THE PROPRIETARY-GOVERNMENTAL DICHOTOMY IN BREACH OF CONTRACT CASES

CHRISTINA CROZIER
KENT RUTTER
Haynes and Boone, LLP
Houston

State Bar of Texas
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Christina F. Crozier

Counsel

christina.crozier@haynesboone.com

Houston

1221 McKinney Street

Suite 2100

Houston, Texas 77010

T +1 713.547.2268

F +1 713.236.5439

Practices and Industries

- Appellate
- Litigation
- Appellate Case Evaluation and Advice
- Energy Appeals
- Tort and Products Liability Appeals

Education and Clerkships

- J.D., University of Houston Law Center, 2005,
- B.S., University of Texas at Austin, 2001, *with highest honors*

Bar Admissions

- Texas, 2005

Court Admissions

- United States Supreme Court
- U.S. Court of Appeals for the Fifth Circuit
- U.S. Court of Appeals for the Eleventh Circuit
- U.S. District Court for the Eastern District of Texas
- U.S. District Court for the Southern District of Texas
- U.S. Court of Appeals for the Ninth Circuit
- U.S. District Court for the Western District of Texas

As a member of Haynes and Boone's Appellate Practice Group for the past 12 years, Christina Crozier has developed a practice centered around effective writing, persuasive oral advocacy, and litigation strategy. Christina has presented oral arguments before the Texas Supreme Court and numerous Texas courts of appeals. She has also authored legal briefing in the Fifth, Ninth, and Eleventh Circuits and the United States Supreme Court.

In addition to her work in appellate courts, Christina is regularly chosen to serve as appellate counsel on trial teams. By taking a strategic approach to legal briefing—including for example, motions for summary judgment, motions to strike experts, and motions to exclude evidence—Christina's work can significantly impact the value of a case before trial even begins. When cases proceed to trial, Christina handles the jury charge, arguments to the court, and error preservation, freeing trial lawyers to devote their time to the presentation of the evidence.

Christina's cases cover a wide range of areas such as personal injury, oil and gas, and general business disputes. She is a regular writer and speaker on a variety of topics, including error preservation, arbitration-related litigation, and attorneys' fees. She has been recognized in *Texas Super Lawyers Rising Stars* by Thomson Reuters for six years.

A native Houstonian, Christina is active in her community. Christina is on the executive board of the Women's Fund for Health Education and Resiliency, an organization dedicated to teaching local women and girls about health and resilience. Christina is also on the council of the Houston Bar Association Appellate Section, where she has served as editor in chief of the *Appellate Lawyer* and chair of the pro bono committee.

Professional and Community Activities

- Houston Bar Association Appellate Section, Council Member (2016-18); Judicial Reception Committee Chair (2018); Appellate Lawyer Editor in Chief (2017-2018); Pro Bono Committee Chair (2016-2017).
- Board of Trustees and Executive Committee, The Women's Fund for Health Education and Resiliency (2013-present)
- Young Leader, United Way of Greater Houston (2007-present)
- Firm Liaison, Adopt-an-Angel Committee, Houston Young Lawyers Association (2007-2008, 2010-2011)
- Committee Chair, Association of Women Attorneys (2008)
- State Bar of Texas
- National Association of Railroad Trial Counsel



Kent Rutter

Partner

kent.rutter@haynesboone.com

Houston

1221 McKinney Street

Suite 2100

Houston, Texas 77010

T +1 713.547.2211

F +1 713.236.5598

Practices and Industries

Appellate

Litigation

Appellate Case Evaluation and Advice

Energy Appeals

Technology and Intellectual Property Appeals

Tort and Products Liability Appeals

Education and Clerkships

J.D., University of Michigan Law School, 1996, *cum laude;* Contributing Editor, *University of Michigan Journal of Law Reform*

B.A., Duke University, 1993

Judge David Hittner, United States District Court, Southern District of Texas

Bar Admissions

Texas, 1996

Court Admissions

United States Supreme Court

U.S. Court of Appeals for the Fifth Circuit

U.S. District Court for the Southern District of Texas

U.S. District Court for the Eastern District of Texas

U.S. District Court for the Western District of Texas

Kent Rutter, an accomplished appellate advocate with more than 20 years of experience, co-chairs Haynes and Boone's appellate practice group and serves as vice-chair of the Appellate Section of the State Bar of Texas. As a civil appellate specialist who is board certified by the Texas Board of Legal Specialization, Kent additionally serves as an officer of the Texas Association of Civil Trial and Appellate Specialists (TACTAS), an organization of board certified attorneys. Kent is a former chair of the Appellate Practice Section of the Houston Bar Association and was the course director of the 2014 Advanced Civil Appellate Practice Course presented by the State Bar of Texas. He was recognized by *Chambers USA*, Chambers & Partners, in Texas for Litigation: Appellate, 2018. Kent was selected for inclusion in *Texas Super Lawyers*, Thomson Reuters, 2012-2017, and was recognized in 2015 as one of the top 100 lawyers in Houston by *Texas Super Lawyers*, Thomson Reuters.

He has been selected for inclusion on *Texas Super Lawyers*, Thomson Reuters, 2012-2017, and was recognized in 2015 as one of the top 100 lawyers in Houston by *Texas Super Lawyers*, Thomson Reuters.

Kent often advises Haynes and Boone's clients regarding the chances of reversal in a potential appeal. His analysis draws on his experience in the appellate courts and from co-authoring an award-winning empirical study of the factors that most frequently result in reversal in the Texas appellate courts. Kent is often asked to lecture on the topic of evaluating appeals, as well as other areas of appellate practice, and has given presentations to hundreds of trial lawyers, appellate lawyers, and in-house counsel.

Kent is also active in the community at large. As a long-time member of the Alexis de Tocqueville Society of the United Way of Greater Houston, Kent has mentored young professionals with an interest in bettering their communities and supported a wide array of organizations that serve families in need.

Publications and Presentations

- "Results of the 2015 Judicial Survey," 25th Annual Conference on State and Federal Appeals, UT Law CLE (June 2015)
- "Women and the Texas Supreme Court: Through the Lens of History," Association of Women Attorneys, Houston (September 2014) [with Justice Eva Guzman]
- "Women and the Texas Supreme Court: Through the Lens of History," Houston Bar Association Appellate Practice Section, Houston (November 2013) [with Justice Eva Guzman]
- "Women and the Texas Supreme Court," State Bar of Texas – History of Texas Supreme Court Jurisprudence 2013, Austin (April 2013) [with Justice Eva Guzman]
- "The Realities Behind The Numbers: A Closer Look at Why Judgments Are Reversed," Houston Bar Association Appellate Practice Section, Houston (October 2012) [with Justice Tracy Christopher]

- “Disqualified! Covering the Basics of Summary & Default Judgment Through Evaluation of Reasons for Reversal,” Texas Judicial Education Conference, Houston (September 2012)
- “Reasons for Reversal In Texas Courts of Appeals,” Annual Harris County Civil Judges’ CLE, Houston (August 2012)
- “Reasons for Reversal In Texas Courts of Appeals,” State Bar of Texas 11th Annual Advanced In-House Counsel Course, Dallas (August 2012)
- “Reasons for Reversal In Texas Courts of Appeals,” Tarrant County Bar Association – Business Litigation Section (July 2012)
- “Reasons for Reversal In Texas Courts of Appeals,” State Bar of Texas 35th Annual Advanced Civil Trial Course, San Antonio, Dallas, and Houston (July, August, October 2012)
- “Reasons for Reversal In Texas Courts of Appeals,” Houston Trial Lawyers Association, Houston (June 2012)
- “Proving Reasonableness and Rates of Attorneys’ Fees and Costs,” Rossdale CLE, Houston (March, July 2012)
- “Enforcing Judgments and Recovering Attorneys’ Fees,” Rossdale CLE, Houston (January 2012)
- *Reasons for Reversal in the Texas Courts of Appeals,* 48 Hous. L. Rev. 993 (2012) [co-author]
- Why Courts Reverse,” State Bar of Texas Advanced Civil Appellate Practice Course, Austin (September 2011)
- *2011 Year in Review - Texas Supreme Court*, Texas Bar Journal (January 2012)
- “Attorney’s Fees: Emerging Issues in Federal and State Practice”, 2011 Conference on State and Federal Appeals, Austin (July 2011)
- *2010 Year in Review - Texas Supreme Court*, 74 Tex. B.J. 16 (January 2011)
- “Interlocutory Appeals: Who, What, When, Where, Why and How,” State Bar of Texas 24th Annual Advanced Civil Appellate Practice Course, Austin (September 2010)
- *Inside the Mind of an Appellate Judge: 25 Lessons from the Appellate Judicial Survey*, 73. Tex. B.J. 116 (February 2010) [co-author]
- *2009 Year in Review - Texas Supreme Court*, 73 Tex. B.J. 33 (January 2010)
- “Results of the 2009 Judicial Survey,” State Bar of Texas 23rd Annual Advanced Civil Appellate Practice Course, Austin (September 2009)
- *Drop the Lifetime Tenure for Justices on High Court*, Houston Chronicle, July 17, 2009 [co-author]
- “Overview of New Discovery Rules,” Houston Paralegal Association (May 2009)
- “Pre-Trial Dispositive Motions,” State Bar of Texas 3rd Annual Winning Before Trial Course, Houston (March 2009)
- “Advanced Appellate Law Practice in the 1st and 14th Courts of Appeals: Navigating in the Thicket,” Houston Bar Association Appellate Practice Section, Houston (February 2009) [with Justice Terry Jennings and Justice Leslie Brock Yates]
- *Results of the 2009 Judicial Survey*, The Appellate Advocate (2009)
- *2008 Year in Review - Texas Supreme Court*, 72 Tex. B.J. 32 (January 2009)
- *2007 Year in Review - Texas Supreme Court*, 71 Tex. B.J. 23 (January 2008)
- “Practice Before the Texas Supreme Court,” State Bar of Texas Appellate Boot Camp, Austin (September 2007)

- *2006 Year in Review - Texas Supreme Court*, 70 Tex. B.J. 40 (January 2007)
- "Gauging the Odds on Appeal," State Bar of Texas Appellate Boot Camp, Austin (September 2006)
- *2005 Year in Review - Texas Supreme Court Changes*, 69 TEX. B.J. 49 (January 2006)
- "Predicates & Objections Mandamus and Appeals," State Bar of Texas 18th Annual Advanced Evidence & Discovery Course, Houston, Dallas, San Antonio (April, May 2005)
- "Reasons for Reversal in Texas Courts of Appeals," State Bar of Texas 21st Annual Litigation Update Institute, San Antonio (January 2005)
- *2004 Legal Perspective: Texas Supreme Court Changes*, 68 Tex. B.J. 66 (January 2005)
- "Protecting Your Client's Case for Appeal and Avoiding Malpractice," Houston Bar Association (November 2004)
- "Case Evaluation With an Eye Toward the Appeal," Union Pacific Railroad Company (September 2004)
- "Why Appellate Courts Reverse," Houston Bar Association Appellate Practice Institute, May 2004 (with Justice Evelyn Keyes)
- "Who's Winning and Who's Losing: An Analysis of Appellate Court Decisions," Travis County Bench Bar Conference (April 2004)
- "Why the 1st & 14th Courts of Appeals Reverse," Houston Bar Association Litigation Section (January 2004)
- *Appellate Law: Broad-Form Submission Narrowed*, 67 Tex. B.J. 21 (January 2004) [co-author]
- "Reasons for Reversal in the Dallas Court of Appeals," Dallas Bar Association Appellate Section (December 2003)
- "Why Courts Reverse," State Bar of Texas, Advanced Civil Practice Course, Austin (September 2003)
- "Why Courts of Appeals Reverse," State Bar of Texas 2nd Annual Advanced In-House Counsel Course, San Antonio (August 2003)
- *Evaluating Appeals by the Numbers*, 66 Tex. B. J. 768 (October 2003) [co-author]
- *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. Tex. Law Rev. 431 [co-author]
- "Why Courts Reverse in Personal Injury Cases", State Bar of Texas 19th Annual Advanced Personal Injury Law Course, Dallas, Houston, San Antonio (June, July, August 2003)
- "Reasons the Fort Worth and Dallas Courts of Appeals Reverse," Tarrant County Bar Association Appellate Section (May 2003)
- "Reasons the 1st & 14th Courts of Appeals Reverse," Houston Bar Association Appellate Practice Section (January 2003)
- "Why Courts of Appeals Reverse," State Bar of Texas Advanced Civil Appellate Practice Course, Austin (September 2002)
- "Perfecting the Appeal," State Bar of Texas LAU Seminar (September 2002)
- "Court of Appeals Panel Discussion," University of Texas School of Law, 11th Annual Conference on State and Federal Appeals, Austin (June 2002) [with Justice Tracy Christopher, Justice H. Hollis Horton, III, and Justice Sue Walker]
- "Fifth Circuit Update", University of Texas School of Law, 12th Annual Conference on State and Federal Appeals, Austin (June 2002)

- *The Texas Supreme Court Goes to War: The Colonel Versus the Judge*, 65 Tex. B.J. 142 (February 2002) [with Judge Mark Davidson]
- *The Texas Supreme Court Goes to War: The Colonel Versus the Judge*, 65 Tex. B.J. 142 (February 2002) [with Judge Mark Davidson]
- *Texas Supreme Court Goes to War: Texas Women Respond to the Court's Call to Duty*, 65 Tex. B.J. 18 (January 2002) [co-author Judge Mark Davidson]
- "Preserving Error at Trial," Civil Appeals for Trial Lawyers, South Texas College of Law (December 2001) [with Justice Dale Wainwright]
- *The Making of a Justice: The 1958 Joe Greenhill/Sarah T. Hughes Race for the Supreme Court*, 63 Tex. B.J. 961 (November 2000) [with Judge Mark Davidson]

Professional Recognition

- Ranked in Chambers USA, Chambers & Partners, Litigation: Appellate, Texas, 2018
- Board Certified in Civil Appellate Law, Texas Board of Legal Specialization
- Selected for inclusion in *Texas Super Lawyers*, Thomson Reuters (2012-2017); Named to the list of Top 100 Houston Super Lawyers (2013-2015)
- Named one of "Houston's Top Appellate Lawyers" by *H Texas* magazine, H Texas Partners (2009, 2010 and 2015)
- Selected for inclusion in *Texas Super Lawyers* - Rising Stars Edition, Thomson Reuters (2004-2011)
- Award for "Outstanding Law Review Article," presented by the Texas Bar Foundation (2004)

Professional and Community Activities

- Chair, Appellate Practice Section of the Houston Bar Association (2010-2011)
- Council Member (2009-2012) and Committee Chair (2008-), Appellate Section of the State Bar of Texas
- State Bar of Texas, Appellate Section
- Houston Bar Association, Appellate Practice Section
- Houston Young Lawyers Association
- National Association of Railroad Trial Counsel
- Texas Association of Civil Trial and Appellate Specialists
- Special Assistant Disciplinary Counsel, Texas Commission for Lawyer Discipline
- Member, Alexis de Tocqueville Society, United Way of Greater Houston
- Fellow, Texas Bar Foundation
- Life Fellow, Houston Young Lawyers Foundation

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City of Dallas v. Trinity E. Energy, LLC,
No. 05-16-00349-CV, 2017 WL 491259 (Tex. App.—Dallas Feb. 2, 2017, pet. filed) (mem. op.) 2, 4

City of San Antonio v. Hays St. Bridge Restoration Grp.,
No. 04-14-00886-CV, 2017 WL 776112 (Tex. App.—San Antonio Mar. 1, 2017, pet. granted) (mem. op.) 2, 4

City of San Saba v. Higginbotham,
No. 03-17-00408-CV, 2018 WL 2016463 (Tex. App.—Austin May 1, 2018, no pet. h.) (mem. op.) 2

City of Tyler v. Owens,
No. 12-16-00128-CV, 2017 WL 3499949 (Tex. App.—Tyler Aug. 16, 2017, pet. filed) (mem. op.) 2, 4

Dallas/Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC,
No. 05-17-00090-CV, 2017 WL 6627542 (Tex. App.—Dallas Dec. 15, 2017, pet. filed) (mem. op.) 2, 4

Exide Techs. v. City of Frisco,
No. 4:17-CV-311, 2017 WL 7731219 (E.D. Tex. Nov. 27, 2017) 2

Exide Techs. v. City of Frisco,
No. 4:17-CV-311, 2018 WL 580216 (E.D. Tex. Jan. 29, 2018) 2

Jamro Ltd. v. City of San Antonio,
No. 04-16-00307-CV, 2017 WL 993473 (Tex. App.—San Antonio Mar. 15, 2017, no pet.) (mem. op.) 2

Tooke v. City of Mexia,
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Wasson Interests, Ltd. v. City of Jacksonville,
513 S.W.3d 217 (Tex. App.—Tyler 2016, pet. granted) 2

Wasson Interests, Ltd. v. City of Jacksonville ("Wasson II"),
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Wheelabrator Air Pollution Control, Inc. v. City of San Antonio,
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TEX. LOC. GOV'T CODE § 212 2

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THE PROPRIETARY-GOVERNMENTAL DICHOTOMY IN BREACH OF CONTRACT CASES

Since 2016, the Texas Supreme Court has issued two opinions—both arising from the same underlying lawsuit—defining the scope of immunity for municipalities in breach of contract claims: *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427 (Tex. 2016) ("*Wasson I*") and *Wasson Interests, Ltd. v. City of Jacksonville*, No. 17-0198, 2018 WL 2449184, at *1 (Tex. June 1, 2018) ("*Wasson II*"). This article extracts the key holdings of *Wasson I* and *II* and flags future cases to watch on the issue.

I. *WASSON I* ADDRESSED THE APPLICATION OF THE PROPRIETARY-GOVERNMENTAL DICHOTOMY IN BREACH OF CONTRACT CASES.

Texas courts have long held that municipalities are immune from torts committed in the performance of their governmental functions, but not their proprietary functions. *See Tooke v. City of Mexia*, 197 S.W.3d 325, 343 (Tex. 2006). This distinction is sometimes called the proprietary-governmental dichotomy. *See Wasson I*, 489 S.W.3d at 430.

Until recently, it was unclear whether the proprietary-governmental dichotomy applies only to tort claims or to breach-of-contract claims as well. In *Wasson I*, the Texas Supreme Court finally resolved the issue. *Id. Wasson I* contains three key holdings.

A. *Wasson I* Holding #1: The proprietary-governmental dichotomy applies to breach of contract claims, as well as tort claims.

The most important holding from *Wasson I* is that the proprietary-governmental dichotomy applies not only to tort claims against municipalities, but also to contract claims. *Wasson I*, 489 S.W.3d at 434.

B. *Wasson I* Holding #2: Chapter 271 does not abrogate the proprietary-governmental dichotomy.

Wasson I also addressed how the dichotomy interacts with Chapter 271 of the Texas Local Government Code. Section 271.152 waives sovereign immunity from some contract claims. It provides:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

TEX. LOC. GOV'T CODE § 271.152. Before *Wasson I*, it was unclear whether Chapter 271 alone governed immunity in contract cases, or whether it operated alongside the common-law dichotomy.

In *Wasson I*, the Texas Supreme Court rejected the argument that Chapter 271 abrogated the common-law dichotomy. 489 S.W.3d at 437. Rather, the court held, "the dichotomy is applied to determine whether there is immunity *in the first instance*, while Chapter 271 acts to waive *already existing* immunity in certain circumstances." *Id.*

Practically speaking, *Wasson I* sets forth a two-step process for determining the applicability of immunity in contract cases against municipalities. *Id.* at 435. In the first step, the court must determine whether immunity exists by asking whether the function is governmental or proprietary under common law. If the function is proprietary, there is no immunity. If the function is governmental, then there is immunity, and the court must proceed to step two. *Id*. In the second step, the court must determine whether immunity has been waived by Chapter 271. *Id*. at 435, 437.

C. *Wasson I* Holding #3: In a contract case, the Texas Tort Claims Act can be used to determine whether a function is proprietary or governmental.

In concluding that the dichotomy applies to contract claims, *Wasson I* acknowledged that "determining which functions are proprietary and which are governmental is not always a cut-and-dried task." *Id.* at 438. The court advised that courts making this determination should be guided by the Texas Tort Claims Act ("TTCA"), even though the TTCA does not directly apply in contract cases. *Id*. at 439.

The TTCA generally defines governmental functions as those "that are enjoined on a municipality by law and are given it by the state as part of the state's sovereignty, to be exercised by the municipality in the interest of the general public." TEX. CIV. PRAC. & REM. CODE § 101.0215(a). The TTCA then provides a lengthy, non-exclusive laundry list of functions deemed governmental:

> (1) police and fire protection and control;
> (2) health and sanitation services;
> (3) street construction and design;
> (4) bridge construction and maintenance and street maintenance;
> (5) cemeteries and cemetery care;
> (6) garbage and solid waste removal, collection, and disposal;
> (7) establishment and maintenance of jails;
> (8) hospitals;
> (9) sanitary and storm sewers;

(10) airports, including when used for space flight activities as defined by Section 100A.001;
(11) waterworks;
(12) repair garages;
(13) parks and zoos;
(14) museums;
(15) libraries and library maintenance;
(16) civic, convention centers, or coliseums;
(17) community, neighborhood, or senior citizen centers;
(18) operation of emergency ambulance service;
(19) dams and reservoirs;
(20) warning signals;
(21) regulation of traffic;
(22) transportation systems;
(23) recreational facilities, including but not limited to swimming pools, beaches, and marinas;
(24) vehicle and motor driven equipment maintenance;
(25) parking facilities;
(26) tax collection;
(27) firework displays;
(28) building codes and inspection;
(29) zoning, planning, and plat approval;
(30) engineering functions;
(31) maintenance of traffic signals, signs, and hazards;
(32) water and sewer service;
(33) animal control;
(34) community development or urban renewal activities undertaken by municipalities and authorized under Chapters 373 and 374, Local Government Code;
(35) latchkey programs conducted exclusively on a school campus under an interlocal agreement with the school district in which the school campus is located; and
(36) enforcement of land use restrictions under Subchapter E, Chapter 212, Local Government Code.

TEX. CIV. PRAC. & REM. CODE § 101.0215(a).

The TTCA's list of proprietary functions is much shorter. The TTCA defines proprietary functions as "those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality." TEX. CIV. PRAC. & REM. CODE § 101.0215(b). The TTCA then provides a non-exclusive list of three proprietary functions:

(1) the operation and maintenance of a public utility;
(2) amusements owned and operated by the municipality; and
(3) any activity that is abnormally dangerous or ultrahazardous.

TEX. CIV. PRAC. & REM. CODE. § 101.0215(b).

The court did not decide in *Wasson I* whether the function in that case was governmental or proprietary. Instead, it remanded so that the court of appeals could determine "whether the . . . contract was entered into in the city's proprietary or governmental capacity." *Wasson I*, 489 S.W.3d at 430.

II. *WASSON II* CLARIFIED THE RULES FOR DETERMINING WHETHER A FUNCTION IS GOVERNMENTAL OR PROPRIETARY.

A. After *Wasson I*, intermediate courts of appeals struggled to distinguish between governmental and proprietary functions in contract cases.

After *Wasson I* was decided, Texas courts grappled with whether to categorize functions as governmental or proprietary in contract cases. Not surprisingly, given the lengthy TTCA list of governmental functions, the vast majority of these cases held that the municipality's function was governmental. *See City of San Saba v. Higginbotham*, No. 03-17-00408-CV, 2018 WL 2016463, at *3 (Tex. App.—Austin May 1, 2018, no pet. h.) (mem. op.); *Castle v. City of Victoria*, No. 13-17-00013-CV, 2018 WL 1755816, at *3 (Tex. App.—Corpus Christi Apr. 12, 2018, no pet. h.) (mem. op.); *Dallas/Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC*, No. 05-17-00090-CV, 2017 WL 6627542, at *3 (Tex. App.—Dallas Dec. 15, 2017, pet. filed) (mem. op.); *City of San Antonio v. Hays St. Bridge Restoration Grp.*, No. 04-14-00886-CV, 2017 WL 776112, at *6 (Tex. App.—San Antonio Mar. 1, 2017, pet. granted) (mem. op.); *City of Tyler v. Owens*, No. 12-16-00128-CV, 2017 WL 3499949 (Tex. App.—Tyler Aug. 16, 2017, pet. filed) (mem. op.); *Jamro Ltd. v. City of San Antonio*, No. 04-16-00307-CV, 2017 WL 993473, at *4 (Tex. App.—San Antonio Mar. 15, 2017, no pet.) (mem. op.); *Wasson Interests, Ltd. v. City of Jacksonville*, 513 S.W.3d 217, 219 (Tex. App.—Tyler 2016, pet. granted).

Far fewer cases have found that functions are proprietary. *See Wheelabrator Air Pollution Control, Inc. v. City of San Antonio*, 489 S.W.3d 448, 453 (Tex. 2016); *City of Dallas v. Trinity E. Energy, LLC*, No. 05-16-00349-CV,
2017 WL 491259 (Tex. App.—Dallas Feb. 2, 2017, pet. filed) (mem. op.); and *Exide Techs. v. City of Frisco*, No. 4:17-CV-311, 2017 WL 7731219, at *6 (E.D. Tex. Nov. 27, 2017), report and recommendation adopted sub nom. *Exide Techs. v. City of Frisco*, No. 4:17-CV-311, 2018 WL 580216 (E.D. Tex. Jan. 29, 2018).

In their analyses, courts repeatedly confronted the same question: what determines whether the function is governmental or proprietary—the facts surrounding the formation of the contract, or the facts underlying the alleged breach of the contract?

Most courts of appeals applying *Wasson I* concluded that they should look to the actions underlying the alleged breach. *See, e.g.*, *City of Tyler*, 2017 WL 3499949, at *5 ("[W]e focus on the acts forming the basis of the suit," not the execution of the underlying contract.); *Exide Techs.*, 2017 WL 7731219, at *5 ("[W]hat is relevant is whether the City's actions underlying the claim are governmental acts entitled to immunity, not whether the City exercised any governmental function in entering into the contract, or whether any part of the contract implicates any governmental function.").

In practice, however, courts sometimes looked beyond the actions underlying the breach to consider the type of governmental entity involved or the circumstances surrounding the underlying contract. *See, e.g.*, *Vizant Techs.*, 2017 WL 6627542, at *3 (looking to the type of governmental entity—an airport—which contracted for services).

The Texas Supreme Court recently resolved this issue in *Wasson II*, 2018 WL 2449184, at *1.

On remand from the Texas Supreme Court, the Tyler Court of Appeals held in *Wasson II* that the function at issue was governmental. The Texas Supreme Court disagreed, and in so doing, provided further guidance for determining whether a function is governmental or proprietary. Once again, the opinion contains three key holdings:

B. *Wasson II* Holding #1: The proper question is whether the municipality was engaged in a governmental or proprietary function when it entered into the contract.

Departing from the approach taken by most intermediate courts of appeals, the Texas Supreme Court held that the relevant action for determining whether a function is governmental or proprietary is the formation of the contract.

The court held: "[T]o 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 that contract. 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." *Wasson II*, 2018 WL 2449184, at *5.

C. *Wasson II* Holding #2: A function is not governmental merely because a city's proprietary action touches upon a governmental function.

The Texas Supreme Court also clarified that governmental functions do not operate as trump cards when both proprietary and governmental functions are implicated.

On remand after *Wasson I*, the Tyler Court of Appeals held that if there are "mixed" governmental and proprietary functions, the entire function will be treated as governmental. *Wasson*, 513 S.W.3d at 221. The Texas Supreme Court rejected this approach. *Wasson II*, 2018 WL 2449184, at *7.

The court emphasized that a city's proprietary action will not be deemed governmental merely because it touches on a governmental function. *Id*. A city's proprietary action is deemed governmental only if it is "essential to the city's governmental actions." *Id*.

D. *Wasson II* Holding #3: Several factors are relevant to whether a function is governmental or proprietary.

Wasson II set forth four factors that courts should consider when determining whether a function is governmental or proprietary. *Id*. at *5.

First, courts should consider whether the city's act of entering into the contract was mandatory or discretionary. *Id*. Functions that are mandatory tend to be governmental, while functions that are proprietary tend to be discretionary. *Id*. at *3, 6.

Second, courts should consider whether the contract was intended to benefit the general public or the residents of the city. *Id*. at *5. Generally, governmental functions are performed primarily for the benefit the general public, while proprietary functions are performed primarily for the benefit of the city's residents. *Id*. at *6.

Third, courts should consider whether the city was acting on the state's behalf or its own behalf when it entered into the contract. *Id*. at *5. Governmental functions are those in which a city acts as a branch of the state, rather than on its own behalf. *Id*. at *7.

Fourth, when governmental and proprietary functions are mixed, courts should consider whether the city's act of entering into the contract was sufficiently related to a governmental function to render the act governmental. *Id*. at *5. As noted above, a city's proprietary action may be treated as governmental only if it is "essential to the city's governmental actions." *Id*. at *7.

III. OPEN QUESTIONS REMAIN.

Wasson I and II resolved several questions pertaining to application of the governmental-proprietary dichotomy in breach of contract cases, but many other questions remain unanswered. Interested practitioners should keep an eye on the following cases, which are making their way through the Texas Supreme Court pipeline:

- *City of San Antonio v. Hays St. Bridge Restoration Grp.*, No. 04-14-00886-CV, 2017 WL 776112 (Tex. App.—San Antonio Mar. 1, 2017, pet. granted) (mem. op.) (briefing on the merits is complete);
- *City of Dallas v. Trinity East Energy, LLC*, No. 05-16-00349-CV, 2017 WL 491259 (Tex. App.—Dallas Feb. 2, 2017, pet. filed) (mem. op.) (briefing on the merits is complete);
- *City of Tyler v. Owens*, No. 12-16-00128-CV, 2017 WL 3499949 (Tex. App.—Tyler Aug. 16, 2017, pet. filed) (mem. op.) (petition phase); and
- *Dallas/Fort Worth Int'l Airport Bd. v. Vizant Techs., LLC*, No. 05-17-00090-CV, 2017 WL 6627542 (Tex. App.—Dallas Dec. 15, 2017, pet. filed) (mem. op.) (briefing on the merits has been requested).

Of particular note is *Hays Street Bridge Restoration Group*, in which the Texas Supreme Court recently granted review. No. 04-14-00886-CV, 2017 WL 776112 (Tex. App.—San Antonio Mar. 1, 2017, pet. granted) (mem. op.). In that case, the court is expected to confront—once again—whether a function is governmental or proprietary, and if it is governmental, whether immunity is waived by Section 271.152.

Another case to watch is *Trinity East Energy*. In that case, the function at issue is categorized as governmental by the TTCA laundry list, but it is considered proprietary under long-established Texas Supreme Court common law. The Dallas Court of Appeals, looking to common law rather than the TTCA, held that the function is proprietary. A petition for review is currently pending in the Texas Supreme Court.

IV. CONCLUSION.

The Texas Supreme Court's holdings in *Wasson I* and *II* resolved several questions and generated several more. As this area remains in flux, municipal attorneys should stay on top of developing case law and adjust their practices accordingly.