA request for healthcare-service providers' Medicaid claims for reimbursement. HHSC asserted the names of, or any information concerning, persons applying for or receiving Medicaid assistance is confidential. The AG issued an opinion the information must be released because it does not identify the individuals from whose claims the information is derived and, thus, is not "any information concerning" Medicaid applicants or recipients. After opposing summary judgments, the trial court ruled for HHSC that the information was excepted from disclosure. The AG appealed.

HHSC is charged with supervising the administration and operation of the Texas Medicaid program. The specific Medicaid-claim information requested was "date of service; procedure code; claim status; billed amount; paid amount; provider name and ID; provider codes; and billing entity." The AG agreed the claim numbers were protected, but the remainder of the information must be released. Tex. Hum. Res. Code § 12.003 states the names and "any information concerning persons applying for or receiving [Medicaid] assistance" are confidential. The statutory construction in this case centered on the phrase "any information concerning" Medicaid recipients. HHSC asserts that since the claim payment information is derived from individual patient treatments, it qualifies as "any information concerning" the recipient. However, the panel disagreed. The fact the information requested is necessarily taken from individuals' Medicaid files is not dispositive. The court analyzed the sentence structure but held the requirement it read the statute liberally to promote disclosure should win out. Section 12.003, therefore, expresses an intent to shield only that information in Medicaid records that names or refers to Medicaid applicants or recipients—i.e., identifies the applicants or recipients, discloses their personal information, or could be used to identify them. However, the court

held the AG did not negate the fact the information could be used to derive the identity of a recipient. Therefore, it remanded the case.

City and Officer who witnessed car accident immune from claims they "failed to protect and warn" of the impending collision

Clegg v. City of Fort Worth, No. 02-17-00040-CV, 2017 WL 6377433 (Tex. App.—Fort Worth December 14, 2017, no pet.) (mem. op.)

This is a Texas Tort Claims Act ("TTCA") vehicle accident case where the Fort Worth Court of Appeals affirmed the granting of the City's plea to the jurisdiction.

Madrigal's car collided with Howell's car when Madrigal ran a red light. Clegg was a passenger in Madrigal's car who suffered injuries. Fort Worth Police Officer Olimpo Hernandez witnessed the accident. He wrote a crash report stating he observed multiple containers of beer inside Madrigal's car, Madrigal smelled of alcohol, had a blood-alcohol level of .10 and was arrested. Clegg filed suit against the City and Hernandez asserting they failed to regulate traffic through the use of his patrol vehicle. In a separate suit, Clegg sued Madrigal. Hernandez was dismissed pursuant to §101.106(e). The City then filed a plea to the jurisdiction asserting the police department was not a jural entity and Clegg's injuries were not caused by the operation of Hernandez' vehicle. The trial court granted the City's plea and issued findings of fact and conclusions of law. Clegg appealed.

Characterizing Clegg's briefing as a "garbled morass," the court held it was not required to guess at what causes of action he was trying to advance but would attempt to decipher them based on the pleadings. However, under §101.055, the TTCA unequivocally does not apply to a claim arising "from the failure to provide or the method of providing police or fire protection." Such is the heart of what Clegg is alleging. Further, no negligent act of Hernandez caused the accident. "[T]he (vehicle)'s use must have actually caused the injury." That is not the case here, therefore no waiver of immunity exists. Moreover, the Texas Supreme Court "has never held that non-use of property can support a claim under the [TTCA]." The plea was properly granted.

City immune from suit alleging negligent use of Vac Truck to clear blockage in sewer line

City of The Colony, Texas v. Rygh, No. 02-17-00080-CV, 2017 WL 6377435 (Tex. App.—Fort Worth December 14, 2017, no pet.) (mem. op.).

This is a Texas Tort Claims Act ("TTCA"), negligent operation of motor-driven equipment case where the Fort Worth Court of Appeals reversed the denial of the City's plea to the jurisdiction and dismissed the Plaintiff's claims.

The Rygh's home was flooded when raw sewage backed up into their home. Prior that morning, Rygh's neighbor, Harper, advised the City a pipe outside his home was expelling sewage into this yard. City repair crews arrived and determine a blockage was causing a backup witnessed by Harper. The City used a "Vac" truck to clear the line. The Vac truck is powered by the engine of the truck and uses a nozzle to break the blockage. The truck uses pressurized water which is propelled downstream out of the back of the nozzle [,] which propels [the nozzle] upstream toward the blockage. When used,

the nozzle broke the blockage causing the sewage to immediately begin flowing downstream away from the residences. The Ryghs later sued the City, alleging that its employees' negligent use of the Vac truck to break through the blockage in the sewer main had caused the sewage to back up into their residence. The trial court denied the City's plea to the jurisdiction and the City appealed.

The Texas Supreme Court has repeatedly clarified that the phrase "arises from" requires a nexus between the operation or use of the motor-driven vehicle and the plaintiff's personal injuries and property damage. As the uncontroverted evidence established, no water was sent upstream toward the residences. Employees were monitoring the sewage levels upstream and noted no sewage reversed course when the nozzle was deployed. Only a physical object was thrust upward into the line 20 or so feet to break the blockage. The nexus requires more than mere involvement of property; the vehicle's operation or use must have caused the injury. Further, the timing in the different affidavits does not conflict as the Ryghs' affidavit asserted their home flooded at approximately 7:45 a.m. and the City's crew did not arrive at the location until after 8:00 a.m. The jurisdictional evidence conclusively establishes that the property damage sustained by the Ryghs did not arise from the City's use of the Vac truck. Finally, no waiver of immunity exists for the claims the City failed to notify the Ryghs of work on the sewer line. The plea should have been granted.

El Paso Court of Appeals holds non-appearance jurors failed to show waiver of immunity in contempt/fee challenge case but should be allowed to amend.

Dallas/Fort Worth International Airport Board v. Vizant Technologies, LLC, No. 05–17–00090–CV, 2017 WL 6627542 (Tex. App.—Dallas December 15, 2017, pet. filed) (mem. op.)

This is a contractual immunity case where the Dallas Court of Appeals affirmed-in-part and denied-in-part the Airport Board's plea to the jurisdiction.

The Dallas/Fort Worth International Airport Board ("Board") is a special purpose governmental entity separate from each of the cities making up its creation. The Board delegated to its staff the ability to execute contracts on behalf of the Board up to $50,000 without Board approval. In 2012 staff retained Vizant Technologies, LLC, to analyze the Board's credit-card processing costs. Its fees were based on the estimated reduction and savings achieved but was limited to $50,000. Vizant delivered the consulting services and by its calculations, it was due over $300,000. Pursuant to the "good faith effort" clause, Board staff submitted a request to the Board for a revised limit of $330,000, but the Board rejected the request. The Board paid Vizant's $50,000 fee as specified in the agreement. Vizant sued the Board for breach of contract, fraudulent inducement, fraud-in-the performance, promissory estoppel, and attorney's fees. The Board filed a plea to the jurisdiction which was denied. The Board appealed.

First, the record shows the Board collects fees for processing credit-card payments in connection with its operation of an airport, something it is expressly authorized by statute to do. The operation of an airport is expressly defined by statute as a governmental function. As a result, the court rejected Vizant's argument the contract was proprietary. However, secondarily, the contract was for services provided to that governmental entity and is expressly waived by Tex. Loc. Gov't Code §§271.151-153.

The Board asserts the contract was not properly executed on behalf of the Board since Vizant sought payment exceeding $50,000. However, the "good faith" clause, under which Vizant focuses was breached, is not tied to a $50,000 limit by either the delegated authority or the contract. Construing the pleadings in Vizant's favor, the court held the Legislature waived immunity for this contract. Next, the court agreed with the Board that it retains immunity for fraud, waiver-by-conduct and promissory-estoppel claims.

Tenant's lease language meant it did not have standing in condemnation suit

Pizza Hut of America, LLC v. Houston Community College System, No. 01-17-00101-CV, 2017 WL 6459550 (Tex. App. — Houston [1st Dist.] December 19, 2017, no pet.) (mem. op.)

This is a condemnation suit where the central issue is a tenant's standing in a condemnation suit and claim for a pro rata share of the award. The First Court of Appeals held the tenant had no standing.

Pizza Hut was a tenant of the Woodridge Plaza Shopping Center when the Houston Community College System ("HCCS") condemned the property. As part of the condemnation proceedings, a condemnation award of $427,100 was designated to be paid to all of Woodridge Plaza's tenants, and Pizza Hut sought $7,100 as its pro rata share. The trial court concluded, based on language in Pizza Hut's lease, it had no standing and was not entitled to any of the award. Pizza Hut appealed.

The Pizza Hut lease with the prior owners had a condemnation clause noting "[t]he Condemnation Award shall belong to the Landlord; however, Tenant shall be entitled to the Unamortized Cost of Tenant Improvements, plus Tenant's relocation expenses as determined by the condemning entity or court of law." After condemnation, Pizza Hut continued operating its business at the Woodridge Plaza location—using its established equipment and improvements—at a profit and without interruption of physical impairment by the condemnation. In April 2016, while the condemnation proceedings were still pending, Pizza Hut sold all ninety of its Houston locations, including the Woodridge Plaza location. The sale price included improvements to the Woodridge Plaza location but not the leasehold interest. A lessee generally has standing in condemnation proceedings and is entitled to share in a condemnation award when part of its leasehold interest is lost by condemnation. However, a tenant may waive this right in the lease or elsewhere. By the definition in the lease, Pizza Hutt suffered no impairment. The court rejected Pizza Hutt's argument that the uncertainty created by the condemnation constituted an impairment. It operated with no change in profit and did not establish the "uncertainty" had any impact on its operation. As a result, it lacked standing to sustain a claim against HCCS.

El Paso Court of Appeals holds non-appearance jurors failed to show waiver of immunity in contempt/fee challenge case but should be allowed to amend.

Luttrell v. El Paso County, No. 08-16-00090-CV, 2017 WL 6506402 (Tex. App.—El Paso December 20, 2017, no pet.).

There is no way to categorize this case in a single sentence. In the thirty-nine-page opinion, the El Paso Court of Appeals addressed a challenge to El Paso County's use of a special assignment judge who would issue and handle all contempt proceedings when a juror would fail to appear for duty.

Long opinion means long summary — sorry. The Court held the County retained immunity based on the pleadings, but the Plaintiff should be afforded the opportunity to amend. The case was remanded. For government attorneys or those suing governments, this opinion provides a good basis and starting point for various immunity issues and Uniform Declaratory Judgment Act ("UDJA") claims.

Appellants filed a lawsuit on behalf of themselves and others, naming Judge Woodard and El Paso County, requesting a declaration that their contempt judgments were void for lack of jurisdiction and that Judge Woodard imposed court costs and fees in an "illegal" manner. Apparently, when a juror failed to respond to a jury summons in a particular court in El Paso County, that court would either "refer" or "transfer" the matter to Judge Woodard for the purpose of allowing him to conduct contempt proceedings against the recalcitrant juror. The collective jurors sought to have their court costs and fees removed and the process stopped. The case has many implications and court performed various analyses of statutes discussing the power of the courts and the counties. By the time the case hit the Court of Appeals, Judge Woodard had been dismissed under judicial immunity and the only issue was the immunity of the County. The County filed a plea to the jurisdiction, which the trial court granted. The collective jurors appealed.

The court began with a history of governmental immunity and transitioned into immunity in declaratory judgment proceedings. The court cited various cases noting the UDJA only waives immunity if the validity of a statute (or ordinance) is in play. The Appellants failed to identify a statute being challenged. Their pleadings "reveal that the true nature of their claims center on their belief that the actions of Judge Woodard and/or the County violated existing law, i.e., that they were held in contempt in violation of their due process rights, and that they were accessed illegal court costs and fees…" Such claims cannot be brought under the UDJA. Additionally, the UDJA may not typically be used to collaterally attack, modify, or interpret a prior court judgment. The contempt proceedings were declared to be criminal in nature, not civil. Civil courts may only exercise "equity jurisdiction" in cases involving criminal proceedings in a "narrow" set of circumstances, which are not present here. The UDJA is the wrong vehicle for making a challenge to the validity of a criminal contempt judgment. There is a line of cases stating the UDJA can be used to collaterally attack void judgments. The proper method to collaterally attack a criminal contempt judgment as being void is through either a petition for a writ of habeas corpus when the contemnor has been subjected to jail time, or a petition for a writ of mandamus when, as here, the contemnor is subjected only to a fine. Such are exclusive mechanisms.

Appellants also sought the recovery of the fines, fees and costs, which they believe Judge Woodard wrongfully imposed. However, Appellants' request for a "refund" cannot be brought in a UDJA proceeding in the absence of legislative permission. When fees are paid in the context of a judicial proceeding, the aggrieved party may challenge the imposition of those fees (illegal or otherwise) in the context of those proceedings, thus satisfying the requirements of due process. When a party pays an illegal tax or fee "under duress" in an administrative matter they may challenge it, but these were judicial proceedings. In a judicial proceeding, once a defendant pays the fee, it is voluntarily given. To avoid paying the fee, the defendant must challenge it in the proceedings or utilize

another system established for the challenge. Appellants had other means of challenging the validity of the costs and fees imposed on them. They could have challenged it in the proceedings, filed a mandamus or brought claims under Article 103.008 of the Texas Code of Criminal Procedure, which provides a separate statutory remedy to correct erroneous or unsupportable court costs. They failed to do so. As to Appellants attempted *ultra vires* claim, they only named the County. Such claims must be brought against an official. Additionally, claims of judicial court action versus county administrative action, falls outside the scope of any takings claims under the Texas Constitution. As to the Appellants §1983 claims, a judge has judicial immunity from a lawsuit brought under §1983, and therefore cannot be named as the "person" who violated the plaintiff's constitutional rights, when the lawsuit is based on the judge's judicial actions. A county may only be held liable in a §1983 case if the plaintiffs are able to demonstrate that the county had an "official policy or custom" that caused them to be subjected to a denial of a constitutional right. Appellants have not alleged in their current pleadings that the County had any policy or custom that deprived them of their federal constitutional rights and only allege Judge Woodard acted without authority. There is nothing in the pleadings or the record to suggest that Judge Woodard was executing any county policies and, to the contrary, everything points to him acting in his judicial capacity (for which he is immune from suit). Finally, the court noted that while the panel "expresses no opinion" as to whether the Appellants can successfully amend, they recognized the should be given the opportunity. The court ends by stating "[w]e do caution Appellants, however, that any amendment to their pleadings must focus on the liability of the County as the only remaining party in the proceeding, with the recognition that Judge Woodard is no longer a party to the proceedings, and expressly explain what actions the County took that would render them liable to Appellants." The case was then remanded.

Beaumont Court of Appeals holds assignee to contract proceeds established waiver of immunity, even though contractor was paid

City of Beaumont v. Interflow Factors Corporation, No. 09-17-00284-CV, 2017 WL 6521345 (Tex. App.—Beaumont December 21, 2017, no pet.) (mem. op.).

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a contract dispute claim. The Beaumont Court of Appeals affirmed the denial.

Interflow sued the City and a contractor named Barnett alleging the City waived immunity by contracting with Barnett to perform landscaping services. Barnett hired Interflow to deal with her invoices and assigned the right to the collected payments on the present and future accounts. The City was provided notice of the assignment. The City allegedly began submitting payments to Interflow for the work performed by Barnett. However, Interflow alleged that, at Barnett's request, the City directly paid Barnett for four invoices that totaled $11,847.00. According to Interflow, because the City had received notice of the assignment, the City's payments to Barnett did not discharge the City's liability to Interflow pursuant to the invoices. The City filed a plea to the jurisdiction, which the trial court denied. The City appealed.

The first issued addressed by the court was the City did not have a contract with Interflow, only Barnett. Therefore, the

waiver of immunity under Tex. Loc. Gov't Code § 271.152 came into question as it relates to assignments. The court performed a mild analysis of the language and citing to *First-Citizens Bank & Trust Co* 318 S.W.3d 560 (Tex. App.—Austin 2010, no pet.), held the statute does not limit who can collect under the contract. An assignee steps into the shoes of the assignor. Therefore, as long as the contractor would have a right to seek payment, so does the assignee. The Court held immunity was therefore waived. [Comment: The Court analyzed the issue of Barnett no longer having the right to seek payment since he was already paid, as that was, apparently, considered a merits-based argument which was not necessary to analyze for jurisdictional purposes.]

Dallas Court of Appeals disagrees with El Paso Court of Appeals and holds civil service commission dismissal of grievance is still subject to appeal to district court

Bailey v. Dallas County, No. 05-16-00789 CV, 2017 WL 6523392 (Tex. App.—Dallas December 21, 2017, pet. filed) (mem. op.).

This is a county civil service case where the Dallas Court of Appeals affirmed-in-part and reversed-in-part the County Defendants' plea to the jurisdiction filed in a district court case challenging his termination.

Bailey was a Dallas County Deputy Sheriff who was indicted for sexual assault and suspended from active duty. Bailey timely filed a grievance challenging his termination. Before the Civil Service Commission ("Commission") held a hearing, the County dismissed the charges against Bailey. Once the hearing was set, the County requested that the Commissioners dismiss Bailey's grievance because he did not request a hearing within thirty days of the dismissal of the indictment, which the County asserted was required by §5.02(2) of the Dallas County Sheriff's Department Civil Service Rules. The Commission granted the motion. Bailey then filed suit in district court under §158.037 of the Texas Local Government Code, which allows for an appeal from a Commission order removing him or demoting him. He also brought declaratory judgment claims asserting the Commission's rules were void and the Commission acted in an *ultra vires* manner. The County Defendants filed a plea to the jurisdiction, which the trial court granted. Bailey appealed.

The County Defendants asserted the Commission's order did not demote or remove him but was simply a dismissal of the appeal. However, this has the effect of leaving the Sheriff's removal in place. The court noted *County of El Paso v. Zapata*, 338 S.W.3d 78 (Tex. App.—El Paso 2011, no pet.) expressly supported the County Defendants' position. However, the court disagreed with the El Paso Court of Appeals, thereby causing a split in the districts. The Commission's dismissal supported the Sheriff's removal and therefore §158.037 was applicable. Next, the court analyzed the UDJA claims. U*ltra vires* claims under the UDJA are prospective only. Bailey clearly is seeking retrospective relief under the UDJA, which is not permitted. Bailey's request for a prospective hearing would require the retrospective setting aside of the prior order of dismissal. Bailey's pleadings also do not actually seek the invalidity of a Commission rule or state statute. He asserts the Commission injected provisions which are not contained within the state statutes. These are complaints about the applicability and construction of the sections, not that they are invalid. Bailey sought a writ of mandamus ordering the County to provide him a Commission hearing. The court disagreed the Commission had the discretion to provide Bailey a hearing. Officials have no discretion

to misapply the law. As a result, the court had jurisdiction to hear Bailey's mandamus claim to a hearing, even though it has a retrospective effect. Finally, the County asserted the Commission was not a separate jural entity subject to suit. Whether the Commission has a separate and distinct legal existence is a jurisdictional fact question. The County has the burden in a plea. It presented no evidence the Commission does not have a separate and distinct legal existence. The court, in a footnote, stated it expressed no opinion as to what the ultimate result of the analysis would be once evidence is submitted, only that the trial court had jurisdiction to consider the issue.

Tyler Court of Appeals holds even though it was established more than 100 years ago, and no street has been built, mere non-use of a dedicated road easement does not amount to abandonment.

Jesus Christ Open Altar Church v. City of Hawkins, No. 12-17-00090-CV, 2017 WL 6523088 (Tex. App.—Tyler December 21, 2017, reh'g denied).

This is a property dispute case in which the 12th Court of Appeals affirmed the trial court's declaratory judgment regarding the City's control over it right-of-way.
The City filed a declaratory judgment action against the Church regarding whether a plat recorded in 1909 dedicated fee simple ownership or any easements for roads to the City as well as whether the City had abandoned the roadway. Apparently, the City executed an "abandonment" deed in 1994 and questions arose regarding the scope of the abandonment. After a hearing, the trial court defined the scope of the property at issue. It further held the 1909 plat conveyed easements in and to the streets and alleys of the City, and the City holds an easement over the property at issue. Also, the court determined that the City has not conveyed or abandoned its easement. The Church, which was claiming ownership of the property, appealed.

Once a road is dedicated to public use, that road remains subject to that use unless it is abandoned. The purpose of a public road, particularly one of local character, is to provide access to property abutting upon it, as well as a thoroughfare between distant points. To show common law abandonment, one must show intent to abandon and acts of relinquishment. The testimony showed that the named street (i.e. Ash Street) was not built on the land where the 1909 plat shows it to be. The City has not used its easement across the disputed tract of land and has no plans to use it. However, there is no evidence of an express intention to abandon the City's easement. There is no evidence that it would be impossible or highly improbable to build a street on the disputed property or that the object of the easement wholly fails. Although it was established more than 100 years ago, and no street has been built, mere nonuse of the easement does not amount to abandonment. In early 1994, English Funeral Home, which at the time owned the Church property at issue, petitioned the City to abandon certain unused streets and alleys, referencing the original 1909 plat. The City did expressly abandon certain streets under the request and referenced them by block number. The record includes deeds showing the chain of title of the Church property from 1993 until the Church's 2015 purchase. Utilizing incorporation by reference, the Court determined the Churches assertion of the location of the easements and scope contradicts the deeds. The trial court's determination that the Church property is south of the abandoned easement, and not included in it, is not so contrary to the overwhelming weight of the evidence as to be

clearly wrong and unjust. Judgment affirmed in favor of the City.

Waco Court of Appeals holds property owner was precluded from bringing further claims for disannexation

Hall v. City of Bryan, No. 10-16-00044-CV, 2018 WL 327142 (Tex. App.—Waco January 3, 2018, no pet.) (mem. op.).

This is a disannexation lawsuit where the Waco Court of Appeals affirmed the trial court's summary judgment motion dismissing the Plaintiff's claims for disannexation.

This is the third lawsuit (4th appeal) brought by Hall in order to disannex property which was annexed by the City back in 1999. The procedural history entails various trips to the Waco Court of Appeals. In 1999 the City annexed a strip of lands leading up to the City's airport, one section belonging to Hall. Hall originally sued for disannexation in 2004 asserting the City failed to follow the annexation service plan but was unsuccessful. She sued again in 2010 and was unsuccessful. She sued again in 2012. Each time Hall attempted different grounds and claims seeking disannexation. In the present case (*Hall III*), the City filed a plea to the jurisdiction which the trial court granted and Hall appealed. The Waco Court affirmed in part and reversed in part, holding that the court had jurisdiction to hear the claims the City failed to provide proper police patrols under the annexation plan created in 1999. All other claims were dismissed. The case was remanded for the police patrol claim and Hall amended her petition again trying to reinject the dismissed claims. The City filed a motion for summary judgment as to all claims, which the trial court granted. Hall appealed.

The Waco Court of Appeals first examined whether Hall's amended petition after remand raised new claims or if they simply recast the claims already dismissed. The court determined she simply re-labeled claims for failing to provide sanitary sewers, fire suppression with hydrants, or a water line capable of supporting fire hydrants. Under the law of the case doctrine, the court would not revisit such claims and they remain dismissed. As to the police patrol claims, the City first asserted the claims were barred by *res judicata* since Hall raised or could have raised the same claims in *Hall I*. Hall's twist on the police patrol claim is that the even if the City provided police patrols, it did not provide them "in good faith" under Chapter 43 of the Local Government Code. The court analyzed the evidence submitted in the City's summary judgment and noted Hall expressly agreed that in her 2004 petition, she was complaining that the City was not conducting routine and preventative police patrols. Further, she agreed that, in anticipation of supporting her petition for disannexation in 2004, she had recorded 130 hours of video purportedly showing no routine patrols on a street in the annexed area. This is some of the same video evidence she contended supports her claims in her 2014 petition. Regardless of whether the specific claim of no regular or routine preventative police patrols was actually pursued in the 2004 petition for disannexation, Hall knew the claim was present in 2004 and could have raised it. Under the principle of *res judicata*, such claims are precluded in the present case. The judgment of the trial court is affirmed.

Dallas Court of Appeals holds ex-police officer failed to establish his termination was in retaliation for whistleblower report of "pronoun confusion" in PD assault report

Hackbarth v. University of Texas at Dallas, No. 05-16-01250-CV, 2018 WL 286406 (Tex. App—Dallas January 4, 2018, no pet.) (mem. op.).

This is a Texas Whistleblower Act case where the Dallas Court of Appeals affirmed the trial court's granting of the University's motion for summary judgment.

Hackbarth was hired as a police officer for the University after retiring from the Dallas Police Department after 28 years of service. While on the force, a specific student at Theno University alleged her boyfriend, Rana, assaulted her. The investigator, MacKenzie, closed the case by allowing the complainant to sign a statement of non-prosecution, but instructed Rana to have no further contact with the complainant. MacKenzie issued an alert to officers to the escalating violence between the couple and that both had refused to prosecute. It advised officers to "take appropriate action" if they made contact and an offense had occurred. Several months later Hackbarth along with Lt. Montgomery, were dispatched to a disturbance at the University library involving both students. Both denied any altercation. When MacKenzie reviewed Hackbarth's report he recognized the names. After consulting with the prosecutor, MacKenzie wanted an arrest for Rana, but Hackbarth insisted no violation occurred. MacKenzie instructed Montgomery to draft an affidavit in support of an arrest warrant which Hackbarth disagreed with some of the wording. Hackbarth reported the incident to the Chief of Police. The Chief investigated and determined "pronoun confusion" caused an error in the report. Hackbarth complained to the DA and Texas Rangers. Rana later pleaded no contest to Class C assault in municipal court. The University's assistant director over police performed a month-long investigation into the entire department and determined the complaints were unfounded. However, he listed several other performance failures, which launched an additional investigation. This second investigation revealed Hackbarth violated several department policies at different times and his supervisors relinquished their control over him due to his dominating behavior. MacKenzie was disciplined for failing to arrest Rana initially months before. Hackbarth was terminated along with his immediate supervisor, Brushwiller. After exhausting an appeal panel made up of law enforcement officers from other agencies, Hackbarth filed this whistleblower lawsuit. The trial court granted the University's motion for summary judgment, which Hackbarth appealed.

When determining whether an agency expresses a negative attitude toward a whistleblower report, courts focus on the words and conduct of the final decision-makers who ultimately approved of the adverse employment action. The assistant director of police at the University made no recommendation or even opinion as to discipline or action to the Chief. It was the assistant director, on his own, who initiated the second investigation with no direction from the Chief or University PD. In determining whether an agency engaged in retaliatory conduct, the plaintiff may present evidence the agency treated a similarly-situated employee differently than it did the plaintiff. The two examples offered by Hackbarth of comparators (who were progressively disciplined for other infractions) were not true comparators. The assistant director never determined either of these two comparing officers conducted investigations that were "inadequate, and completely devoid of any customary police investigatory procedures" or had the attitude problems attributable to Hackbarth.

Brushwiller was also terminated but made no whistleblower reports. No evidence presented creates a fact issue to any of these comparative facts. As a result, the trial court properly granted the summary judgment.

Trial Court could not properly issue TRO to enjoin city from considering annexation ordinance

In Re City of Pearland, No. 14-17-00921-CV, 2018 WL 344036 (Tex. App.—Houston [14th Dist.] January 9, 2018, no pet.) (mem. op.).

The 14th Court of Appeals in Houston granted the City's petition for mandamus compelling a trial court to lift its temporary restraining order issued in an annexation lawsuit.

Senate Bill 6, which requires a city to obtain consent by a majority of the property owners in an area before it can annex, went into effect December 1, 2017. The City of Pearland attempted to annex an area prior to the effective date. On November 20, Plaintiffs filed their First Amended Petition, which alleged that the City, in the annexation process, had failed to comply with certain provisions of the Texas Open Meetings Act, amongst other things. Plaintiffs requested a temporary restraining order restraining the City from considering the annexation ordinance, which the trial court granted and set an injunction hearing for December 4, 2017. Pressed for time, the City filed a mandamus and request for emergency relief in the court of appeals. The court issued an order for the trial court to remove the restraining order on November 27th , but filed this supplemental brief explaining its legal reasons.

Under §551.142(a), a property owner, whose property has been annexed, has standing to challenge the validity of and enjoin an annexation ordinance based on violations of the Open Meetings Act. Therefore, if the City did violate the Texas Open Meetings Act, the property owners have a legal remedy to challenge the annexation (after it occurs) for violations of the Act. The purpose of a TRO is to preserve the status quo. By restraining the City's actions and setting a hearing after the deadline, the district court essentially had made a final, non-appealable adjudication affecting the City. That is not maintaining the status quo but issuing a ruling on the merits.

Notice of water in alcove is not actual notice under TTCA of water in adjoining hallways says Fort Worth Court of Appeals

Tarrant County v. Carter-Jones, No. 02-17-00177-CV, 2018 WL 547588 (Tex. App.—Fort Worth January 25, 2018, no pet.) (mem. op.).

This is a premise defect/Texas Tort Claims Act ("TTCA") case where the Fort Worth Court of Appeals reversed the denial of a plea to the jurisdiction and rendered judgment for the County.

Marks, a courthouse worker, noticed a puddle of water in front of a restroom, which is in an alcove separate from the hallway. The puddle was confined, was approximately two feet in diameter and was not expanding. She reported it to maintenance. About an hour later, Carter-Jones slipped and fell on water located in the hallway. Carter-Jones sued the County under a premise defect theory. The County filed a plea to the jurisdiction, which was denied. The County appealed.

Merely referring to the TTCA in a petition does not establish a waiver of immunity.

Courts must consider the factual allegations and/or evidence. The court first noted Carter-Jones did not plead and therefore did not establish personal property was involved for waiver purposes. Carter-Jones and the County disagree about what the known "dangerous condition" in this case actually was under a premise defect theory. Carter-Jones asserts the water on the alcove floor that later spread to the hallway created an unreasonable risk of harm. The County asserts it must have known of the water in the hallway which caused the fall for a waiver to exist. The County's evidence established that it did not have actual knowledge of the water in the hallway. Its evidence asserts the facilities-management department would have responded to a water leak or hazard in the corrections-center hallway more quickly than water in front of a closed bathroom in an alcove with no traffic. "Actual knowledge" requires knowing that "the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time." No evidence exists the County had actual knowledge water was in the hallway. While Carter-Jones conclusory pleadings state the County had actual knowledge, the evidence established otherwise, with no contravention. As a result, the plea should have been granted.

Supervisor's directive that employee "snitch" on anything going wrong is not "criminal activity" under the Texas Whistleblower Act

Metropolitan Transit Authority of Harris County v. Williams, No. 01-17-00724-CV, 2018 WL 541932 (Tex. App.—Houston [1st Dist.] January 25, 2018) (mem. op.).

This is a Texas Whistleblower Act suit where the First District Court of Appeals in Houston reversed the denial of the employer's plea to the jurisdiction and rendered judgment for the Metro Authority.

Williams was a track maintainer for Metro. Williams complained to Metro's compliance officer asserting a hostile work environment by his supervisor, Ratcliff. Williams alleged Ratcliff instructed him to "snitch" on anyone or anything going wrong on the track and that when Williams expressed reservations Ratcliff became hostile. Later a incident occurred between Williams and another Metro employee, Fred Burton. Burton reported the incident to the Metro police the next day. Burton asserted Williams began to curse at him, calling him a derogatory name for a black person, and threatening to fight him off Metro property. Three other people were witnesses to the incident, including Ratcliff. Williams wrote a response to the incident but asserts Burton's accusations were retaliation for Williams' complaint against Ratcliff. Police charged Williams with assault by threat and Metro terminated Williams. On an aside, after Williams was terminated, another employee reported Ratcliff and Burton for theft of Metro property and Williams cooperated with the investigation. Williams filed suit under the Texas Whistleblower Act. Metro filed a plea to the jurisdiction which the trial court denied. Metro appealed.

"Snitch" means to report on someone else. Williams' attempt to change the meaning is unsupported in the text of his report. In the context of the entire passage, Ratcliff asking Williams to be his eyes and ears on the track conveys the idea that Williams would watch what other people were doing and report to Ratcliff. Nothing in this passage indicates that Ratcliff was engaged in any criminal activity and seeking Williams's help in the process. Simply because Williams was later charged with a crime by another employee

does not mean Williams was retaliated against for his report to the compliance officer. Metro produced evidence that another employee reported the criminal acts of Ratcliff and Burton after Williams was fired. Metro's evidence established that an officer was assigned to investigate the allegations and that the first time the officer spoke to Williams was after he had been terminated. Metro could, therefore, not retaliate against him because of anything he provided the officer.

Under PIA, school could reasonably anticipate litigation even though it was given only a "conditional" threat of suit

B. W. B. v. Eanes Independent School District, No. 03-1600710-CV, 2018 WL 454783 (Tex. App.—Austin January 10, 2018, no pet.) (mem. op.).

This is a Public Information Act ("PIA") and mandamus action where the Austin Court of Appeals affirmed the order granting in part the school's motion for summary judgment but denying its plea to the jurisdiction. BWD's daughter attended Eanes Independent School District ("EISD") and was on the soccer team. BWD alleges the coach bullied his daughter and released her private information, thereby violating FERPA, HIPPA, and EISD's Acceptable Use Guidelines for Technology. He requested records related to Coach Rebe from EISD. The school sought an AG opinion regarding certain documents. However, federal regulations do not allow the AG to review certain documents pertaining to student records. The AG deferred to the EISD to determine student record applicability. The AG then determining the remining records were excepted under the litigation exception of the PIA since BWD had threatened formal complaints under the administrative process against the coach. BWD filed suit to compel the disclosure of the records. The trial court denied EISD's plea to the jurisdiction but granted, in part, EISD's summary judgment motion.

The court first held, contrary to EISD's arguments in its plea, requestors are permitted to sue for mandamus to challenge an AG opinion regarding the release of information. They are not required to accept the AG's determination of any exceptions. Therefore, the trial court has jurisdiction over this suit. FERPA (the federal statute on school privacy issues) establishes BWD has no standing to challenge EISD's determination of what is a student record and what is not. Under FERPA a parent has a right to examine those records, and this right trump the PIA's litigation exception. Unfortunately, FERPA creates no private right of action. BWD's course of action is to file a complaint with the federal Department of Education for the right to inspect the records.

For what remains, in order to fall within the litigation exception, the school must have reasonably anticipated litigation at the time of the records request and the withheld information must relate to the anticipated litigation. An isolated threat over the telephone, without more, does not trigger "reasonably anticipated litigation" for an entity. However, when a genuine dispute exists involving the entity, at least one threat of litigation has been presented, and the entity receives communication from an attorney, an entity may reasonably anticipate litigation. Here, BWD sent an email to Coach Rebe and carbon copied four other EISD email addresses addressing the dispute. His attorney contacted the school and stated they intend to file a formal administrative complaint, but they would not file suit if the coach had no further contact with the student. A "conditional" threat of litigation, matched

with the other case specific facts, established EISD could reasonably anticipate litigation in order to assert the exception. The documents at issue in this case relate directly to the dispute and the coach. As a result, they can be withheld.

Failure to drive school bus to hospital instead of waiting for ambulance to assists non-responsive child is a non-use of property, which does not waive immunity says Beaumont Court of Appeals.

Delameter v. Beaumont Independent School District, No. 09–17–00045–CV, 2018 WL 651268 (Tex. App.—Beaumont February 1, 2017, pet. filed) (mem. op.).

This is a wrongful death/Texas Tort Claims Act case where the Beaumont Court of Appeals affirmed the granting of the school district's plea to the jurisdiction.

A disabled/wheelchair bound child was receiving therapy while attending school in the Beaumont Independent School District ("BISD"). The bus BISD used to pick up the child had both a driver and an attendant. After his chair was placed on the bus, it was locked in place. The duties of the District's employees required them to lift the chair onto the bus, to lock the chair in place, and to monitor the child's condition on the way to school. During transport the child became unresponsive. The driver and attendant stopped the bus and called BISD headquarters. They did not drive the bus to any emergency room but awaited the arrival of an ambulance consistent with District policies. Unfortunately, the child died. The family brought suit against BISD asserting the bus was driven in a negligent manner causing the child to become nonresponsive. The District filed a plea to the jurisdiction, which was granted. The family appealed.

According to the Delameters, the bus's movement eventually caused the restraints to tighten around the child causing him to lose consciousness. The Delameters also argued that stopping the school bus and waiting for an ambulance when the driver could have made it to a nearby hospital involved the use or the operation of the bus. However, after analyzing the evidence submitted, the court held nothing indicated the driver drove the bus at an unsafe speed or that he engaged in any unsafe maneuvers. Even though the Plaintiff's evidence suggests that the child's harness may have required adjustment, this statement amounts to no evidence to show that the harness injured or caused his death. Further, the failure to drive the bus to the hospital is a non-use of property, which does not waive immunity. As a result, the plea was property granted.

City did not act in bad faith under PIA in cost estimate calculation; City established it produced all records discovered

Rines v. City of Carrollton, No. 05-15-01321-CV, 2018 WL 833367 (Tex. App.—Dallas February 13, 2018, no pet.) (mem. op.).

This is a Texas Public Information Act ("PIA") case where the Dallas Court of Appeals affirmed the trial courts order dismissing the Requestor's lawsuit. [Comment: this case is a rare one which also deals with cost estimates and allegations of overcharging.]

Rines, the Requestor, filed a PIA request for the civil service files of fourteen specified police officers. The City requested an Attorney General ("AG") opinion for some documents and issued a cost estimate letter for the remainder. After production of the uncontested documents, the City refunded some of the costs paid bythe Requestor. After receipt of the AG opinions, Rines filed suit

asserting the City acted in bad faith in providing a cost estimate letter and that the City did not comply with his request. The City filed a plea to the jurisdiction which included an evidentiary hearing with testimony. The trial court granted the City's plea and issued findings of fact and conclusions of law. Rines appealed.

The City's testimony included how specific City employees conducted searches for records and the results. The City established it produce all records it located which were not contested under the AG opinion request. Rines asserts documents still exist and are missing which must be produced. He also objected to the testimony of record officials who did not have personal knowledge of the records being searched. However, the testimony established the record retention individuals' job duties entailed custodial functions of the records. Further, Rine's objection during the hearing was not ruled upon, so provides the appeals court nothing to review. In general, the City's jurisdictional evidence demonstrates it searched for the requested information, officially requested responsive documents from relevant individuals, and produced to appellant all responsive information it was able to locate and obtain. Rines produced no evidence as to what was missing or that it was within the City's records. The City conclusively established it complied with release under the Act. Rines further did not provide evidence the City's initial computation for the cost estimate was inaccurate based on the information available at the time. He provided no evidence of how the computation occurred and what was considered. After release, the City refunded monies based on the actual numbers released, but such factored in the non-release of information discovered but subject to the AG opinion. Nothing indicates the City did not act in good faith in its initial calculation. Simply because the end cost is different does not equate to bad faith.

Filing a timely motion for new trial under the wrong cause number still invoked extended deadline for notice of appeal

Fort Bend County v. Norsworthy, No. 14-17-00633-CV, 2018 WL 894050 (Tex. App.—Houston [14th Dist.] February 15, 2018, no pet.) (per curiam) (mem. op.).

This is an appellate procedure case of interest mainly to litigators. The opinion is based on Fort Bend County's motion to consolidate two appeals.

In a wrongful death/Texas Tort Claims Act case, Fort Bend County was sued by multiple plaintiffs. At least one plaintiff was severed, and different orders were issued at different times. At one point, the County filed a motion for new trial after a summary judgment motion but attached the wrong cause number by mistake. On appeal, the plaintiff in the severed case asserts the notice of appeal was defective and untimely because the appellate timetable was not extended by the motion for new trial. The court considered the procedural aspects only for this opinion.

The Texas Supreme Court has consistently admonished that appellate decisions should turn on substance instead of technicalities. So as long as the appellant's efforts constituted a bona fide attempt to invoke appellate jurisdiction courts should construe them as successful. Filing a timely motion for new trial under the wrong cause number or in the wrong case evinces a bona fide attempt to invoke appellate jurisdiction when no one is confused about or misled as to the judgment in question. Examining the record from the hearing where this issue was discussed, the court held no party was confused or

prejudiced by the technical error. As a result, the cases could be consolidated.

State immune from suit asserting failure to follow forfeiture procedures

State of Texas v. Menchaca, No. 13-16-00602-CV, 2018 WL 897980 (Tex. App.—Corpus Christi February 15, 2018, pet. filed) (mem. op.).

This is an interlocutory appeal from the denial of a plea to the jurisdiction where the 13th Court of Appeals reversed the denial and rendered in favor of the State.

A Cameron County District Attorney's Office investigator sent notices to two banks that it was investigating potential money laundering by Menchaca so the banks froze his accounts. Later, the State filed a civil forfeiture action against Menchaca seeking to seize one of Menchaca's bank accounts. Menchaca subsequently answered and counterclaimed for declaratory judgment relief. Prior to answering Menchaca's counterclaim, the State nonsuited its civil forfeiture action. The State then answered Menchaca's counterclaim and filed a plea to the jurisdiction which the trial court denied. The State appealed.

Menchaca actually seeks *ultra vires* declaratory relief against the State of Texas for failing to comply with the law related to civil forfeitures. However, these types of suits cannot be brought against the State because the State retains its immunity. They must be brought against officials. "Menchaca's action is defeated by sovereign immunity."

Dallas Court of Appeals upholds jury verdict holding circumstantial evidence can establish actual knowledge of a dangerous condition

Texas Department of Transportation v. Milton, No. 05-16-00955-CV, 2018 WL 850913 (Tex. App.—Dallas February 14, 2018, no pet.) (mem. op.).

This is a premise defect case against the Texas Department of Transportation ("TxDOT") where the Dallas Court of Appeals affirmed a jury verdict against TxDOT.

Milton, a motorcyclist, was injured in a single-vehicle accident on FM Road 148. Milton asserts his tire became tied up in a groove in the roadway, causing him to end up in a ditch. [The opinion has a photo.] He asserts TxDOT knew about the groove and failed to warn or fix it. A TxDoT maintenance supervisor had ordered "rough road ahead" signs put out at that location due to previous problems with soil expansion and contraction. It also contracted with a road crew for placing the signs as well as repair potholes. The jury was provided instructions on premise liability, including actual knowledge of an unreasonably dangerous condition. The jury returned a verdict for Milton and TxDOT appealed.

To prove actual knowledge, a licensee must show that the owner actually knew of the dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition could develop over time. TxDOT contends the evidence is legally insufficient. Courts must consider the evidence in the light most favorable to support the judgment. Actual knowledge can be found if supported by circumstantial evidence. Given the photos, testimony and

record, the court held a reasonable jury could conclude TxDOT had actual knowledge, irrespective of a lack of direct evidence. And while there was conflicting evidence the signage was or was not sufficient to warn, a jury could also reasonably believe one expert over another. The jury verdict is therefore affirmed.

Beaumont Court of Appeals holds incident report of inmate injury due to power tools was insufficient to establish actual knowledge under TTCA

Texas Department of Criminal Justice v. Cisneros, No. 09-17-00161-CV, 2018 WL 1095533 (Tex. App.—Beaumont March 1, 2018, no pet.) (mem. op.).

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Tort Claims Act ("TTCA") case, where the Beaumont Court of Appeals reversed the denial and ruled in favor of the Texas Department of Criminal Justice ("TDCJ").

Cisneros was injured in an accident involving a commercial grade woodworking power saw while incarcerated by the TDCJ. While Cisneros was cleaning the saw with an air hose while it was turned off, another incarcerated individual turned the power on. Cisneros lost his right hand and fingers. He sued the TDCJ for negligence. The TDCJ filed a plea to the jurisdiction, which was denied. It appealed.

The TDCJ asserted Cisneros failed to file a notice of claim within the statutory time period. Cisneros asserts the TDCJ had actual notice of his claim and therefore, formal statutory written notice is not needed. To have such actual knowledge, the governmental unit must have: (1) knowledge of a death, injury, or property damage; (2) subjective awareness of the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) knowledge of the identity of the parties involved. Subjective awareness is required because if a governmental entity is not aware of its fault, it does not have the same incentive to gather the information the statute is designed to provide. Fault, as it pertains to actual notice, is not synonymous with liability; rather, it implies responsibility for the injury claimed. Cisneros asserts that because the guards were called, and an incident report was created, that is sufficient. However, the report indicated Cisneros acted negligently by failing to follow protocols requiring a supervisor to lock out the machine. The investigation reports do not show TDCJ's fault. The fact that TDCJ investigated Cisneros's accident does not constitute subjective awareness. No other evidence existed within the record indicating TDCJ had knowledge of some fault of its own. As a result, the plea should have been granted.

14th Court of Appeals holds employee does not have to file TWC charge of retaliation if the employee asserts retaliation for filing discrimination charge

Metropolitan Transit Authority of Harris County v. Douglas, No. 14-17-00176-CV, 2018 WL 1057629 (Tex. App.—Houston [14th Dist.] February 27, 2018, no pet.)

This is an employment discrimination and retaliation case where the 14th District Court of Appeals affirmed the denial of the employer's plea to the jurisdiction.

Douglas is a lieutenant with the Metro Police Department ("Metro"). She applied for one of two available captain positions. Metro had procedures to use an outside agency to do

competency assessments of candidates, but the Chief, at the time, decided to use a five-person panel of Metro employees. The panel scored Douglas the highest of the candidates. The Chief then interviewed the candidates and promoted both male candidates. Douglas was not promoted. Douglas filed a discrimination charge with the Texas Workforce Commission Civil Rights Division ("TWC") but after 180 days without a right-to-sue letter, Douglas filed suit. After her charge was filed, Douglas asserts the incoming Chief (who was a female) had her performance review lowered. So, she added a retaliation charge to the suit. Metro filed its plea to the jurisdiction, which the trial court denied.

An appeal is moot when there is no longer a live controversy between the parties and appellate relief would be futile. Live controversies exist so the claims are not moot. An adverse employment action in the context of a retaliation claim is not limited to conduct that constitutes ultimate employment decisions. Actionable conduct includes any actions that a reasonable employee would find materially adverse. A downgrade of an employee's performance evaluation may constitute an adverse employment action if it might have dissuaded a reasonable worker from making or supporting a charge of discrimination. As a result, Douglas jurisdictionally asserted an adverse employment action. Douglas argues she was not required to exhaust her administrative remedies because the trial court has ancillary jurisdiction over retaliation claims that grow out of an earlier discrimination charge. The court analyzed the different U.S. Supreme Court opinions on this type of argument. Ultimately, it held that a plaintiff cannot rely upon a continuing violation theory for retaliatory conduct which occurred prior to the original charge, but when the retaliatory conduct is allegedly in response to the original charge (i.e. retaliation grows out of a discrimination charge filed), the plaintiff need not exhaust a new set of administrative remedies. As a result, the trial court properly denied the plea.

County must sue AG, not individual concealed handgun license holder, in dispute over courthouse sign says 1st District Court of Appeals

Holcomb v. Waller County, No. 01-16-01005-CV, 2018 WL 1321132 (Tex. App.—Houston [1st Dist.] March 15, 2018, pet. filed).

This is a concealed handgun/courthouse civil suit where the First District Court of Appeals reversed a declaratory judgment for the County.

The Waller County Courthouse houses civil and criminal courts as well as County offices. Outside, the County has a sign, pursuant to Penal Code §30.06, indicating it is a criminal violation for a concealed handgun license holder to enter the Courthouse carrying a concealed handgun. Holcomb, a license holder, followed the procedure in Tex. Gov't Code §411.209(a), to put the County on notice he believed the sign was used improperly since it prohibited carrying a handgun in all areas of the courthouse, not just areas accessible to the courts. In response Waller County sued Holcomb seeking a declaratory judgment his interpretation of the statute was incorrect. The trial court denied Holcomb's plea to the jurisdiction and granted the County's requested relief. Holcomb appealed.

Holcomb's letter to Waller County providing notice of an ostensible violation of §411.209(a) is the basis for the County's suit against him. As a matter of law, however,

writing a letter to a political subdivision to complain about perceived unlawful action does not create subject-matter jurisdiction. Holcomb had a statutory right to notify the County of his contention. Even in the absence of a statute, he had a constitutional right to complain. Holcomb's letter therefore does not constitute a redressable wrong. Further, no harm has befallen the County due simply to the letter. Since the Texas Attorney General has the exclusive right to seek enforcement, any legal dispute over the lawfulness of the County's signage would be between the County and the Attorney General, not Holcomb. Waller County effectively sought and obtained a declaratory judgment in its favor as to its disagreement with the Attorney General without making him a party. Because only the Attorney General has the authority to decide whether a suit for violation of §411.209(a) is warranted, he was a necessary party and the judgment rendered in his absence was an impermissible advisory opinion. Finally, since the County utilized the suit to impact Holcomb's statutory and constitutional right to complain about perceived unlawful action, it's actions entitled Holcomb to attorney's fees under the Citizens Participation Act. The declaratory judgment of the trial court is reversed, and the case is remanded for the sole purpose of awarding Holcomb attorney's fees.

Justice Jennings concurred regarding the lack of subject-matter jurisdiction for the County to sue Waller. However, he dissented as to the remand, noting that if no jurisdiction exists, the trial court could not grant the motion to dismiss under the CPA. It would be improper for the trial court to award attorney's fees in such a case.

Since University policies did not address non-tenured professor's situation, she was deemed an "at-will" employee with no entitlement to due process

Schovanec v. Assadi-Porter, No. 07-17-00426-CV, 2018 WL 1404494 (Tex. App.—Amarillo March 20, 2018, pet. filed) (mem. op.).

This is a due process in employment case where the Amarillo Court of Appeals reversed the denial of the University's plea to the jurisdiction and dismissed the case.

Assadi-Porter was on a twelve-month, non-tenure track as an associate professor at Texas Tech University ("University"). She received a notice of termination at one point and was told she could grieve the termination. She asserts she relied upon the advice of human resource personnel and met with her supervisors to contest the termination. By the time she formally grieved the termination, the University deemed her grievance untimely. She sued the University and the President asserting due process violations. The University and President filed a plea to the jurisdiction, which has denied. They appealed.

A two-part test applies to due process claims: 1) does the plaintiff have a recognized liberty or property interest and 2) if so, what process is due. In the employment context, a recognized property interest exists when an employee can only be dismissed for cause. Under Texas law, an employment relationship is presumed to be at-will, and an employer may terminate at-will employees "for good cause, for bad cause, or no cause." An at-will employment relationship creates no property interest in continued employment. A faculty member's employment is subject to her contract and the

school's operational policies. The University's policies state that for non-tenured professors, they can either be terminated for cause prior to the expiration of her term, or non-renewed at the close of a term. However, the court held the policies must not be read in isolation and the next policy in the manual states the dismissal provision applies only to non-tenured faculty who have served more than six years. Assadi-Porter served for less than two. As a result, since no specific contract or policy adoption applies to Assadi-Porter, she is presumed to be an at-will employee and has no property interest in continued employment.

Texarkana Court of Appeals holds county court at law has jurisdiction to hear PIA mandamus against city, despite district court language in PIA

Miller v. Gregg County, 06-17-00091-CV, 2018 WL 1386264 (Tex. App.—Texarkana March 20, 2018).

This is a Public Information Act ("PIA") lawsuit in which the Texarkana Court of Appeals flipped back and forth between sections of the Government Code before modifying the trial court's order regarding release of certain records held by Gregg County ("County").

Miller sought a PIA request to allegedly "expose the depth and degree of the intimate relationships" between City of East Mountain Police and Deputies of the Gregg County Sheriff's Office. Miller filed a suit under the PIA seeking a writ of mandamus in County Court at Law #2 to compel Gregg County to disclose certain police phone log information. The County filed a plea to the jurisdiction, which was granted. Miller appealed.

The PIA states "A suit filed by a requestor under this section must be filed in a district court for the county in which the main offices of the governmental body are located." TEX. GOV'T CODE ANN. § 552.321(b) (West 2012). "District courts are always the courts of exclusive original jurisdiction for mandamus proceedings unless the constitution or a law confers such jurisdiction on another tribunal." Miller asserts §25.0003(a) of the Texas Government Code states "In addition to other jurisdiction provided by law, a statutory county court exercising civil jurisdiction concurrent with the constitutional jurisdiction of the county court has concurrent jurisdiction with the district court in: (1) civil cases in which the matter in controversy exceeds $500 but does not exceed $200,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition…" However, the Texas Legislature expressly amended the PIA in 1999 and added the requirement a suit be brought in district court. The Court of Appeals held this created a "condition precedent" to bringing a PIA mandamus action under Government Code §311.016(3). The Court of Appeals stated the question for it, then becomes, does §552.321(b) trump other sections of the Government Code. After a statutory construction analysis, the Texarkana Court held §552.321(b) does not deprive a county court at law of its jurisdiction under §25.0003(a). That being said, the Court then analyzed the evidence submitted and the extent to which the County searched for responsive phone records requested. The County presented uncontroverted evidence that no responsive documents exist. As a result, the trial court properly granted the plea, but based on the challenge to jurisdictional facts, not the jurisdiction of a county court at law. The court then modified the judgement, taking out references to dismissal of claims for

declaratory and injunctive relief, which were not present in Miller's prayer for relief.

Trial court had jurisdiction to determine if certain jobs should be classified as civil service, but not to award backpay

City of Amarillo v. Nurek, No. 07-17-00120-CV, 2018 WL 1415406 (Tex. App.—Amarillo March 21, 2018, no pet.)

This is a civil service lawsuit where the Amarillo Court of Appeals reversed-in-part the denial of the City's plea to the jurisdiction.

In Amarillo, firefighter positions have civil service protection and firefighters are contained within the Fire Supersession Department. However, positions in the Amarillo Fire Marshall's Office ("FMO") have traditionally been treated outside the protection. Nurek and Stennett were the highest scoring individuals on the promotional exams for positions of an Investigator I (equivalent rank of lieutenant) and Investigator II (equivalent rank of captain) within the FMO. When they were not offered the positions, they sued to declare the positions subject to civil service protection (and therefore eligible for placement via promotional exam). They also sought instatement in the positions and the backpay. The City and the officials sued, filed a plea to the jurisdiction which was denied. They appealed.

Immunity bars a declaratory judgment action seeking a declaration of the government's liability for money damages. However, that only addresses the Plaintiffs' claim for backpay. The court held jurisdiction exists for the trial court to examine the City's failure to classify firefighter positions within the FMO as civil service positions. Under §180.006 of the Texas Local Government Code, immunity is waived "for claims to recover monetary benefits that are authorized by a provision of…" the Act. However, the claims asserted do not specify the sections which would authorize the payment in the Plaintiffs' pleadings. "While appellees may prove to be right regarding appellants' erroneous classification of FMO positions outside of the civil service, it is clear that appellees have not affirmatively pled facts demonstrating that their claims for monetary benefits are authorized by a provision of the Civil Service Act." Further, the pleadings do not differentiate between acts of the City and any alleged ultra vires acts of individual officials. Nothing indicates where the City Manager is responsible for civil service job classification. The failure to allege enough jurisdictional facts to demonstrate the trial court's jurisdiction gives rise to a right to amend the pleadings unless the jurisdictional defect may not be cured by repleading. As a result, part of the plea should have been granted and part was proper to deny but amended pleadings should be ordered.

Administrative records of county court at law not subject to PIA says Houston's First District Court of Appeals

Ramirez v. Wells, No. 01-17-00262-CV, 2018 WL 1474201 (Tex. App.—Houston [1st Dist.] March 27, 2018) (mem. op.).

This is a Texas Public Information Act ("PIA") suit where the 1st District Court of Appeals in Houston affirmed the trial court judgment in favor of the court administration defendants.

Ramirez was removed from the eligibility list to receive criminal court appointments in the Harris County Criminal Courts at Law, after having been on the list for some time. Ramirez filed a PIA to see all records related to his removal. The Court Manager informed him the judiciary is exempt from the PIA and

the rules of judicial administration protects release of internal deliberations of the court. The question under Rule 12 is whether the documents are court administrative files vs judicial records. Ramirez appealed to the Office of Court Administration ("OCA"), arguing that the decision to remove him from the list was an administrative decision and thus the information he requested did not constitute judicial records. The OCA agreed they were administrative, but determined it only had authority over judicial records so could not grant Ramirez any relief. Ramirez filed a petition for writ of mandamus under PIA to compel release of the records. After opposing summary judgments, the trial court granted the Defendant's MSJ and denied Ramirez' MSJ. Ramirez appealed.

Under the PIA, the judiciary is specifically excluded in the PIA's definition of "governmental body." Access to information collected, assembled, or maintained by or for the judiciary is governed by the rules adopted by the Supreme Court of Texas or by other applicable laws and rules. The record demonstrated that regardless of whether the records were "judicial" or "administrative" they qualify as "information produced, maintained, or assembled by the judiciary." Access is therefore not governed by the PIA. Since Ramirez' petition only seeks mandamus under the PIA, the trial court properly denied his summary judgment.

Ex-employee failed to allege she was qualified for her position but court held she was entitled to amend in discrimination/retaliation case

City of Granbury v. Willsey, No. 02-17-00343-CV, 2018 WL 1324774 (Tex. App.—Fort Worth March 15, 2018, no pet.) (mem. op.).

This is an age/sex discrimination and retaliation case where the Fort Worth Court of Appeals affirmed-in-part and reversed-in-part the order denying the City's plea to the jurisdiction.

Willsey worked for the City for over seventeen years, including nine years as a police officer and almost nine years as a public works inspector. In 2016 the City eliminated her inspector position but reassigned her to be a permit clerk. Three days after she inquired as to how long before her retirement would vest, the City terminated her. The City asserts the inspector as well as the permit clerk position were eliminated and absorbed into the existing number of employees. The City filed a combined answer/plea to the jurisdiction. The trial court denied the plea. The City appealed.

The court went through a detailed point-by-point prima facie analysis. To be successful in an age discrimination claim a plaintiff must plead that she was either (1) replaced by someone outside the protected class, (2) replaced by someone younger, or (3) otherwise discharged because of her age. Willsey did not plea or establish she was qualified for the inspector position, only that she was eliminated. Simply because she was an inspector for nine years does not equate to her continued qualifications for the position. The same goes for her sex discrimination claims. Under the retaliation claims, Willsey asserts that the City pursued her after her termination by "making up false accusations against her and seeking criminal charges against her" for stealing records, interfering with her future employment. However, the court responded "[e]ven construing Willsey's pleadings liberally in her favor, we are left to guess what the protected activity is that Willsey participated in prior to her termination that the final decisionmaker for

the City was aware of and the causal link between that protected activity and her termination." However, the court then analyzed whether the lack of pleading sufficiency could be cured by allowing her the ability to amend. Because this is a reduction-in-force case rather than a true replacement case, and the City's arguments focus on a replacement case, it has not established an amendment would be futile. As a result, it remanded the case to allow the trial court to allow an amendment after some level of discovery has occurred.

San Antonio Court of Appeals holds City made a judicial admission employee was acting within course and scope of employment at time of accident by filing §101.106(e) motion to dismiss. Therefore, not entitled to jury question on course and scope

Ramos v. City of Laredo, No. 04-17-00099-CV, 2018 WL 1511875 (Tex. App.—San Antonio March 28, 2018, no pet.).

This is a Texas Tort Claims Act ("TTCA") case where the San Antonio Court of Appeals reversed a jury verdict and rendered judgment against the City.

While Ramos, a motorcyclist, was making a left-hand turn into the park he was struck by another motorcycle with flashing lights attempting to exit the park in the wrong lane driven by an individual Ramos asserted was named Guerra. Guerra is a police officer with the City of Laredo. Ramos sued the City and Guerra. The City claimed that Guerra was on leave on the date of the accident, was not involved in the accident, and was not acting in the course and scope of his employment at the time of the accident. But the City also asserted Guerra must be dismissed under §101.106(e) of the TTCA. In response to the City's plea to the jurisdiction and motion to dismiss, Ramos non-suited Guerra with prejudice. Guerra testified he was at home, asleep, at the time of the accident. At trial, over Ramos' objections, the court submitted a question to the jury on whether Guerra was acting within the course and scope of employment. The jury returned a verdict Guerra was negligent and liable but was not acting within the course and scope of his employment. Ramos appealed the verdict.

Section 101.106(e) of the TTCA is titled "Election of Remedies" and provides that when a claimant files suit "under this chapter" against both a governmental unit and its employee, the employee shall immediately be dismissed from the suit upon the filing of a motion to dismiss by the governmental unit. By filing a §101.106(e) motion to dismiss, a governmental unit "effectively confirms the employee was acting within the scope of employment and that the government, not the employee, is the proper party." Thus, when the City requested that Guerra be dismissed pursuant to §101.106(e), the City confirmed Ramos's allegation that Guerra was acting in the scope of employment at the time of the accident and agreed to vicariously defend its employee. Because of the election by the City to be held responsible for its employee in its plea, the court held the City was bound to its judicial admission that Guerra was acting in the scope of employment at the time of the accident.

Justice Barnard wrote separately only to emphasize that the 4th Court prognosticated this type of argument in 2011 and cautioned entities not to shift arguments mid-stream trying to avoid liability. Either the employee is not in the course and scope and no dismissal under §101.106(e) applies, or they are in the course and scope and §101.106(e) requires a dismissal

Plaintiff's pro se brief insufficient to preserve arguments on appeal holds Dallas Court of Appeals

Hernandez v. Dallas Independent School District, No. 05-17-00227-CV, 2018 WL 1835692 (Tex. App.—Dallas April 18, 2018, no pet. h.) (mem. op.).

This is a Texas Whistleblower Act case where the Dallas Court of Appeals affirmed the dismissal of the Plaintiff's claims.

The Dallas Independent School District ("DISD") employed Hernandez as an elementary school teacher for approximately sixteen years. Prior to the end of the 2013/14 school year Hernandez sued DISD, DISD executive director Jacqueline Lovelace, and other employees in federal district court alleging age discrimination, sex discrimination, constitutional violations, and retaliation under the Texas Whistleblower Act for reports he filed with the TEA, DISD Office of Professional Responsibility (OPR), and Child Protective Services (CPS). He appeared pro se. While the case was pending, DISD issued a non-renewal of his teacher contract, which was later sustained by an independent hearing examiner. After multiple amendment attempts, the federal district court declined supplemental jurisdiction. Hernandez then filed a Whistleblower claim in state court. DISD filed a plea to the jurisdiction, challenging both the pleadings and the existence of evidence which the trial court granted. Hernandez appealed.

The court of appeals first noted Hernandez did not properly file his brief or cite to record references in support. As a result, the court held "he has preserved nothing for our review." However, it considered the legal arguments regardless. In a multi-report situation, each report must be evaluated to determine if the complained-of conduct constitutes a violation of actual law and if the report was made to an appropriate law enforcement authority. However, Hernandez' response to DISD's plea did not address any of his reports or why the reports should be considered submitted to an appropriate law enforcement authority. Hernandez did not carry his burden. Further, he tried to bring in federal claims on appeal, but his state law petition only contained the Whistleblower Act cause of action. Finally, Hernandez asserts the statute of limitations, while expired, was tolled for 30 days after dismissal by the federal court under 28 USC §1367(d). However, the trial court did not dispose of the claims based on the statute of limitations, so §1367 is inapplicable. The order granting the plea was affirmed.

If you would like to read this opinion, click here. Panel consists of Justice Lang, Justice Brown, and Justice Whitehill. Memorandum Opinion by Justice Brown. Hernandez appeared pro se. The attorneys listed for DISD are Carlos G. Lopez, Kathryn E. Long and Oleg Nudelman.

Home-Rule City cannot extent building codes into ETJ says Dallas Court of Appeals

Collin County v City of McKinney, No. 05-17-00546-CV, 2018 WL 2147926 (Tex. App.—Dallas May 11, 2018, no pet. h.).

In this statutory construction case, the Dallas Court of Appeals held City of McKinney lacks authority to enforce its building codes in its extraterritorial jurisdiction, but it has authority to require a landowner to plat its property.

The City and County previously entered into an agreement designating the City as the exclusive authority for platting and related

permits. Custer Storage Center, LLC ("Custer") owns land located in the County and within the City's ETJ and uses the property for a self-storage business. During construction the City demanded Custer plat the property and obtain City building permits. When Custer refused, the City sought a declaratory judgment and injunction. All parties (City, County and Custer) filed summary judgment motions. The trial court concluded that the City's and County's respective authority to enforce platting and building permit requirements for property in the City's ETJ is determined based on whether a property is subdivided and held the City could only require building permits if the property is subdivided.

The Dallas Court of Appeals analyzed the Texas Supreme Court's opinion in Town of Lakewood Village v. Bizios, 493 S.W.3d 527 (Tex. 2016) and held that while a home-rule municipality has authority under the Texas Constitution within its borders, it requires express authority to regulate in the ETJ. Such express authority applies to every municipality, regardless of type. Since no express authority allows extending building codes into the ETJ, the City cannot require building permits. However, the Texas Local Government Code does expressly authorize a city and county to designate the city as the exclusive authority for plat and subdivision regulations. That does not allow tagging the building codes onto the plat or subdivision ordinances. However, Custer's construction plans clearly trigger a requirement for platting, which they did not perform. Since the court significantly modified the judgment, it remanded back to the trial court to determine the issue of attorney's fees.

Trial court abused its discretion in awarding attorney's fees to City in vested rights and declaratory judgment case

Patsy B. Anderton, et al. v. City of Cedar Hill, 05-17-00138-CV (Tex. App. – Dallas, May 25, 2018)

The Dallas Court of Appeals affirmed-in-part and reversed-in-part a judgment for the City of Cedar Hill ("City") in a case involving a non-conforming use in a specific zoning district.

This case went up and down the appellate latter in one appeal already. The Andertons purchased an existing landscaping and building materials business—a commercial rather than local retail business—that operated on Lots 5 and 6, about the time the City rezoned the area to a retail zone. The Andertons requested a zoning change to make their legal non-conforming use a legal conforming use, which the City denied. Several years later the City filed a declaratory petition and sought civil penalties against the Andertons prohibiting them from operating the existing business on the lots. The Andertons counterclaimed under Tex. Loc. Gov't Code Chapter 245 for vested rights and inverse condemnation. Both parties moved for summary judgment. The trial court granted the City's summary judgment motions and denied the Andertons' motions. The Andertons appealed the first time and won a partial remand. However, afterwards, the City passed two zoning amendments making the lots lawful. The City sought attorney's fees for the claims it won in the first appeal and filed a plea to the jurisdiction on the Andertons' remaining counterclaims. The trial court denied the plea and went to trial on the attorney's fee issue. The trial court later entered a final judgment on remand, dismissing the Andertons' claims for non-conforming use rights in Lots 5 and 6 as moot and awarding the City its attorney's fees. The Andertons appealed.

The court first held, given the zoning amendments, at the time it rendered judgment, the trial court had no practical ability to alter the legal relationship between the parties. As a result, the Andertons' claim as to the non-conforming use status was moot and the trial court was obliged to dismiss barring some valid exception. There are two exceptions that confer jurisdiction regardless of mootness: (1) the issue is capable of repetition, yet evading review; and (2) the collateral consequences doctrine. The record did not reflect any evidence indicating the City was likely to rezone the property back to retail only, so the first exception does not apply. Theoretical possibility is not sufficient to satisfy the test. The "collateral consequences" doctrine applies to the narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment. The Andertons, however, do not argue, and the record does not reflect, any concrete disadvantages or disabilities that will persist should their claim be dismissed as moot. So, the judgement is affirmed as to the Andertons' counterclaims. As to the award of attorney's fees, the UDJA does not condition the entitlement to fees on prevailing party status. The trial court's findings of fact and conclusions of law affirmatively indicate the trial court awarded the City its attorney's fees as "equitable and just based on the claims asserted in this case, the objectives sought by the parties and the outcome of this case" and not as a "prevailing party." However, notwithstanding, the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees. As in cases involving only a modicum of success in the context of the prevailing party statute, even fees supported by uncontradicted testimony may be "unreasonable" in light of the amount involved, the results obtained, and in the absence of evidence that such fees were warranted due to circumstances unique to the case. After going through the win/loss points and going through each lot in the case, the appellate court held the trial court abused its discretion in awarding attorney's fees.

City's BOA within its discretion to grant variance due to situation where property was a prime target for "destruction or damage by the local . . . students"

Lenda Vogler v. City of Lamesa and April Vara 11-16-00168-CV (Tex. App – Eastland, May 24, 2018)

The Eastland Court of Appeals affirmed the City of Lamesa Board of Adjustment's grant of a setback variance for a car port.

Vara sought a setback variance from the City of Lamesa Board of Adjustment ("BOA") in order to build a car port in order to protect her antique cars. The variance was granted, but a neighbor (Vogler), opposed the variance. Vogler sued under Chapter 211 of the Texas Local Government Code to undo the variance. The trial court affirmed the BOA's grant of the variance and Vogler appealed.

The trial court sits only as a court of review, and it may consider only the legality of the Board's decision. bears the burden to establish that the Board's action was illegal, and she must do so by a very clear showing that the Board abused its discretion by acting arbitrarily and unreasonably or without reference to any guiding rules or principles. Vogler first asserts the BOA's variance amounted to a rezoning, however, the Board granted an area variance, not a use variance. Next, the record reveals that the location of the Varas' property makes it a prime target for "destruction or damage by the local . . .

students . . . who might lob rocks and bottles and cans and whatnot at them." Such a condition appears to be unique to the Varas' property. That the Varas' own antique cars do not make the unique condition of the property a self-imposed hardship. As a result, the BOA was within its powers and discretion to grant the variance and Vogler failed to meet her burden.

City immune from claims it misapplied its own ordinances or procedures, but not for TOMA claims

Peter Schmitz, et al v. Town of Ponder, Texas, et al. 02-16-00114-CV, (Tex. App. – Fort Worth, May 10, 2018).

This is an appeal from a final judgment against the Plaintiffs who attempted to force the Town to enforce its zoning laws against other property owners.

In 2014 the Denton County Cowboy Church ("Church") purchased property zoned single family residential under the Town of Ponder's zoning ordinance. The Church's property is adjacent to the Plaintiffs' property. According to Ponder's comprehensive plan, the Plaintiffs' properties are designated for future low-density residential zoning. In 2015 the Church began construction of an arena. The Town issued a building permit for an open arena. Plaintiffs sued the Church and Town of Ponder, seeking injunctions prohibiting the Church from continuing construction. They also brought claims under §1983 for due process, takings, and equal protection violations. The Town and Church both filed pleas to the jurisdiction which the trial court granted. The Plaintiff appealed.

The Uniform Declaratory Judgment Act ("UDJA") does not waive immunity of a governmental entity when no ordinance is being challenged. The City maintains immunity for claims seeking a declaration of the claimant's statutory rights or over a claim that government actors have acted outside the law—ultra vires. However, the majority of the Plaintiff's requested declarations would establish that the Town, not the individual committee or council members, violated or misapplied its own ordinances or procedures, rendering its actions arbitrary and unreasonable. The Town maintains immunity from such claims. The ordinances further did not waive the Town's immunity by authorizing suit for enforcement. With no UDJA claim, requests for permanent injunction are also not viable. Liability against a governmental unit for private-nuisance injuries arises only when governmental immunity is clearly and unambiguously waived, which is not the case here. However, immunity is waived under the Texas Open Meetings Act ("TOMA") so the TOMA claims are remanded. The court stressed that the waiver of immunity under TOMA does not apply to the extent Plaintiffs seek more than injunctive relief or a declaration that the Town's actions were voidable under TOMA only. Under Plaintiffs' §1983 claims, a regulatory taking can occur when governmental action unreasonably interferes with a landowner's use and enjoyment of his property. However, the Plaintiffs claims challenge the process in which the Town enforced its ordinances, not the substance of the enforcement. Plaintiffs have no protected property interest in the manner in which the Town enforced or failed to enforce its ordinances against the Church, rendering their claim under § 1983 not viable. And while the Town argued RLUIPA preempted their enforcement of certain matters of the ordinances, RLUIPA does not implicate jurisdiction so is not proper to raise in a plea. The court then analyzed the claims against the Church and ultimately held some claims survived and were remanded.

Fort Worth Court of Appeals holds Plaintiff's claim officer negligently deployed road spikes was actually a battery, so no waiver of immunity exists

City of Fort Worth, Texas v. Mary Deal, 02-17-00413-CV (Tex. App. – Fort Worth, May 31, 2018).

This is a Texas Tort Claims Act ("TTCA") case were the Fort Worth Court of Appeals reversed the denial of the City's plea to the jurisdiction and dismissed the Plaintiff's claims.

Officer Shelton observed Plaintiff's son, Lange, speeding and initiated pursuit. Officer Shelton's in-car video camera recorded the pursuit and shows Lange dangerously speeding through residential areas and violating numerous traffic laws. Lange did not yield or pullover. At some point at least one police officer stopped to deploy a "Stop Stick"—a device designed to puncture a vehicle's tires when they contact the embedded steel spikes—but Lange passed by before the officer could get into position. Less than six minutes later, Lange lost control of his vehicle and struck a tree. He was ejected from the vehicle and died. Deal sued the City, which filed a plea to the jurisdiction. The trial court denied the plea and the City appealed.

Deal claimed that the unknown police officer had deployed the TDD negligently, that the tires were damaged and that is what caused Lange to lose control. The City asserts Deal's negligent-deployment claim was barred by the TTCA's intentional-tort exception. Texas has recognized common law battery claims for more than a century. Actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. Lange had such a close connection with his vehicle that the indirect, offensive contact between the TDD and the vehicle was sufficient to constitute contact with Lange's person. Taking the Plaintiff's pleadings as true, the unknown police officer's alleged negligent decisions about where, when, and how to deploy the TDD here were all subsumed in, and not distinct from, the commission of the battery. Consequently, Deal's negligence claims arise out of the battery and is subject to the TTCA's intentional-tort exception. See Tex. Civ. Prac. & Rem. Code Ann. § 101.057(2). The Plaintiff's claims are dismissed, and judgment rendered for the City.

Evidence of a shorted-out lift pump on one day, is not evidence of faulty motor driven equipment on a different day says 13th Court of Appeals

City of Edinburg v. GNJ Realty Investments LLC, 13-17-00290-CV (Tex. App.—Corpus Christi-Edinburg August 22, 2017).

This is an interlocutory appeal in a Texas Tort Claims Act ("TTCA")/sewage backup case involving alleged negligent operation of a motor-driven lift pump. The 13th Court of Appeals reversed and rendered an opinion in favor of the City.

GNJ Realty Investments LLC (or "GNJ") brought a negligence claim against the City of Edinburg ("the City"), for sewage backup and property damage allegedly caused by a City-owned faulty motor-driven lift pump. GNJ leased a building to RGV Footcare. On February 2, 2014, a RGV Footcare employee, saw standing water in almost every room of the building's floors. She called a plumber soon after and called the City the next day. GNJ asserted negligence because it felt the City failed to use reasonable care in the service and maintenance of the motor-driven

equipment used in the sanitation system. It asserted the flooding was system backup and arose from this failure. The wastewater supervisor for the City testified that upon personal inspection, the manhole that gave sewer service to GNJ's building showed no evidence that anything the City owned caused this incident. He further testified that if a lift pump can be faulty, certain alarms and logs would have been generated by the system. No such alarms or logs were created on that day, although a short was logged as occurring the following day. The City filed a plea to the jurisdiction which the trial court denied. The City appealed.

The court held no evidence in the record indicated the pump was faulty and was directly linked to the flooding of GNJ's building. As stated by the supreme court many times "arises from" must have a nexus between the operation and/or maintenance of the equipment and the damage sustained. The connection must be considerably more than just the involvement of property. The trial court was not presented with any evidence that any of the pumps at Lift Station 30 were clogged—fully or partially—on February 3, 2014. Moreover, that a pump "shorted out" the day after RGV Footcare experienced the water back up is alone not evidence that it was malfunctioning the day before. Given the record, the court reversed the trial court's denial order and rendered judgment for the City. GNJ's claim was dismissed.

City of Houston can be sued by pension board for non-compliance with statutory pension provision and PIA

City of Houston, et. al. v. Houston municipal employees pension system, 17-0242, — S.W. 3d — (Tex. June 8, 2018).

City of Houston created several local government corporations to which it transferred some of its employees. Specifically, at issue is the adoption of resolutions by the Houston Municipal Employees Pension System's Board of Trustees (the board) related to those employees, their status, and the City's obligation to contribute to the pension fund. Under the state statute applicable to Houston's board, the board has authority to interpret the statute and such interpretation is considered final. The system interpreted the term "employee" subject to the pension fund to include employees of several local government corporations, especially those where the corporation is controlled by City appointees and funded by the City (such as the pension system employees). The City refused to fund those individuals and the system sued under an ultra virestheory. It also sued for failure to provide information under the Texas Public Information Act (TPIA).

The Court first held that the statute states the pension system can file suit on behalf of the board, therefore the system has standing. The Court agreed with the City that the system was trying to use an ultra viresclaim to enforce a contract where the end result is the payment of funds. However, the contract in this case was simply the mechanism used for the City to comply with the requirements of the statute. The City must still follow the statutory requirements for funding the pension plan, so the system can bring an ultra viresclaim to compel compliance with the statute. However, the Court interpreted the pleadings to read the system seeking prospective relief only. Strangely enough, the Court held that the identity of the party is not relevant to the jurisdictional situation in the PIA portion of this case (city v Public Information Officer) as a mandamus is proper against the entity under the PIA. However, the PIA is not applicable to the

other defendants who are not the PIO or the City. It also held that where the City has a right of access to the information (that of the other corporations), the information is subject to the PIA. Therefore, jurisdiction is proper for the system's claims.

City retained ability to revoke non-consent tow permit says U.S. 5th Circuit

Rountree v. Dyson No. 17-40443 (5thCir. June 11, 2018)

This is a 42 U.S.C. 1983 suit where the City of Beaumont removed a tow-truck company from its non-consent tow rotation list and the 5thCircuit affirmed a dismissal in favor of the City.

Rountree owned a towing company and had been on the non-consent tow rotation list for thirty years. Police Chief James Singletary revoked Rountree's city-issued towing permit based on a complaint by a competing tow company, which asserted—truthfully—that three of Rountree's state-issued licenses had lapsed. Rountree did not dispute the lapse, but instead asserted the Chief persuaded the competitor to file the complaint and had targeted Rountree. The permit is not required for all tows, just non-consent tows requested by PD. Later, Rountree was called by a former customer to help with a tow but Rountree called a permitted tow truck to help the former customer. Sergeant Troy Dyson arrived on the scene and told Rountree to leave. Rountree refused and Dyson arrested him. The charge was later dismissed. Rountree sued the City and Dyson. The trial court dismissed his claims and Rountree appealed.

First, the 5thCircuit held that the trial court was within its discretion to dismiss the case before considering Rountree's amended pleading. "Defendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending." Rather, "[i]f some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading." Second, class-of-one claims are inapposite "to a local government's discretionary decision to include or not include a company on a non-consent tow list." If a city has the discretion to choose from whom it contracts private services, then it must equally retain the discretion to choose when to terminate such relationship. Alternatively, Rountree's equal-protection claim fails because he did not sufficiently allege that he has been treated differently from others similarly situated. Finally, Rountree was unable to overcome Dyson's entitlement to qualified immunity. The City had a criminal ordinance requiring all tow truck operations to follow the commands of police at scenes. Since it is undisputed Rountree refused, the arrest was based on such action by Rountree and was within Sgt. Dyson's discretion. The dismissals were affirmed.

City's affidavit failed to show how a reasonable ambulance driver would have acted similarly, so plea was properly denied

City of Dallas v Duressa, 05-17-01238-CV (Tex. App. — Dallas, June 13, 2018)

This is a Texas Tort Claims Act ("TTCA")/ambulance accident case where the Dallas Court of Appeals affirmed the denial of the City's plea to the jurisdiction.

Duressa was involved in a car accident and Dallas dispatched an ambulance driven by Officer Wyatt. In transporting Duressa to the hospital she was stable so the lights and siren were not activated. Duressa's son rode with

her in the ambulance. The roadway was icy and the ambulance slid and collided with stopped cars at an intersection. Duressa sued under the TCAA. The City filed a plea to the jurisdiction asserting Wyatt was performing discretionary actions, entitled to official immunity, and therefore the City is immune. The trial court denied the plea and the City appealed.

Courts apply an objective standard to determine whether an officer has acted in good faith, balancing the need for the officer's actions with the risks those actions pose. In an emergency response situation, an officer acts in good faith if a reasonably prudent officer under the same or similar circumstances could have believed the need for the officer's actions outweighed a clear risk of harm to the public from his actions. There must be evidence addressing "what a reasonable officer could have believed under the circumstances" substantiated with facts showing the officer assessed each of the need/risk balancing factors. The needs and risk analysis, however, demonstrated the lights and sirens were not active and there was no immediate need for a rush. The affidavits do not set out facts explaining the seriousness of the accident, the extent of any injuries, or any other circumstances requiring urgent transport of the patient to the hospital. Similarly, the affidavits do not state facts showing Wyatt considered the availability of any possible alternative courses of action, but simply conclude that, because the officers had been dispatched through the 9-1-1 system and were expected to respond urgently to the scene. Because a material fact issue remains as to whether Wyatt acted in good faith the trial court properly denied the plea.

Zoning amendment was not retroactive and property owner had no vested interest in perpetual use of his property for a specific purpose says Dallas Court of Appeals

Hinga Mbogo, et al. v. City of Dallas, et al. 05-17-00879-CV (Tex. App. – Dallas, June 19, 2018)

This is an appeal from an order granting the City Defendants' plea to the jurisdiction in a constitutional challenge to zoning laws. The Dallas Court of Appeals affirmed the granting of the plea.

Hinga leased land and opened a general repair shop on Ross Avenue in Dallas, Texas, in 1986. At that time, the City's zoning ordinances allowed automobile-related businesses on Ross Avenue. After performing a study which found automobile-repair shops were a concern in the area based on the connected roads and services in the area, the City amended its zoning ordinance in 1988 prohibiting such uses. At that time, Hinga was fully aware that continuing his business became a "nonconforming use." In 1991, Hinga purchased the property, expanded and upgraded knowing the property was nonconforming. In 2005 the City again amended the zoning ordinance and codified specific provisions related to non-conforming uses and provided deadlines. A property owner could appeal to the board of adjustment to extend deadlines to comply with the requirements. The BOA gave Hinga a new compliance date of April 13, 2013. Hinga then received a zoning change and SUP which expired in 2015. Hinga applied for a new SUP in February 2016, which was denied. The City filed suit seeking a permanent injunction to prevent operations and sought fines of $1,000 per day. Hinga counterclaimed and brought in various City officials. The City defendants filed a plea to the jurisdiction, which was granted. Hinga appealed.

Hinga argues the City's ordinances, as applied to him, are unconstitutionally retroactive. A retroactive law is one that extends to matters that occurred in the past. Hinga asserted in 2005 and 2013 he had no notice the City would at some point make his use illegal. However, a law is not retroactive because it upsets expectations based in prior law. Further, there are strong policy arguments and a demonstrable public need for the fair and reasonable termination of nonconforming property uses. In 2005 the City's ordinance change allowed the owner of a nonconforming use to apply for a later compliance date if the owner would not be able to recover his investment in the use by the designated conformance date. The ordinance did not change any use but rather, it prospectively altered a property owner's future use of the property. The 2013 ordinance likewise set a deadline for when it expired. As a result, the ordinances are not retroactive. Additionally, the court noted not all retroactive laws are unconstitutional. Here, any interest that Hinga had in the use of his property is not "firmly vested." There is no bright-line rule and, generally speaking, an individual has no protected property interest in the continued use of his property for a particular purpose. The process provided likewise did not deprive Hinga of due process or single him out in any respect. The City allowed Hinga to run a business from 1991 through 2015 as either a nonconforming use or under a SUP; however, his use became illegal once his SUP expired. Hinga's position under his takings argument appears to be that any restriction on his desired use of the property results in unconstitutional damage or destruction to his property. That is simply not the case as he had no vested right to perpetual, guaranteed use of his property in a specific way. As a result, the plea was properly granted.

Developer's asserted causal link between use of bulldozers and inability to timely sell lots is insufficient to establish waiver of immunity says 13th Court of Appeals

City of Weslaco v. Raquel Trejo and Roberto Trejo, 13-18-00024-CV (Tex. App. – Corpus Christi, June 21, 2018)

This is an interlocutory appeal from the denial of the City's plea to the jurisdiction in a Texas Tort Claims Act case where the 13th Court of Appeals reversed but remanded the case.

The Trejos began to develop land into a residential subdivision. The Trejos hired Rio Delta Engineering to develop plans and designs for the subdivision's infrastructure. Before lots could be sold, essential services such as water and sewer would have to be designed, built, and approved by the City. The City elected to combine the sewer and water plans of the Trejos as well as another client of Rio Delta, the Apostolic Church. The Trejos alleged the City delayed the sewer extension unreasonably, costing them the ability to timely sell lots. The Trejos filed suit alleging that the City was negligent in managing the sewer construction project, which "involved the use of motorized vehicles." The City filed a plea to the jurisdiction, which was denied. The City appealed.

Because the Legislature has deemed sanitary and storm sewers to be a governmental function, immunity applies to the design allegations. The Trejos did not establish a waiver for such a claim. No waiver exists for negligent training of personnel or supervisors. As to the claims for negligent operation of bulldozers, there must be a causal nexus between the operation or use of the motor-driven vehicle or equipment and a plaintiff's property damage. This causal

nexus is not satisfied by the mere involvement of vehicles or equipment, nor by a use that "does no more than furnish the condition that makes the injury possible." The Trejos "have drawn a thin thread of causation across the span of many years and several intermediary steps—the use of equipment led to the design flaws, which led to problems with the sewer, which led to construction delays, which led to the Trejos' inability to sell houses in 2008, which led to the project's insolvency in 2009, which led to the bank's foreclosure—in an effort to link the use of motorized equipment to the underlying harm of foreclosure." Such is too tenuous to be a causal link. However, the court held the Trejos should be given the opportunity to amend so remanded the case.

State trial court lacks jurisdiction over property dispute when U.S. government has a potential interest in the property

Rio Grande City Consolidated Independent School District v. City of Rio Grande, et al., 04-17-00346-CV (Tex. App. – San Antonio, June 27, 2018)

In this property dispute, the San Antonio Court of Appeals affirmed-in-part and reversed-in-part a trial court's order granting the City's plea to the jurisdiction.

The Rio Grande City Consolidated Independent School District ("District") asserts it owns a 0.64 acre tract of land. It sued the City of Rio Grande ("City") for trespass to try title and declaratory judgment. The U.S. government filed an intervention to preserve its interest in the property. The City filed a plea/MSJ which the trial court granted. The District appealed.

Pursuant to 28 U.S.C. § 1346(f), federal district courts have exclusive original jurisdiction in trespass to try title claims where the U.S. government has an interest in property. As a result, the state trial court lacked jurisdiction to hear the title claim. The school district amended its pleading after the plea was filed to allege an unconstitutional taking. The plea/MSJ was not amended. Because the record shows the school district's unconstitutional taking claim was not addressed in the plea to the jurisdiction/summary judgment motion, the trial court erred in disposing of this claim.

Negligent maintenance of school bus is not negligent operation or use of bus for immunity purposes says 4th Court of Appeals

San Antonio Independent School District v. Maria Hale, et al. 04-18-00102-CV (Tex. App. – San Antonio, June 27, 2018)

This is a Texas Tort Claims Act ("TTCA")/bus accident case were the San Antonio Court of Appeals reversed the denial of the San Antonio Independent School District's plea to the jurisdiction.

Hales son was riding on the bus when the rear exit door opened, and he fell out. He sustained a traumatic brain injury. Hale alleges the accident was caused by a defect in the rear exit door's latching mechanism that caused the door to open while the school bus was in motion. In addition to suing the designers and manufacturers of the school bus, Hale sued the school district. The district filed a plea to the jurisdiction, which was denied. The district appealed.

The mere involvement or proximity of a school bus to injury does not mean the injury arises from the use or operation of the bus. When an injury occurs on a school bus but does not arise out of the use or operation of the bus, and the bus is only the setting for the injury, immunity for liability is not waived.

Hale does not allege any affirmative acts or omissions by the bus driver, nor does she allege the bus driver's actions or inaction caused the injury. Hale does not allege the school bus driver negligently or otherwise improperly operated or used the school bus. accepting Hale's allegations as true, such negligence relates to the maintenance of the school bus. However, even if the district was negligent in maintaining the school bus, maintenance is not "operation or use" of the school bus. The plea should have been granted.

City could not use Family Code legitimation to challenge standing in wrongful death case

City of Austin d/b/a Austin Energy v. Maria Del Rosario, 03-18-00107-CV (Tex. App. – Austin, July 3, 2018)

Jaime Membreno died in 2009 when he came in contact with one of the City's overhead power lines while working on a construction job in Austin. Membreno was a citizen of El Salvador. Jaime was never married to Maria. She asserts that after his death she gave birth to Jaime's son in El Salvador where she lived. She sued the City on behalf of her minor son under a premise-defect theory of liability. She claimed that the City "failed to use reasonable care to safely operate and maintain the electric distribution system and its overhead distribution lines and poles in particular." The City filed a plea to the jurisdiction which was denied. The City appealed.

The City asserts to have standing to sue under the Wrongful Death Act, an illegitimate child must comply with the requirements of Texas Family Code §160.201(b), thereby establishing a father-child relationship. However, the Texas Supreme Court has previously held it is inappropriate to incorporate the requirements of the Family Code for legitimation into the Wrongful Death Act. Additionally, in order to try and establish a father-son relationship, Maria had a DNA test performed of Jaime's brother. The decedent's brother had a 99.8% chance that they are nephew and uncle. The brother swore that he had never engaged in sexual relations with Maria. Maria showed the birth certificate demonstrating Jaime was listed as the father and provided her own affidavit. The court held Maria marshaled proof from which the fact finder could conclude that the clear and convincing evidence showed that her child was the son of the decedent. The City asserted Maria also lacked capacity to sue, however, a lack-of-capacity challenge is not jurisdictional. As a result, the City's plea was properly denied.

A police officer's subjective preference for assignment is insufficient to prove a materially adverse personnel action says Dallas Court of Appeals

City of Dallas v. Christopher Worden, 05-17-00490-CV) Tex. App. – Dallas, July 3, 2018).

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Whistleblower Act case where the Dallas Court of Appeals reversed the denial and dismissed the Plaintiff's claims.

Worden is a police officer who responded to a suspicious-persons call at a Wal-Mart Supercenter parking lot regarding a group of juveniles. Multiple officers arrived and separated various suspects. During the stop, Officer Nicholas Smith and Sergeant Fred Mears told Worden to take the handcuffs off of a juvenile they had detained. He was unaware at the time that Smith had been threatening to fight the juvenile or that Mears was mocking him. When Worden realized the

antagonism, he again handcuffed the juvenile and placed him in the squad car. Worden reported these events (the Juvenile Incident) to his supervisor and other investigators. Then, months later, Worden and other officers responded to a report of an active shooter in a vehicle. Video of the confrontation reportedly showed Worden "body-slamming" the suspect against the side of his car and inappropriate force. Worden was placed on paid administrative leave during the IA investigation. Worden was later suspended for 10 days due to the Juvenile incident and an additional 15 days due to the active-shooter incident. Worden appealed internally. His record was cleared for the juvenile incident and his suspension for the active-shooter incident was reduced. After returning to work, Worden was reassigned to Communications. He brought this Whistleblower Act case, based on the juvenile incident. The City filed a plea to the jurisdiction which was denied. The City appealed.

Under the Whistleblower Act, an employee can sue only for adverse employment actions. The test for adverseness under the Act is an objective one: the action taken "must be material, and thus likely to deter a reasonable, similarly situated employee from reporting a violation of the law." Worden alleges that Communications had "a stigma attached to it," and that it was "for 'troubled' or 'problem' officers," but he offers nothing more than his personal opinion to support that judgment. A police officer's subjective preference for assignment is insufficient to prove a materially adverse personnel action. Worden alleges further that his assignment to the Department's Employee Development Program (EDP) was an adverse action taken in retaliation against him for his report concerning the Juvenile Incident. Worden testified that the EDP has a "negative connotation to it" because it operates under the Internal Affairs Department and he believes the program is a remedial one. However, the record established he was "boarded and identified as a candidate" for the EDP in June 2015, shortly after he returned to work from his suspension and was assigned to the Communications Division. However, Worden did not do anything under the program and was not required to. It therefore is not adverse. A host of other complaints were determined to be minimal issues which did not rise to the level of an adverse action. Finally, the court held Worden failed to establish a causal connection between any alleged actions and his reports. The court declined to apply a conduit theory of liability due to alleged animus from other officers. As a result, the plea should have been granted. The case was reversed and rendered in favor of the City.

University retains immunity from suit after chemistry student accidentally ingested sodium cyanide from lab

Texas A&M University v. Kevin Taylor, et. al, 10-17-00288-CV (Tex. App. – Waco, July 3, 2018)

This is an interlocutory appeal from the denial of Texas A&M University's plea to the jurisdiction where the Waco Court of Appeals reversed the denial.
The Taylors' son, Christian, was a biochemistry major at TAMU. TAMU provided a key to Christian to allow him to access the biochemistry lab. Christian ingested sodium cyanide he obtained from the lab and died. The Taylors sued for wrongful death. TAMU filed a plea to the jurisdiction which was denied.

The Texas Tort Claims Act waives immunity for injuries arising out of a condition or use of tangible personal property. To state a "condition" claim under the Tort Claims Act,

there must be an allegation of "defective or inadequate property." Taylors argue that the failure to secure the sodium cyanide in some manner within the locked lab was a "condition" of tangible personal property that contributed to Christian's death. However, the Taylors' pleadings include no facts that indicate that the sodium cyanide itself was somehow "defective or inadequate." A governmental unit does not "use" tangible personal property "when it merely allows someone else to use it." Further, the injury must be contemporaneous with the use of the tangible personal property (i.e. using that property must have actually caused the injury.) None of those situations exist in this case. Finally, Taylor's arguments asserting TAMU's policy decisions waived immunity disregard the TTCA provision preserving immunity for discretionary functions. As a result, the plea should have been granted.

City's denial of plat application citing inconsistencies with "general plan" of city, without more, is insufficient and therefore vested rights are implicated

The Village of Tiki Island, et al. v. Premier Tierra Holdings Inc., 14-18-00014-CV (Tex. App. – Houston [14th Dist.], July 10, 2018)

This is an interlocutory appeal in a land-use case were the 14th Court of Appeals affirmed the denial of the City's plea to the jurisdiction.

This case has gone up and down the appellate ladder already. Prior summary found here. Premier sought to develop property for a mixed-use marina project. Premier submitted a plat application which included up to one hundred residential units and up to 250 dry stack enclosed boat slips. The City had no meaningful land-use regulations or platting or subdivision regulations. Five days later the city enacted a zoning ordinance prohibiting dry boat storage, limiting heights and set-backs, and restricting rental dates and parking. The City then rejected the plat application as being inconsistent with the new ordinance. Premier next sought a rezoning application as a planned unit district, which was denied. It also sought several plat amendments which were denied. Premier filed a mandamus and sought declaratory relief asking the court to approve the original plat application and successive plat applications based on vested rights under chapter 245 of the Texas Local Government Code. It further brought a taking claim. The City Defendants filed a plea to the jurisdiction which was denied. The City Defendants appealed.

Chapter 245 creates a system by which property developers can rely on a municipality's regulations in effect at the time the original application for a permit is filed. It freezes" the rules at the time the original application for a permit is filed and limits the rights of a city to "change the rules in the middle of the game." Chapter 212 of the Texas Local Government Code deals with plat approval and requires plats to conform to the "general plan" of the city and for extensions of utilities and roadways. The City's assertion that it relied on a pre-existing "general plan" of the City in denying the original plat application was rejected as the City did not provide, in the record, evidence of such a plan or what its framework would have been. Chapter 212 plans must be adopted after public hearings, which is not evident in the record. A vague reference to a general plan of the city is insufficient for plea purposes and a fact question exists preventing the plea. Further, Chapter 245 expressly authorized a declaratory judgment suit to establish Chapter 245 rights. As to the takings claim, the court held Premier alleged facts to support a takings claim based on the denial of its vested rights in the project.

Fort Worth Court of Appeals holds candidate on ballot for two separate offices resigned second office by law, not the first, once taking oaths

City of Frest Hill, et al. v. Michielle Benson, et. al., 02-1-00346-CV (Tex. App. – Fort Worth, July 12, 2018).

This is a dual-office holding/statutory construction case where the Fort Worth Court of Appeals affirmed an order removing the official from the second position to which she was elected.

City of Forest Hill has a seven-member council. the City's public library is a library district established pursuant to chapter 326 of the local government code and the board of trustees is elected. At the same time as her candidacy for Place 3 on the council, Benson ran for Place 5 on the board of trustees. Benson filed the city-council application before she filed the library-board application. The City did not prohibit Benson from running for both offices, her name subsequently appeared on the ballot as a candidate for both offices, and she was elected to both offices. She was sworn in first as a city-council member and second as a library-board trustee on the same day. The City asked and received an Attorney General opinion the offices were incompatible. The AG opined that by taking the oath for the second position (Place 5 library trustee) she automatically resigned her position on the council. The Council "accepted" her resignation (which she disputed existed) and kicked her off the council. Benson sued and received a temporary injunction prohibiting enforcement of the City's acceptance and allowing her to remain on the council. The trial court also permanently enjoined the City from interfering with Benson's occupation of Place 3 of the city council, awarded Benson attorney's fees, and issued findings of fact and conclusions of law. The City appealed.
The case boiled down to statutory construction between Texas Election Code §§141.033 – 034 and §201.025. Section 141.033 states the second application is invalid for an election (then arguably she could only have been elected to the first office) and §201.025 states the first office is vacated upon being qualified for the second. The City asserts it could not bring a §141.033 challenge because §141.034 states it must wait until after the first early voting ballot is cast. However, the time limits within §141.034 involve challenges to form, content, or procedure, none of which are present. By contrast, §141.033 addresses the invalidity of an application that a person submits for a place on the ballot for an office that the person is "not permitted by law" to hold. As a result, §141.033 applies. Under §201.025 the statute applies only to a person who is a current officeholder when she accepts and qualifies for the second office. However, Benson was elected to the city-council and library-board offices on the same day, and she took the oath of office and qualified for both offices on the same day. The court held "construing the term 'officer' to include a person who only became an officer on the same day that she qualified for the 'other' office would be absurd—it cannot be presumed that Benson intended to resign her city-council position on the very same day that she took the oath of office for that position." Like §141.034, §201.025 has no application on these facts.

Employee failed to establish valid comparators in equal protection/employment discrimination case, so individuals entitled to qualified immunity says 5th Circuit

Mitchell v. Mills No. 17-40737 (5th Cir. July 13, 2018)

This is an equal protection in employment case where the 5th Circuit held the individual defendant mayors were entitled to qualified immunity.

Mills and Chartier were both mayors at different times during Mitchell's employment by the City. Mitchell is an African-American man in the Public Works Department ("PWD"). Mitchell alleged the defendants paid him less than two comparable white coworkers. Mitchell's comparators are Davlin, who is a Street Superintendent and Heard, who was Davlin's predecessor. Both comparators shared some overlapping duties with Mitchell, but they also had additional duties and skills including experience in operating street-related heavy equipment, including a motor grader. Mills and Chartier moved for summary judgment on the basis of qualified immunity, which the trial court denied. They filed this interlocutory appeal.

Mitchell bears the burden to overcome qualified immunity. Mitchell may not rest on mere allegations or unsubstantiated assertions but must point to specific evidence in the record demonstrating a material fact issue. In order to establish a violation of the Equal Protection Clause in the employment context, a plaintiff must prove a racially discriminatory purpose or motive. As part of his prima facie case of wage discrimination, Mitchell "must show that he was a member of a protected class and that he was paid less than a non-member for work requiring substantially the same responsibility." His circumstances must be "nearly identical" to those of a better paid employee. Given the undisputed facts, Davlin and Heard are not nearly identical comparators. They worked in the street department and Mitchell in the water department. Streets required specialized skills which were not required for Mitchell's job. It is undisputed that Mitchell possessed none of these skills and that such skills and responsibilities were not required for his position. In sum, Mitchell failed to carry his burden to overcome the defendants' claim of qualified immunity. The summary judgment should have been granted.

4th Court of Appeals holds VIA bus system not immune from bus accident, notwithstanding common carrier heightened standard of care argument

VIA Metropolitan Transit Authority v. Shantinia Reynolds, 04-18-00083-CV (Tex. App. – San Antonio, July 18, 2018)

This is an interlocutory appeal from the denial of a plea to the jurisdiction in a Texas Tort Claims Act ("TTCA")/vehicle accident case where the San Antonio Court of Appeals affirmed the denial.

Reynolds was injured when the VIA bus he was riding as a passenger rear-ended another driver. Reynolds sued VIA Metropolitan Transit ("VIA"), based, in part, on a heightened standard of care given it was a common carrier bus system. VIA filed a plea to the jurisdiction which was denied. VIA appealed.

VIA asserts its governmental immunity is not waived under a cause of action based on a "high degree of care" standard and the TTCA only waives immunity for general negligence. Recently, in VIA Metropolitan Transit v. Meck, No. 04-17-00108-CV, 2018 WL 1831681 (Tex. App.—San Antonio, April 18, 2018, no pet. h.) the 4th Court of Appeals held the TTCA motor vehicle waiver of immunity applies, regardless of the standard of care. Citing to Meck, the court held "[n]owhere in the motor-driven vehicle

exception are specific standards of care expressly mentioned as is the case with other exceptions under the TTCA," and thus, "to determine whether VIA's immunity is waived by the motor-driven vehicle exception, we must determine whether the bus driver would be liable." VIA was a common carrier and its bus driver would be personally liable under Texas law because he allegedly breached a "high degree of care" so VIA's immunity from suit is waived under the TTCA.

Claims against City for Sex-Offender Residency Registration Ordinance is moot after passage of Tex. Loc. Gov't Code §341.906

Texas Voices for Reason and Justice, Inc. v. The City of Meadows Place, 14-17-00473-CV (Tex. App. – Houston [14th Dist.] July 19, 2018).

This is a challenge to a sex-offender residency restriction ordinance (SORRO) which the 14th Court of Appeals held is now moot given legislation effective September 1, 2017.

Meadows Place's SORRO prohibits certain sex offenders from permanently or temporarily residing within 2,000 feet of any premises where children commonly gather. Texas Voices sued Meadows Place asking the trial court to declare the SORRO unconstitutional because Meadows Place, as a general-law city, had no authority to enact it. The City filed a plea to the jurisdiction, which the trial court granted. Texas Voices appealed.

After the dismissal, in the last legislative session, H.B. 1111 created Texas Local Government Code § 341.906 which allows general-law cities to enact such ordinances. In response, Meadows Place passed two ordinances to bring its SORRO into compliance with §341.906. A case is moot when the court's action on the merits cannot affect the parties' rights or interests. This includes while the case is on appeal. After Meadows Place came into compliance with §341.906 it possessed the ability to pass and enforce a SORRO. Texas Voices claims focus only on the validity of the ordinance. Therefore, the case has become moot.

Trial court properly awarded attorney's fees to school district as plaintiffs should have reasonably known the individual officials were absolutely immune.

Farr et. al. v Arlington ISD, 02-17-00196-CV (Tex. App. – Fort Worth, July 19, 2018)

In this asserted ultra vires case, the Fort Worth Court of Appeals affirmed the granting of the school district defendants' plea to the jurisdiction.
The Plaintiffs comprise of students, employees, and parents who asserted they were exposed to poor air quality at the school causing dizziness, nausea, and a host of other ailments. In addition to suing the school district, the individual board of trustees, the superintendent, and several private parties. They originally sued for negligence, gross negligence, and other claims, but after a host of court proceedings, the primary focus ended up centering on injunctive relief. The school district officials counterclaimed for attorney's fees. They filed a plea to the jurisdiction and motion to dismiss which the trial court granted. The Plaintiffs appealed.

The court first held the Plaintiffs did not bring a true ultra vires claim. The Plaintiffs did not allege the individual school officials acted outside of their authority. Next, the court held the last live pleading omitted the claims against the officials in their official capacities. As a result, ultra vires injunctive

relief is not applicable. Next, in the education context, attorney's fees can be viewed as sanctions. Under a sanctions analysis the strictures of the loadstar method of calculations is not applicable. The record demonstrates sufficient evidence to support the sanction. Given the officials retain absolute immunity from suit, a reasonable attorney should have known a suit against them was improper.

5th Court of Appeals holds mandatory third-party venue provision controls over TTCA venue provision

Pioneer Natural Resources USA, Inc. v. Texas Department of Transportation, 05-17-01245-CV (Tex. App. – Dallas, July 20, 2018).

This is a Texas Tort Claims Act ("TTCA")/vehicle accident case where the Dallas Court of Appeals reversed an order dismissing the third-party claims against TxDOT.

A fatal vehicle accident occurred between Edward Pittinger and a Kenworth tractor trailer owned, serviced, and maintained by Pioneer-related business entities. Pittinger's survivors filed a petition in Dallas County asserting wrongful death and survival claims against Pioneer. Pioneer filed a third-party petition against TxDOT alleging TxDOT controlled the roadway and breached its duties to ensure no defects existed or warn of the dangerous conditions. TxDOT filed a motion to dismiss arguing a waiver of sovereign immunity exists "only if the claim meets each and every requirement for waiver under the entire" TTCA. Section 101.102(a) provides that "[a] suit under this chapter shall be brought in state court in the county in which the cause of action or a part of the cause of action arises." TxDOT further cited §311.034 of the Government Code, which provides that "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements…" The trial court dismissed the suit and Pioneer appealed.

The term "statutory prerequisite" has three components: (1) a prerequisite must be found in the relevant statutory language, (2) the prerequisite must be a requirement, and (3) the term "pre" indicates the requirement must be met before the lawsuit is filed. No court has decided whether §101.102(a) constitutes a statutory prerequisite to suit. The Plaintiff's choice of venue should be honored absent a mandatory venue statute that requires transfer is shown. Section 15.062(a) of the Civil Practice and Remedies Code notes mandatory venue for third-party claims, but §101.102(a) notes a form of mandatory venue for TTCA claims. After analyzing case law and using statutory construction principles, the court held the third-party-venue provision of §15.062(a) controls over other mandatory venue provisions. The trial court erred in dismissing the case.

City wins breach of lease claim against FBO, but *quantum meruit* claims were remanded

Laredo Jet Center, LLC v. City of Laredo, 04-17-00316-CV (Tex. App. – San Antonio, July 25, 2018)

This is an FBO lease dispute where the San Antonio Court of Appeals affirmed-in-part and reversed-in-part a summary judgment motion issued in favor of the City.

Laredo Jet was a fixed-based operator ("FBO") at the Laredo International Airport. In 2014, the City and Laredo Jet discussed a contract under which Laredo Jet would demolish an existing hangar and rebuild a larger hangar, but Laredo Jet wanted a forty-year lease to secure financing. The City

entered into a lease agreement for a term of three years. Under the 2014 lease, Laredo Jet agreed to complete replacing the hangar within three years. In 2015, Laredo Jet and the City entered into a second lease agreement for a term of thirty years; the 2015 lease was contingent upon Laredo Jet constructing the new hangar by August 1, 2017, as required by the 2014 lease. Laredo Jet asserted the City made numerous representations that the full forty-year term would be eventually incorporated. However, in 2016 Laredo Jet stopped hanger construction asserting its financiers would not provide payments until the forty-years is secured. The City refused. Laredo Jet sued the City, alleging claims for breach of contract, promissory estoppel, and quantum meruit, among others. The City filed a traditional motion for summary judgment, which was granted. Laredo Jet appealed.

The court of appeals first held JP court has exclusive jurisdiction for forcable entry and detainer cases, so the district court lacked jurisdiction to determine immediate possession rights. It next held Laredo Jet did not expressly responds to the City's breach of contract and declaratory claims, so they waived the ability to argue them on appeal. The court then determined the City is immune from Laredo Jet's estoppel arguments. However, in its motion for summary judgment, the City did not challenge any of the elements of quantum meruit arguing, Laredo Jet could not recover in quantum meruit when an express contract existed. However, there is an exception for "building or construction contracts." The City failed to conclusively establish its entitlement to judgment as a matter of law on Laredo Jet's quantum meruit claim. As a result, the court reversed and remanded the quantum meruit and immediate possession claims and affirmed the remainder.

Sheriff's deputy unable to sue for TCHRA, Whistleblower Act, and collective bargaining claims says Beaumont Court of Appeals

Jefferson County, Texas v. Cherisse Jackson, 09-17-00197-CV (Tex. App. – Beaumont, July 26, 2018).

This is an interlocutory appeal from the denial of a plea to the jurisdiction in an employment suit where the Beaumont Court of Appeals reversed and dismissed the Plaintiff's claims.

Jackson sued the County alleging the sheriff and Deputy Werner with IA, discriminated and retaliated against her after she failed to cooperate in an investigation against another county employee, April Swain. Werner was investigating whether Swain and an inmate had been involved in a sexual encounter at the jail in 2014. Jackson claimed that Deputy Werner approached her to determine whether Jackson had witnessed the alleged encounter. When she told Werner, she did not see the incident, Werner allegedly then asked for a written statement claiming she had while viewing a security monitor. Jackson refused and asserts she was later demoted, then not given a lieutenant's position. Jackson later filed an EEOC complaint asserting retaliation and discrimination for failing to give the statement in violation of the Texas Commission on Human Rights Act ("TCHRA"). Six days after Jackson filed her EEOC claim, she sued the County under the Texas Whistleblower Act. The County filed a plea to the jurisdiction which the trial court denied. The County appealed.

The County asserts Jackson failed toestablish a causal connection between the failure to cooperate and the adverse actions. It asserts Jackson was demoted following a

Disciplinary Review Board hearing, which found that in May 2015, Jackson engaged in insubordinate conduct toward Lieutenant Hawkins, a superior officer. The court held the documents attached to the County's plea support the County's allegation that it demoted Jackson because Lieutenant Hawkins filed a grievance against Jackson that a Disciplinary Review Board determined had merit. The investigation and the disciplinary proceedings involving Jackson consumed nearly the entirety of the six-month period during which Jackson was eligible to be considered for a promotion to lieutenant. Once produced, the burden shifted to Jackson to rebut with evidence of pretext, which she was unable to do. Under the TCHRA, Jackson asserts she participated in an investigation, so the anti-retaliation provisions apply. However, under the TCHRA exhaustion of remedies must occur before a trial court can acquire jurisdiction over a party's TCHRA claims. The court held Jackson exhausted her administrative remedies only for two of her claims, that the County demoted her then refused to promote her. But she failed to establish a causal connection. Further, as to Jackson's Texas Constitution claims, none of the evidence the parties asked the trial court to consider established that Jackson had been treated any differently than other, similarly situated, employees. The collective bargaining agreement did not provide a protected property interest in rank. Additionally, any "free speech" claims she has brought relate only to her internal communications as part of her job and are not protected. Finally, since Jackson failed to follow the mandatory arbitration provision of the collective bargaining agreement, she cannot sue for breach. As a result, the plea should have been granted.

City and EDC established personal/specific jurisdiction over out-of-state financial institutions involved in failed EDC project

City of White Settlement, et al. v. Benjamin S. Emmons, and Source Capital, LLC, 02-17-00358-CV (Tex. App. – Fort Worth, September 27, 2018)

While involving a governmental entity, this case is more about personal jurisdiction over an out-of-state financial institution involved in an EDC project. It will likely only be of interest to litigators and contract drafters.

In September 2013, the City and EDC entered into a transaction with Hawaiian Parks – White Settlement, LLC (HPARKS) where the City would ground lease land to HPARKS to construct a water and adventure park and would pay up to $12.5 million for the construction, to be financed by debt obligations issued by either the City or the EDC. The ground lease agreement allowed HPARKS to encumber the leasehold interest and capital improvements but only with the City's consent. The owners of HPARKS mortgaged the Park in order to finance the park construction. HPARKS ran out of money and could not meet its past due obligations or complete construction. Capital One and the Source Capital Lenders issued notices of default. As part of a financial reorganization, the City and EDC agreed that HPARKS could execute documents granting a lien on all of its right, title, and interest under the ground lease and that Capital One could foreclose on that interest in an event of default of its loan to HPARKS. Despite receiving new loans and changing ownership, HPARKS failed to make good on its obligations to the City or Bank. The City sued the owners and lenders claiming the banking entities falsely represented that the City would be provided payment in exchange for allowing the encumbrances and not declaring

a default. Further instead of making the October 2015 lease payment and ensuring that the Park had enough income, the Defendants diverted HPARKS's income to operate the other parks in other cities. The Source Capital Defendants filed a special appearance noting a lack of personal jurisdiction. The trial court granted the special appearance without holding a live hearing. The City and EDC appealed.

A Texas court may assert personal jurisdiction over a nonresident defendant only if the requirements of the Texas long-arm statute and of due process under the Fourteenth Amendment are satisfied. A trial court may exercise specific jurisdiction over a defendant only if the suit arises out of or relates to the defendant's forum contacts. This depends on the existence of activity or an occurrence that takes place in the forum state and is therefore subject to its regulation. The court went through a lengthy listing of evidence and testimony. The evidence showed the various defendants were physically present in the state and made allegedly fraudulent representations on which the City and EDC relied. The court held the Source Capital defendants purposefully availed themselves of the privilege of conducting business and investment activity in Texas sufficient to confer specific jurisdiction on the trial court for fraud and torts. However, personal jurisdiction over the individual agents of Source Capital does not extend to the breach of contract claim. Unlike in a tort context, a corporate agent who is not individually a party to a contract may not be held liable for breaching a contract to which only his principal is a party. As a result, the trial court's order is affirmed-in-part and reversed-in-part.

Lack of due care finding by accident review board is evidence only of negligence, not recklessness under emergency responder exception to TTCA

Harris County v. George J. Spears, 14-17-00662-CV (Tex. App. – Houston [14th Dist.], September 25, 2018)

This is an interlocutory appeal where the Fourteenth Court of Appeals reversed the denial of the County's plea to the jurisdiction in this emergency responder/vehicular accident case and rendered judgment for the County.

While responding to an emergency call (i.e. possible suicide and medical emergency), Deputy Corporal Baskins collided with Spears at an intersection. As Baskins approached the intersection he slowed almost to a complete stop. The cars moved to permit Deputy Baskins to proceed through the intersection. As Baskins drove through the intersection, a vehicle driven by Spears hit the rear passenger side of his patrol vehicle. The vehicle's siren clearly can be heard in the dash cam video. The County's accident review board noted Baskins failed to use "due care" by not clearing the intersection first and issued a 1-day suspension. The County filed a combined motion for summary judgment and plea to the jurisdiction, which the trial court denied. The County appealed.

The emergency responder provision of the Texas Tort Claims Act ("TTCA") retains immunity unless a responder drives with "reckless disregard for the safety of others." The burden of proof is on the plaintiff to show that the emergency response exception does not apply. The term "emergency" is interpreted broadly under the TTCA. Deputy Baskins's affidavit stated the importance to preserve the scene before family arrive and the varying needs when

responding to such calls. The evidence established an emergency existed. Further, Spear's arguments do not justify limiting the emergency response exception to preclude application to a backup responder to a priority two call. The evidence shows that Deputy Baskins was not acting with reckless disregard at the time of the collision. The accident review board's reprimand does not create an issue of fact regarding recklessness — rather, the board's conclusion that Deputy Baskins "failed to exercise due care" is evidence only that Deputy Baskins acted negligently in entering the intersection. As a result, the County's dispositive motions should have been granted.

City properly brought enforcement of junked vehicle ordinance in district court, but city ordinance did not properly adopt alternative administrative procedure

In re Philip T. Pixler, 02-18-00181-CV (Tex. App. – Fort Worth, July 26, 2018).

This is a mandamus suit where the Fort Worth Court of Appeals held the district court had jurisdiction over the City of Newark's enforcement of its junk vehicle ordinance, but that the City ordinance did not properly create an alternative mechanism to allow for administrative penalties.

Pixler owns an auto-tech business and would sometimes store vehicles in parking spaces and on the neighboring property. Pixler was given eight complaints which were submitted to an administrative board under the City's ordinances. The board determined the vehicles were junk vehicles and assessed $8,000 in administrative penalties. Pixler did not challenge the board decision directly. The City then filed a petition in district court seeking (1) to enjoin Pixler from further violating its ordinances, (2) to collect the $8,000 in administrative penalties, and (3) to impose separate civil penalties against Pixler for continuing to violate its ordinances. The City won a partial summary judgment motion and awarded penalties totaling $80,000.00, but since the City's Texas Uniform Fraudulent Transfers Act claim is still pending, no final judgment has been entered. Pixler filed this mandamus proceeding challenging the district court's subject matter jurisdiction over the matter.

The court divided the holding into roughly three parts: district court jurisdiction over junk-vehicle determinations, district court jurisdiction over administrative penalties assessed by the administrative board, and the district court's jurisdiction over the additional civil penalties. Subchapter B of chapter 54 of the Texas Local Government Code addresses health and safety ordinances and allows a district court to have jurisdiction over enforcement of such ordinances. And §54.016 permits the municipality to obtain injunctive relief against the owner of the premises that is allegedly in violation of the ordinance. Since the City ordinance declares any junked vehicle visible from a public place to be detrimental to the safety and welfare of the public, enforcement is properly in the district court. And since §54.017 allows civil penalties of no more than $1,000 per day, the district court has jurisdiction over the civil penalties. However, for administrative penalties assessed by the administrative board, the City's ordinances did not comply with the statutory requirements. The City's ordinances adopt the procedures established under the Texas Transportation Code chapter 683 for abatement of junked vehicles. But, the procedures adopted address enforcement in municipal court before a judge. And while Subchapter E of Chapter 683 allows a city to adopt an alternative procedure for junked vehicles and §54.044 of the Local Government Code likewise allows a city to adopt a general alternative procedure, none of

the City's ordinances actually did that. The court acknowledged the City has the statutory authority to adopt an alternative administrative procedure, but to do so, the City must adopt a specific ordinance setting out the process. Simply because the City has a municipal court of record, does not, by default, mean it can utilize an alternative administrative procedure. Because the City utilized that procedure when its ordinances did not adopt one, the administrative board lacked authority to assess the $8,000 administrative penalty.

Austin Court of Appeals holds vehicle barrier into parking lot was not a traffic control device; therefore, plaintiff injured by tripping on barrier must proceed under premise defect theory

Texas Facilities Commission v. Courtland Speer, 03-17-00244-CV (Tex. App. – Austin, August 31, 2018).

This is a Texas Tort Claims Act ("TTCA") trip and fall case where the Austin Court of Appeals reversed the denial of the Commission's plea to the jurisdiction.

The Commission manages State-of-Texas-owned properties that include a surface parking lot, designated as "Lot 27." Lot 27 was constructed with vehicle access points that included a short driveway near its northwestern corner that crosses an adjacent sidewalk. A vehicle barrier consisting of two concrete posts with a cable suspended between the posts was constructed across the driveway to address pedestrian/vehicle problems at that point. Speers alleged, at night, he tripped over the cable and was injured. He brought suit against the Commission, asserting the cable, over time, had drooped lower than designed due to a partially uprooted post and it had lost its reflectors. The Commission filed a plea to the jurisdiction, which was denied. The Commission appealed.

Section 101.021 of the TTCA holds immunity is waived for a premise defect. However, other TTCA provisions modify the scope and effect of the waivers. The Commission asserts §101.022 states that a property owner must have actual notice of a dangerous condition in order to attribute liability as a premise defect. Speers asserts, under §101.022(b) and §101.060 that a heightened standard applies for traffic control devices. Speers asserts the cable and posts are traffic control functions, therefore a heightened standard applies to the property owner. The court, putting the sections into practical context, read through the various TTCA sections. It held the net effect of the provisions is that the TTCA waives immunity with respect to a premises-defect claim founded on an unreasonably dangerous condition arising from "the absence, condition, or malfunction of a traffic or road sign, signal, or warning device" – but only in instances where the governmental unit had actual or constructive notice of the "absence, condition, or malfunction" and failed to correct it within a "reasonable time" thereafter. But such a claim is not subject to the licensee standard generally imposed by §101.022(a). The court then analyzed whether the cable was a "traffic control" sign, signal or warning device. Such devices are those used in connection with hazards *normally* connected with the use of the *roadway*. Taking a detailed analysis, the court held such devices are distinguishable from special defect types of situations which carried the higher standard of care. The cable also does not direct normal users of the roadway in the traditional sense. Speers incorrectly believes §101.060 is a standalone provision, which it is not. Section 101.060 presumes a premise defect waiver under §101.021 and modifies that waiver. Trip-and-fall cases are traditionally treated as

premise defect claims, despite plaintiffs attempting creative pleadings to impose a higher standard. This is a premise defect case and Speers failed to establish actual notice of the dangerous condition to the Commission.

Historic Commission's suit moot after City acquired title to property says El Paso Court of Appeals

City of El Paso v Grossman, 02-17-00384-CV (Tex. App. – El Paso, August 30, 2018).

Max Grossman, an assistant professor of Art History at the University of Texas-El Paso and who serves on the El Paso County Historical Commission, sought a declaratory judgment to prevent the City from demolishing an older downtown area, "Duranguito" (Union Plaza), and putting up a multipurpose cultural, athletic, and performing arts facility. The City filed a plea to the jurisdiction, which was denied. During the pendency of the appeal, the court of appeals issued emergency relief to prevent demolition while the appeal was pending. The City moved the court of appeals dismiss its appeal, explaining that since its notice, the City had purchased the property in question and wished to proceed to trial. Grossman opposed the dismissal.

Texas Natural Resources Code § 191.0525(a) requires notice to a historical commission before an entity breaks ground in order for the commission to determine historical significance. After acquiring title, the City did notify the Commission. This mooted the declaratory judgment claims. The remainder of Grossman's claims are not yet ripe as they occur after notice and historic analysis are provided. As a result, the court granted the City's motion to dismiss the appeal as moot and release the emergency stay.

Ex-employee failed to file supplemental EEOC charge, so failed to exhaust administrative remedies says Eastland Court of Appeals

Christopher Wernert v. City of Dublin, 11-16-00104-CV (Tex. App. – Eastland, August 30, 2018).

This is an employment discrimination case were the Eastland Court of Appeals affirmed the granting of the City's dispositive motion. Wernert was a police officer for the City who suffered a serious knee injury on the job when he slipped and fell on an icy street while directing traffic. The injuries were listed as permanent preventing him from continuing patrol duties. However, Wernert was also an investigator and continued to perform those duties for two years. Then, the Chief of Police added patrol duties back into his job requirements. Wernert filed an EEOC/TWC charge. Wernert was then required to exhaust his leave but was later terminated by a new Chief when he could not return to work, including patrol. Wernert filed suit but alleged acts which occurred after his EEOC charge was filed. The City filed a summary judgment motion, asserting a lack of jurisdiction for failing to exhaust administrative remedies. The trial court granted the motion and Wernert appealed.

Each discrete act of discrimination requires administrative remedy compliance. Discrete discriminatory acts are not actionable if time-barred, and each discrete discriminatory act starts a new clock for filing charges alleging that act. The court analyzed the current state and federal law and whether Wernert was required to file a supplement charge in order to preserve acts which occurred after the first charge. The only adverse actions taken prior to the first charge was a change in job duties, while the forced leave and termination occurred after his charge. Adopting the

reasoning from the U.S. Fifth Circuit expressed in *Simmons-Myers v. Caesars Entertainment Corp*., 515 F. App'x 269, 273 (5th Cir. 2013), the Eastland court held Wernert's claims are precluded because he did not file an administrative charge for these discrete acts that occurred after his previous EEOC charge. Wernert was required to pursue administrative relief for each of these discrete acts even though they were related to the factual basis of his previous charge. And since the only acts for which he sought damages were the post-charge acts, the trial court properly granted the summary judgment.

Police report insufficient to establish actual notice of a claim under the TTCA says Eastland Court of Appeals

Darvus Henry v. City of Midland, 11-16-00265-CV (Tex. App. – Eastland, August 31, 2018).

This is a Texas Tort Claims Act ("TTCA") vehicle collision case where the Eastland Court of Appeals upheld the granting of the City's plea to the jurisdiction based on lack of timely notice.

Henry sued the City of Midland asserting that "a manhole cover caught the underside" of his vehicle causing a single-vehicle accident. He pleaded that the manhole cover was tangible physical property but, in the alternative, that the manhole cover was a special defect or premises defect. The City filed a plea to the jurisdiction which the trial court granted.

The TTCA requires notice of a claim within six months and the City of Midland's charter requires written notice of claim within sixty days after the injury or damage is sustained. Henry asserted the City had the required elements of actual notice of the claim. "Knowledge that a death, injury, or property damage has occurred, standing alone, is not sufficient to put a governmental unit on actual notice for TTCA purposes." Whether a governmental unit has actual notice is a fact question when the evidence is disputed, but it is a question of law when the evidence is undisputed. Henry relies on a police accident report to establish notice. There is no mention in the police accident report that a manhole cover was a cause of the accident or that the City's maintenance of the manhole cover was a cause of the accident. Furthermore, the police accident report indicates that Henry was not injured as a result of the accident. That is insufficient to establish actual notice of fault or of the injury. The plea was properly granted.

County immune from suit brought by late Judge's widow asserting her husband was exposed to asbestos in the Jefferson County courthouse and subsequently died.

Jefferson County, Texas v. Ellarene Farris, et al., 01-17-00493-CV (Tex. App. – Houston [14th Dist.], August 31, 2018).

This is an interlocutory appeal in a wrongful death case where the 14th Court of Appeals reversed the denial of Jefferson County's plea to the jurisdiction.

Widow Ellarene Farris asserts her late husband, Judge James Farris, was exposed to asbestos in the Jefferson County courthouse and subsequently died. She sued Jefferson County in its capacities as premises owner and employer. The County filed a plea to the jurisdiction, which was denied. The County appealed.

Judge Farris retired in December 1996 and passed away in 2004. The County asserts it did not have the notice of claim within six

months after the last alleged exposure, so no waiver of immunity exists. Farris' widow contends that she had no claim, and thus no notice was required, until after Judge Farris's death on November 5, 2004, to which she properly submitted written notice to the County. The court held the Tort Claims Act specifies that the event triggering the notice requirement is "the incident giving rise to the claim." Tex. Civ. Prac. & Rem. Code § 101.101(a). The wrongful-death claim only could be pursued if Judge Farris himself "would have been entitled to bring an action for the injury" if he had lived. Since his last exposure was in 1996, his notice would have likewise been untimely in 2005. As a result, Mrs. Farris' notice was untimely.

The dissent asserts the death is a necessary element to provide notice, so the notice timeline starts to run from the date of death, not the last exposure. Judge Farris died of mesothelioma on November 5, 2004, a mere nine days after exhibiting his first symptoms of illness and nearly eight years after his last exposure. Justice Jennings would hold the notice timely.

School immune from suit where student drop-off only provided location of incident – student's injuries caused by reckless driver

Stiff v. Kaufman Indep. Sch. Dist., 05-17-00988-CV, 2018 WL 3725278, at *1 (Tex. App.—Dallas August 6, 2018) (mem. op.).

This is a school bus/drop-off case brought under the Texas Tort Claims Act ("TTCA"). The Dallas Court of Appeals affirmed the trial court's judgment in favor of the school. Seven-year-old Nicholas Christopher Garza ("Garza") exited a Kaufman ISD school bus and was crossing the road to his foster parents' home when he was hit by a pickup truck, operated by Salvador Hernandez. Garza was killed. His biological parents sued Kaufman ISD asserting the school bus was defective, and that the drop-off location was unreasonable and a dangerous condition. Hernandez, who was speeding well over the limit, vision impaired, and driving without a license, said he did not see the bus or Nicholas. Hernandez later pleaded guilty to criminally negligent homicide. Regarding the drop-off location, all witnesses to the accident agreed there was a "risk" in children crossing the 2-lane highway, but no one testified the drop-off location was a "dangerous condition". The school filed a motion for summary judgment which was granted. Garza's parents appealed.

A common law negligence claim can only be successful if the plaintiff pleads and establishes proximate cause of the injury. The test of foreseeability requires that a person of average intelligence should have anticipated the hazard created by a negligent act or oversight. Speculation or presumption are not enough. When alleged negligence merely results in a plaintiff's presence at a location, but entirely different behavior or action causes injury, the damage is removed from the defendant's original conduct.

Under the TTCA, the operation or use of a motor vehicle "does not cause the injury if it does no more than furnish the condition that makes the injury possible". Any complaints stating that Kaufman ISD was negligent in the mapping or planning of bus stops when creating a bus route do not involve the use or operation of a motor vehicle. Neither the school bus, nor any part of the school bus, was used directly as a proximate cause of Garza's death. The trial court's judgment was affirmed.

City obtained mandamus to remove TRO preventing display of budget meeting which addressed fiscal impact of pending charter election

In re Sylvester Turner, Mayor and Dave Martin, Houston City Council Member 14-18-00649-CV (Tex. App. – Houston [14th Dist.], Aug. 23, 2018)

This is an original mandamus where the 14th District Court of Appeals in Houston reversed a trial judge's order requiring the City to remove the video and transcript of the City's budget meeting from its website.

A Houston firefighter association ("Association") collected petitions to place a charter amendment on the ballot which addresses comparable compensation between the firefighters and police. The City Council scheduled a council vote for August 8, 2018, to place the Charter Amendment on the ballot. Pursuant to the Texas Local Government Code, for a charter amendment to appear on the November 2018 general election ballot, the City must publish a fiscal impact in the paper several times. The first publication must occur, at the latest, by mid-October 2018. Relators' petition states that the City's Budget and Fiscal Affairs Committee scheduled a public meeting for July 26, 2018, in anticipation of the publication. Various City officials spoke at the meeting and the Association's attorney was invited to speak. Afterwards a video was posted. Four days later, the Association sought a temporary injunction to prevent release of the video asserting it violated the Election Code. A judge signed a TRO restraining the City from displaying on municipal websites or other municipally funded media platforms any audio, video, or transcribed versions of the July 26 meeting.
The Association alleges the City violated §255.003 of the Election Code, which prohibits an officer or employee of a political subdivision from knowingly spending public funds for political advertising. "Political Advertising" includes a communication supporting or opposing a measure that appears on an Internet website. The City's Budget and Fiscal Affairs Committee scheduled the July 26 public meeting to obtain information regarding the fiscal impact of the proposed charter amendment. The fiscal impact of the charter amendment is relevant to whether voters and Council Members may oppose or support the charter amendment. The 14th Court held it was not unreasonable or unexpected that statements tending to indicate support for, or opposition to, the charter amendment might be voiced at the meeting. However, according to Ethics Advisory Opinion No. 456, such public discussion generally does not violate §255.003 of the Election Code. Such section was not intended to inhibit discussion of matters pending before a governmental body. In such a situation, public funds were not being used for political advertising by making the meeting video publicly available, even though an incidental effect of posting the video on the City's website may be to re-publish statements supporting or opposing the charter amendment. As a result, the district court judge committed error, and mandamus was issued.

City employee returning to work from lunch deemed not to be in course and scope of employment says 14th Court of Appeals

Martin Molina v. City of Pasadena, 14-17-00524-CV (Tex. App. – Houston [14th Dist.], August 21, 2018).

This is a vehicle accident/Texas Tort Claims Act ("TTCA") case where the 14th District Court of Appeals affirmed the granting of the City's plea to the jurisdiction.

The City's inspector for the engineering department, Rendon, was driving a City vehicle on way back from his lunch break. He stopped at the intersection, looked both ways, and saw Molina on the sidewalk twenty feet away. Rendon believed he had time to turn, confirmed there was no on-coming traffic from his left, and took his foot off the brake. The vehicle traveled approximately one foot before impacting Molina. When Rendon inquired, Molina stated he was fine, left the scene, and proceeded home. Molina later sued the City. The City filed a plea to the jurisdiction, which the trial court granted. Molina appealed.

It is the general rule that use of public streets or highways in going to or returning from one's place of employment is not within the scope of one's employment. The City admitted that while traveling to a job site, which Rendon was doing, was considered "on duty." When the vehicle involved in an accident was owned by the defendant and the driver was an employee of the defendant, however, a presumption arises that the driver was acting within the scope of his employment when the accident occurred. The court went through a burden shifting analysis noting evidence that the employee was on a personal errand to eat at the time of the accident, such as Rendon, refutes an allegation that he was acting in the course and scope of his employment. The burden then shifts to the City to present other evidence that Rendon was in the course and scope of his employment. An employee who has turned aside, even briefly, for a personal errand is no longer in the scope of employment until he returns to "the path of duty." However, evidence that Rendon was returning to work from a personal errand at the time of the accident rebutted the presumption that he was acting in the course and scope. He had not returned to duty and the City's conclusory statements of "on duty" is not a legal determination. Because there is no probative evidence that raises a genuine issue of material fact as to whether Rendon was engaged in the City's business at the time of the accident, there was no dual purpose to Rendon's personal errand. As a result, the plea was properly granted.

Police officer's need to reach site of 911 call justified actions of entering intersection in course and manner – immunity therefore preserved

Jason Roche v. City of Austin, 03-17-00727-CV (Tex. App. – Austin, August 21, 2018).

This is a vehicle accident/Texas Tort Claims Act ("TTCA") case were the Austin Court of Appeals affirmed the granting of a dismissal order.

Police Officer Nguyen was responding to a 911 call that a man brandishing a knife was threatening people in the Dollar General Store parking lot. While in route he collided with the pickup truck driven by Roche. As the officer approached an intersection, the traffic light was red, and traffic was stopped in all lanes in his direction. To proceed, the Officer elected to drive over the median dividing the eastbound and westbound lanes. Roche entered the intersection under a yellow light. Although Roche heard the emergency siren before he proceeded into the intersection, he did not see the police car until it was too late. The Officer was later reprimanded for violating department policies on how to respond to such calls. Roche sued the City. The City filed a motion for summary judgment asserting immunity, which was granted. Roche appealed.

Under the emergency exception provision of the TTCA, no waiver of immunity exists if: (1) the employee was responding to an

emergency; (2) the employee was acting in compliance with applicable laws and ordinances governing the employee's response; or (3) in the absence of such a law or ordinance, the employee did not act with conscious indifference or reckless disregard to the public's safety. The emergency exception provision is designed to balance the public's safety with the need for prompt response from public-safety personnel. Imposing liability for a simple failure in judgment could deter emergency personnel from acting decisively and from taking calculated risks. Emergency exception provision is intended to prevent judicial second-guessing of split-second and time pressured decisions emergency personnel are forced to make. The court held "the Officer's timely presence at the store was crucial to protect the safety, and perhaps lives, of these people. The need to reach the Dollar General premises as quickly as possible was manifest." The court analyzed the "laws" and "ordinances" governing the Officer's response under the Texas Transportation Code. Section 546.001 allows, among other acts, the operator of an emergency vehicle to "proceed past a red or stop signal or stop sign, after slowing as necessary for safe operations," and to "disregard a regulation governing the direction of movement or turning in specific directions." A police department's internal policy or procedure is not a "law" or "ordinance" for purposes of waiver of immunity, so the reprimand is irrelevant. Witnesses stated no other vehicles were in the intersection when the Officer entered it. The Officer was driving "relatively slowly" and slowed down before he entered the intersection, the Officer took his foot off the accelerator before entering the intersection, and Roche entered the intersection at a "relatively fast" pace, without hesitation. After reviewing the submitted evidence the court held the summary-judgment record establishes, as a matter of law, that the Officer complied with the laws applicable to the emergency situation. The judgment was affirmed.

City found liable in $4.7 million dollar breach of an economic development agreement

City of Lancaster v. White Rock Commercial, LLC, 05-17-00583-CV (Tex. App. – Dallas, Aug. 20, 2018).

The Dallas Court of Appeals reversed-in-part and affirmed-in-part a $4.7 million-dollar verdict against the City of Lancaster arising out of an alleged breach of an economic development agreement. [Comment: warning, this is a 30-page opinion].

White Rock is a real estate developer. In 2007, the City was willing to provide economic incentives to promote a certain development. White Rock entered into two contracts: (i) an "Incentive Agreement" with the Lancaster EDC and (ii) a Chapter 380 Economic Agreement with the City. White Rock agreed to design and construct infrastructural improvements for a 1.4 million square-foot industrial park. Each contract had a different method of payments and the parties disagree as to whether the 380 Agreement was to supplement the Incentive Agreement or provide additional funding beyond the Incentive Agreement. In the City's view, the 380 Agreement's purpose was to reimburse White Rock's expected costs that were in excess of the $1.8 million to be paid under the Incentive Agreement as the EDC had a limited budget. White Rock counters that the Incentive Agreement provided additional incentives above 380 Agreement. White Rock sued the City in June 2014, alleging that it breached the 380 Agreement. It filed a motion for partial summary judgment which established

liability, disposed of the City's defenses, an ordered the only remaining issue was damage amounts. The City subsequently filed a plea to the jurisdiction, claiming that it was immune from White Rock's breach of contract suit and that the 380 Agreement created a debt prohibited by the Texas Constitution. The trial court denied the plea. A bench trial was held on damages and the trial court awarded $4,726,217.53. The City appealed.

The court started out analyzing whether the 380 Agreement, which was focused on infrastructure, was entered into as a governmental function or a proprietary function of the City. Because "the functions expressly covered by the 380 Agreement are expressly identified in section 101.0215 [of TTCA] as governmental functions, we do not apply the *Wasson II* [4-part] test." Instead, the court relied on the legislative language holding the infrastructure focus of the agreement means the contract was entered into for a governmental purpose. The contract was therefore, subject to analysis of the contractual waiver provisions of immunity under Chapter 271 of the Texas Local Government Code. Whether a contract has all the essential terms to be an enforceable agreement is a question of law. Material terms are determined on a case-by-case basis. The City asserted White Rock was already legally required to construct and dedicate the infrastructure, so the City's assistance in financing the legal obligation was not a benefit, good, or service to the City. The court held that while the contract expressly stated it was expected to benefit the City and is expected to net $12.4 million in benefits, "this benefit to the City is too attenuated for a waiver." However, the circumstances of this case demonstrate that White Rock's Agreement to construct the infrastructural improvements was itself a direct benefit to the City. The City's agreement to pay White Rock for such construction is further evidence of a contract for services. Immunity is therefore waived under §271.152. Further, the 380 Agreement was not an unconstitutional debt. Next the court analyzed the language and stated the sections of the 380 Agreement cited by the City were conditions subsequent, which are affirmative defenses, not conditions precedent, which are jurisdictional. The court then analyzed the various points of error and concluded the evidence supported the judgment against the City. However, the evidence does not support a claim by White Rock for insurance costs and the trial court errored in the pre-judgment and post-judgment interest calculations. Otherwise, the judgment is affirmed.