Case Law Update

City of Bryan

Roadshow

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First Court of Appeals holds 380 development agreement was an agreement for goods and services (waiving immunity) but dismissed all other claims brought against the City by the developer

Town Park Center, LLC v. City of Sealy, Texas, Janice Whitehead, Mayor, Lloyd Merrell, City Manager and Warren Escovy, Assistant City Manager, **01-19-00768-CV**, (Tex. App – Hou [1st], Oct. 28, 2021)

In this contract dispute, the First Court of Appeals in Houston affirmed in part and reversed in part the City's plea to the jurisdiction. This is the third lawsuit involving the parties and underlying dispute.

Town Park Center and the City executed a "380" Economic Development Agreement ("the EDA") to develop a commercial shopping center on Town Park's property. Town Park Center agreed to develop and construct the shopping center according to a development plan that the City had approved. The City agreed to pay annual economic development grant payments (based on sales tax collections) to Town Park Center "as an incentive to comply with this Agreement." Town Park Center first filed suit against the City and officials, asserting breach of contract and other claims.

The basis was an assertion the EDA required the City to sell stormwater detention capacity to Town Park and failed. The City filed a plea to the jurisdiction, which was granted as to the city but not the individual officials. The officials appealed but Town Park non-suited. Town Park then filed a second suit against other officials, but which was otherwise identical. Town Park later non-suited,only to file a third suit seeking mandamus, declaratory, injunctive relief, takings, ultra vires claims and claims under the "vested rights provision" of Local Government Code chapter 245. The factual allegations were nearly identical to the first and second suit. The City filed a plea to the jurisdiction and argued immunity as well as *res judicata* "ish" arguments. The trial court granted the plea and Town Park Center appealed.

The court noted that *res judicata* is an affirmative defense and could not be raised in a plea to the jurisdiction. It declined to consider the arguments through the lens of a summary judgment noting the trial court consideration lacked the hallmarks of a true summary judgment proceeding, including the required 21 days' notice of a hearing date. However, the City also raised immunity defenses. The court held the EDA constituted a contract for goods or services which can trigger a waiver of immunity. The EDA included a provision for Town Park Central to build and dedicate a road to the City as part of the development, which therefore constitutes a service. The trial court therefore erred in granting the plea as to the breach of contract claim. However, as to the Chapter 245 vested rights claim, Town Park Center did not identify any City order, regulation, ordinance, rule, or other requirement in effect when its rights in the project vested

that mandates the sale of the capacity at issue. With no change in order or rule, Chapter 245 is inapplicable. As to Town Park's takings claim, it failed to establish the City's refusal to allow the purchase of detention capacity deprived them of the beneficial use of the property. Specifically, the court noted Town Park Center finished the development and sold it to host a grocery store. The City, therefore, did not deprive it of all economic use of the property. As to the *ultra vires* claims, the court first chastised the parties for failing to follow proper pleadings rules, making the determination more difficult on the court, specifically by labeling various amended pleadings as supplemental pleadings. Considering the pleadings as filed, the court held the City officials ended up joining the City's plea as part of a supplement (without objection from the other side). Merely failing to comply with a contract does not give rise to an *ultra vires* claim. While Town Park Central points to a city resolution allowing for detention capacity purchases, it does not mandate the sale of detention capacity. It instead only provides that the City may sell detention capacity, which is discretionary. As a result, the *ultra vires* claims were properly dismissed.

In short, the court reversed the dismissal of the breach of contract claim, ultimately affirmed the dismissal of all other claims, and remanded for trial.

Panel consists of Justices Kelly, Guerra, and Farris. Opinion by Justice Farris can be read **here.** Docket page with attorney information found **here.**

The plaintiff failed to show that damages were insufficient in a condemnation case where therewas sufficient evidence supporting the judgment of the trial court.

Posted on **November 2, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

Castellanos v. Harris County, Texas and City of Baytown, Texas., No. 01-20-00414-CV (Tex. App.—Houston [1st Dist.] Oct 7, 2021) (mem. op.).

In this appeal from a trial court's judgment in a condemnation case, the First Court of Appeals in Houston affirmed the trial court's judgment because there was sufficient evidence to support theamount in their judgment as it related to the condemned property.

The plaintiffs' property was the subject of a condemnation case including a road easement, water line easement, a temporary construction easement, and damages for the remainder of the project. After the trial court issued its judgment, the plaintiffs appealed arguing that the amount of compensation in the judgment should have been higher and that their suggested jury instruction regarding compensation to make changes to the home post-condemnation should have been given.

The Texas Constitution requires adequate compensation to any property owner whose property is taken by a governmental entity. Tex. Const. art. I, § 17(a). This value is

determined by fair market value on the date of the taking which can take into account both the current use and the highest and best use. *See Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 611 (Tex. 2016). When only a portion of the property is taken both the value of what is taken and the damages to the remainder are both used to determine compensation. *Morello v. Seaway Crude Pipeline Co., LLC*, 585 S.W.3d 1, 29–31 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). In addition, to complain about a jury instruction on appeal, the plaintiff needs to make such objection at the trial. Tex. R. Civ. P. 274; Tex. R. App. P. 33.1. To properly bring a claim that a ground of recovery or defense was not considered, the avenue would have been a motion for judgment notwithstanding the verdict or a motion to disregard a jury finding. Those motions were not filed. The Court of Appeals affirmed the trial jury's compensation amount because the plaintiffs did not prove that the evidence presented at trial required a different fair market value for the property and did not properly object to the lack of award for changes to the house post-condemnation.

The court of appeals affirmed the trial court's judgment because the plaintiffs failed to conclusively establish that the amount of compensation was insufficient.

If you would like to read this opinion click **here.** Panel consists of Justices Kelly, Guerra, and Farris. Opinion by Justice Kelly.

A charter election proposition that receives more votes than a second charter proposition on the same ballot can invalidate a second charter proposition if proper notice is given.

Posted on **November 2, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

Hotze v. Sylvestor Turner, Mayor and City of Houston, Texas., No. 14-19-00959-CV (Tex. App.—Houston [14th Dist.] Oct 12, 2021).

In this appeal from a trial court's summary judgment in favor of the city and mayor, the Fourteenth Court of Appeals in Houston affirmed the trial court's judgment because the election ordinance correctly affirmed that only one ballot proposition of two could be passed.

The City's charter amendment election ballot contained two propositions on expenditures that were contradictory. Both passed. The plaintiff sued the mayor and the city arguing that: (1) the clause invalidating the second proposition was not properly in the first ballot proposition; and (2) that the clause invalidating the second ballot proposition conflicts with state law and the Texas Constitution. The trial court granted the city's motion for summary judgment that the first ballot proposition was the only valid amendment The plaintiff appealed.

The primary issue is the validity of two

charter amendment propositions related to financial limitations of the city that were on the same ballot. The first ballot proposition included a clause outside of stating that:

> "If another proposition for a Charter amendment relating to limitations on increases in City revenues is approved at the same election at which this proposition is also approved, and if this proposition receives the higher number of favorable votes, then this proposition shall prevail and the other shall not become effective."

Both ballot propositions passed, but due to the language in the first ballot proposition, and the first ballot proposition passing with more votes, only the first ballot proposition was deemed valid. Even though this clause was not within the portion of the ballot proposition it is stillvalid because voters are "presumed to be familiar with every measure on the ballot." *Dacus v. Parker*, 466 S.W.3d 820, 825 (Tex. 2015). Not only was the language in the ballot indicating that only one proposition may be valid, newspaper articles stated that this was a possibility at the time of the election. Section 9.005 of the Texas Local Government Code states that a ballot proposition is adopted if a majority of qualified voters vote for the proposition. Both propositions were approved and adopted, but the invalidating clause in the first proposition was still effective to invalidate the second proposition without violating Section 9.005 and by extension the Texas Constitution. The Court of Appeals affirmed the trial court's summary judgment in favor of the City.

The dissent stated that the invalidating clause was an unconstitutional and illegal poison pill provision and should be held void, especially considering that the second ballot proposition was voter driven while the first ballot proposition was city driven.

If you would like to read this opinion click **here.** The Dissent can be read **here**. Panel consists of Justices Jewell, Zimmerer, and Hassan. Majority Opinion by Justice Hassan. Dissenting Opinion by Justice Jewell.

City retains immunity from sewer backup claims as not evidence existed of specific, affirmative action by the city which caused damage

Posted on **October 26, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs
City of Robinson v. Gabriel and Irene Rodriguez., No. 10-21-00075-CV (Tex. App.—Waco Oct 6,2021) (mem. op.).

In this appeal from a trial court's denial of the city's plea to the jurisdiction based on a takings claim, the Waco Court of Appeals reversed and rendered judgment against the plaintiff because the plaintiff had not provided sufficient evidence that a specific, affirmative act of the city had caused the sewer backup.

The plaintiffs sued the city after they experienced multiple sewer backups. The specific two backups at issue were both investigated by the city. Both times the city stated that the issue was on the plaintiffs' property, but this conclusion was disputed. The plaintiffs sued under a takings claim. The city filed a plea to the jurisdiction arguing that it was immune from suit because proof of negligent contact related to the sewer backups is insufficient for takings liability. The trial court denied the city's plea to the jurisdiction and the city appealed.

To plead a takings claim under the Texas Constitution, the plaintiff has to show that the city *intentionally* damaged property for public use. *See* Tex. Const. I, § 17; *Gen'l Servs. Comm'n v. Little- Tex Insulation, Inc.*, 39 S.W.3d 591, 598 (Tex. 2001)(emphasis added). This requires proof of the city knowing that a specific act would cause the damage or that that the specific damage was a consequential result of the specific action of the city. "Evidence of a governmental entity's failure to avoid preventable damage may be evidence of negligence, but it is not necessarily evidence of the entity's intent to damage the plaintiff's property." *See City of San Antonio v. Pollack*, 284 S.W.3d 809, 821 (Tex. 2009). Even finding that the sewer backup was caused by a blockage on the city side, without evidence of a specific act, the city's immunity is not waived. The Court of Appeals reversed and rendered on the trial court's denial on the plea to the jurisdiction and held that the city's immunity was not waived.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Gray, and Justices Johnson and Rose. Chief Justice Gray dissenting. Opinion by Justice Johnson.

Fort Worth Court of Appeals holds dead tree which fell on trail jogger was a natural condition and City had not duty to warn

Posted on **October 18, 2021** by **Ryan Henry**

City of Arlington v. Monique Ukpong, **02-21-00078-CV**, (Tex. App – Fort Worth, Oct. 14, 2021) This is a Texas Tort Claims Act ("TTCA")/premise defect 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.

Ukpong went running on the park's trail, as she had done "many times before." That day, while she was running on the trail, a dead hackberry tree next to the trail fell on her, causing injury. Ukpong sued the City. The City filed a plea to the jurisdiction and asserted a lack of waiver of immunity. The trial court denied the plea and the City appealed.

The Tort Claims Act also provides that "if a claim arises from a premise defect, the governmental unit owes to the claimant only the duty that a private person owes to a licensee on private property…" When property is open to the public for "recreation," however, the Recreational

Use Statute ("RUS") further limits a governmental unit's duty by classifying recreational users as akin to trespassers. Under the RUS, a landowner has no duty to warn or protect trespassers from obvious defects or conditions. A property owner "may assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake." Nature is full of risks, and it is certainly foreseeable that human interaction with nature may lead to injuries and possibly even death. The City did not owe Ukpong a duty to protect her from obvious defects or conditions and generally did not owe a duty to warn or protect her from the dangers of natural conditions in the park, whether obvious or not.

Ukpong's own pleadings asserted the dead tree was an obvious condition. Further, even if the dead tree was not an obvious condition, it was a natural condition, and no duty to warn existed regardless. The City did not owe a duty to warn or protect Ukpong from the dead tree that fell on her. Therefore, the plea should have been granted.

Panel consists of Chief Justice Sudderth, and Justices Womack and Walker. Reversed and rendered. Memorandum Opinion by Justice Womack can be read **here.** Docket page with attorney information found **here.**

Passenger in pickup truck injured during a car accident failed to timely sue within limitations says First District Court of Appeals

Posted on **October 18, 2021** by **Ryan Henry**

Andre Gibbs v. The City of Houston, **01-20-00570-CV**, (Tex. App – Houston [1st Dist], Oct. 12, 2021)

This is a Texas Tort Claims Act ("TTCA") case where the First Court of Appeals affirmed the granting of the City's motion for summary judgment.

Brannon was driving a pickup truck when she collided with a Houston Police Department SUV, driven by a City employee. Gibbs was one of six passengers riding in the pickup truck. Brannon sued the City, which the other passengers joined, but Gibbs was not named in the amended petition. After the statute of limitations passed, Gibbs was joined in a later petition. The City filed a motion for summary judgment against Gibbs asserting the statute of limitations. The trial court granted the motion and Gibbs appealed.

The party suing a governmental entity has the burden to establish jurisdiction by pleading—and ultimately proving—not only a valid immunity waiver but also a claim that falls within the waiver. the City argued that neither it nor its employee could be liable to Gibbs under Texas law because Gibbs' claims are barred by limitations. Thus, the City argued, Gibbs' claims do not fall within any TTCA waiver. Gibbs asserted the "inadvertent omission"

exception which is based on excusable inadvertence or mistake. However, the exception was created when existing parties were inadvertently dropped from suit, then added back later. In this case, Gibbs joined as a party in the suit for the first time after limitations expired. Ordinarily, an amended pleading adding a new party does not relate back to the original pleading. Since Gibbs was not added until after the limitations expired, it was proper for the court to grant the City's summary judgment.

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra. Affirm TC Judgement. Memorandum Opinion by Justice Rivas-Molloy can be read **here**. Docket page with attorney information found **here.**

Tyler Court of Appeals holds EEOC complainant's deadline to file suit begins to run when his complaint is received by the EEOC, not when the appeal is perfected

Posted on **October 18, 2021** by **Ryan Henry**

Gunter P. Coffey v. Texas Parks and Wildlife Department, **12-21-00015-CV**, (Tex. App – Tyler, Oct. 6,2021)

This is an employment discrimination, hostile work environment, and retaliation claim in which the Tyler Court of Appeals affirmed the trial court's order granting the Texas Parks and Wildlife Department's plea to the jurisdiction.

Coffey was employed by the Texas Parks and Wildlife Department (the Department). Coffey submitted an intake questionnaire to the Equal Employment Opportunity Commission (EEOC) alleging a host of charges. Coffey was later terminated. He received a "right-to-sue" letter from the EEOC. He then brought suit. The Department filed a plea to the jurisdiction, asserting, among other reasons, Coffey failed to file suit within two years of filing his EEOC discrimination charges. The trial court granted the plea and Coffey appealed.

Coffey contends that the two-year statute of limitations begins to run from the date that the charge is perfected, not the dates the relevant charges of discrimination were filed. Under listed case law, the timeliness of the complaint shall be determined by the date on which the complaint is received by the EEOC. The court noted the underlying record made clear the dates the complaints were filed and received by the EEOC. Therefore, because Coffey filed this suit more than two years after the date his First and Second Charges were received by either the EEOC or TWC, the trial court properly granted the Department's plea.

Panel consists of Chief Justice Worthen, and Justices Hoyle and Neeley. Affirmed. Memorandum Opinion by Chief Justice Worthen can be read **here.** Docket page with attorney information found **here.**

U.S. Fifth Circuit holds standing for First Amendment violation can be shown through chilled speech without the need for actual arrest or citation.

Posted on **September 27, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

Anthony Barilla v. City of Houston, Tex., No. 20-20535 (5th Cir. Sept. 10, 2021).

In this appeal for dismissal for lack of standing by the district court, the U.S. Fifth Circuit reversed and remanded the district court's order, holding that the intention to engage in busking (playing music for tips) plus the ordinance regulating the activity was sufficient to show standing on his First Amendment claim.

The plaintiff sued the city after his busking permit to play music for tips expired. He desired to busk in other parts of the city but was kept from doing so based on the need to get a permit and the ordinance that prohibits busking in most areas of the city. He chose not to busk but instead to file suit against the city. The city argued that the plaintiff had not proved an actual injury or standing because he had not been arrested, denied a permit, or cited for busking. The district court granted the city's motion to dismiss based on the plaintiff's lack of standing.

To prove standing, a plaintiff must demonstrate an injury in fact by showing that the plaintiff: (1) has the serious intention of engaging in conduct that affects a constitutional interest; (2) that the conduct is regulated or prohibited; and (3) the threat of enforcement against the conduct is substantial. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Both music and solicitation for times are constitutionally protected. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Standing existed in this case because the plaintiff had shown a serious intention to busk as he had engaged in the activity previously, and the activity of busking is constitutionally protected. The U.S. Court of Appeals for the Fifth Circuit reversed the district court's dismissal and remanded for further review on the standing issue.

The court of appeals reversed and remanded the district court's dismissal on the basis of standing because the plaintiff provided sufficient evidence of a serious interest in engaging in constitutionally protected activity that is being regulated/prohibited by the city.

If you would like to read this opinion, click **here.** Panel consists of Chief Judge Owen and Judges Clement and Higginson. Opinion by Judge Stephen A. Higginson.

Tyler Court of Appeals holds a motion for new trial did not extend the time to perfect an accelerated appeal

Posted on **September 22, 2021** by **Ryan Henry**

SignAd, Ltd. V. The City of Hudson, **12-21-00056-CV**, (Tex. App – Tyler, Sept. 15, 2021)

This case is mainly procedural, and the Tyler Court of Appeals held SignAd failed to timely file its notice of appeal, either as an interlocutory appeal or of a final judgment.

This is a billboard construction case where the City sought injunctive relief and civil penalties asserting SignAd violated its local ordinances. SignAd asserted counterclaims for declaratory judgment, compensation for loss of the billboard if ordered to remove it, inverse condemnation, unenforceability of the ordinance against SignAd, and 42 U.S.C. § 1983. The trial court issued various orders but the order of contention is a January 19, 2021 order granting the City's first amended motion to dismiss for lack of subject matter jurisdiction. The parties disagree as to whether the January 19th order was a final order or is interlocutory. The order contained various findings including that SignAd lacks standing to bring its counterclaim for declaratory judgment, SignAd's billboards exceed the size limitations for commercial signs, and that SignAd cannot maintain its billboards under the ordinance even if it achieved a total victory in this case.

The court of appeals held if the order is an appealable interlocutory order, the notice of appeal was due to be filed within twenty days after the judgment or order was signed, i.e., February 8. SignAd filed its notice of appeal on April 13th. SignAd's motion for a new trial did not extend the time to perfect an accelerated appeal. But even if not interlocutory a notice of appeal must be filed within thirty days after the judgment is signed or within ninety days after the judgment is signed if any party timely files a motion for new trial. However, any motion for new trial was due to be filed by February 18. SignAd filed its motion for new trial on February 22. The certificate of service attached to the motion for new trial reflects that it was served on February 16; however, the motion is file marked February 22. Thus, the motion was late and did not extend the time for filing the notice of appeal. And an "order overruling an untimely new trial motion cannot be the basis of appellate review, even if the trial court acts within its plenary power period." As a result, the court of appeals dismissed the appeal for want of jurisdiction.

Panel consists of Chief Justice Worthen, and Justices Hoyle and Neeley. Dismissed for Want of Jurisdiction. Memorandum Opinion per curiam can be read **here**. Docket page with attorney information found **here.**

13th Court of Appeals holds City sufficiently complied with TOMA and Tax Code in 2019 when it adopted its annual tax rate

Posted on **September 9, 2021** by **Ryan Henry**

Leftwich v City of Harlingen, **13-20-00110-CV** (Tex. App. – Corpus Christi, Sep. 9, 2021).

This is a declaratory judgment suit to declare the city violated procedural requirements when it adopted its tax rate in 2019. The Thirteenth Court of Appeals held no alleged violation constituted a waiver of the City's immunity.

Leftwich alleges the City violated several statutory requirements in 2019 when it adopted its tax rate, including (1) the published notice failed to conform to the "date, time[,] and location" requirements of Texas Local Government Code § 140.010(c), (2) the City failed to meet the deadline to adopt the tax rate (requiring a vote on proposed tax rate "not be earlier than the third day or later than the [fourteenth] day after the date of the second public hearing"); (3) the City violated TOMA by not allowing public comment "before or during" the consideration of the of the tax ordinances and various other procedural deficiencies. The City filed a plea to the jurisdiction, which the trial court granted. Leftwich appealed.

The court first noted that TOMA's waiver of sovereign immunity only extends to mandamus or injunctive relief for actual or threatened violations of TOMA, not to suits for declaratory relief. Further, under TOMA, substantial compliance is sufficient. The location of a meeting may be sufficient without including the full street address, name of the city, or meeting room, so long as the notice sufficiently apprises the public of the location. Here, the term "town hall" sufficiently put the public on notice of the location of the meeting. No general waiver of immunity exists under the UDJA. Plaintiff sought a judgment "declaring that the [o]rdinances are invalid and void ab initio" due to appellees' alleged TOMA and tax code violations. The alleged TOMA violation during the meeting focused on the City Council not taking public comments before voting on the first reading of the tax ordinance. However, the mayor was clearly heard on camera, prior to the final vote on the first reading of each ordinance, asking for discussion, to which no one responded. Assuming, arguendo, that the mayor's call for discussion was not clearly directed to the public, Leftwich would remain unsuccessful as that was only the first reading. The ordinance was not adopted until the second reading. Only an action taken in violation of TOMA is voidable. Under the tax code, no requirement exists that two publications exist for public hearings, only that two public hearings are held and that notice is published. Under § 26.06(e) of the Texas Tax Code, the City was required to hold a meeting to vote on the tax ordinances not "earlier than the third day or later than the [fourteenth] day after the date of the second public hearing." However § 26.06(e) provides no authority for a court to enjoin the collection of taxes for failure to comply with § 26.06(e),

which is what Plaintiff seeks. Plaintiff further asserts the councilmember making the motion failed to follow the specific language for the motion contained within the statute. However, after reviewing the record, the court concluded the motion followed the important parts of the statutory language, verbatim. Leftwich next asserted the City failed to properly post the necessary tax information on the City's website. However, Leftwich failed to present evidence that would raise a fact issue as to whether the City previously posted the notice to the website. The court concluded the undisputed language which was present meets the requirements of Texas Tax Code § 26.05(b)(2), which requires the notice be published *after* the ordinance is adopted. Leftwich failed to allege jurisdiction under TOMA or the Tax Code for any alleged violation. Finally, while Plaintiff attempts to bring a First Amendment claim, he failed to brief the claim and therefore waived it.

If you would like to read this opinion click **here**. Panel consists of Justices Benavides, Hinojosa and Silva. Memorandum opinion by Justice Silva.

Trial court's granting of City's plea to the jurisdiction considered void because it should have issued its order in the separate case created by the plaintiff's bill of review

Posted on **August 31, 2021** by **Ryan Henry**

Clayton Richter, Dorothy Richter, and Jonathan Richter v. City of Waelder, Texas, **13-20-00494-CV**
and **13-20-00495-CV**, (Tex. App – Corpus Christi – Edinburg, August 12, 2021)

This is a flooding case, but the opinion focused entirely on procedural problems where the Corpus Christi Court of Appeals dismissed the appeal, noting the court lack jurisdiction over the appeals because the ultimate merits of this case were adjudicated in the wrong trial court proceeding.

The Richters sued the City of Waelder (the City) for various causes of action after leaks in the City's waterpipe caused multiple flooding incidents on the Richters' property. The trial court granted the City's plea to the jurisdiction, but the Richters later filed a bill of review. The trial court granted the bill of review, but then again granted the City's plea under the original cause number. The Richters appealed the granting of the plea and the City cross-appealed the granting of the bill of review.

A bill of review is an equitable proceeding to set aside a judgment that is not void on the face of the record but is no longer appealable or subject to a motion for new

trial. When a trial court grants a bill of review and sets aside a judgment in a prior case, the subsequent trial on the merits must occur in the bill of review proceeding, not in the underlying case in which the judgment is vacated. By proceeding as it did, the trial court created two jurisdictional problems: (1) the bill of review judgment does not fully adjudicate the Richters' suit; and (2) the trial court signed the judgment in the original cause after its plenary power expired. The trial court's bill of review judgment fails to address the merits of the Richters' claim. Therefore, it is not a final, appealable order. The granting of the plea in the original proceeding is void because the court had lost plenary power under that cause number. Since the court of appeals only has appellate jurisdiction over either final judgments which are timely appealed (not present here) or authorized interlocutory orders (also not present because of a lack of plenary power), the court of appeals has no jurisdiction over either appeal. Essentially, the court's opinion results in the trial court having to consider the plea to the jurisdiction under the cause number for the bill of review and not the original case.

Panel consists of Justices Longoria, Hinojosa, and Tijerina. Memorandum opinion by Justice Hinojosa can be found **here.** Docket pages with attorney information found **here**.

Pro se appellant could not prevail on summary judgment appeal when he failed to appeal each ground for summary judgment.

Posted on **August 30, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs
Elezar Balli v. Officer Florentino Martinez, et al., No. 14-20-00030-CV (Tex. App.—Houston [14th Dist.] August 10, 2021) (mem. op.).

In this appeal from a trial court's summary judgment in favor of the defendant officers, the 14th Court of Appeals affirmed the trial court's judgment because the pro se plaintiff failed to challenge all grounds for the summary judgment and the court was required to affirm the summary judgment on the unchallenged grounds.

The plaintiff sued the officers of the Clute Police Department for tort and 1983 claims pro se after he was arrested for domestic violence and transported to jail. While being transported the plaintiff struggled against the officers, knocked the officers down, bit the police chief, threatened the officers, hit his head on the inside of the back seat of the police car, and damaged the police car. During the arrest, the officers tased the plaintiff. The officers tried to use a pillow to protect the plaintiff's head in the backseat of the car. The defendant officers argued that: (1) the amount of force was objectively reasonable as a matter of law; (2) they were entitled to qualified immunity; and (3) the plaintiff's

conviction for assault for biting the police chief barred his claim for damages. The trial court granted the defendant officers' summary judgment without specifying the grounds and the plaintiff appealed the summary judgment. The trial court also dismissed the state law claims since under Section 101.106(f) of the Texas Civil Practices and Remedies Code, the plaintiff was required to bring suit against the City rather than the officers. The City and Police Chief were dismissed from the case because they were not properly served and the trial court had no jurisdiction over them as defendants. The plaintiff did not appeal theseholdings.

Under Texas Rule of Civil Procedure Rule 166a(c), for a summary judgment to be overturned, an appellant has to prove that any and all grounds for summary judgment were not meritorious. If the appellant does not challenge every ground for which summary judgment was granted, then a court of appeals has to uphold the summary judgment. The appellant in this case only appealed the issue that his conviction for assault barred his claim and failed to challenge the other two grounds.

The court of appeals affirmed the trial court's summary judgment in favor of the defendant officers because the pro se plaintiff failed to appeal on all of the summary judgment grounds. If you would like to read this opinion click **here.** Panel consists of Justices Zimmerer, Bourliot, and Spain. Opinion by Justice Jerry Zimmerer.

Dallas Court of Appeals holds trial court had jurisdiction for BOA appeal only, but no monetary or constitutional claims could survive the board's plea

Posted on **August 25, 2021** by **Ryan Henry**

City of Dallas, et al v. PDT Holdings, Inc., et al. **05-21-00018-CV** (Tex. App. – Dallas, August 24,2021).

This is an appeal from a board of adjustment decision where the Dallas Court of Appeals reversed in part and affirmed in part.

PDT Holdings, Inc ("PDT") applied for a permit from the City to build a duplex on its property in Dallas. PDT submitted building plans, which were approved and began construction. However, a City inspector cited PDT and issued a stop work order on the grounds that the structure did not comply with the thirty-six-foot height restriction. PDT adjusted the plans down to 36 feet, but was then told the actual height restriction was twenty-six feet due to the residential proximity slope (RPS) ordinance after it had completed 90% of the construction. PDT sought a variance for the height restriction (three story duplex) but the variance was denied by the board of adjustment ("BOA"). PDT appealed to district court but also sought a variety of monetary damages caused to the project. The matter was temporarily abated by agreement and the parties resubmitted to the BOA (with all new members), which again denied the request. The BOA filed a

plea to the jurisdiction which was denied. The BOA appealed.

A district court has subject matter jurisdiction only to decide whether the Board's decision was illegal under section 211.011. The BOA argued the original appeal to district court was timely but attempted to assert PDT had to appeal the 2nd denial and failed to do so. The Board cites no authority for this requirement other than the general requirement that a petition for writ of certiorari must be filed within ten days of the Board's decision. The court held the second BOA decision did not change the substance of the controversy between the parties or the issues before the trial court. Further, nothing demonstrates the trial court lost jurisdiction over the first decision, over which it would still be allowed to proceed. As a result, the trial court properly denied the plea as to the illegality question only. The court next held that it must evaluate jurisdiction based on each claim. PDT did not specify what cause of action entitled it to recover damages or cite express authority waiving governmental immunity for recovery of damages. The plain language of section 211.011(f) does not authorize an award of damages. Further, there is no implied right of action to recover money damages for violation of the due course-of-law provision of the Texas Constitution. The Texas Constitution authorizes suits for equitable or injunctive relief only. But this limited waiver of immunity exists only to the extent the plaintiff has pleaded a viable constitutional claim. The court agreed with the BOA that PDT does not have a vested property right in obtaining a variance from the RPS ordinance. The mere existence of a building permit does not render an ordinance unenforceable. A person does not acquire a vested right in a building permit issued in violation of an ordinance. Here, jurisdiction exists for judicial review of the Board's decision under section 211.011 only. The plea should have been granted for all other claims.

If you would like to read this opinion click **here.** Panel consists of Justices Nowell, Osborne and Pederson. Opinion by Justice Nowell.

El Paso Court of Appeals holds since city appealed denial of a plea to the jurisdiction, but not the final judgment entered at the same time, court could not hear the appeal

Posted on **August 22, 2021** by **Ryan Henry**

The City of Brady and Brady Police Department v. William Dale Scott, **08-20-00155-CV** (Tex. App. – El Paso, Aug. 16, 2021).

The El Paso Court of Appeals determined it did not have jurisdiction to hear an interlocutory appeal from a Chapter 47 suit to determine ownership of property.

This case started when City police seized $11,450.00 from Scott when searching his home. Scott was investigated for a type of fraud after complaints came that he was operating some form of scam. Several years

later, Scott filed suit specifically under the Texas Code of Criminal Procedure Art 47.01 et seq, which allows for a specific hearing to determine person with the superior right to possession of property. His Chapter 47 petition complained that although the police opened a case file in the matter and provided him with a receipt stating that it had taken $11,452 in cash from him, the police never returned the cash to him. Criminal charges were never filed. The City filed a plea to the jurisdiction. The trial court denied the plea in the same order it issued a final judgment granting Scott's relief. The City filed an interlocutory appeal.

The City asserts the funds were not seized as part of a criminal investigation, but to determine their ownership. The City asserted it no longer has the funds as they were disposed of under article 18.17 of the Code of Criminal Procedure allowing for disposing of funds when the owner is unknown. Under that article, the police placed an advertisement in the local Brady newspaper stating that it had cash in excess of $500 in its possession, and that anyone claiming the money had 90 days to contact them. After no one responded the department obtained an order awarding the funds to the City of Brady from a Brady Municipal Court judge. The City alleged that Scott only had 30 days to appeal or otherwise contest the municipal court's disposition order, and that doing so was a "statutory prerequisite" to filing a Chapter 47 petition. The City also asserted that the notice setting hearing only set the plea, and not a final determination on the Chapter 47 suit. The trial court ruled on both matters in the same order. The City filed an *interlocutory* appeal, appealing only the denial of the plea. The El Paso court held when a trial court has already entered a final judgment, an appellate court has no jurisdiction to hear a governmental body's interlocutory appeal from an order denying its plea to the jurisdiction, and the governmental body must instead pursue an appeal from the final judgment. Since the City's appeal did not timely appeal the final judgment or file an appeal bond for a Chapter 47 appeal, the court has no jurisdiction to hear the City's arguments. The case is therefore dismissed.

If you would like to read this opinion click **here**. Panel consists of Chief Justice Rodriguez, Justice Palafox and Justice Alley. Opinion by Justic Alley.

Fourth Court of Appeals holds plaintiff suing for BOA decision must be given opportunity to replead to show timing of when the BOA decision was filed in board's offices

Posted on **August 22, 2021** by **Ryan Henry**

Alpha Securities, LLC, v City of Fredericksburg, **04-20-00447-CV** (Tex. App. – San Antonio, Aug. 10, 2021, no pet h.).

This is a board of adjustment appeal and declaratory judgment action where the San Antonio Court of Appeals agreed no

jurisdiction existed, but remanded to provide the Plaintiff the opportunity to replead.

Alpha Securities purchased real property in Fredericksburg's historical district. It sought a varianceto expand its doors so the building could be used for commercial uses. The historic district's review board approved the expansion of one door, but not the other on Milam St. As a result, Alpha Securities was unable to obtain a Certificate of Occupancy, water and electrical services. Alpha Securities appealed the determination to the City's Board of Adjustment (BOA), and the BOA denied relief. Alpha sued the City, which filed a plea to the jurisdiction. The trial court granted the plea and Alpha appealed.

Alpha's first argument, that the City did not timely seek a ruling on the plea, was overruled. Subject matter jurisdiction cannot be waived, and courts cannot acquire subject matter jurisdiction by estoppel. Alpha attempted to bring *ultra vires* claims but did not include any specific officials. Such claims were properly denied. To the extent Alpha Securities intended to establish that the review board and BOA violated the law, including its constitutional rights, the UDJA does not waive the City's governmental immunity. Next, the court analyzed the timeliness of the appeal. The appeal clock does not start to run at the time of the BOA decision- rather when the BOA's decision "is filed in the board's office." The pleadings do not establish the date when the BOA's decision was filed in the board's office. Because Alpha Securities' pleadings are insufficient to establish jurisdiction but do not affirmatively demonstrate an incurable defect, the trial court should have given Alpha the opportunity to replead. [Comment: this appears to require pleadings to affirmatively list the specific dates for deadline compliance in order to establish jurisdiction]. The City asserts Alpha replied three times and should not be allowed to do so again. However, the Fourth Court determined that was inconsequential in this case. If the *trial court* determines the plea is meritorious and the pleadings are deficient, the plaintiff must *then* be givena reasonable opportunity to amend the pleadings to cure the jurisdictional defects. As a result, the case was remanded.

If you would like to read this opinion click **here**. Panel consists of Justices Chapa, Rios, andRodriguez. Memorandum opinion by Justice Rodriguez.

Inmate failed to show the County had actual notice of his claim within statutory time period

Posted on **August 8, 2021** by **Ryan Henry**

Christopher Branch v. Fort Bend County, 14-19-00477-CV, 2021 WL 2978639 (Tex. App.—Houston [14th Dist.] July 15, 2021, no pet. h.) (mem. op.)

This is Texas Tort Claims Act (TTCA) case where the Fourteenth Court of Appeals

affirmed the trial court's granting of a dispositive motion and holding there was no evidence the County was subjectively aware of any fault in causing or contributing to Branch's injuries.

Branch alleged that he was injured on August 1, 2016, when he slipped and fell outside of his jail cell at the Fort Bend County Jail. Branch further alleged that his fall was caused by a puddle of water that was a result of a burst pipe in the facility that jail personnel failed to diagnose and fix. Prior to filing suit, Branch sent the County a letter on April 21, 2017, providing notice pursuant to the Texas Tort Claims Act regarding his injuries sustained on August 1, 2016. Branch then sued the County on July 13, 2018. The County filed a plea to the jurisdiction which the trial court granted. Branch appealed.
Although formal written notice of a claim is not required when a governmental entity has actual notice of a claimant's injury, mere knowledge that an incident has occurred is not sufficient. Actual notice means that the governmental entity is subjectively aware that it may be responsible causing or contributing to a claimant's death, injury, or property damage in the manner alleged by the claimant. Here, the County provided undisputed evidence establishing that Branch failed to give formal written notice within six months after the day of the incident giving rise to his claim.

Although Branch alleged for the first time on appeal that the County had actual notice of his claim, the appellate court also rejected that argument. Instead, the court determined that there was no evidence in the record, which included the incident report or Branch's inmate medical records, that showed the County was subjectively aware it might be responsible for Branch's injury. Finally, there was no evidence any investigation conducted with regard to Branch's fall was conducted much less that it showed any subjective awareness on the part of the County.

If you would like to read this opinion click **here**. Panel consists of Justices Spain, Hassan, and Poissant. Memorandum Opinion by Justice Hassan.

Property owners around lake drained by GBRA had no standing to sue as they possessed no particularized injury

Posted on **August 8, 2021** by **Ryan Henry**

Jimmy and Cheryl Williams, et al. v. Guadalupe-Blanco River Authority and its Officers and Directors, 04-20-00445-CV, (Tex. App. – San Antonio, July 7, 2021)

This is a takings case where the San Antonio Court of Appeals partially reversed and affirmed the trial court's judgment on Guadalupe-Blanco River Authority's ("GBRA") plea to the jurisdiction in takings suit. The trial court granted GBRA's plea to all claims except the property owners' takings claims after GBRA drained lakes around their

properties.

Six hydroelectric dams ("Hydro Dams") were privately constructed between 1928 and 1932 and put in service in the Guadalupe River Valley in Comal, Guadalupe, and Gonzales Counties. Construction of the hydro dams resulted in the formation of six lakes: Meadow, Placid, McQueeney, Dunlap, Wood, and Gonzales. In 1963, GBRA acquired the six hydro dams. Spill gates at two of the hydro dams failed draining both Lake Wood and Lake Dunlap. As a result of the deterioration of the hydro dams and respective spill gates, GBRA announced its intent to perform a "systematic drawdown" of the remaining four lakes, beginning at Lake Gonzales and then moving upstream to Meadow Lake, Lake Placid, and Lake McQueeney. Appellants—owners of properties adjacent to the lakes—sued GBRA (and its officers in their official capacities) for injunctive relief to prevent the announced drawdown, declaratory relief, and damages based on diminished property values.

GBRA asserted that the property owners lacked standing because they could not demonstrate a particularized injury. Standing requires a plaintiff to establish: (1) the plaintiff's claimed injury is "both concrete and particularized and actual and imminent, not conjectural or hypothetical"; (2) the injury is "fairly traceable to the defendant's challenged action"; and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

The Court of Appeals reversed the trial court's denial of the plea as to the taking claims, finding that the property owners could not demonstrate a particularized injury apart from the community at large absent ownership of a property right in the hydro dams, the lands underneath the lakes, or the water itself. As a result, the Court of Appeals dismissed the sole remaining claim againstGBRA.

Panel consists of Justices Alvarez, Chapa, and Valenzuela. Memorandum Opinion by JusticeValenzuela can be read **here.** Docket page with attorney information found **here.**

Since pedestrian plaintiff admitted he caused the accident to officers at the scene, City did not have actual notice of claim within required time period

Posted on **August 8, 2021** by **Ryan Henry**

The City of Houston v. Michael Gantt, **14-20-00229-CV**, (Tex. App – Houston, August 5, 2021) This is a Texas Tort Claims Act (TTCA) case where the Fourteenth Court of Appeals reversed the trial court's denial of the City's plea to the jurisdiction and dismissed the Plaintiff's claims.

Gantt was a pedestrian who was struck by a patrol car driven by Houston police officer Young. Gantt filed suit. The City filed a plea to the jurisdiction asserting Gantt did not meet the notice of claim requirements under the TTCA and the City did not have

actual notice of the claim. The plea was denied and the City appealed.

Gantt admitted he did not provide written notice of claim timely under the TTCA, but asserted the City had actual knowledge of the claim. The City must have "subjective awareness" of its fault in the situation, else actual notice does not exist. The City's crash report indicates Gantt ran in front of the vehicle and failed to yield the right of way to the vehicle. Gantt's statement given to police states he ran in front of the vehicle and it was his fault he was hit. The court noted that while Gantt's statement, alone, is not dispositive, Gantt did not claim it was Young's fault. As a result, the City did not have actual notice and subjective awareness of its fault in the accident.

Panel consists of Chief Justice Christopher, and Justices Jewell and Poissant. Reversed and rendered. Memorandum Opinion by Justice Poissant can be read **here**. Docket page with attorneyinformation found **here.**

Since City's plea to the jurisdiction only challenged non-jurisdictional facts, plea was property denied in breach of contract suit

Posted on **August 8, 2021** by **Ryan Henry**

City of Del Rio v. Henry Arredondo, **04-20-00409-CV**, (Tex. App – San Antonio, August 4, 2021) This is a breach of contract suit where the Fourth Court of Appeals held that because the City's plea only challenged non-jurisdictional facts, the plea was properly denied.

City hired Arredondo as its City Manager. The parties entered into an Employment Agreement, which provided Arredondo served "at the pleasure of the City Council." The City Council later voted to terminate the Employment Agreement. Arredondo then sued the City, alleging the City Council did not obtain a majority vote to terminate his employment, which constituted a breach of contract claim. He also pled an alternative breach of employment contract claim. The City fileda plea to the jurisdiction, which was denied.

Section 271.152 of the Texas Local Government Code waives governmental immunity for the adjudication of certain breach of contract claims. The City asserts the contract did not alter the employment-at-will doctrine and the City complied with the contract. The crux of this appeal is whether the facts asserted by the City are "jurisdictional facts." Not all facts relating to the merits are necessarily jurisdictional facts. The at-will nature and city's compliance with the contract, in this situation, were not jurisdictional facts, so the plea was properly denied.

Panel consists of Chief Justice Martinez, and Justices Chapa and Valenzuela. Affirmed. Memorandum Opinion by Justice Chapa can be read **here**. Docket page with attorney informationfound **here.**

Trespass to try title claims failed to waive immunity, but court remanded to allow furtherpleading attempts

Posted on **August 8, 2021** by **Ryan Henry**

City of San Antonio v. Albert Davila, Individually; Madeline Davila, Individually; and Albert Davila as Trustee of the Albert Pena Davila and Madeline Davila Living Trust, **04-20-00478-CV**, (Tex. App – San Antonio, August 4, 2021)

This is a trespass to try title case where the Fourth Court of Appeals reversed the denial of the City's plea to the jurisdiction but remanded to allow Plaintiff the ability to replead.

The Davilas sued the City in a trespass to try title action. The Davilas alleged that, as part of closing and abandoning 12th Street and conveying parcels to adjoining landowners in 1987, the City deeded the subject property to the Davilas' parents. Alternatively, they allege they adversely possessed the property. The City filed a plea to the jurisdiction asserting the City issued a quick claim deed to Davila's parents and the deed recites the City passed an ordinance authorizing the sale of the property to the Davilas' parents. The quitclaim deed also contains a metes-and-bounds description of the subject property and reserves a utility easement. The trial court denied the pleaand the City appealed.

When a city is sued in a trespass to try title action based on adverse possession, governmental immunity is not waived, and the trial court lacks subject matter jurisdiction. As a result, the claims, as alleged, do not waive immunity. The Davilas argue section 16.005 of the Texas Civil Practice & Remedies Code waives the City's governmental immunity, which relates to road closure ordinances. The Davilas did not request relief from the City's ordinance under Chapter 16, which authorized the sale or abandonment of property, but from the quitclaim deed itself. It does not waive immunity. However, the plea attacks the pleadings only. The City's brief does not argue or explain why the pleading defect—suing the City instead of government officials for ultra vires acts — is incurable. As a result, the Davilas must be given the opportunity to amend their pleadings.

Panel consists of Chief Justice Martinez, and Justices Chapa and Valenzuela. Reversed and remanded. Memorandum Opinion by Justice Chapa can be read **here**. Docket page with attorney information found **here.**

Junk vehicle owner failed to establish ownership in municipal court, so was not entitled to sue for taking in later suit

Posted on **August 8, 2021** by **Ryan Henry**

Jane Vorwerk v. City of Bartlett and John Landry Pack, Mayor, **03-21-00001-CV**, (Tex. App – Austin,August 6, 2021)

The Bartlett Municipal Court declaring a 1986 Toyota mobile home to be a junk vehicle. The municipal court found that defendant James Fredrick Hisle was the owner or person in lawful possession of the mobile home, he was properly notified and appeared in person before the court, and he was afforded ample time to remove the mobile home from his property under Ordinance. It was also declared to be a public nuisance. The court ordered removal and if Hisle did not remove it the City could. Vorwerk filed suit in justice court asserting she owned the vehicle and the City committed a taking. The City's filed a plea to the jurisdiction which was granted.

Vorwerk asserted she created a fact issue regarding the ownership of the vehicle. Vorwerk did not submit any evidence that she owned the mobile home at the time of the municipal court proceeding. Therefore, because the relevant evidence presented by the City and the Mayor was undisputed, that is, that Vorwerk was not the registered owner, and because Vorwerk did not present any evidence that she was the owner of the mobile home at the time of the municipal- court proceeding, the court conclude that she did not raise a fact issue concerning her ownership of the mobile home at the time of the municipal court hearing. The JP properly dismissed the case for lack of jurisdiction.

Panel consists of Justices Goodwin, Triana, and Kelly. Affirmed. Memorandum Opinion by JusticeTriana can be read **here**. Docket page with attorney information found **here.**

Eastland Court of Appeals holds deputies entitled to qualified immunity after takedown broke suspects jaw as video did not show constitutional level violations

Posted on **August 5, 2021** by **Ryan Henry**

Peter Klassen v. Gaines County, Texas, and Gaines County Deputy Sheriffs Ken Ketron and Clint Low, 11-19-00266-CV (Tex.App.—Eastland July 15, 2021)

This is an excessive force/§1983 case where the Eastland Court of Appeals affirmed the trial court's granting of the County's and deputy's dispositive motions.

Deputies responded to a disturbance involving possible aggressive actions by Klassen. Klassen was ordered to the ground and, while one of the deputies was attempting to put Klassen into the prone position, Klassen moved his hands and the deputy used his body weight to move Klassen into position. This caused Klassen to strike his chin on the ground, knocking out several teeth and breaking his jaw. Klassen sued. The deputies filed a motion to dismiss t under the Tort Claims ACT ("TTCA"), which the trial court granted. They then filed a motion for summary judgment for the remaining federal and state claims. The trial court granted the motion as to the state claims, leaving the federal claims pending. Klassen then filed an amended petition which was almost exactly the same as the previous petition except that he, relevantly, attached as an exhibit an expert's opinion that the force used was excessive. In response, appellees

filed another motion to dismiss and a motion for summary judgment in the alternative, which the trial court granted. Klassen appealed the granting of the motion.

The Court of Appeals specifically noted that the trial court stated in its order that it examined the *entire record* when it dismissed Klassen's claims, as such an analysis indicates that the trial court dismissed the claims under its motion for summary judgment as opposed to a motion to dismiss under the pleadings. When doing so, the standard for determining whether a trial court made an appropriate holding when it considered certain summary judgment evidence is a review for an abuse of discretion. In this case, the Court found no such abuse.

The Court found dismissal of the deputies was proper under the TTCA. Second, the Court found there was no excessive force after reviewing the video. Third, the Court found that qualified immunity shielded the deputies as Klassen was unable to establish specific actions constituted a violation of clearly established law. The Court found Klassen had suffered no "constitutional injury" via the excessive force claim, so the county could not be held liable for any failure to train its deputies.

If you would like to read the memorandum opinion click **here**. Panel consists of Chief Justice Bailey and Justices Trotter and Williams. Opinion by Justice Williams.

San Antonio Court of Appeals held City park and airport police could proceed with declaratory claims to establish collective bargaining rights

Posted on **August 5, 2021** by **Ryan Henry**

City of San Antonio and Erik Walsh, in his Official Capacity v. San Antonio Park Police Officers Association, et al, **04-20-00213-CV**, (Tex. App – San Antonio, July 14, 2021).

This is a civil service/collective bargaining suit where the San Antonio Park Police Officers Association ("SAPPOA") sought declaratory relief for three distinct issues related to the legal classification of San Antonio's park and airport police officers. The San Antonio Court of Appeals affirmed in part and reversed in part the City's plea to the jurisdiction.

The SAPPOA argued that San Antonio's park and airport police officers are "police officers" entitled to collectively bargain with the City of San Antonio ("City") under chapters 174 and 143 of the Texas Local Government Code. The court explained Chapter 174 provides a limited waiver of immunity as follows: "This chapter is binding and enforceable against the employing public employer, and sovereign or governmental immunity from suit and liability is waived only to the extent necessary to enforce this chapter against that employer." Tex. Loc. Gov't Code Ann. §174.023. SAPPOA clearly alleged a violation of their right to collectively bargain under Chapter 174.

The court held that these factual allegations were sufficient to establish the subject matterjurisdiction of the court.

However, SAPPOA did not allege or argue that chapter 143 provides for a waiver of immunity for their declaratory judgment claim. The court held SAPPOA did not request a declaration concerning the validity of chapter 143, but instead sought a declaration as to the park and airportpolice officers' rights under this chapter. Thus, the court held that the UDJA does not waive the City's immunity with respect to their declaratory claim pursuant to chapter 143. Finally, the court held that SAPPOA alleged sufficient facts that, if taken as true, would confer standing for their ultra vires claims.

Panel consists of Chief Justice Martinez, and Justices Rios and Watkins. Reversed in part, Renderedin part, and Affirmed in part. Memorandum Opinion by Chief Justice Martinez can be read **here**.

Amarillo Court of Appeals holds committed individual cannot challenge commitment or conditions through secondary suit

Posted on **August 2, 2021** by **Ryan Henry**

James Richards v. Marsha McLane, in Her Official Capacity as Director of the Texas CivilCommitment Office, **07-20-00306-CV**, (Tex. App – Amarillo, July 6, 2021)

This is a declaratory judgment/*ultra vires* type case where the Amarillo Court of Appeals affirmed the granting of the Director's plea to the jurisdiction.

Richards sued the director of the Texas Civil Commitment Office involving his commitment orders for being a sexually violent predator. The Director filed a plea to the jurisdiction, which was granted. Richards appealed.

Section 841.082 of the Texas Health and Safety Code provides that the court civilly committing someone as a sexually violent predator "retains jurisdiction of the case with respect to a proceeding conducted under . . . subchapter [E of the statute], . . . or to a civil commitment proceeding conducted under Subchapters F and G." TEX. HEALTH & SAFETY CODE ANN. § 841.082(d) (West Supp. 2020). The Court examines the claims based on the nature of the facts asserted and not the labels placed upon them by the pleading party. When reviewing the pleadings, the court held Richards actually challenged the legitimacy of his confinement for inpatient services. Richards sought to obtain less restrictive housing and supervision through the suit, thereby countermining the committing court's jurisdiction. Further, since the housing requirements apply upon the "release" of an individual, and Richards has yet to be released, the challenge is not yet ripe.

Panel consists of Chief Justice Quinn, and Justices Pirtle and Parker. Affirmed. Memorandum Opinion per curiam can be read **here**. Docket page with attorney information found **here.**

Slip and fall plaintiff failed to dispute hospital's proof of no actual notice of dangerous condition

Posted on **July 30, 2021** by **Ryan Henry**

The University of Texas MD Anderson Cancer Center v. Courtney Simpson, **01-20-00679-CV**, (Tex.App – Houston [1st Dist.], July 22, 2021)

This is an interlocutory appeal in a premise defect/Texas Tort Claims Act (TTCA) case where the First District Court of Appeals reversed the denial of the University's plea and dismissed the Plaintiff's claims.

Simpson was a visitor to the University's MD Anderson hospital when she slipped and fell "due to a wet slippery floor." Simpson was visiting a friend who had surgery and was in a patient room. Simpson purportedly left her friend's patient room to get ice from the ice machine. As she walked down the hallway, she fell and broke her wrist. Simpson asserted that she slipped on a round- shaped patch of clear liquid, about three to five inches in diameter. Simpson allegedly did not know that a clear liquid had caused her to fall until she heard someone hear the nurse's station point out the liquid and admit they should have cleaned it up. Simpson did not know the identity of any of the persons who were present at the nurse's station. MD Anderson asserted it did not receive any reports of substances or liquids being spilled or present on the floor where Simpson fell and did not receive any reports of falls at that location before Simpson fell. Simpson asserted that anyone who would have admitted to knowing the water was there must be an employee of MD Anderson. The hospital asserted that an unidentified person commenting on the water does not establish a fact issue that the person was an MD Anderson employee. The trial court denied the plea and MD Anderson appealed.

To prove actual knowledge, the plaintiff must show that the governmental unit actually knew of the dangerous condition at the time of the accident. Actual knowledge of an unreasonably dangerous condition can sometimes be proven through circumstantial evidence. However, circumstantial evidence establishes actual knowledge only when it "either directly or by reasonable inference" supports that conclusion. MD Anderson presented evidence establishing it did not have actual knowledge of a dangerous condition prior to the fall. Simpson testified she did not know what type of medical professionals were present at the nurse's station and did not know what the admitting person was doing at the station. She admitted she did not see any ID badge on the admitting person and could not recall race or age. She also admitted that she did not know if the person was a nurse or not. MD Anderson produced evidence that non-employees of MD Anderson can be present at a nurse's station and wear scrubs. MD Anderson met its burden, but Simpson did not dispute MD Anderson's facts. As a result, the plea should have beengranted.

Panel consists of Chief Justice Radack, and Justices Landau and Countiss.

Memorandum Opinion by Justice Countiss can be read **here**. Docket page with attorney information found **here.**

First District Court of Appeals holds inmate failed to property provide notice of claim for alleged sexual assault

Posted on **July 30, 2021** by **Ryan Henry**

Troylencia Wolf Anderson v. Waller County, Texas, et al, **01-20-00097-CV**, (Tex. App – Houston [1st Dist.], July 20, 2021)

This is an alleged sexual assault case brought under the Texas Tort Claims Act (TTCA) where the First Court of Appeals affirmed the granting of the County's plea to the jurisdiction.
Anderson alleged that while incarcerated at the Waller County Jail, she was taken to her cell by an unknown female jailor and given a minor amount of food and water. She took mayonnaise and obstructed the security camera. After eating her food, she claims she blacked out and therefore assumed she had been drugged. She asserts she was sexually assaulted then released. Anderson brought claims against the County, the Sheriff, and several jailors for sexual assault, assault, intentional infliction of emotional distress, and negligence. She amended her pleadings indicating the misuse or malfunctioning of security cameras lead to the assaults as well as providing unsafe food. The County filed several pleas to the jurisdiction, which were eventually granted. Anderson appealed.

A plaintiff's failure to provide the statutorily required notice deprives the trial court of jurisdiction and requires the court to dismiss the plaintiff's case. Knowledge that an injury has occurred, standing alone, is not sufficient to put a governmental unit on actual notice for TTCA purposes. Further, mere investigation of an incident or injury does not show that a governmental unit had actual notice for purposes of the TTCA. Anderson's written notice was provided four years after her incarceration and nothing in the record indicates the County was aware, for actual notice purposes, that Anderson had reported her claims to the Texas Rangers. Anderson did not allege the date on which the County received actual notice and did not allege that the County had actual notice that Anderson had received some injury within six months of the incident giving rise to Anderson's claimed injury. Anderson's allegations that the Texas Rangers investigated an unspecified complaint by Anderson at some unspecified time, even if taken as true, do not show actual knowledge of the claim. Finally, the court held that when a plea is granted, if it is one of pleading defects only which could be cured, the dismissal may be without prejudice, but if the petition could not possibly allege facts demonstrating a waiver of immunity, or if the Plaintiff had been given an adequate opportunity to replead and failed, then the dismissal should be with prejudice. The trial court properly granted the plea with prejudice.

Panel consists of Chief Justice Radack, and Justices Landau and Countiss. Memorandum Opinion by Justice Countiss can be read **here**. Docket page with attorney information found **here.**

Mere acknowledgment a police report exists does not establish actual notice of claim because the existence of an investigation alone is insufficient to demonstrate actual notice says 13th Court of Appeals

Posted on **July 22, 2021** by **Ryan Henry**

City of Mission, Texas v. Lucila Gonzalez, **13-20-00138-CV**, (Tex. App – Corpus Christi & Edinburg,July 22, 2021)

This is a premise liability case under the Texas Tort Claims Act ("TTCA") where the Corpus Christi & Edinburg Court of Appeals reversed a denial of the City's plea to the jurisdiction and dismissed the claims.

Gonzalez was taking the trash out at her residence when she slipped and fell, striking her right knee on the ground. It is undisputed that the fall occurred on private property. However, Gonzalez alleges the area where she fell was muddy "because of negligent repair work to a water line rupture" by City employees. City firefighters emptied the water line across the street from her residence. Gonzalez alleges that the released water flowed across the street, causing the muddy condition and her fall. The City filed a plea to the jurisdiction, which was denied. The City appealed.

Under the TTCA, a governmental unit must be given notice of a claim against it not later than six months after the day that the incident. The letter of representation Gonzalez sent to the City does not comply with the written notice requirements of § 101.101 because it fails to reasonably describe the incident, the injury claimed, or the time and place of the incident. Gonzalez asserted the police report established actual notice of claim; however, no police report was in the record. The City's mere acknowledgment a police report exists does not raise a fact issue because the existence of an investigation alone is insufficient to demonstrate actual notice. Nothing else in the record indicates actual knowledge of the claim sufficient under the TTCA. The plea should have been granted.

Panel consists of Chief Justice Contreras, and Justices Benavides and Silva. Reversed and rendered. Memorandum Opinion by Benavides can be read **here**. Docket page with attorney information found **here.**

Since injured inmate had observed repair of table and knew it was inadequate, inmate accepted the risk of sitting at table – County therefore not liable under TTCA

Posted on **July 22, 2021** by **Ryan Henry**

Hidalgo County Detention Center v. Isidro Villa Huerta, **13-20-00113-CV**, (Tex. App – Corpus Christi& Edinburg, July 22, 2021)

This is a premise liability case under the Texas Tort Claims Act ("TTCA") where the Corpus Christi & Edinburg Court of Appeals reversed a denial of the City's plea to the jurisdiction and dismissed the claims.

A table in a "day room" at the county jail broke at the base. The Hidalgo County Sheriff's Office submitted a "Maintenance Work Order Request Form" for repair of the table that same day. A technician welded the table and returned the form half an hour later, indicating that the problem had been resolved. Huerta, an experienced welder and inmate at the jail, observed the repair performed by the technician. Two days later, he sat on the table with three other inmates when the same point at the base broke. Huerta asserted he was injured and filed suit. The County filed aplea to the jurisdiction, which was denied. The County appealed.

Under the provisions of the TTCA applicable, the County owed a duty of care not to injure a licensee by willful, wanton or grossly negligent conduct, and to use ordinary care either to warn of or to make reasonably safe, a dangerous condition of which the County is aware and the licensee is not. Although there is no one test for determining actual knowledge that a condition presents an unreasonable risk of harm, courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential danger presented by the condition. If a licensee is aware of a dangerous condition, he has all that he is entitled to expect, that is, an opportunity for an intelligent choice as to whether the advantage to be gained by coming on the land is sufficient to justify him in incurring the risks involved. The court disagreed with the County and noted the same table had broken at the same place at least three separate times, so a fact issue exists on whether the County had actual notice of the dangerous condition. However, Huerta testified that he observed the table's repair two days before his fall, and based on his experience, he knew the weld was inadequate to ensure the structural integrity of the table because Hidalgo County's "in-house maintenance guy" did a "quick tack [weld]." Huerta knowingly decided to sit at the same table. As a result, he was already aware of the danger and accepted the risk. The plea should have been granted.

Panel consists of Chief Justice Contreras, and Justices Benavides and Silva. Reversed and rendered. Memorandum Opinion by Benavides can be read **here**. Docket page with attorney information found **here.**

Austin Court of Appeals holds AG establishedonly 6 days of violations by city of concealed handgun prohibitions, not the 500+ asserted

Posted on **July 22, 2021** by **Ryan Henry**

Ken Paxton, Texas Attorney General v. City of Austin, Mayor Steve Adler, Ora Houston, Delia Garza, Sabino Renteria, Gregorio Casar, Ann Kitchen, Don Zimmerman, Leslie Pool, Ellen Troxclair, Kathie Tovo, and Sheri Gallo, each in their Official Capacity, **03-19-00501-CV**, (Tex. App – Austin, July 22,2021)

This is a handgun notice/AG penalty case against the City of Austin. The Austin Court of Appeals affirmed the imposition of civil penalties against the City of Austin imposed by the trial court and denied the AG's request for stronger penalties as a matter of law.

In 2015, the Legislature enacted Section 411.209 ("Wrongful Exclusion of Concealed Handgun License Holder") of the Texas Government Code, which it amended in 2017 and 2019. The section addresses penalties against a City that improperly prohibits the carrying of concealed handguns in certain locations. Under §30.06 of the Texas Penal Code, in order to prohibit a licensed concealed handgun carrier from entering a public building, the City must post a specific sign with specific language. A citizen testified he sent the City notices to remove a pictorial sign and that he was orally told he could not enter. Under §411.209, the AG filed suit against the City for improperly prohibiting licensed carriers. The trial court dismissed the claims related to the City's prohibition picture of a gun with a circle and line through it, but held the AG met its burden of proof as to other warnings (including oral warnings) on six separate days. The trial court imposed penalties of $9,000 against the City. The City did not appeal, but the AG did. AG asserted the City should have been penalized over $5 million due to continuing violations and in dismissing the pictorial violation.

To be a prohibited notice under former Section 411.209(a), the notice must be either "by a communication described by Section 30.06, Penal Code" or "by any sign expressly referring to thatlaw or to a license to carry a handgun." Former Tex. Gov't Code § 411.209(a). The City's pictorial sign is not "a communication described by Section 30.06, Penal Code." And although the City's Etching perhaps could be considered a "written communication" in the ordinary and common meaning of that phrase, Section 30.06 expressly defines "written communication" under which the pictorial sign does not qualify. As a result, dismissal of claims related to the pictorial sign was proper. Next, the district court concluded that the Attorney General met his burden to establish a violation of former Section 411.209(a) for six different days in 2016. However, it failed to prove continuing violations on any other day. When a party attacks the legal sufficiency of an adverse finding on an issue on which it bears the burden of proof, the judgment must be sustained unless the record conclusively establishes all vital facts in support of the issue. The AG failed to make

such a showing. Finally, the Attorney General did not raise any complaint until his appeal regarding the district court's award of a $1,500 per diem amount rather than the mandatory $10,000 minimum authorized by the statute for subsequent violations. As a result, the court could not review that issue as it was not preserved.

Panel consists of Justices Goodwin, Kelly, and Smith. Affirmed. Memorandum Opinion by Justice Goodwin can be read **here**. Docket page with attorney information found **here.**

Evidence that a decisionmaker knew about the report of illegal activity is required to prove a Whistleblower retaliation claim.

Posted on **July 13, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs
Houston Community College v. Sabrina Lewis, No. 01-19-00626-CV (Tex. App.—Houston [1st Dist.], June 29, 2021) (mem. op.).

In this appeal from a trial court's holding denying the college's plea to the jurisdiction on racial discrimination claim and Whistleblower claim, the First District Court of Appeals reversed the trial court's judgment and dismissed the case because the plaintiff provided insufficient evidence of discriminatory intent in her termination and failed to provide evidence of causation related to the Whistleblower retaliation claim because the individuals responsible for her termination did not have knowledge of her report of alleged illegal activity before her termination.

The plaintiff sued the college after she was terminated for cause from her employment. The plaintiff was the Director of Veterans Affairs Department for the college and is an African- American woman. The plaintiff argued that she was terminated either due to her race or because she made a report of illegal activity to the state and federal Veterans Affairs agencies. The plaintiff sued the college for racial discrimination and Whistleblower retaliation. The college argued that there was insufficient evidence of racial discrimination because she was replaced by an African-American and there was no showing she was treated differently than other similarly situated employees. The college also argued that the plaintiff could not prove causation under the Whistleblower claim because there was no evidence that the individuals involved in the termination knew of the report of illegal activity. The trial court denied the college's plea to the jurisdiction related to the claim and the college appealed.

To establish a prima facie case of race discrimination, a plaintiff must show that the plaintiff: (1) is a member of a protected class, (2) was qualified for their position, (3) suffered an adverse employment action, and (4) that others similarly situated were treated more favorably than the plaintiff or the plaintiff was replaced by someone who is not in the same protected class. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). The plaintiff, in

this case, failed to establish that her termination was based on any discriminatory intent. Evidence that a subordinate employee had made a derogatory remark was insufficient to show discriminatory intent and the employer established reasonable bases for the plaintiff's termination. Also, her replacement was also African-American.

To establish a claim under the Whistleblower Act, an employee must establish that but for a good faith report of illegal activity, the employer would not have taken an adverse employment action against the employee. *Office of Att'y Gen. v. Rodriguez*, 605 S.W.3d 183, 192 (Tex. 2020). The plaintiff failed to produce evidence that the individuals responsible for her termination knew about her report of illegal activity to the Veterans organizations at the state and federal level. This failure meant the causation prong of Whistleblower claims was not met. The court discussed without deciding whether or not the "conduit" or "cat's paw" theory of liability could be extended to Whistleblower retaliation claims.

The court of appeals reversed the trial court's denial of the college's plea to the jurisdiction and dismissed the case because insufficient evidence of either claim was provided.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Radack and Justices Kelly and Rivas-Molloy. Opinion by Justice Veronica Rivas-Molloy.

Dallas Court of Appeals holds coordination of extra-duty assignments for police officers is a governmental function – Plaintiffs required to provide proper notice of claim under TTCA

Posted on **June 30, 2021** by **Ryan Henry**

Town of Highland Park v. Tiffany Renee McCullers, individually and for the benefit of Calvin Marcus McCullers and Calvin Bennett McCullers and ANF of C.J., Minor, and Sonya Hoskins, et al, **05-19- 01431-CV**, (Tex. App – Dallas, June 29, 2021)

This is a Texas Tort Claims Act ("TTCA") case in which the Dallas Court of Appeals reversed thedenial of the Town's plea to the jurisdiction and dismissed the claims.

The Town had a program to provide extra-duty work to various police officers in the area, but which was at the request of private citizens. The Town offered a security service assignment to Southern Methodist University ("SMU") police officer Calvin Marcus McCullers ("Officer McCullers") to guard a private residence under construction. After accepting the assignment, Officer McCullers sat for just over an hour in his car on the property. The National Weather Service issued a severe thunderstorm warning. Heavy rains occurred over the property so much that water rose up the sides of his vehicle. Seconds later, Officer McCullers opened the passenger door, stepped out of the vehicle, lost his footing, and the water swept him and his vehicle over an embankment at the edge of the Property.

Officer McCullers did not survive. The family sued the City under general negligence and premise liability theories. The Town filed a plea to the jurisdiction, which was denied. The Town appealed.

It is undisputed that Plaintiffs did not provide written notice to the Town of their claims within six months of the accident, however, the Plaintiffs assert the Town had actual notice of the claims. Actual notice under section 101.101(c) requires evidence that the government had knowledge of its alleged fault in causing or contributing to the claimant's injury. The issue is not whether the City *should* have made the connection between injury and responsibility as alleged, but whether the City made the connection or had knowledge that the connection had been made. The Town (i) acted on and investigated Officer McCullers's request for rescue and (ii) learned of Officer McCullers's death. However, those acts and the knowledge of Officer McCullers's death are not sufficient to establish actual notice under the TTCA. Further, even if the Town had knowledge of the area's general propensity for flooding, such is insufficient. The Texas Supreme Court has held the City's knowledge of torrential rains did not establish actual knowledge of flooding at a specific location. As a result, no notice was provided. Further, as to the Plaintiff's premise liability claim, the Town did not own the property. Plaintiffs assert the Town had an easement on the property.

However, the record shows that (i) the Town had neither a possessory interest nor an ownership interest in the land located within the easement, (ii) the easement did not give the Town authority to control or maintain the land located within the easement, and (iii) the Town had not used the easement for some years before July 5, 2016. Finally, the actions of the Town were not proprietary. TTCA section 101.0215 enumerates "police and fire protection and control" as the first in the statutory list of governmental functions. The extra-duty jobs were provided only to certified law enforcement officers. Officer McCullers was serving in a police capacity at the time of his death. As a result, the plea should have been granted.

The Concurring opinion focused more on the proprietary-governmental dichotomy. Texas courts have consistently held that when a city's police activities are aimed at crime prevention, such activities are necessarily governmental. Since such was a governmental function, Plaintiffs failed to provide proper notice.

The Dissent would hold the coordination of off-duty officers was proprietary. The Town coordinated private security services for private property owners, not the general public. Panel consists of Chief Justice Burns, and Justices Pedersen and Goldstein. Reversed and dismissed. Opinion by Justice Pedersen can be read **here**. Dissenting opinion by Chief Justice Burns can be read **here**. Concurring Opinion by Justice Goldstein can be read **here**. Docket page with attorney information found **here.**

Copyright infringement does not qualify as a constitutional taking says Texas Supreme Court

Posted on **June 22, 2021** by **Ryan Henry**

Jim Olive Photograph, D/B/A Photolive, Ince v University of Houston System, 19-0605 (Tex. June 18,2021)

The Texas Supreme Court held that a governmental entity's infringement on a copyright does notqualify as a taking under the federal or state constitution.

Jim Olive Photography d/b/a Photolive, Inc. (Olive) is a professional photographer who took a series of aerial photographs of the City of Houston in 2005 and displayed them on his website for purchase. Such photos were registered with the United States Copyright Office. Olive asserts the University of Houston ("University") downloaded a copy and removed all identifying copyright and attribution material and began displaying the photographic image on several web pages. Olive sued the University for a taking without compensation. The University filed a plea to the jurisdiction which was denied. The University appealed. The court of appeals disagreed and dismissed Olive's claims. Olive appealed.

A copyright is a form of intellectual property that subsists in works of authorship that are original and are fixed in a tangible medium of expression. For a term consisting of the author's life plus seventy years, the owner of a copyright enjoys the five exclusive rights of reproduction, adaptation, distribution, and public performance and display. The Court assumed, without deciding, that a copyright is a protected property interest. However, a compensable taking does not arise whenever state action adversely affects private property interests. Governments interfere with private property rights every day. Some of those intrusions are compensable; most are not. "A taking is the acquisition, damage, or destruction of property via physical or regulatory means." To determine whether a physical or regulatory interference with property constitutes a taking, a court ordinarily undertakes a "situation-specific factual inquiry." Property is the bundle of rights that describe one's relationship to a thing and not the thing itself. Infringement of a copyright, however, is different than a typical appropriation of tangible property where rights are more closely bound to the physical thing. An act of copyright infringement by the government does not take possession or control of, or occupy, the copyright. The government's violation of the copyright owner's rights does not destroy the right or property. The Copyright Act provides that no action by a governmental body to seize or appropriate such ownership shall be given any effect under the Act. Similarly, the government's unauthorized use of a copy of the copyrighted work is not an "actual taking of possession and control" of the copyright. Copyright infringement not only lacks the key features of a per se taking; it also does not implicate the reasons for creating a per se rule in the first place. Although the Texas Constitution waives governmental immunity with respect to inverse condemnation claims, such a claim must

still be "predicated on a viable allegation of taking." Allegations of copyright infringement assert a violation of the owner's copyright, but not its confiscation, and therefore factual allegations of an infringement do not alone allege a taking. The plea should have been granted.

The concurring opinion focused more on the need to be flexible with a broad range of harm to
property. However, the concurring justices agreed that copyright infringement was too far outsidethe protection.

If you would like to read this opinion click **here**. JUSTICE DEVINE delivered the opinion of the Court. JUSTICE BUSBY filed a concurring opinion (found **here**) in which JUSTICE LEHRMANN joined and in which JUSTICE BLACKLOCK joined as to part II.

Texas Supreme Court holds historic preservation ordinance is not "zoning" but must still comply with certain Chapter 211 requirements

Posted on **June 22, 2021** by **Ryan Henry**

Powell, et al., v City of Houston, 19-0689 (Tex. June 4, 2021)

The Texas Supreme Court determined that Houston's Historic Preservation Ordinance was not a zoning ordinance and therefore the zoning restrictions under state law do not apply. However, certain provisions of Chapter 211 of the Texas Local Government Code still apply to the ordinance. The Houston City Council adopted a Historic Preservation ordinance which required owners of properties in those districts to seek approval from the Houston Archaeological and Historical Commission before modifying or developing their property. The City originally had a waiver provision, but it was removed in 2010 and instead adopted a procedure allowing a neighborhood to seek reconsideration of a designation. Several property owners brought this suit seeking a declaratory judgment that the Ordinance is void and unenforceable because it violated the City Charter's limits on zoning and it does not comply with certain provisions of Chapter 211 of the Local Government Code. The trial court ruled for the City after a bench trial. The owners appealed arguing the ordinance is a zoning regulation, but the court of appeals disagreed and affirmed the trial court's order.

The Houston City Charter does not prohibit the City from zoning altogether, but it limits the City's power to adopt a zoning ordinance by requiring six months' notice of any proposed ordinance and voter approval in a binding referendum. Zoning regulations have numerous characteristics, and given the prevalence of zoning ordinances, not all of these characteristics are always present. However, generally, a zoning ordinance is defined as a city ordinance that regulates the use to which land within various parts of the city may be put. It also allocates uses to the various districts of a municipality, as by allocating residences to certain parts and businesses to

other parts, but more on a comprehensive basis throughout the entire city. Conversely a "historic preservation" is the effort to conserve, preserve, and protect artifacts and developed places, including structures and landscapes, of historical significance, and does not fall under traditional zoning categories.

The Court analyzed various aspects of zoning and definitions, historically and determined the ordinance was not a zoning ordinance. For example, the ordinance impacts a site by requiring alterations and additions to a building to remain compatible with the building's own existing height, size, and location, and with that of the rest of the district. Because each building is regulated according to its own features or the features of nearby buildings, there is no uniform standardization of height, bulk, and placement across the district as in traditional zoning laws. In sum, the Ordinance does not regulate the purposes for which land can be used, lacks geographic comprehensiveness, impacts each site differently in order to preserve and ensure the historic character of building exteriors, and does not adopt the enforcement and penalty provisions characteristic of a zoning ordinance. Therefore, it is not zoning.

However, Chapter 211 of the Local Government Code subjects regulations that would not traditionally be considered zoning to certain procedural requirements, such as regulation of structures in historically significant areas and certain pumping and use of groundwater. The fact Chapter 211 applies to this type of regulation does not mean it qualifies as zoning. However, eventhough Chapter 211 applies, the owners failed to establish that the City did not comply with the requirements. For example, the ordinance actually qualifies, by itself, as a comprehensive plan for its intended purpose. As a result, the court of appeals order is affirmed.

If you would like to read this opinion, click **here**. JUSTICE BUSBY delivered the opinion of the Court.

Tyler Court of Appeals holds Tort Claims Act notice must list specific claimants in order to waive immunity

Posted on **June 14, 2021** by **Ryan Henry**

Leondra Leach v. The City Of Tyler, **12-21-00004-CV** (Tex. App. – Tyler June 9, 2021).

This is a Texas Tort Claims Act ("TTCA") premise defect case where the Tyler Court of Appeals affirmed the trial court's order dismissing the case for lack of proper notice.

Leach asserts he was injured when a piece of board flew from a City "roll-off" truck as it passed Leach on the roadway. The board struck the truck he was driving and entered the driver's side window, striking him in the head. Leach's employer submitted a notice of claim using a Claims Notice form provided by the City, but did not fill in certain fields as to Leach. Leach

did not fill out his own form. After Leach filed suit, the City filed a no-evidence motion for summary judgment as to proper notice under the City's charter and ordinance, which the trial court granted. Leach appealed.

Ameri-Tex (Leach's employer) listed itself alone as the "claimant" and omitted Leach's name from that field. Section 101.101(a) speaks to the governmental unit's entitlement to receive a notice of a *claim* along with the damage or injury *claimed*. Ameri-Tex listed only its property damages under the provision for the amount of claim. The court noted that had Ameri-Tex made some reference to Leach's damages in the "amount of claim" section, even if such damages were described as "unknown at this time," its earlier omission of Leach as a "claimant" would be less critical. However, part of the purpose behind the notice provision is that the entity has an awareness of its fault as ultimately alleged and an incentive to investigate the allegations to assess its exposure to liability because it no longer is protected by the shield of immunity.

Without knowledge of the identity of a potential claimant and the knowledge this additional claimant will make personal injury claims as opposed to merely property damage claims, the entity does not have the same incentive. Notice which does not convey the "perceived peril" that would serve the notice requirement's purpose is insufficient.

If you would like to read this opinion click **here**. Panel consists of Chief Justice Worthen, and Justices Hoyle and Neeley. Memorandum opinion by Justice Neeley.

Fort Worth Court of Appeals holds oral pronouncements from bench cannot be considered when appealing a written order granting Town's plea to the jurisdiction

Posted on **June 1, 2021** by **Ryan Henry**

John Artuso v. Town of Trophy Club, Texas, **02-20-00377-CV**, (Tex. App – Fort Worth, May 13, 2021) This is a negligence, taking, and declaratory judgment action where the Fort Worth Court of Appeals affirmed the granting of the Town's plea to the jurisdiction.

Plaintiff Artuso sued the Town of Trophy Club for negligence and gross negligence with regard to his home's placement in the Town's Public Improvement District No. 1 (PID) and the special assessments imposed in the district. Artuso asserted he timely paid all assessments and even overpaid. He requested the Town credit his account for previously over-assessed amounts, which he characterized as a taking. He claimed that the manner in which the Town apportioned the PID costs was arbitrary and capricious, amounting to a violation of his due process rights, and he complained that the Town had not responded to his assessment-reduction petition. The Town filed two pleas to the jurisdiction, which were granted. Artuso appealed.

Artuso's argument that the trial court's oral statements about the grounds for granting the plea were improper. The trial court's

signed order listed no grounds. The appellate court asserted it could not look to the oral statements in the record, only to the wording of the actual written order. By applying this policy, the courts and parties are relieved of the obligation to "parse statements made in letters to the parties, at hearings on motions for summary judgment, on docket notations, and/or in other places in the record." Because Artuso has failed to challenge all of the grounds upon which the Town's motion could have been granted, and failed to brief all grounds, the court of appeals affirmed the granting of the dispositive motions.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Sudderth, and Justices Kerr and Womack. Memorandum Opinion by Chief Justice Sudderth. Docket page with attorney information found **here.**

Termination of as needed contract did not result in any damages under chapter 271, so no waiver of immunity exists

Posted on **May 26, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

City of Heath v. Robert Williamson d/b/a PCNETSYS, No. 05-20-00685-CV (Tex. App.—Dallas, May3, 2021) (mem. op.).

In this interlocutory appeal from a trial court's holding denying a city's plea to the jurisdiction on a contract claim, the Fifth Court of Appeals vacated the trial court's judgment and dismissed the case because damages falling under Chapter 271 of the Local Government Code were not part of the claim as an as-needed services contract.

The plaintiff sued the city after his contract with the city for IT services was terminated early. The agreement provided that the plaintiff would be paid a monthly retainer for IT services "as may be required by the City." The agreement was set to terminate in October 2021, but the city terminated the agreement effective April 30, 2019. Both parties agreed that the plaintiff had been paid for all services already provided. The plaintiff sued the city for breach of contract arguing that he was owed lost profits and "loss of the benefit/expectation of the contract." The city argued that the contract was not properly executed and created an unconstitutional debt. The trial court denied the city's plea to the jurisdiction related to the claim and the city appealed.

Chapter 271 of the Texas Local Government Code waives a city's immunity when there is a claim for certain types of damages related to a written contract including the "balance due and owed". Tex. Loc. Gov't Code §271.153. Immunity is not waived for consequential damages. The court of appeals held that there was no claim for recoverable damages because there was no balance due and owing as the plaintiff had already been paid for all services rendered. Thus, immunity had not been waived. The court also held there was no reason to allow further discovery or allow repleading because the parties were in agreement that all services

had been paid for and it was only future payments that the plaintiff was seeking.

The court of appeals vacated the trial court's denial of the city's plea to the jurisdiction because no damages that waive contractual immunity had been pled or existed.
If you would like to read this opinion click **here.** Panel consists of Justices Reichek, Schenck, and Carlyle. Opinion by Justice Amanda L. Reichek.

Eastland Court of Appeals holds City failed to obtain ruling on special exceptions, therefore it could not complain about a lack of factual specificity in the pleadings within its plea to thejurisdiction

Posted on **May 14, 2021** by **Ryan Henry**

City of Odessa, Texas v. AIM Media Texas, LLC d/b/a The Odessa American, **11-20-00229-CV** (Tex. App. – Eastland, May 13, 2021).

This is a Public Information Act ("PIA") case where the Eastland Court of Appeals held the Plaintiff had properly fallen under the jurisdiction of the PIA.

AIM Media, a newspaper company, sued the City for mandamus under the PIA asserting the City failed to timely provide the information requested and improperly redacted information. The City asserted it provided all information and that AIM Media plead conclusory allegations only, with no facts. The City asserts it filed special exceptions to the bare pleadings then filed a plea to the jurisdiction, which was denied. The City appealed.

The court noted the City challenged the pleadings only, so the pleadings were taken as true for purposes of the plea. The PIA allows a requestor to sue for mandamus. While the court appeared to acknowledge that a lack of factual allegations can be grounds for a plea, the court held the City failed to obtain a ruling on their special exceptions. As a result, whether the special exceptions properly put AIM Media on notice of any jurisdictional defects was not before the court. Taking the pleadings as true, the court held AIM Media pled the minimum jurisdictional requirements.
The plea was therefore properly denied.

If you would like to read this opinion click **here**. Panel consists of Chief Justice Bailey, Justice Trotter and Justice Williams. Opinion by Chief Justice Bailey.

Dallas Court of Appeals holds malfunctioning 911 system did not proximately cause plaintiff'sdeath

Posted on **April 27, 2021** by **Ryan Henry**

The City of Dallas v. Estate of Yolanda Jeanne Webber, et al., **05-20-00669-CV** (Tex. App. – Dallas,April 22, 2021).

This is a Texas Tort Claims Act ("TTCA") case where the Dallas Court of Appeals

held the City wasimmune from suit.

Yolanda Webber began experiencing shortness of breath while riding in a car with her family. Despite constant attempts by family and later bystanders to reach the 9-1-1 operator, none were able to get through. While paramedics from a nearby fire station were able to eventually arrive, Webber passed away shortly afterward. The family brought suit against the City asserting the negligent use of tangible personal property was the proximate cause of her death. The City filed a plea to the jurisdiction, which was denied. The City appealed.

Under the TTCA, immunity is not waived if the property's condition or use does not proximately cause the injury or death. The Webbers allege the various components of the City's 9-1-1 system caused Yolanda's death by preventing her from receiving timely medical attention. However, a mere delay in treatment resulting from a malfunctioning 9-1-1 system is not a proximate cause of a claimant's injuries for purposes of immunity waiver. Proximate causation requires that the condition or use of the property must *actually have caused* the injury. Property that simply hinders or delays treatment falls short. The plea should have been granted.

If you would like to read this opinion click **here**. Panel consists of Chief Justice Burns, Justice Myers and Justice Carlyle. Memorandum Opinion by Justice Carlyle

Texas Supreme Court holds ratepayer has standing to sue to challenge electric rate increase

Posted on **April 23, 2021** by **Ryan Henry**

Data Foundry, Inc. v City of Austin, 19-0475 (Tex. April 9, 2021)

This is a utility rate challenge case. However, the issue considered by the Texas Supreme Court is whether the company purchasing electricity has standing to sue. The Court held it does have standing.

Data Foundry is an internet service provider that operates data centers in Austin. The City owns and operates Austin Energy, an electric utility system. In 2016, Austin Energy proposed to change the retail rates it was charging for electric services. The City hired a hearing examiner to conduct areview of the proposed new rates. Several ratepayers, including Data Foundry, intervened and participated in the hearing process. Ratepayers were permitted to conduct discovery, provide testimony, and cross-examine witnesses at a public hearing. Data Foundry submitted briefs in which it argued, as it does in this case, that Austin Energy's proposed rate structure would result in rates that were unreasonable, unlawful, and confiscatory. The Austin City Council passed an ordinance establishing new base rates and pass-through rates. Data Foundry sued in district court to hold the ordinance invalid. The City filed a motion to dismiss all of Data Foundry's claims underRule 91a. The trial court granted the motion, but the Court of Appeals reversed in part and affirmed in

part.

The threshold inquiry into standing "in no way depends on the merits of the [plaintiff's] contention that particular conduct is illegal." To maintain standing, a plaintiff must show: (1) an injury in fact that is both concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) that the injury is fairly traceable to the defendant's challenged action; and (3) thatit is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. In the context of lawsuits filed by ratepayers to challenge utility rates charged by a municipality, the Court has not required an individual plaintiff to allege its injury is distinct from injuries other ratepayers may suffer. An injury is "particularized" for standing purposes if it "affect[s] the plaintiff in a personal and individual way." Data Foundry thus alleges an injury that is particularized to it—Data Foundry suffers financial harm because it must pay Austin Energy a particular sum of money that exceeds what Data Foundry contends it should have to pay and that the rate is discriminatory. The fact that the City's actions may also injure other residents does not preclude a finding that Data Foundry has alleged a sufficiently particularized injury. Being forced to part with one's money to pay an excessive electric rate is an injury that is personal and individual, even though others may suffer the same injury. The Court held several cases holding that a utility ratepayer cannot establish standing to sue unless it alleges an injury different from that of other ratepayers, beyond its personal obligation to pay a rate that it claims is improper, are disapproved of as inconsistent with Texas standing jurisprudence. The Court remanded to determine the remaining issues under PURA as such determinations are not based on standing, which was the only ground upon which the trial court ruled.

If you would like to read this opinion click **here**. JUSTICE HUDDLE delivered the opinion of theCourt.

San Antonio Court of Appeals holds city ethics commission properly ruled complainant's filing was frivolous and could award sanctions

Posted on **April 14, 2021** by **Ryan Henry**

Lakshmana Viswanath v. The City of Laredo, 04-20-00152-CV (Tex. App. – San Antonio, April 14,2021)

This is an appeal from a city ethics commission determination where the San Antonio Court of Appeals affirmed the commission's finding but reversed the award of attorney's fees.

Viswanath is the founder of a government watchdog group known as Our Laredo, who ran for city council and was defeated by Councilman Martinez in 2018. In 2019, a member of Our Laredo, Victor Gomez, filed an ethics complaint with the City's Ethics Commission against the Co-City

Managers arguing they were required to "ensure" that Councilman Martinez forfeit his seat due toan alleged conflict of interest. They did not file a complaint against Martinez, but against the Co- Managers. Viswanath filed an additional ethics complaint against the Co-City Managers arguing they unfairly advanced the private interest of certain developers at the expense of the general population by recommending that City Council pass two ordinances. The Commission dismissed both complaints, concluding they did not allege violations of the Laredo Ethics Code and therefore did not invoke the Commission's jurisdiction. After finding both complaints frivolous, the Commission publicly admonished Gomez and ordered Viswanath to pay the maximum civil fine—$500.00—plus $7,900.68 in attorney's fees to the Commission's conflicts counsel. Viswanath filed a verified petition in district court appealing the Commission's decision and seeking a declaratory judgment. The City filed a motion for summary judgment, which the trial court granted. Viswanath appealed.

The court of appeals first held that the City's ethics code allows an appeal to district court and requires a suit against the City. It, therefore, waived the City's immunity from suit, but only for thelimited purposes spelled out in the Ethics Code and that the proper mechanism for that is the UDJA. Under this mechanism, the trial court must review the Commission's decision under the substantial evidence rule. At the initial hearing, Viswanath testified he was involved in filing both the complaint about Councilman Martinez and the complaint about the ordinances. Viswanath testified that the objection he raised was that the Co-City Managers "made the wrong recommendation"—a recommendation which was ultimately accepted by City Council. He was informed by several city officials that city management could not conduct the investigation he requested or provided the remedy he sought. Based on this evidence, the Commission could have reasonably determined that Viswanath was aware the Co-City Managers lacked authority to perform the investigation or grant the relief he requested, yet still filed his complaint in a groundless and harassing action. Substantial evidence supported the Commission's decision, so the trial court was required to affirm it as a matter of law. The court also determined that the Commission was authorized to require a complainant who files a frivolous complaint to pay a civil penalty, the respondent's fees, and any other sanction authorized by law. As a result, the Commission has the authority to aware the Commission's attorney's fees be paid as an "other sanction" allowed by law. However, the record does not show what evidence was presented to substantiate the fee amount. As a result, that portion is reversed and remanded for the trial court to determine a proper award amount.

If you would like to read this opinion click **here**. The panel consists of Chief Justice Martinez, Justice Chapa and Justice Watkins. Memorandum Opinion by Justice Watkins.

U.S. Fifth Circuit holds court can dismiss claims *sua sponte* when party has had ample opportunity to amend deficient pleadings

Posted on **April 2, 2021** by **Ryan Henry**

Anokwuru v. City of Houston, et al., No. 20-20295 (5th Cir. March 16, 2021)

This is a racial discrimination/§1983 case where the U.S. Fifth Circuit Court of Appeals affirmed the district court's Rule 12(b)(6) dismissal.

The Houston Police Department was investigating an alleged "gang rape." The victim identified three suspects, one named "Idris" and the other two with nicknames "Jay" and "CheChe." The suspect "Jay" provided a statement, naming Anokwuru by his first name of "Chidera" as being involved in the incident. Based on the statements of the victim and "Jay," the Houston Police Officer M. Francis decided to proceed with charging Anokwuru with the incident. Following indictment, the victim definitively responded that Anokwuru was not one of the three assailants and the case was dismissed by the Harris County District Attorney's Office. Via an original complaint, a series of amended complaints, and multiple motions for leave to amend, Anokwuru filed a §1983 claim against the City of Houston and Officer Francis, claiming false/wrongful arrest,malicious prosecution, racial discrimination, and that the City had a policy of "failing to train, supervise, and discipline its employees." The City filed an original (and amended) Rule 12(b)(6) motion to dismiss. The trial court dismissed Anokwuru's claim but did so without granting the City's motion. Anokwuru appealed.

The Fifth Circuit first addressed Anokwuru's substantive claims. The false arrest, equal protection, malicious prosecution, and "failure to train" claims were all dismissed due to Anokwuru's failure to properly allege the required elements for each respective alleged violation. Addressing the procedural arguments, the Fifth Circuit's decision to deny Anokwuru's fourth request to amend hiscomplaint was not an abuse of discretion when his proposed amendment presented no new allegations or claims. Finally, the Fifth Circuit affirmed the district court's *sua sponte* decision to dismiss Anokwuru's claims because Anokwuru had multiple opportunities to put forth his best case, he filed multiple responses to the City's arguments, and was even given notice of the magistrate judge's recommendation to dismiss his claims – to which Anokwuru responded – before the district court dismissed his claims. Such is within the trial court's discretion.

If you would like to read this opinion, click **here**. Panel consists of Circuit Judges Stewart,Higginson, and Wilson. Opinion by Circuit Judge Wilson.

The emergency exception to the Tort Claims Act preserves immunity from car accident damages and injuries caused by a fire hose falling from a fire truck en route to a fire.

Posted on **April 2, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

Nathan White v. City of Houston, No. 01-20-00415-CV (Tex. App.—Houston March 25, 2021).

In this appeal from a trial court's holding that the city retained immunity under the emergency exception to the Texas Tort Claims Act, the First Court of Appeals affirmed the trial court's judgment because the use of a fire hose on a fire truck headed to an emergency began when the truck left for the emergency invoking both the Texas Tort Claims Act and its emergency exception. The plaintiff sued the city after his car was damaged and he was injured by a fire hose dragging behind a fire truck *en route* to an emergency. The plaintiff sued the city arguing that the dragging hose was missing an integral safety component because there is equipment available that could have ensured that the hose did not fall off the truck while it was in motion. The plaintiff also argued that because the hose was *en route* it was in use at the time of the dragging, but was not actually being used in the emergency, so the emergency exception did not apply. The city argued that because the fire truck was *en route* that the emergency exception to the Tort Claims Act applied and preserved immunity. The trial court granted the city's plea to the jurisdiction m and the plaintiff appealed.

The Texas Tort Claims Act waives a city's immunity when there are injuries or damages caused bythe operation or use of a motor-driven vehicle and motor-driven equipment. Tex. Civ. Prac. & Rem. Code § 101.021. Immunity is not waived for non-use of property. Once a waiver is established due to use of property, the governmental entity can retain its immunity if the use wasduring an emergency and the action was "not taken with conscious indifference or reckless disregard for the safety of others." *Id.* § 101.055(2). The court of appeals held that if the hose being on the truck was sufficient to invoke use under the Tort Claims Act, that use was related to the emergency where the truck carrying the hose was headed. The court also held there was no evidence of conscious indifference or reckless disregard. The court of appeals upheld the trial court's grant of the city's plea to the jurisdiction.

If you would like to read this opinion click **here.** Panel consists of Justices Goodman, Landau, and Guerra. Opinion by Justice Gordon Goodman.

U.S. Supreme Court holds officers "seized" suspect by shooting her even if the suspect was still able to flee and escape.

Posted on **March 25, 2021** by **Ryan Henry**

Torres v Madrid, et al., No. 19–292. (U.S. March 25, 2021)

This is an excessive force/§1983 case where the U.S. Supreme Court held the proper inquiry into a"seizure" by excessive force (i.e. gunshots) is whether the challenged conduct objectively manifests an intent to restrain as opposed to force applied by accident or for some other purpose.

Four New Mexico State Police officers arrived at an apartment complex in Albuquerque to execute an arrest warrant for a woman accused of white-collar crimes. They approached Torres in her vehicle, but she did not notice them until one attempted to open the door. Torres testified she only saw individuals had guns and believed they were carjackers. She drove off at an accelerated rate, but the officers shot at her thirteen times. She was temporarily paralyzed. She plead no contest to aggravated fleeing and other related charges. She later sued two of the officers for excessive force under §1983. The District Court granted summary judgment to the officers, and the Court of Appeals for the Tenth Circuit affirmed. They relied on Circuit precedent providing that "no seizure can occur unless there is physical touch or a show of authority," and that "such physical touch (or force) must terminate the suspect's movement" or otherwise give rise to physical control over the suspect. Torres appealed.

The Court performed a detailed analysis of the term "seizure." The Court held a seizure requires the use of force with intent to restrain. Accidental force will not qualify. It stated "… the appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context." The seizure does not depend on the subjective perceptions of the seized person. The Court held the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued. The Court emphasized this rule is narrow. There is a distinction between seizures by control and seizures by force. A seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement. Seizure by force is the application of force with intent to restrain (viewed from an objective standard). However, not all seizures are unreasonable, so the Court remanded the case back for a reasonableness determination.

If you would like to read this opinion click **here**. Chief Justice ROBERTS delivered the opinion of the Court, in which BREYER, SOTOMAYOR, KAGAN, and KAVANAUGH, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. BARRETT, J., took no part in the consideration or decision of the case.

Dallas Court of Appeals holds grading of landfor sports facility is proprietary in specific situation with land lease

Posted on **March 23, 2021** by **Ryan Henry**

The City Carrollton, Texas v. Weir Brothers Contracting, LLC, **05-20-00714-CV** (Tex App. – Dallas,March 22, 2021)

This is a contractual immunity case where the Dallas Court of Appeals held the City's lease of certain land was a proprietary function, therefore immunity did not apply.

The City advertised for proposals to bid on purchasing or leasing several acres of City owned land. The City then executed a land lease with Blue Sky Sports Center of Carrollton, LP ("Blue Sky") for 30 acres to "operate a multi-use sports, recreational, entertainment, and related service facility." Blue Sky was required to use the leased premises "solely for the purpose of constructing,maintaining, and operating the Facilities." Blue Sky was allowed to enter into sublease agreements for the provision of food and refreshments, a pro shop, an arcade, and several other services. The Lease required the facilities to be open to the public "during reasonable times as is customary for [Blue Sky's] type of business." Blue Sky was further permitted to charge fees for use of the facilities. Shortly less than a year later the City and Arthur James, Inc. ("AJI") entered into a contract for the grading of several acres which included the 30 acres that had been leased to Blue Sky. As compensation, AJI would receive 6.27 acres of the tract. However, during the grading, AJI's contractor dug into a capped landfill. All work stopped until the City could develop a solution. The City terminated its agreement with AJI due to work not being completed within the specified time period. The City refused to pay the contractor, Weir. Weir obtained an assignment from AJI and sued the City for breach of contract, quantum meruit, promissory estoppel, and tortious interference with contract. The City filed a plea to the jurisdiction which was denied. The City appealed.

The court held the true nature of the dispute revolves around the City's lease of property for the recreation facility and not the mere grading of a road. Recreational facilities are listed as governmental functions, but Blue Sky's construction and operation of the facility is not a function of the City or on the City's behalf. Although the extent to which the bidder's use of the property would "complement" a nearby public recreational facility owned and managed by the City, nothing in the record suggests the lease with Blue Sky was essential to the City's operation of thatpublic facility so as to render the act governmental. As a result, the court held the actions were proprietary. The City does not enjoy immunity from suit and the plea was properly denied.

If you would like to read this opinion click **here**. Panel consists of e Justices Molberg, Reichek, and Nowell. Opinion by Justice Reichek.

U.S. Fifth Circuit holds former police officer failed to establish same-sex sexual harassment by supervisor even under recent Bostock decision

Posted on **March 23, 2021** by **Ryan Henry**

Brandy Newbury v City of Windcrest, Texas, 20-50067 (5th Cir. March 22, 2021)

This is an employment discrimination case where the U.S. Fifth Circuit Court of Appeals affirmed the granting of the City's motion for summary judgment.

Brandy Newbury was a police officer within her first year of employment with the City. Newbury asserted during the first year she was sexually harassed by a female supervisor, Officer Jaime because Jaime was rude to her and confrontational. The City hired an outside investigator who determined Jaime was rude, but the actions did not constitute sexual harassment. Later on, during the first year, Newbury asserted she heard a rumor another officer was following her trying to catch her violating City policy. She reported her belief that was occurring, but nothing was done. Finally, Newbury asserts the City was secretly recording her in her home by remotely activating her body-worn camera. While the manufacturer testified the cameras could not be remotely activated that way, Newbury continued to assert a §1983 claim for invasion of privacy. However, Newbury admitted she never saw a recording of herself taken and based her belief on the fact a red light on her camera would come on by itself. Newbury asserted the treatment was so bad she felt forced to resign, but then later asserted she was terminated. The City filed a motion for summary judgment, which was granted. Newbury appealed.

The Fifth Circuit started by noting Title VII is not a general civility code for the American workplace. Contrary to Newbury's assertions, the panel distinguished this case from the recent U.S. Supreme Court opinion of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) holding that while the *Bostock* decision "expanded the groups of individuals protected by Title VII, it in no way altered the preexisting legal standard for sexual harassment." The panel held Newbury did not receive an adverse personnel action as a supervisor's "rudeness" was insufficient to constitute an adverse action. Additionally, the rude actions complained of did not rise to that "greater degree of harassment" that would cause a reasonable person to resign. Additionally, a shift-change, even one which has an officer on it the plaintiff does not like, is not an actionable claim. Newbury failed to provide sufficient evidence that comparable men and women were treated differently. Newbury failed to establish a *prima facie* case of retaliation since no adverse employment action occurred. Further, the evidence demonstrated she resigned and was not terminated. Therefore, all of her Title VII claims failed. Finally, Newbury failed to establish the body-worn cameras actually recorded her or that, even if she had produced recordings, there was a policy, custom, or practice which would have

caused the recordings. As a result, the trial court properly granted the City's summary judgment motion.

If you would like to read this opinion click **here**. Panel consists of Justices Jones, Smith and Elrod.Opinion by Justice Smith.

San Antonio Court of Appeals holds receipt of payment or exclusive use of premises are not substantial factors to determine invitee status under TTCA for premise defect case

Posted on **March 17, 2021** by **Ryan Henry**

City of San Antonio v. Nadine Realme, 04-20-00119-CV (Tex.App.—San Antonio, March 17, 2021) This is a Texas Tort Claims Act ("TTCA") case where the Plaintiff alleges a premises defect claim against the City. The Court of Appeals reviewed the denial of the City's plea to the jurisdiction, ultimately affirming the denial.

Plaintiff Realme paid to participate in a 5K run/walk that took place on the City's streets and sidewalks. The event itself was sponsored by private entities and Realme's participation fee was directed to the private entities. She followed the pre-designated route and, along that route, between the sidewalk and the street, she tripped on a metal object protruding from the ground, causing bodily injury. She sued the City. The City filed a plea to the jurisdiction and argued that Realme was not an invitee, but rather a licensee under premise defect standards. As a result, the City had to have actual knowledge of the dangerous defect. The crux of the City's argument was two-fold: that the City did not receive payment for Realme's use of the premises, that other – nonpaying – members of the public also had access to the area and, therefore, Realme was not aninvitee under the TTCA. The trial court denied the City's plea to the jurisdiction, which the City then appealed to the Court of Appeals.

The specific TTCA provision that the Court of Appeals focused upon states that the City owes to Realme "only the duty that a private person owes to a licensee on private property **unless the claimant pays for the use of the premises**." The Court of Appeals overruled the City's argumentafter analyzing the plain language of that provision to come to the conclusion that the language makes no distinction between who received payment for use of the premises or even whether the payment was for the exclusive use of the premises. The fact that the City did not receive payment is immaterial. On appeal, the City also raised a new issue that Realme's claim is barred by immunity under the Recreational Use Statute. However, the Court of Appeals found that the City did not provide Realme the opportunity to develop the record or conduct discovery on the Recreational Use argument at the trial level, nor show how Realme would be unable to demonstrate jurisdiction through that avenue even if given the opportunity. The Court of Appealsrefused to address for the first time on appeal. In construing Realme's pleadings in her favor and considering the

evidence admitted, the Court of Appeals found there was a material fact issue on the question of immunity, affirmed the denial, and remanded the case to the trial court for furtherproceedings.

If you would like to read this Memorandum Opinion, click **here**. Panel consists of Chief Justice Martinez and Justices Alvarez and Rios. Memorandum Opinion by Justice Rios.

San Antonio Court of Appeals holds City's "Paid Sick Leave" ordinance was preempted by state law

Posted on **March 11, 2021** by **Ryan Henry**

Washington et al. v. Associated Builders & Contractors of South Texas, Inc., et al., 04-20-00004-CV (Tex. App.—San Antonio, March 10, 2021).

In this case, the Fourth Court of Appeals considered the legality of San Antonio's paid sick leave (PSL) ordinance. The Court held the PSL ordinance was unconstitutional because it established a minimum wage and is inconsistent with Texas Minimum Wage Act (TMWA).

In 2018, various advocacy groups and non-profits initiated a petition to adopt what was labeled the "Paid Sick Leave Ordinance." One of the most critical components of the PSL ordinance was that it would require many San Antonio employers to provide paid leave to their employees for sick days, doctor appointments, and for other specifically enumerated reasons. Under the ordinance, a business's failure to comply with the provision of paid time off could result in fines. Instead of sending the ordinance to the electorate under the city charter, the City Council decided to adopt the PSL ordinance verbatim as submitted in the petition. In response, multiple businesses and business associations sought and obtained temporary and permanent injunctions to prevent its enforcement. The City appealed.

While there were numerous claims asserted the court's primary focus was to analyze whether the PSL ordinance established a minimum wage, thereby causing the ordinance to be preempted by the TMWA and/or unconstitutional. The court's decision turned on whether paid sick leave constitutes a "wage" under the TMWA. The court relied on dictionary definitions and the common meaning of words within the ordinance. Ultimately, the court held the PSL ordinance was in fact a"wage" and wage regulations are governed by the TMWA. The ordinance was therefore preempted.

If you would like to read this opinion, click **here**. Opinion by Justice Alvarez. Panel consists of Justices Alvarez, Rios, and Watkins. For more information on San Antonio's Sick & Safe Leaveordinance and other related items, click **here**.

Fourth Court holds plaintiff's premise defect claims cannot be brought as tangible personal property claims

Posted on **March 11, 2021** by **Ryan Henry**

City of San Antonio v. Nolan Anderson, 04-20-00320-CV (Tex.App.—San Antonio, March 10, 2021) This is a Texas Tort Claims Act ("TTCA") case where the Court of Appeals reversed the denial of the City's plea to the jurisdiction and dismissed the claims with prejudice.

Plaintiff Anderson was on crutches and exiting a terminal at the San Antonio International Airport. There was deposition testimony that it was raining that day. He stated that he noticed a rubber mat outside the terminal door, that the ground was wet when he moved his crutches forward and fell, injuring himself. Anderson alleged both a condition/use of tangible personal property (by failing to use a slip-preventing mat) and, alternatively, a defective condition of the premises (because the City should have known it was raining and needed to have made safe an area whereone would not expect to find water). During Anderson's deposition, when asked if he had any reason to believe anyone from the City knew about the water before he fell, replied: "Not that I know of, no, sir." The City filed a plea to the jurisdiction and a no-evidence motion for partial summary judgment. The trial court granted the summary judgment but denied the plea to the jurisdiction. The City then appealed the denial.

The Court of Appeals focused on Anderson's apparent attempt to couch a premises defect claim as a tangible personal property claim. The TTCA clearly delineates between the two claims such that one claim cannot be both a condition/use of personal property and a premises defect. The former claim was succinctly dismissed because Anderson expressly alleges it is attributed to a failure to use a certain type of mat, which is not a valid claim under the TTCA. As to the latter, none of Anderson's testimony created a fact issue as to whether City had any knowledge or notice of the water on the ground or mat, which is one required element for bringing forth a premises defect claim. As a result, the denial of the plea to the jurisdiction was reversed and Anderson's claims were dismissed with prejudice.

If you would like to read this memorandum opinion, click **here**. Panel consists of Justices Chapa, Rodriguez, and Valenzuela. Memorandum Opinion by Justice Valenzuela.

Dallas Court of Appeals holds Parkland Hospital did not have actual knowledge of glass pane defect prior to it falling and injuring Plaintiff

Posted on **March 5, 2021** by **Ryan Henry**

Dallas County Hospital District d/b/a Parkland Health & Hospital System v. Lidia Bravo and Jefrey Bravo, **05-20-00640-CV**, (Tex. App – Dallas, March 4, 2021)

This is a Texas Tort Claims Act ("TTCA") case where the Dallas Court of Appeals reversed the denialof Parkland's plea to the jurisdiction and dismissed the claims.

Plaintiff Bravo visited a sick family member at a Parkland hospital when as he sat in the main lobby, a large glass pane from a second-story walkway suddenly fell on him from overhead, causing him injuries. Bravo sued Parkland for a premises defect. Parkland filed a plea to the jurisdiction, which was denied. Parkland appealed.

Under a premise defect theory, a limited duty requires the owner of the premises to avoid injuring the plaintiff through willful, wanton, or grossly negligent conduct and to use ordinary care either to warn the plaintiff of, or make reasonably safe, a dangerous condition of which the owner is aware and the plaintiff is not. Parkland submitted evidence the glass pane was installed prior to October of 2015 and Parkland received no notice of any potential problems with the pane prior to Bravo's injury. None of Plaintiff's evidence showed Parkland had any prior actual notice of a dangerous condition or provided a basis from which such notice could reasonably be inferred. As a result, no actual knowledge is evidenced. The plea should have been granted.

If you would like to read this opinion click **here.** Panel consists of Justices Molberg, Reichek, and Nowell. Reversed and rendered. Memorandum Opinion by Justice Molberg. Docket page with attorney information found **here.**

Amarillo Court of Appeals holds Texas Attorney General immune from County's claims regarding conceal handgun signs

Posted on **March 5, 2021** by **Ryan Henry**

Ken Paxton, Texas Attorney General v. Waller County Texas; et al, **07-20-00297-CV**, (Tex. App –Amarillo, March 4, 2021)

This is a conceal/carry notice case where the Amarillo Court of Appeals reversed the denial of theTexas Attorney General's plea to the jurisdiction and dismissed the case.

The Waller County Courthouse has a sign noting a person cannot carry any weapons, including knives and guns, in the courthouse. Section 411.209 of the Government Code prohibits a political subdivision from posting notices barring entry to armed concealed-handgun license holders unless entry is barred by statute.

Terry Holcomb filed a complaint with the County regarding the sign. The County did not remove the sign and instead sued the Texas Attorney General seeking a declaration the signs do not violate §411.209, which was resolved in a prior case. Separate from the declaratory judgment action, the Texas Attorney General brought a mandamus action against Willer County and various county officials. Waller County filed counterclaims seeking declarations. The AG filed a plea to the jurisdiction as to the counterclaims which was denied. The AG appealed.The Uniform Declaratory Judgments Act ("UDJA") is not a grant of jurisdiction, but rather is a procedural device for deciding cases already within a court's jurisdiction. The UDJA does not allow "interpretation" claims against a governmental entity or official. The County's counterclaims seek interpretation of §411.209, not its invalidation. The UDJA does not waive sovereign immunity for "bare statutory construction" claims. To sue the AG for ultra vires claims, the AG must not be exercising his discretion. Because the AG has discretion to bring or not bring an enforcement claim, no *ultra vires* action is possible. Section 411.209 of the Government Code authorizes the Attorney General to investigate alleged violations of the statute and decide whether further legal action is warranted. When an official is granted discretion to interpret the law, an act is not ultra vires merely because it is erroneous; "[o]nly when these improvident actions are unauthorized does an official shed the cloak of the sovereign and act ultra vires." As a result, the counterclaims should be dismissed.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Quinn, and Justice
Pirtle and Parker. Reversed and Remanded to Trial Court. Opinion by Justice Parker. Docket page with attorney information found **here.**

Texas Supreme Court holds ordinance initiative ballot language is misleading because it did not account for exceptions

Posted on **March 3, 2021** by **Ryan Henry**

In Re: Linda Durnin, et. al, 21-0170 (Tex. March 2, 2021)

This is an original proceeding mandamus action where the Texas Supreme Court held petitioners were entitled to mandamus to make sure the City Council's ballot language properly complied with the intent of the citizen-initiated petition to adopt an ordinance.

Petitioners brought an initiative petition requiring the City Council place on the ballot for the May 2021 election an ordinance regarding camping in public places (including sidewalks) and aggressive solicitation for money. The City Council called the election for the initiative. When the Council approved the ballot language, it stated the ordinance creates a criminal offense and penalty for anyone sitting or lying down on a public sidewalk or sleeping outdoors. Petitioners sued for

mandamus asserting, among other things, that the ballot language inaccurately reflects the ordinance to be voted upon.

The Texas Supreme Court held the wording of the proposed ordinance does not apply to just *anyone*. The ordinance contains certain exceptions for common uses of the sidewalk. Thus, only a subset of those who engage in the covered behavior—not just anyone—can be penalized under the ordinance. In this regard, the word "anyone" in the Council's ballot language threatens to "mislead the voters" by misrepresenting the measure's character and purpose or its chief features. The court issued mandamus to strike the word "anyone" for two locations in the ballot. However, the Court disagreed with the Petitioners noting that they did not meet the burden necessary for an emergency mandamus action to hold the City Council lacked the ability to select the language. The proposition correctly states that the ordinance creates criminal offenses and penalties. The Court held "Relators would prefer that this aspect of the ordinance appear less prominently in the proposition, but it is not [the court's] job to micromanage the sentence structure of ballot propositions. [It's] job is to ensure voters are not misled…" The only defect the Court believed needed adjusting was the word "anyone" as it does not account for exceptions.

The dissent agreed the language was misleading, but would not have reached that issue. It believed the Petitioners clearly established the charter prevents the City Council from deciding the ballot language. Instead, the City should be required to cite the caption language contained in the proposed ordinance.

If you would like to read this opinion click **here**. Justice Blacklock delivered the opinion of the court. Justice Boyd dissented (found **here**) and was joined by Justice Devine and

Dallas Court of Appeals holds Plaintiffs failed to challenge all grounds on which dismissal could have been granted; therefore dismissal is affirmed

Posted on **March 3, 2021** by **Ryan Henry**

Chris Carter and Karen Pieroni v. Dallas City Plan Commission and City of Dallas, **05-20-00190-CV**, (Tex. App – Dallas, March 1, 2021)

This is a Confederate monument case where the Dallas Court of Appeals affirmed the granting of the City's plea to the jurisdiction.

After a Confederate monument was originally scheduled for removal from a City cemetery, Plaintiffs brought suit to prevent its destruction. Through asserted the City violated its own codes, violated the Texas Open Meetings Act, the Texas Monument Protection Act and a few others. The City filed a plea to the jurisdiction, which was granted, except to claims under the Texas Antiquities Act. Plaintiffs appealed after non-suiting the remaining

claim.

No judgment may be reversed on appeal unless the error complained of probably caused rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1). To appeal, an appellant must challenge each independent ground asserted in the plea. The City asserted three grounds in its plea to the jurisdiction: standing, governmental immunity, and the political question doctrine. The political question doctrine is not necessarily a component of or necessarily entwined with either ofthe other two grounds. Plaintiffs challenged standing and immunity, but not the political question doctrine. Because the Plaintiffs did not challenge each independent, standalone ground on which the dismissal of their claims could properly have been based, the court affirmed the granting of the plea.

If you would like to read this opinion click **here.** Panel consists of Justices Myers, Osborne, and Carlyle. Memorandum Opinion by Justice Carlyle. Docket page with attorney information found**here.**

13th Court of Appeals holds remainder of employment contract was consequential damages, not amounts due and owed, therefore no waiver of immunity exists for breach

Posted on **February 25, 2021** by **Ryan Henry**

Edinburg Housing Authority, Dr. Martin Castillo, Gabriel Salinas, Simon Garza, Marissa Chavana, and Juan Guzman v. Rodolfo Ramirez, **13-19-00269-CV**, (Tex. App – Corpus Christi Feb. 25, 2021)This is an interlocutory appeal from the denial of a housing authority's motion to dismiss on jurisdictional grounds in an employment dispute. The Corpus Christi Court of Appeals reversed the denial and dismissed the case.

Ramirez signed a three-year employment contract with the Housing Authority to be its Executive Director and was extended for another three years, to end in 2021. However, in 2018 the board ofthe housing authority terminated Ramirez. Ramirez sued the Authority as well as individual commissioners (hereinafter "Authority Defendants") for breach of contract, as well as constitutional due course of law, equal protection, and declaratory judgment relief. The Authority Defendants filed a motion to dismiss under Rule 91a citing a lack of jurisdiction. The trial court denied the motion and the Authority Defendants appealed.

The court first decided that, contrary to the individual commissioner's assertion, the court did have interlocutory jurisdiction to hear the appeal involving them individually as well as in their official capacities. Section 51.014(a)(5) of the Texas Civil Practice & Remedies Code allows interlocutory appeal for the denial of a motion for summary judgment based on an individual's immunity. While the underlying motion was a motion to dismiss as opposed to an MSJ, the courtdetermined they are treated the same for purposes of

§51.014(a)(5). Next, suits brought pursuant to a Texas constitutional provision are limited to equitable relief and do not allow a claim for monetary damage. This applies to the entity as well as individual employees and officials. Ramirez's constitutional claims should have been dismissed because they sought only the recovery of monetary damages. Next, to trigger the waiver of immunity for contract claims under Tex. Loc. Gov't Code § 271.152, a plaintiff must claim damages within the limitations of the chapter, i.e. balances due and owed, but not paid. Consequential damages are specifically excluded. Ramirez does not claim that the Housing Authority and its Commissioners failed to pay him for work he completed as the Housing Authority's Executive Director. Rather, Ramirez seeks recovery of the wages he would have earned had his employment contract continued through the end of its extended term. These future wages would be considered "lost profits," which are "consequential damages excluded from recovery." As a result, no jurisdiction exists as to the contract claim. The court then determined Ramirez's constitutional claims against the commissioners, individually, cannot be brought against them as private actors. Because the individual commissioners are not the State or an entity thereof, these claims cannot stand.

Further, Ramirez signed a contract with the Authority, not the individual commissioners. As a result, the commissioners cannot be individually sued for breach of contract. Finally, Ramirez had the opportunity to amend and failed to correct any defects. As a result, he is not entitled to amend. Finally, the court determined the Authority Defendants were entitled to attorney's fees and remanded to the trial court for such a determination.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Contreras, and Justices Hinojosa and Silva. Reversed and remanded. Opinion by Justice Hinojosa. Docket page with attorney information found **here.**

An employer cannot discriminate against anindividual based on their intent to become pregnant

Posted on **February 19, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

South Texas College v. Arriola, No. 12-19-00222-CV (Tex. App.—Corpus Christi Feb, 2021).

In this appeal from a trial court's holding that being able to become pregnant is a protected classunder the Texas Commission on Human Rights Act (TCHRA), the 13th Court of Appeals affirmed

the trial court's judgment because federal case law related to Title VII has held that being able tobecome pregnant is a protected class under sex discrimination protections.

The plaintiff sued her employer claiming her employer discriminated against her

after she stated that she was trying to become pregnant. She alleged she was harassed and discriminated against after making this statement by her co-workers and supervisors and was terminated four months after stating she was trying to become pregnant. Her employer alleged that intending to become pregnant is not a protected class and therefore she had no case under the TCHRA. The trial court denied the employer's plea to the jurisdiction related to this issue and the employer appealed.

The TCHRA prohibits sex discrimination based on "pregnancy, childbirth, or a related medical condition." Tex. Labor Code § 21.106(a). The purpose of the TCHRA is to enact the policies of federal anti-discrimination laws such as Title VII of the Civil Rights Act and the Pregnancy Discrimination Act. Due to this purpose, federal case law guides the analysis, especially in cases such as this one where the issue has not been previously decided by Texas courts. Federal cases involving the Pregnancy Discrimination Act have held that the ability or intent to become pregnant are protected classes and discrimination against these individuals is prohibited sex discrimination. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991). The Court of Appeals affirmed the trial court's holding that the intent or ability to get pregnant is a protected class as guided by federal case law.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Contreras, and Justices Hinojosa and Silva. Opinion by Justice Leticia Hinojosa.

Austin Court of Appeals holds City's diligent search established no actual knowledge of premise defect, therefore no waiver of immunityexists

Posted on **February 11, 2021** by **Ryan Henry**

*City of Austin v Brandy Credeu*r, **03-19-00358-CV** (Tex. App. – Austin, February 11, 2021)

This is a premise defect case where the Austin Court of Appeals reversed the denial of the City's plea to the jurisdiction and dismissed the case.

Credeur was injured when she fell walking along a city sidewalk in front of private property owned by Riedel. She asserts she stepped off the sidewalk to cross the street, stepped on a cement block covering a pipe, and then onto an "adjacent, improperly sealed water valve cover," both of which were obscured by Riedel's "overgrown lawn." She sued the City, Riedel, and a utility company. The City filed a plea to the jurisdiction, which was denied. The City appealed.

Texas courts "consistently treat[] slip/trip-and-fall cases as presenting claims for premises defects." The court considered Plaintiff's rendition of facts and even added a photo of the area in the opinion. Even

assuming that the sidewalk, in this case, was "sufficiently related to the street" to come within the realm of special defects, the court held the alleged defect was not on the sidewalk itself but in the grass near the sidewalk. Credeur stepped off the sidewalk to cross the street, walking through an area not intended for pedestrian use, and thus the defect she encountered cannot be considered to have posed a danger to the ordinary users of the sidewalk. As a result, it is not a special defect, but a premise defect. The City produced evidence that employees did a diligent search of all reports made to the City which could have notified it of the defect prior to Credeur's injury and found none. Without actual knowledge of the defect, no waiver of immunity exists. [Comment: the court went into detail about all the City did to establish a lack of knowledge, which can be a good roadmap for other entities having to establish the same type of fact.] The City's evidence detailed what the City did in response to discovery to find reports and that all departments which might have a report were searched. Credeur has not identified another City employee or department that might have received a report about the alleged defect. As a result, Credeur failed to raise a fact question as to notice and the City's plea should have been granted.

If you would like to read this opinion click **here**. Panel consists of Chief Justice Byrne, Justice Triana and Justice Smith. Memorandum Opinion by Chief Justice Byrne

Plaintiff must prove the TWC's decision is unreasonable, arbitrary, and capricious to overturn a denial of unemployment benefits.

Posted on **February 10, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs
Van Deelen v. Tex. Workforce Comm'n, No. 14-18-00489-CV (Tex. App.—Houston [14th] January 26,2021) (mem. op.).

In this appeal from a trial court's judgment granting the TWC's summary judgment motion on an unemployment benefits case, the 14th Court of Appeals affirmed the trial court's judgment because there was substantial evidence of the plaintiff's termination being caused by employment misconduct.

The plaintiff, a teacher, sued the Texas Workforce Commission and the School District (his employer) when he was denied unemployment benefits because his termination was for misconduct. The evidence presented was that the plaintiff was terminated from the school district for: (1) assault of a supervisor; (2) misconduct toward school staff and students; and (3) misrepresentation on his employment application. After the plaintiff was terminated, he applied for unemployment compensation from the Texas Workforce Commission (TWC). A TWC Appeal Tribunal held that the plaintiff was terminated for mismanagement of a position of employment and was therefore

not entitled to unemployment compensation. The full TWC affirmed the decision of the tribunal. The plaintiff appealed to the trial court, which upheld the decision of TWC and rendered summary judgment for TWC and the school district. The plaintiff appealed. Section 201.012 of the Texas Labor Code provides for denial of unemployment compensation by the Texas Workforce Commission if the employee is terminated for misconduct. The Court reviews a TWC unemployment compensation decision for whether the decision is based on substantial evidence. *See* Tex. Lab. Code § 212.202(a); *McCrory v. Henderson*, 431 S.W.3d 140, 142 (Tex. App.—Houston [14th Dist.] 2013, no pet.). To reverse a decision of the TWC on unemployment benefits, the plaintiff has the burden to show that the TWC's determination is not supported by substantial evidence. *See Collingsworth Gen. Hosp. v. Hunnicutt*, 988 S.W.2d 706, 708 (Tex. 1998). The primary issue is whether the evidence considered by the TWC reasonably supported the decision of the TWC, and the decision may only be overturned if the decision is unreasonable, arbitrary, and capricious. The Court of Appeals held that the evidence of misconduct was sufficient to uphold the TWC's decision even though there was evidence contraryto the TWC's decision.

If you would like to read this opinion click **here.** Panel consists of Justices Bourliot, Zimmerer, and Spain. Opinion by Justice Jerry Zimmerer.

Dallas Court of Appeals holds City waived immunity in lease agreement for use of soccerfields in exchange for upgrades and maintenance

Posted on **February 5, 2021** by **Ryan Henry**

City of McKinney, Texas v. KLA International Sports Management, LLC, **05-20-00659-CV**, (Tex. App – Dallas, Feb. 4, 2021)

This is a contractual immunity case where the Dallas Court of Appeals held the City's immunitywas waived.

KLA, a private sports management company and the City signed a non-exclusive revocable license agreement on December 18, 2018, giving KLA "recreational use" of three fields at the city-owned park. By an amendment, KLA agreed to replace two existing artificial turf soccer fields (Fields 1 and 2) and rehabilitate a grass field. The work, once commenced, was required to be completed within 180 days. In exchange, the City granted KLA a priority 30-year license entitling it to use the improved fields for only soccer practice and soccer games in accordance with an agreed annual use calendar. The City later issued a notice of default to KLA, alleging construction and timeliness deficiencies and other breaches. Ultimately the City terminated the contract under a theory of breach. KLA sued the City for breach of contract seeking specific performance, damages, attorney's fees, and injunctive relief. The City filed a plea to the jurisdiction, which was denied. The City

appealed.

The court first stated the standards from *Wasson II* relating to the governmental/proprietary dichotomy does not apply if the function is listed as governmental in a statute. The court determined the City's license contract constituted a governmental function. Section 271.152 of the Texas Local Government Code provides a "limited waiver of immunity for local governmental entities that enter into certain contracts." Chapter 271 does not define "services," but the Texas Supreme Court has interpreted the term in this context as "broad enough to encompass a wide array of activities." The agreement to provide services need not be the primary purpose of the agreement. "When a party has no right under a contract to receive services, the mere fact that it may receive services as a result of the contract is insufficient to invoke chapter 271's waiver of immunity." However, the license here required KLA to (1) improve or rehabilitate the three fields to a standard that reasonably equated to a FIFA-certified playing surface using industry-standard components and materials from a FIFA-approved turf manufacturer and (2) to provide year-roundmaintenance services on those fields. Thus, the City's license agreement provided for both goods and services and provided more than indirect benefits to the City. The City need not pay currency in order to constitute proper consideration. Improving, rehabilitating, and maintaining the soccer fields was proper consideration for nonexclusive use of the fields and satisfies the requirements of Chapter 271. The plea was properly denied.

If you would like to read this opinion click **here.** Panel consists of Justices Molberk, Reichek, and Nowell. Affirmed. Opinion by Justice Reichek. Docket page with attorney information found **here.**

Property owner not entitled to de novo review of nuisance determination says Austin Court of Appeals

Posted on **February 3, 2021** by **Ryan Henry**

Mark Groba v. The City of Taylor, Texas, **03-19-00365-CV** (Tex. App. – Austin, Feb. 3, 2021)
In this nuisance abatement case, the Austin Court of Appeals affirmed the granting of the City'splea to the jurisdiction.

Groba, a real property owner, was subject to an enforcement action in the Municipal Court of Taylor, acting in an administrative capacity. The court conducted a hearing and issued an order granting the City's application to declare Groba's property a nuisance under chapter 214 of the Texas Local Government Code. The municipal court later issued an order declaring that Groba failed to comply with its original order to clean up the nuisance. The City then filed a Chapter 54lawsuit to enforce its ordinances and the orders in district court. The City sought injunctive relief related to its nuisance determination, including

authorizing the City to demolish the building and charge the costs for doing so to Groba. The City also sought civil penalties. The trial court issued an injunction order allowing the City to demolish the building, which the City did. The day after the demolition, Groba filed a counterclaim for declaratory judgment and trespass, arguing that he was entitled to a jury trial on the nuisance determination. The City filed a plea to the jurisdiction, which the trial court granted. Groba appealed.

After receiving a copy of the municipal court order, Groba did not appeal and, thus, did not comply with the jurisdictional prerequisites for judicial review of the nuisance determination. Groba asserted he was entitled to *de novo* review of the City's nuisance determination, and even if he had failed to timely appeal the nuisance determination, the City is estopped from asserting a jurisdictional challenge to his request for a jury trial because the City "misled" him by filing "multiple proceedings" and by dismissing the criminal municipal-court case after he had requested a jury trial. A property owner aggrieved by a municipality's order under § 214.001 may seek judicial review of that decision by filing a verified petition in district court within thirty days of receipt of the order. A court cannot acquire subject-matter jurisdiction by estoppel. The City's *enforcement* of an ordinance may be estopped, but only in exceptional circumstances that are not present. But subject-matter jurisdiction is still not conferred through estoppel. Further, contrary to Croba's assertions, the Texas Supreme Court's opinion in *City of Dallas v. Stewart*, 361 S.W.3d 562 (Tex. 2012) does not give him an unconditional right to *de novo* review of a nuisance determination. A *de novo* review is required only when a nuisance determination is appealed, which Croba did not perform.

If you would like to read this opinion click **here**. Panel consists of Chief Justice Byrne, Justice Baker and Justice Triana. Memorandum Opinion by Chief Justice Byrne.

Texas Supreme Court holds Texas Board of Chiropractic Examiners' rules are valid even over objection of the Texas Medical Association

Posted on **February 1, 2021** by **Ryan Henry**

Texas Board of Chiropractic Examiners v Texas Medical Association, 18-1223 (Tex. Jan. 29, 2021)

This case centers on the tension between chiropractors and physicians and several Texas Board of Chiropractic Examiners' rules. The Texas Supreme Court held the Board's rules were valid. The analysis is beneficial for government lawyers as 1) it discusses the presumptions of validity and statutory construction and 2) for any lawyers defending personal injury or involved in worker's compensation systems the scope of the rules can be important.

The line between practicing medicine and practice in the chiropractic profession is not always clear. The Texas Chiropractic Act (the Act) draws part of that line by defining the practice of chiropractic to include evaluating the musculoskeletal system and improving the subluxation complex. The Texas Board of Chiropractic Examiners (the Board) has issued rules defining both terms as involving nerves in addition to muscles and bones. Another Board rule authorizes chiropractors to perform an eye-movement test for neurological problems that is known by the acronym VONT. The Texas Medical Association (TMA) asserts that only physicians may perform VONT. The Legislature passed the Medical Practice Act (the MPA) to regulate physicians. It empowers the Texas Medical Board "to regulate the practice of medicine" in Texas. The Court wentthrough a detailed history of the Act and MPA and the Board and the TMA. The Board adopted what is now Rule 78.1 defining chiropractic practice to include diagnosing and treating neuromusculoskeletal conditions causing an alteration in the biomechanical and/or neuro- physiological reflections. In comments to the Board, TMA opposed the definition of the musculoskeletal system which would include the nervous system and brain. The Board also allowed chiropractors to perform vestibular-ocular-nystagmus testing or VONT. TMA sued to invalidate the rules as exceeding the scope of chiropractic practice prescribed by the Act. After a bench trial, the court issued findings of fact and conclusions of law, holding that the challenged rules are invalid because they exceed the statutory scope of chiropractic practice. The Board appealed. The court of appeals affirmed in part.

The Court first held the TMA had proper authority to sue to invalidate the Board rules because theMPA recognizes that "the practice of medicine is a privilege" reserved to licensed physicians. Obtaining and maintaining the privilege imposes economic costs and allowing nonphysicians to practice medicine outside the MPA's control would impair—or at least threaten to impair—that privilege. The Board rules are presumed valid. Using the principles of statutory construction and this presumption as the starting point, the Court found the trial court failed to afford Rule 78.1 a presumption of validity. TMA argues that the rule's references to nerves authorize chiropractors to diagnose any neurological condition, which is the practice of medicine. However, the rule's words cannot be read beyond their context. Nothing in Rule 78.1 suggests that chiropractic practice extends beyond the evaluation and treatment of the musculoskeletal system. The rule merely acknowledges the reality that chiropractors cannot ignore the presence and effect of associated nerves that help shape the musculoskeletal system and allow it to move. The Board's definition of the musculoskeletal system only includes those nerves "associated" with the muscles, tendons, ligaments, bones, joints, and tissues "that move the body and maintain its form." Because chiropractic is carved out of the comprehensive regulation of the practice of medicine under the MPA, its scope under the Act must be limited. Rule 78.1 acknowledges and respects the Act's boundaries. As a result, TMA has not

overcome the definitions' presumption of validity. With regards to the VONT rule, it is a neurological test that a medical doctor may use to diagnose a problem of the brain, inner ear, or eyes, none of which is a part of the spine. However, the Board also presented evidence that VONT can be used to facilitate chiropractic treatment. A reading of all the Board's rules together makes it clear that a chiropractor's proper use of VONT is not for treating a neurological condition, which is certainly outside the scope of chiropractic, but rather for the limited purpose of determining whether and how to treat a patient's musculoskeletal system. As a result, both rules retain their presumption of validity.

If you would like to read this opinion click **here**. Chief Justice Hecht delivered the opinion of the Court, in which Justice Guzman, Justice Lehrmann, Justice Devine, Justice Blacklock, and Justice Busby joined in full, and in which Justice Boyd and Justice Bland joined except with respect to PartIII(D).

Austin Court of Appeals holds temporary injunction order need not set a specific trial date, but must place the case for trial on the court's calendar, otherwise the order is void

Posted on **February 1, 2021** by **Ryan Henry**

Hegar, Comptroller of Public Accounts of State of Texas, et al., v Zertuche Construction, LLC, **03-19-00238-CV** (Tex. App. – Austin, Jan. 22, 2021).

This is a tax collection case, but the main thrust is the procedural ruling on injunctions where the Austin Court of Appeals held that Zertuche Construction's temporary injunction order was void due to a lack of trial setting.

The Comptroller audited Zertuche's sales-and-use tax report, determined it owed additional taxes, and imposed penalties and interest. After a decision upholding an assessment of approximately $2.6 million, Zertuche submitted a written protest letter and followed the procedural steps for challenging the holding. Zertuche filed suit challenging the assessment and seeking an injunction to prohibit the Comptroller from taking action to collect the taxes owed under the assessment.

The Comptroller responded by filing a plea to the jurisdiction. The trial court conducted a combined hearing on the Comptroller's plea to the jurisdiction and Zertuche's application for a temporary injunction to enjoin tax collection. The trial court issued a temporary injunction order prohibiting tax collection, but did not rule on the plea. The Comptroller and AG appealed. Rule 683, dealing with temporary injunction orders, requires that an order granting a temporary injunction state the reasons for its issuance and set "the cause for trial on the merits with respect to the ultimate relief sought." See Tex. R. Civ. P. 683. The trial court's order stated "[t]he parties will set this matter for trial as soon as possible after the resolution of *EBS*

Solutions [case pending in Texas Supreme Court] if Defendants' Plea to the Jurisdiction and Motion to Dismiss for Lack of Jurisdiction is denied by this Court." Thus, rather than set a date for trial, the order provides that the parties will set the matter for trial. Although a specific trial date need not be set in the order, the order must "set the cause for trial on the merits" and that "rule 683 implicitly requires the injunction to order the cause be calendared on the trial court's docket." Because the temporary injunction order does not set the cause for trial on the merits the Court of Appeals determined the order was void.

If you would like to read this opinion click **here**. Panel consists of e Justices Goodwin, Baker, andKelly. Memorandum Opinion by Justice Kelly.

U.S. 5th Circuit holds property owner's federal Clean Water Act claim against Town for improper discharge was proper due to lack ofcomparable state regulation

Posted on **January 28, 2021** by **Ryan Henry**

Stringer v. Town of Jonesboro, 20-30192 (5th Cir. Jan. 18, 2021)

In this §1983 taking suit and federal Clean Water Act ("CWA") case, the U.S. 5th Circuit held the Plaintiff's §1983 suit for damages due to sewage backup was barred, but not her Clean Water Actclaim.

Stringer alleges that, since at least 2011, the Town's wastewater treatment system has malfunctioned during periods of heavy rain, with chronic failures of a specific pump. She asserts the Town failed to respond to her complaints as political payback she ran against the mayor in an election. She was also an alderwoman. The Louisiana Department of Health (LDOH) and the Louisiana Department of Environmental Quality (LDEQ) were aware of the overtaxed system. LDEQ sent the Town warning letters and issued compliance orders. LDOH also enforced the State Sanitary Code, issued the Town a compliance order imposed mandatory ameliorative measures and assessed a daily fine. Stringer brought a "citizen suit" under the CWA, 33 U.S.C. § 1365, as well as constitutional takings claims under 42 U.S.C. § 1983. She also sued the Mayor asserting he retaliated against her. The Defendants filed a motion to dismiss which the trial court granted. Stringer appealed.

The CWA creates a regime of water pollution regulation that harnesses state and federal power but also allows citizen suits. However, such citizen suits are not permitted if the applicable state is already prosecuting comparable enforcement actions. A state statute is "comparable" to the CWA so long as the state law contains comparable penalty provisions, has the same overall goals, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and has adequate safeguards. The Louisiana Sanitary Code provides no formal or structured means for

interested citizens to become aware of LDOH's enforcement efforts, nor any mechanism by which they can call for further action. However, LEQA's enforcement mechanisms provide for interested parties to obtain "periodic notice" of "all violations, compliance orders and penalty assessments," because it mandates public comment before a proposed settlement is finalized, and because it permits third parties to "intervene in an adjudicatory hearing, or petition for an adjudicatory hearing if none is held." However, LDEQ was not the focus of the Defendants' diligent prosecution argument in the district court. Further, whether LDEQ has "diligently" pursued a comparable action under § 1319(g) may be "a fact- intensive question that can only be answered after the proper development of a record." As a result, the CWA claims should not have been dismissed. However, Stringer's §1983 takings claim had a one-year statute of limitations. Stringer's complaint confirms she was aware of the pertinent underlying facts as early as November 2011. A cause of action accrues when the plaintiff learns the facts giving rise to her injury. As a result, such claims were properly dismissed. Finally, Stringer's First Amendment retaliation claim was also time-barred.

If you would like to read this opinion click **here**. Panel consists of Justices Elrod, Duncan and Wilson. Opinion by Justice Duncan.

14th Court of Appeals holds ex-employees trigger date to file a charge of discrimination only occurs when employer's discriminatory animus becomes sufficiently clear and he has suffered a tangible employment action

Posted on **January 22, 2021** by **Ryan Henry**

Metropolitan Transit Authority of Harris County, Texas v. John Carter, **14-19-00422-CV** (Tex. App. – Houston [14th Dist.], January 14, 2021)

This is an employment dispute where the 14th Court of Appeals affirmed the denial of a plea to the jurisdiction filed by the Metropolitan Transit Authority (Metro).

Carter worked as a bus operator for Metro. In 2014 Carter was involved in a vehicle accident that Metro categorized as "preventable." Carter's union representative requested a reconsideration. Due to polio as a child, Carter walked with a noticeable limp. When reviewing the video of the accident, the superintendent (Ramirez) believed Carter did not have sufficient leg strength to lift his leg off the accelerator and instead had to use his arm to move his leg off the accelerator andonto the brakes. Cater had to submit to a fitness-for-duty evaluation and was held to be capable of performing the job. Ramirez refused to put Carter back to work. Ramirez required Carter to pass a Texas Department of Public Safety Skilled Performance Evaluation (SPE) to determine if he was

capable of driving commercial vehicles, which had not been done by Ramirez before. However, Carter passed. From June 2014 to January 2016, Metro moved Carter from place to place within the agency. In January 2016, after receiving notification that Carter had not passed the January 2016 medical examination, Metro placed Carter on involuntary medical leave.

However, Carter had received a 2015 medical certificate noting he could operate commercial vehicles. At this point, Carter filed a charge of discrimination. In March of 2017, Metro terminated Carter. Carter sued for disability and age discrimination and retaliation. Metro filed a plea to the jurisdiction, which was denied. Metro appealed.

The court first held Carter's claims were not time-barred. Even though he was on notice in 2014 that he may have been subject to discrimination, his wages did not change and he was not otherwise impacted until placed on medical leave in 2016. He timely filed his charge of discrimination in 2016 and was terminated in 2017. The court specifically stated "[i]t was only when Metro placed Carter on involuntary medical leave even though he possessed a valid, two- year CDL and DOT medical certification, that Metro's discriminatory animus became sufficiently clear and he had suffered a tangible employment action, that Carter was required to file a charge of disability discrimination." As a result, he timely filed his charge and brought suit. The court then held that fact issues exist as to the remaining aspects of the disability discrimination and retaliation charges.

If you would like to read this opinion click **here**. Panel consists of Chief Justice Christopher, Justice Wise and Justice Zimmerer. Memorandum Opinion by Justice Zimmerer. Docket page with attorney information found **here.**

Beaumont Court of Appeals holds City is not liable for alleged failure to create a police report, failure to investigate, or failure to prosecute as asserted by Plaintiff

Posted on **January 22, 2021** by **Ryan Henry**

***Caryn Suzann Cain v. City of Conroe, Tex., et al.*, 09-19-00246-CV, 2020 WL 6929401 (Tex. App.—Beaumont Nov. 25, 2020)**

This is an interlocutory appeal from the trial court's order granting the City's motion to dismiss, plea to the jurisdiction, and traditional motion for summary judgment.

Plaintiff, Caryn Suzann Cain, filed a *pro se* civil suit against the Conroe Police Department alleging police negligence in the department's investigation and disposal of her complaints regarding disputes with her neighbors. Cain asserted the City failed to render police assistance and file an incident report after she was allegedly assaulted by her neighbor's dog, and that the Department showed bias towards her neighbor, a state correctional officer, who allegedly continued to harass her over a period of eighteen months. Cain later § 1983 claims against the City. In response,

the City defendants filed a motion to dismiss under §101.106(e) of the Civil Practice and Remedies Code, a plea to the jurisdiction, and traditional motion for summary judgment. The trial court granted all motions.

The officers were entitled to dismissal of the tort claims under §101.106(e). Next, under the TTCA if an injury does not arise from a city employee's operation or use of a motor-driven vehicle, then the city is not liable for its employee's negligence. "Arises from" requires a plaintiff to show a direct connection between the injury and the employee's vehicle operation or use. Simply using a patrol vehicle's radio is not actionable. Similarly, the court noted mere involvement of tangible personal property in an injury does not, by itself, waive immunity. The tangible personal property must do more than create the condition that makes the injury possible. Here, no tangible personal property was negligently used to result in any of the alleged injuries. Next, to allege a valid constitutional rights violation under § 1983 against the City, Cain was required to assert a deprivation was caused by a policy, custom, or practice of the City. A municipality is not liable under § 1983 for the unconstitutional acts of its non-policymaking employees. The Court determined Cain did not allege sufficient facts showing an unconstitutional policy or custom was being implemented. Finally, the Due Process Clause does not require the State to protect life, liberty, and property of its citizens against invasion by private actors, and it generally confers no affirmative right to government aid. Thus, Cain's allegation that the City failed to protect her against her neighbor did not constitute a due process violation.

If you would like to read this opinion click **here**. Panel consisted of Chief Justice Steve McKeithenand Justices Hollis Horton and Leanne Johnson. Opinion by Chief Justice McKeithen. Docket page with attorney information can be found **here**.

El Paso Court of Appeals holds courts analyze the substance of pleadings, not the form of creative pleadings trying to reframe the claims.

Posted on **January 22, 2021** by **Ryan Henry**

***Joseph O. Lopez v. The City of El Paso*, 08-19-00123-CV (Tex. App.—El Paso Dec. 9, 2020)**

This is an interlocutory appeal from the trial court's order granting the City's plea to the jurisdiction in which the El Paso Court of Appeals affirmed.

Plaintiff, Joseph O. Lopez sued the City of El Paso, for alleged injuries he sustained as the result of an arrest by two City police officers. Lopez alleged that during the arrest, the officers forcefully pulled him from his vehicle; flung him to the ground, pinned him and applied pressure on his torso, head, and neck. He also asserts one of the officers struck him in the head multiple times. Lopez further alleged that the officers negligently employed a baton

while using excessive force.The City filed a plea to the jurisdiction, which was granted.

On appeal, the Eighth Court of Appeals addressed the sole issue of whether the trial court abused its discretion by deciding that Appellant had failed to allege sufficient facts to support a waiver of immunity under the Texas Tort Claims Act ("TTCA"). First, the court noted that § 101.106(a) bars a plaintiff from suing city employees once the plaintiff has elected to sue the city first, even in cases where city employees might otherwise be solely and personally liable in their individual capacities. The court then acknowledged Lopez had creative pleading in an attempt to avoid characterizing the officers' conduct as an intentional tort. It noted that when courts analyze a plaintiff's pleadings to determine the existence of waivers of immunity, courts look at the substance of the pleadings, not to their characterization or form. The TTCA does not apply to intentional acts including assault, battery, false imprisonment, or any other intentional tort. In thiscase, the police conduct alleged by Lopez, the substance of his claims, fell under the category of intentional torts, specifically assault and battery, not negligence. As a result, the alleged tortious conduct did not sustain a waiver of immunity under the TTCA. The plea was properly granted.

If you would like to read this opinion click **here**. Panel consisted of Chief Justice Jeff Alley and Justices Yvonne Rodriguez and Gina Palafox. Opinion by Justice Rodriguez. Docket page with attorney information can be found **here**.

14th Court of Appeals holds describing the general place where an injury occurs is sufficient for Tort Claims Act notice.

Posted on **January 20, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

Metro. Transit Auth. of Harris County v. Tracey Carr, No. 14-19-00158-CV (Tex. App.—Houston [14th] January 12, 2021) (mem. op.).

In this appeal from a trial court's order denying the city's plea to the jurisdiction in a vehicle accident tort claims case, the 14th Court of Appeals affirmed the denial.

The plaintiff sued the transit authority after she was injured on a bus. The plaintiff was injured when boarding a bus due to the driver's sudden acceleration. The plaintiff alleged that the injury occurred on October 25, 2017 on or around 7:15 p.m. near a specific intersection on Bus 3578. She stated that the driver was male and either Hispanic or Caucasian. The plaintiff injured her back, neck, and spine. The plaintiff notified the transit authority of this information within six months of her alleged injury. The transit authority filed a plea to the jurisdiction asserting the notice was insufficient because she gave the wrong bus number in her notice. The trial court denied the Authority's plea to the jurisdiction and the Authority appealed.

A plaintiff is required to present written

notice to the governmental entity within six months of aninjury that could give rise to a claim under the Texas Torts Claim Act. The notice has to "reasonably" describe the injury or damage, the time and place of the incident in question, and the facts of the incident. Tex. Civ. Prac. & Rem. Code § 101.101(a). Whether a notice provided to the governmental entity is timely and adequate is a question of law for the court to decide. The court of appeals upheld the trial court's denial of the transit authority's plea to the jurisdiction, holding that the plaintiff's notice was sufficient because she provided notice of the location, the injury, and the facts of the injury. The description was sufficient with the street intersection despite the allegation that the bus number of the bus where the accident occurred was incorrect. If you would like to read this opinion click **here.** Panel consists of Chief Justice Christopher and Justices Wise and Zimmerer. Opinion by Justice Ken Wise.

City not liable for accident caused by stolen ambulance says San Antonio Court of Appeals

Posted on **January 11, 2021** by **Ryan Henry**

The City of San Antonio v. Smith, 04-20-00077-CV (Tex.App.—San Antonio, November 25, 2020)(mem. op.)

This is an appeal from a denial of the city's plea to the jurisdiction in a Texas Tort Claims Act ("TTCA") case stemming from the operation of an ambulance.

Two paramedics were dispatched to a "Code 3" emergency in an apartment complex, warranting the use of the ambulance's lights and sirens while in transit. When they arrived, they parked the ambulance, left the emergency lights on, and left the vehicle idling. Neither paramedic had heardof an idling ambulance being stolen nor had any inclination that the area would pose such a risk. While they were attending to the patient, an unknown person stole the ambulance and collided with two cars. The occupants of the other vehicles sued the city under the TTCA, alleging their injuries arose from the operation or use of a motor vehicle or were caused by a condition or use of tangible personal property. The allegation was that the City negligently left the ambulance unattended and it failed to use an adequate anti-theft device. The City filed a plea to the jurisdiction, primarily focusing on the facts that the ambulance was not operated by a city employee and that nonuse of property do not fall under TTCA's' waiver of immunity. The trial court denied the City's plea and the City appealed.

The Court quickly dismissed the "operation of a motor vehicle" claim, as it was undisputed that no city employee was operating the ambulance. The appellees' "condition or use of tangible personal property" claim focused on case law holding that items lacking an "integral safety component" fall under the TTCA's waiver of immunity. However, the Court distinguished that such cases are not only

the outer bounds of what could fall under the TTCA, but also inapplicable here because the ambulance did have anti-theft measures: door locks and an alarm. Thus, the appellees' argument was not that the ambulance lacked an integral safety component, but that the ones present were not enough, and that does not waive immunity under the TTCA. Ultimately, the Court reversed the denial and dismissed the appellees' case.

If you would like to read this opinion, click **here**. Panel consists of Chief Justice Marion, Justice Martinez, and Justice Rios. Memorandum opinion by Chief Justice Marion.

Fifth District Court of Appeals holds property owner's pleadings adequately alleged waiver of immunity in sewer backup case due to overtaxed pumps

Posted on **January 11, 2021** by **Ryan Henry**

The City of Blue Ridge v. Rappold, 05-19-00961-CV (5th Cir. Dec. 3, 2020) (mem. op.)

This is an interlocutory appeal from a denial of the City's plea to the jurisdiction, in a sewagebackflow case.

The Rappolds brought a claim under the Texas Tort Claims Act ("TTCA"), alleging that the City's wastewater treatment facility ("WWTF") failed in its operation, causing raw sewage and stormwater to cover portions of the Rappolds' property several times over the course of three years. The City requested discovery to which Rappold objected. The trial court considered the plea prior to the City's motion to compel discovery. The first sewage backup event was allegedly due to an electrical failure in the pumps while the remaining were due to high levels of rain creating too much waterflow for the pumps to handle. The plea was denied and the City appealed.

The court first held that identifying a specific person in the pleadings is not necessary to establish causation, only that a City employee acted negligently within the course and scope of their duties. It also disagreed with the City's claim that the Rappolds' claim indicates non-use and, similarly, fails to show operation. The court points to allegations that the City failed to properly maintain the WWTF and that the City's employees were not using the WWTF as designed. These additional allegations created a sufficient nexus between the damage and the City's actions to adequately allege that the City was negligently using the motor-driven equipment. Similarly, the City employees' knowledge that the WWTF is unable to handle large amounts of water it receives attimes indicates negligence in continuing to operate the pumps in such a condition. The court also found proper pleading of the "condition or use of tangible personal property" as different components failed at different times. Finally, it held that the Rappolds were able to properly plead a takings claim by alleging that the City's knowledge of the WWTF's inadequacy

resulted inthe City using the Rappolds' land as an overflow depository.

If you would like to read this memorandum opinion, click **here**. Panel consists of Justice Molberg and Justice Carlyle. Memorandum opinion by Justice Carlyle.

Tyler Court of Appeals holds District is immune from sewer backup as 20 year old plastic coupler which failed was not part of the motorsystem

Posted on **January 11, 2021** by **Ryan Henry**

Sean Self v. West Cedar Creek Municipal Utility District, **12-20-00082-CV**, (Tex. App – Tyler, Jan. 6,2021)

This is an appeal from the granting of a plea to the jurisdiction in a sewage backup case in which the Tyler Court of Appeals affirmed the order.

Self and his wife Kimberly entered into a contract with the District in 2012 water and sewer services. After sewage backed up into their home in April 2015, the District made some repairs to the vault system. Another backup occurred in 2016 and Sean Self sued the District alleging negligent use of motor-driven equipment, premises defect, unconstitutional taking, non-negligent nuisance, and breach of contract. The District filed a plea to the jurisdiction, which was granted. Self appealed.

It is undisputed that a plastic coupler (known as a quick connect) failed causing the backup. Self argued the motors, pipes and couplers are all one system. The court explained in detail how the Self system worked. The coupler gives District employees the ability to remove the pump without cutting pipes. There is no motor in the coupler. It merely assists in disconnecting the pump if it needs to be worked on. If the coupler fails, gravity will cause any sewage coming from a higher-grade property to backfill Self's property. Self's expert plumber testified the pumps used can cause high pressure, which could potentially break the coupler, but he did not know that is what occurred in this instance. However, there was no evidence that the coupler assists in sewage collection other than to the extent it helps maintain the connection between the pump and the discharge line. The evidence shows that, if the coupler breaks, whether the pump is on or not, the sewage in the tank would flow out to the ground or through the line in the tank and back into the house, due to the force of gravity, not the operation or use of motorized equipment. Under a premise defect theory, the duty owed by an owner of premises to an invitee is not that of an insurer. The coupler was placed in 1995. The fact that materials deteriorate over time and may become dangerous does not itself create a dangerous condition, and the actual knowledge required for liability is of the dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition can develop over time. No evidence of actual knowledge existed. In the context of an inverse condemnation claim, "the requisite intent is present when

a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." A taking cannot be established by proof of mere negligent conduct. No knowledge of intent is present. While Self alleged a claim for non-negligent nuisance, there is no separate waiver of governmental immunity for nuisance claims. Finally, as to the breach of contract claim, no goods are services were provided to the District, it was the District providing services to Self. As a result, no waiver of immunity exists.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Worthen, and Justices Hoyle and Neeley. Affirmed. Opinion by Justice Neeley. Docket page with attorney information found **here.**

Second Court of Appeals holds general law cityhas inherent power to require solid waste haulers to obtain a license

Posted on **January 8, 2021** by **Ryan Henry**

Builder Recovery Services LLC v. The Town of Westlake, Texas, **02-20-00051-CV**, (Tex. App. – Fort Worth, Jan. 1, 2021)(mem. op.).

This is a declaratory judgment/ordinance invalidation suit brought by a solid waste collector where the Fort Worth Court of Appeals affirmed the Town's power to require licenses. [Warning, this is a long opinion at 56 pages].

BRS contracts with home builders in the Town of Westlake to remove the temporary construction waste that the builders generate and place a dumpster on the property during construction. The dumpsters are towed to each site and place as much as 20,000 pounds of weight upon the Town'sroads, with as many as ten visits to each site during construction. BRS initially raised concerns that the Town's regular solid waste hauler (Republic) could not be the sole hauler for temporary construction waste. The city council delegated the Town's staff to meet with the builders to discuss amendments to the Town's ordinances in order to address the issue. The Town eventually passed an ordinance allowing third-party haulers like BRS to obtain licenses for temporary construction waste services in imposed certain regulations on the license. BRS brought suit asserting, among other things, that the license fee was not tied to actual administrative costs, thatthe ordinance was preempted by state law, and challenging the Town's authority to pass the ordinance. After a bench trial, the trial judge found largely in favor of the Town but did invalidate the license fee calculation. BRS appealed.

The court first went through a detailed analysis of the power distinctions between general law cities and home rule cities. While the Town is a general law city, the court held it has the power to regulate solid waste collection under §361.113 of the

Texas Health and Safety Code. The court rejected BRS' argument that the section does not empower the Town to issue licenses as a license is an inherent part of the regulatory power. Licenses are one means for a governmental agency to regulate activities that the Town is empowered to regulate. The court analyzed the various powers of the Town, including inherent powers and noted the power to regulate carries with it all means to accomplish the regulation, including licensing. Further, BRS failed to establish the ordinance was invalid because it failed to negate all conditions which would warrant the ordinance. Further, such rules do not conflict with the franchise section of the same subtitle of the statute. Franchises and licenses are separate creatures. The court analyzed the wording of the various health and safety code sections and determined the power to license is not preempted by any other portion of the code. It held a "dumpster" is not the same as a "container" as that term is defined under the Solid Waste Disposal Act. The court determined the license fee issue was moot due to an amended ordinance. However, due to an outstanding issue of attorney's fees, the court remanded to the trial court for disposition.

If you would like to read this opinion click **here**. Panel consists of Justice Bassel, Justice Womack and Justice Wallach. Memorandum opinion by Justice Bassell.

The Tenth Court of Appeals held immunity waived for airport lease based on improvements made by tenant

Posted on **January 4, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

City of Cleburne v. RT General, LLC, No. 10-20-00037-CV (Tex. App.—Waco December 16, 2020)(mem. op.).

This is an interlocutory appeal from a trial court denial of the city's plea to the jurisdiction on a breach of contract and related claims regarding an airport lease. The Waco Court of Appeals affirmed the denial.

The plaintiff sued the city after the city attempted to evict the plaintiff from the city's airport under a lease agreement with the plaintiff. The city and plaintiff entered into a lease agreement for airport facilities where the plaintiff could use the airport facilities at no charge for ten years because the plaintiff had expended over $300,000 in repairing the city's airport facilities. After the first ten years, the plaintiff was required to pay rent for use of the facilities. Three years into the lease, the city sent a letter of eviction to the plaintiff, and the plaintiff sued the city for breach of contract, inverse condemnation, declaratory judgment, and fraud. The city argued it had immunity from suit because the airport operation is a governmental function and the contract was missing an essential term, the rental payments for the first ten years. The trial

court denied the city's plea to the jurisdiction.

Immunity is based on whether a function on which liability is based is a governmental or proprietary function. *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142, 146 (Tex. 2018). Operation of an airport is a governmental function. Tex. Transp. Code § 22.021(a)(2). Immunity from a governmental function can be waived by a contract claim if the contract falls within the provisions of Chapter 271 of the Local Government Code including stating the essential terms of the contract. Tex. Loc. Gov't Code § 271.152. While price is an essential term of an agreement, the court of appeals held that past consideration could meet this requirement. The court of appeals also held that claims for declaratory judgment and inverse condemnation can move forward on the same set of facts because immunity is waived under breach of contract.

Chief Justice Gray dissented by footnote stating that there was insufficient evidence that goods or services were provided to the city under the lease agreement. Chief Justice Gray would also render judgment on the other claims as they are creative pleading efforts that should be dismissed as attempts to avoid the governmental immunity issue.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Gray and Justices Davis and Neill. Opinion by John Neill and Chief Justice Gray dissenting by footnote within the opinion.

The Eleventh Court of Appeals held that failure to monitor or provide medical care for an inmate who was injured in a county jail is insufficient to waive immunity under the Tort Claims Act.

Posted on **January 4, 2021** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

James Garms v. Comanche County, No. 11-19-00015-CV (Tex. App.—Eastland December 18,2020) (mem. op.).

In this appeal from a trial court's judgment granting the city's plea to the jurisdiction on a tort claims case, the Eastland Court of Appeals affirmed the trial court's grant of the plea because injuries allegedly caused by failure to monitor or provide medical care is a nonuse of tangible personal property which does not waive immunity under the Tort Claims Act.

The plaintiff sued the county after he was injured in the county jail. The plaintiff was an inmate in the county jail when he was injured. He had informed the jail staff that he felt unwell and his blood pressure was checked. Despite a high blood pressure reading, the duty nurse was not notified and the plaintiff was not monitored. The plaintiff lost consciousness and sustained a serious head injury. The plaintiff was left unattended with a serious head injury which caused further issues. The plaintiff sued the county for negligence caused by a faulty motorized camera and failure to

monitor and provide medical care to the plaintiff. The trial court granted the county's plea to the jurisdiction.

Immunity from a governmental function can be waived under the Tort Claims Act if the injury is caused by: (1) the operation or use of motor-driven equipment; or (2) use of tangible of personal property. Tex. Civ. Prac. & Rem. Code § 101.021. The plaintiff must also show a nexus between the injury and the uses listed in the Tort Claims Act. *LeLeaux v. Hampshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992). Claims based on inaction of government employees or nonuse of tangible property are insufficient to waive immunity under the Tort Claims Act. *Harris Cty. v. Annab*, 547 S.W.3d 609, 614 (Tex. 2018). The court of appeals held that the claims for failure to monitor or provide medical care did not waive the county's immunity. The court of appeals upheld the trial court's grant of the city's plea to the jurisdiction.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Bailey and Justices Trotter and Wright. Opinion by Justice W. Stacy Trotter.

First Court of Appeals holds transporting patient to hospital was Texas Medical Liability Act claim, but passenger's claim was proper under TTCA

Posted on **December 24, 2020** by **Ryan Henry**

***City of Houston v. Najla Hussein and Asha Obeid*, No. 01-18-00683 (Tex. App. — Houston November 19, 2020) (mem. op.).**

This is a case involving the interplay between the Texas Tort Claims Act ("TTCA") and Texas Medical Liability Act ("TMLA") stemming from a single motor vehicle collision. The City appealed the trial court's order denying its motion for summary judgment and its motion to dismiss the negligence suit brought by plaintiffs, Najla Hussein and Asha Obeid.

Hussein's mother, Obeid, was suffering chest pain and called 911 in response. First responders arrived and placed Obeid in the ambulance and began to transport Hussein and her mother to a hospital. Mid transport, Obed made a request to be transported to a different and specific hospital. In response to her request, the ambulance exited the tollway and while driving through a narrow toll booth, the left and right sides of the ambulance struck the booth allegedly causing injuries to Obed and her daughter. Plaintiffs filed suit alleging the negligent operation of a motor vehicle. The city filed a motion for summary judgment asserting the application of the TTCA's "emergency responder exception" while also moving to

dismiss their claims arguing that they constitute health care liability claims under the TMLA. The trial court denied both motions.

In considering the City's motion to dismiss under the TMLA, the court of appeals determined that Obed's claim constituted a health care liability claim, and as such, was required to submit an expert report, with a curriculum vitae for the expert whose opinion is offered, on a defendant physician or health care provider within 120 days of the filing of the City's answer. *See* Tex. Civ.

Prac. & Rem. Code Ann. §§ 74.001(a)(13), 74.351(a),(b). As no expert report was submitted, the court dismissed Obed's claim with prejudice, reversing the trial court's judgment. However, the TMLA claim related only to the mother (Obed) who was receiving treatment, not to Hussein. Asto Hussein's claim for personal injuries under the TTCA, the emergency responder exception requires the driver to be responding to an emergency. While lights and sirens were used when traveling to Obed's location, her EKG was normal, and no lights and sirens were on when he impacted the toll barriers. As a result, a fact question exists on whether an emergency existed.

If you would like to read this opinion click **here**. Panel consists of Chief Justice Radack, Justice Goodman and Justice Countiss. Memorandum Opinion by Justice Countiss.

The Tenth Court of Appeals affirmed the trial court's summary judgment against the plaintiff developer because it did not challenge all possible grounds supporting the summary judgment order

Posted on **December 21, 2020** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

David A. Bauer, et al. v. City of Waco, No. 10-19-00020-CV (Tex. App.—Waco December 9, 2020)(mem. op.).

The Waco Court of Appeals affirmed a trial court's judgment dismissing the plaintiff's vested rights and takings claims on summary judgment.

The plaintiff developer sued the city after being required to provide an easement for a water line and meet other requirements in the city's code prior to construction of its project. The city required changes to various permit applications of the plaintiff prior to approval and required an easement for a previously placed waterline. The plaintiff developer sued the city for vested rights and takings, arguing the regulations were inapplicable due to the vesting of its original permit. Among its summary judgment arguments, the City argued that a declaration of the plaintiff's vested rights would not resolve the issue because the ordinance in place at the time of initial permit vesting would yield the same result. As to the required easement, the City argued that the plaintiff did not seek a

variance from the easement and could not claim a taking. The trial court granted summary judgment in favor of the city but the order did not provide specific reasons.

To appeal a summary judgment, the appealing party has to prove that any or all bases for the summary judgment is error. *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995); *Lesher v. Coyel*, 435 S.W.3d 423, 429 (Tex. App.—Dallas 2014, pet. denied). To establish a claim for vested rights under Chapter 245 of the Local Government Code the plaintiff needs to show that the city is required to review a permit application based on the regulations in effect at the time the original application is filed. *See* Tex. Loc. Gov't Code § 245.002; *Milestone Potranco Dev., Ltd., v. City of San Antonio*, 298 S.W.3d 242, 248 (Tex. App.—San Antonio 2009, pet. denied). For a takings claim, the plaintiff needs to show that the action where the property was taken was done without consent of the property owner and that there has been a final decision regarding the application of the regulations to the property at issue. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 929 (Tex. 1998). The court of appeals upheld the trial court's judgment on both the vesting rights and takings claims because the plaintiff failed to disprove every basis for the summary judgment including that the ordinance in effect for vesting would not have changed the result and that the original property owner had given consent for the installation of the water line.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Gray and Justices Davis and Neill. Opinion by Chief Justice Tom Gray.

Third Court of Appeals holds church's motion for new trial in water rate EDJA case held valid given unique and troubling circumstances in case

Posted on **December 21, 2020** by **Ryan Henry**

City of Magnolia v Magnolia Bible Church, et al., 03-19-00631-CV (Tex. App. – Austin, Dec. 18,2020)

This is an interlocutory appeal from an order granting a new trial and denying a plea to the jurisdiction in a water rate case in which the Austin Court of Appeals affirmed the granting of new trial and the denial of the City's plea.

This case involves the interplay between the provisions of the Expedited Declaratory Judgment Act ("EDJA")(which deals with public securities), the Texas Rules of Civil Procedure, and the constitutional principles of due process. The City adopted an ordinance relating to the City's water-system rates. In addition to residential and commercial accounts, the ordinance created a new category of water user, the "Institutional/Non-Profit/Tax-Exempt accounts," which, among others, covered churches. The Churches opposed the new category and surcharge as being discriminatory under the Tax Code and the

Texas Religious Freedom Restoration Act ("TXRFRA"). The City preemptively filed a validation suit under the EDJA to validate the bonds and rates tied to the bonds, but only notified the public through newspaper publications. It did not expressly notify the church of the suit. The trial court granted the City's validation of the rates. The Church later filed a regular Uniform Declaratory Judgment Act ("UDJA") claim asserting the rates were discriminatory. When the City informed the Church of the final judgment under the EDJA claim, the church filed a motion for new trial in the EDJA trial court (under Tex. R. Civ. P. 329). The City filed a plea to the jurisdiction asserting the trial court lost plenary power over the case. The trial court denied the plea and granted the motion for new trial. The City appealed.

Chief Justice Rose held that due process does not require personal service in all circumstances, but any use of substituted notice in place of personal notice—e.g., notice by publication—must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Notice by publication is insufficient when the name, address and interest are known. The EDJA empowers an issuer of public securities to seek an expedited declaratory judgment concerning "the legality and validity of each public security authorization relating to the public securities," including, as relevant here, the legality and validity of "the imposition of a rate, fee, charge, or toll." Tex. Gov't Code § 1205.021(2)(E). Ordinarily, notice by publication satisfies due process as to the parties bound by an EDJA judgment because the EDJA permits only *in rem* declarations concerning property rights and is notice to the public. However, in this case, the church challenged the application under religious freedom grounds. Due process, therefore, requires more than notice by publication. Because notice to the Churches was constitutionally insufficient, the resulting judgment was void and can be challenged at any time. Justice Trianna took a slightly different approach, using the text of the EDJA and holding that it does not conflict with Rule 329 (allowing a new trial for persons who did not receive notice) and Rule 329 extends the plenary power of the court for a certain period of time. Since the Church met the time periods under Rule 329, it was within the trial court's discretion to grant or deny the motion or new trial.

Justice Baker's dissent holds that such an interpretation undermines the intent of the EDJA which is to quickly decide the issue then preclude future claims from any other person who challenges the rate and bond applications. He asserts Rule 329 only applies when a defendant (not an interested person) does not appear after service by publication.

If you would like to read the various opinions, Chief Justice Rose's concurring opinion is **here**, Justice Trianna's concurring opinion is **here**, and Justice Baker's dissent is **here**.

U.S. 5th Circuit held reasonableness of an ADA accommodation request is normally a fact issue plus alleged discrimination is not enough for discriminatory firing claim under ADA

Posted on **November 30, 2020** by **Ryan Henry**

Jones v. Lubbock County Hosp. Dist., 19-11364, 2020 WL 6787549, at *1 (5th Cir. Nov. 18, 2020) This is an interlocutory appeal of a granting of summary judgment for the University Medical Center ("UMC") and appealed by its former employee, Ricky Jones. The U.S. 5th Circuit affirmed inpart, vacated in part, and remanded in part.

Jones, a respiratory therapis, has breathing problems and relies on supplemental oxygen. He requested UMC to accommodate his condition by letting him wear a portable oxygen device while working, but UMC denied the request. Subsequently, Jones took a few weeks of leave afterworking for a few days with his supplemental oxygen device, applied for, and was offered a secretarial position with UMC. Jones denied the offer after he returned from leave and felt he could without his device. Jones again requested the use of the device, was denied, then took a few weeks of leave. During that time, he sought other work around UMC but found no opening. After a third request was denied, he put in his two weeks' notice and resignation. During the two weeks, Jones was fired for sending messages which violated UMC's policy against gossip. Jones filed suit. UMC filed a motion for summary judgement which the trial court granted. Jones appealed.

The Fifth Circuit vacated the lower court's ruling, stating that whether a proposed accommodationis reasonable is generally a fact issue and that Jones showed a triable fact issue in how he and UMC interpreted his request. However, for Jones' discrimination claim, the Fifth Circuit held that the evidence of UMC's alleged failure to accommodate did not offer evidence to connect it to his being fired. UMC was able to show a legitimate reason for Jones' firing which Jones failed to rebut. As a result, the discrimination claim remained dismissed but the failure to accommodate claim was remanded.

If you would like to read this *per curiam* opinion click **here**. Panel consists of Judge Stewart, Justice Duncan, and Justice Wilson.

The Ninth Court of Appeals affirmed judgmentfor City in First Amendment/Whistleblower claims since no causal connection was present

Posted on **November 30, 2020** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs
Samer Shobassy v. City of Port Arthur, No. 09-18-00363-CV (Tex. App.—Port Arthur November 19,2020) (mem. op.).

In this appeal from a trial court's judgment dismissing the plaintiff's retaliation-in-employment case. The Beaumont Court of Appeals affirmed the trial court's summary judgment.

The plaintiff worked as an assistant city attorney for the city for five years and the city attorney was the plaintiff's supervisor. During the plaintiff's employment, he discussed the city's compliance with purchasing law in the context of his employment as an assistant city attorney. He was terminated by the city attorney and was given a termination notice which indicated that he was terminated because, among other things, he failed to follow-up on tasks and communicate with the city attorney and failed to complete the tasks assigned to him. Plaintiff sued the city in district court claiming a Whistleblower Act claim and that his termination violated his First Amendment rights. The city filed a plea to the jurisdiction and no evidence motion for summary judgment which the trial court granted.

To establish a claim for retaliation under the Whistleblower Act, the plaintiff has to show that theemployer's termination would not have occurred had the plaintiff not made a good faith allegation of violation of law to an appropriate law enforcement authority. *Tex. Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 637 (Tex. 1995). The report has to be a "but-for" cause of the termination. *Office of the Attorney Gen. of Tex. v. Rodriguez*, 605 S.W.3d 183, 198 (Tex. 2020). The plaintiff was unable to make the causal connection. To establish a claim for a free-speech retaliation claim, the plaintiff must show the plaintiff was terminated for engaging in constitutionally protected speech. *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 675 (1996). The speech in question is not protected if it is spoken within the context of the employee's official duties. *Davis v. McKinney*, 518 F.3d 304, 312 (5th Cir. 1998). The Whistleblower claim was dismissed because the claims of illegal conduct by the City were not made until after the termination. The free speech claim was invalid because his speech was performed and related to is employment position. The dismissal of both was proper.

If you would like to read this opinion click **here.** Panel consists of Chief Justice McKeithen andJustices Kreger and Horton. Opinion by Justice Hollis Horton

Beaumont Court of Appeals held Plaintiff failed to overcome emergency responder exception under Texas Tort Claim Act in vehicle accident case

Posted on **November 30, 2020** by **Ryan Henry**

Texas Dept. of Pub. Safety v. Kendziora, 09-19-00432-CV (Tex.App.—Beaumont, Nov. 5, 2020) This is an interlocutory appeal from the denial of Texas DPS's plea to the jurisdiction in a case involving a car accident while a DPS trooper ("Chapman") was responding to an emergency. The Beaumont Court of Appeals reversed the denial.

Chapman was responding to a call reporting one hundred people fighting at a sports complex. En route, he approached a red light with his lights and siren activated, activated his airhorn, and slowed to a near stop while clearing the intersection. He looked both ways while crossing the intersection and cleared multiple lanes before being struck by Kendziora. Kendziora filed suit under the Texas Tort Claims Act ("TTCA") for personal injuries sustained from that collision. DPS put forth the emergency exception defense under TTCA, which preserves immunity if the employee was in compliance with applicable law or was not acting recklessly. Chapman testified that he considered the nature of the emergency in deciding to respond immediately and urgently, while still ensuring vehicles at the intersection were stopped before proceeding. Kendziora testified that she did not hear any sirens or see any police lights prior to the collision.

The Court of Appeals held that Kendziora failed to raise a fact issue as to whether Chapman acted recklessly when he entered the intersection. She did not present any evidence showing Chapman failed to slow as necessary before entering the intersection or that he acted recklessly. Kendziora argued that the dashcam video is evidence of the reckless actions, but the video was not tendered or admitted into evidence in the lower court and was not part of the appellate record.

If you would like to read this memorandum opinion click **here**. Panel consists of Chief Justice McKeithen, Justice Kreger, and Justice Johnson. Opinion by Chief Justice McKeithen.

The Sixth Court of Appeals affirmed the dismissal of TTCA case because the trial court was not required to review a late-filed amended petition in making its decision on summary judgment.

Posted on **November 20, 2020** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs
Raul Gonzales v. City of Farmers Branch, No. 06-20-00054-CV (Tex.App.—Texarkana November 5,2020) (mem. op.).

This is a Texas Tort Claims Act ("TTCA")/vehicle accident case where the Texarkana Court of Appeals affirmed the trial court's summary judgment in favor of the City.

The plaintiff was a passenger in a vehicle where a police officer shot and killed the driver of the vehicle. The plaintiff alleged that the city negligently trained and supervised its officers and for reckless use of the firearm. The city filed a plea to the jurisdiction and a motion for summary judgment arguing that the plaintiff's claims were for intentional torts for which the city retains immunity. The trial court granted the city's plea to the jurisdiction and summary judgment, dismissing the plaintiff's claims. On the same day, the plaintiff filed an amended petition. The plaintiff appealed the trial court's judgment arguing that: (1) he should have been allowed to speak at the non-jury trial; and (2) that the trial court should have taken into consideration his late amended petition before issuing its judgment.

The court held that amended petitions must be filed within seven days of the date of a summary judgment proceedings or have leave of the court before being filed. Tex. R. Civ. P. 63; *Horie v. Law Offices of Art Dula*, 560 S.W.3d 425, 431 (Tex. App.—Houston [14th Dist.] 2018, no pet.). The courtof appeals noted that no trial was held in this case, it was decided by summary judgment, and thus there was no trial for the plaintiff to be excluded from. Further, the court held Gonzales did not appeal the dismissal on substantive grounds and only argued the amended petition should have been considered. The court of appeals affirmed the trial court's judgment dismissing the plaintiff's claims because the plaintiff did not request leave to file the amended petition as required by the Rules of Civil Procedure.

If you would like to read this opinion click **here.** Panel consists of Chief Justice Morriss and Justices Burgess and Stevens. Opinion by Chief Justice Josh R. Morriss, III.

El Paso Court of Appeals held Governor's executive orders control over county judge order in the event of conflicts

Posted on **November 15, 2020** by **Ryan Henry**

State of Texas, et al v. El Paso County, Texas, et al., **08-20-00226-CV** (Tex. App. – El Paso, Nov. 13,2020).

This is an interlocutory appeal from the denial of the temporary injunction involving a conflict between the county judge's executive order and the Governor's executive order. The El Paso Court of Appeals reversed the denial.

The Governor's executive order GA-32 allows bars and open with reduced capacity in October of 2020. After the County had a surge in COVID-19 cases, El Paso County Judge Ricardo Samaniego issued an executive order including a stay at home mandate and eliminating social gatherings

notconfined to a single household. While it listed several permitted essential services, bars were not included and restaurants could only allow curbside pickup. The State and a collection of restaurants sued the County and the judge asserting the order was contrary to the Governor's order. They sought a temporary injunction to prevent enforcement of the County Judge's order, which the trial court denied. Plaintiffs appealed.

The court first wanted to make clear that it was not deciding on the wisdom of either order, only the statutory construction provision as to which controlled over the other. The Governor's order contains a preemption clause countermanding any conflicting local government actions, but the County order states any conflict requires the stricter order to apply. County judges are deemed to be the "emergency management director" for their county. The Texas Disaster Act contemplates that a county judge or mayor may have to issue a local disaster declaration and has similar express powers to those issued to the Governor. However, a county judge is expressly referred to as the "agent" of the Governor, not as a separate principle. Further, even if the County judge had separate authorization, the Legislature has declared the Governor's executive order has the force of law. State law will eclipse inconsistent local law. Additionally, the Act allows the Governor to suspend the provisions of any regulatory statute within an executive order, which would include the County order. The court then analyzed the standards for a temporary injunction and held thetrial court erred in denying the injunction. Finally, the court concluded by stating how essential the role of a county judge is when managing disasters and emergencies and that their opinion should not be misunderstood. The Governor's order only controls over conflicts, and any provision of the County order which can be read in harmony remains enforceable.

Justice Rodriguez's dissent opined that the Governor exceeded the authority provided by the Disaster Act. In his view, "the Governor has taken a law that was meant to help him assist local authorities by sweeping away bureaucratic obstacles in Austin, and used it in reverse to treat local authorities as a bureaucratic obstacle to…" a once-size-fits-all coronavirus response plan.

If you would like to read this opinion click **here**. The dissent by Justice Rodriguez is found **here**. Panel consists of Chief Justice Alley, Justice Rodriguez and Justice Palafox. Opinion by Chief Justice Alley.

Austin Court of Appeals holds that under the Civil Service Act applied to police officers, a reinstatement list must factor in seniority in the position being demoted and not seniority in thedepartment

Posted on **November 13, 2020** by **Ryan Henry**

Bradley Perrin v. City of Temple, et al, **03-18-00736-CV**, (Tex. App – Austin, Nov. 6, 2020)

This is an employment dispute in a civil service police department with crossclaims and a host ofprocedural matters. The Austin Court of Appeals ultimately held the Plaintiff was entitled to the promotional position of corporal.

Perrin and Powell were serving as police officers for the City and took the written examination for promotional eligibility to the rank of corporal. Five officers passed, including Perrin and Powell. The results were publicly posted on a certified list with Powell being third and Perrin being fifth. Then, the Director added seniority points, but made Perrin third and Powell fifth. The City Defendants and Powell contend that the Director erred in adding the seniority points and did so incorrectly. However, before the list expired, the City eliminated four corporal positions and created two new lieutenant and two new sergeant classifications. The Chief sent out a memo stating the sequence of events should have resulted in the promotion of Officers Mueller, Perrin, Powell and Hickman to corporal, and then the immediate demotion back to the rank of police officer, and placement on a Re-Instatement List for the period of one year. The reinstatement list listed Powel higher than Perrin due to seniority points being included. Perrin sued the City Defendants for a list status higher than Powell under declaratory judgment and *ultra vires* claims.The City Defendants counterclaimed, seeking declaratory relief that Powell was entitled to the promotion and Powell intervened. The trial court issued an order denying Perrin's plea to the jurisdiction and motion for summary judgment and granting the City Defendants' and Powell's motions for summary judgment. Perrin appealed.

The court first held the legislature waived immunity for dissatisfaction with the grading in §143.034(a) of the Texas Local Government Code, which permits an "eligible promotional candidate" who is "dissatisfied" with "the examination grading" to "appeal, within five business days, to the commission for review." To the extent that Powell is relying on the UDJA to challenge"the examination grading" such is precluded due to the redundant remedy doctrine. Powell's ultra

vires claim is not dependent on the remedies so is permitted to move forward for prospective relief only, but since Powell sought a reevaluation of the promotion list, that is not prospective. The trial court erred in granting Powell's summary judgment for retrospective relief to alter the list. conclude that the City Defendants' counterclaim requesting declaratory relief did not rise to a justiciable level and therefore the district court lacked subject matter jurisdiction over the counterclaim. It is the promotional eligibility list that provided the rights and status of the parties as to their initial promotion to corporal. Whether Perrin was erroneously placed ahead of Powell on the promotional eligibility list does not affect the rights and status of the parties under that list because, on this record, there is no mechanism by which the expired list may be retroactively amended. By providing a unilateral right of review only to officers, the Civil Service Act is not thereby permitting a declaratory judgment action through which the City Defendants may challenge the decision of

the Director in making the list. However, for the reinstatement list, the context of the statute makes clear that the reinstatement list is created by the demotion of officers who have "least seniority in a position" and that the list "shall" be "in order of seniority." The court determined that "seniority" in section 143.085(a) refers to seniority in the corporal position, not seniority in the Department. So, when multiple individuals are promoted to open vacancies from a promotional eligibility list at the same time and then demoted at the same time, "seniority" for the reinstatement list is determined by the order of the promotional eligibility list. If you would like to read this opinion click **here.** Panel consists of Justices Goodwin, Kelly, and Smith. Memorandum Opinion by Justice Goodwin. Docket page with attorney information can be found **here.**

The U.S. Fifth Court of Appeals held plaintiffs had standing to challenge zombie law provision in charter despite the election being over.

Posted on **November 10, 2020** by **Ryan Henry**

Special contributing author Laura Mueller, City Attorney for Dripping Springs

Joe Richard Pool, III, et al. v. City of Houston, et al., No. 19-20828 (5th Cir. October 23, 2020).

In this appeal from a trial court's dismissal of an election case. The U.S. Fifth Circuit reversed the trial court's dismissal and held that the plaintiffs had standing to continue the suit for future petitions.

The plaintiffs are petition circulators who attempted to circulate a petition in the city where they are not registered voters. The city stated that it had a charter provision that required petitions to be circulated or signed by registered voters, but that they were going to look into the issue.

While the city was researching the issue, the plaintiffs filed suit in federal district. The district court held that the charter provision was unconstitutional and granted the temporary restraining order preventing enforcement. After the petition period was over, the trial court dismissed the case as moot. The plaintiffs appealed. During the litigation, the city added an "editor's note" to its charter that it would accept petitions from anyone and had a link to a new form regarding such. The city argues that it will not be enforcing the provision and has approved a form and notation to that effect which should preclude a permanent injunction case.

When laws are deemed unconstitutional they are not always updated or removed from documents. These are called zombie laws. The Houston Charter has a provision that limits petition signers to registered voters. This type of law was deemed unconstitutional in 1999 but was not removed from the city's charter. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 193–97 (1999). In order to show standing to overturn such a zombie law, plaintiffs must show that they are

"seriously interested in disobeying, and the defendant seriously intent on enforcing, the challenged measure." *Justice v. Hosemann*, 771 F.3d 285, 291 (5th Cir. 2014). The Fifth Circuit held that it was clear that the plaintiffs would continue to try to submit petitions despite not being registered voters and that the city's notation and form were insufficient to prevent enforcement. The court held that the plaintiffs have standing and could continue their suit against the city for future petitions.

If you would like to read this opinion click **here.** Panel consists of Justices Graves, Costa, and Engelhardt. Opinion by Circuit Judge Gregg Costa.

U.S. 5th Circuit holds Plaintiff students established standing to assert University's student speech policies on harassments and rudeness are unconstitutional

Posted on **November 10, 2020** by **Ryan Henry**

Speech First, Inc. v. Fenves, 19-50529 (5th Cir. Oct. 28, 2020)

This is a First and Fourteenth Amendment free speech case in a university setting. The U.S. 5th Circuit Court of Appeals reversed the dismissal of the plaintiffs' claims and reinstated the case. Speech First, Inc., ("Speech First") is an organization of free-speech advocates which brought suit on behalf of students at the University of Texas at Austin ("University") challenging seven policies of the University. The policies prohibited obscenity, defamation, rude statements, "verbal harassment of another" with a very broad definition, a requirement that if a person demands the student to stop communicating with them the student must oblige, and several others. The Dean of Students (Fenves) has primary authority and responsibility for the administration of student discipline. The trial court dismissed the claims due to a lack of standing. The Plaintiffs appealed.

In general, "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,'" so the fact the University amended its policies does not preclude the court from analyzing the original policies. Further, some of the definitions were not amended, thereby leaving the controversy live. Next, Because Speech First seeks a preliminary injunction on behalf of its members, it must clearly show that it likely has *associational* standing to bring its case on the merits. Speech First has standing if any of its members have standing. The gravamen of Speech First's claims is that its student-members wish to engage in robust debate on timely and controversial political topics from a contrarian point of view. Because their views do not mirror those of many on campus, their speech may be deemed "harassment," "rude," "uncivil," or "offensive," as those terms are defined in the University's policies. The court has repeatedly held, in the pre-enforcement context, that "[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." Evidence

supported that students "are afraid to voice their views out of fear that their speech" may violate University policies. Further, terms like "harassment," "intimidation," "rude," "incivility," and "bias" beg for clarification as they are too broad and not sufficiently prescriptive. The prong requiring substantial threat of future enforcement to confer standing does not necessarily apply for a facial challenge, only an "as-applied" challenge. The dismissal is reversed and the case remanded to thedistrict court for a reassessment of the preliminary injunction. The court finally cautioned that "In our current national condition, however, in which 'institutional leaders, in a spirit of panicked damage control, are delivering hasty and disproportionate punishment instead of considered reforms,' courts must be especially vigilant against assaults on speech in the Constitution's care." If you would like to read this opinion click **here**. Panel consists of Justices King, Jones and Costa.

Opinion by Justice Jones.

14th District Court of Appeals holds all elements of a circumstantial-evidence retaliation claim (including pretext) are jurisdictional, plus court lacked jurisdiction over Plaintiff's discriminationclaim

Posted on **November 3, 2020** by **Ryan Henry**

***Margaret Fields v. Houston Indep. Sch. Dist.*, 14-19-00010-CV (Tex. App.—Houston [14thDist.] Oct. 15, 2020)**

This is an employment discrimination and retaliation case where the Houston Court of Appeals

(14th Dist.) affirmed the granting of the school district's plea to the jurisdiction. Fields enrolled as a teacher intern in the Houston Independent School District ("HISD") alternative-certification program as a means of becoming a full-time teacher for HISD. An alternative-certification committee served as the final decision-making authority. It reviewed andevaluated Fields, who had difficulty with performance. After exhausting several performance enhancement plans, the committee dismissed Fields from the program. After receiving her right to sue letter, Fields sued for discrimination and later retaliation. HISD filed a plea to the jurisdiction, which was granted. Fields appealed.

The Fourteenth Court of Appeals first held Fields' retaliation charge was factually related to her discrimination charge. Therefore, even though Fields did not file or amend her discrimination charge to include retaliation, she was not required to in order to bring suit. Next, the court recognized NISD presented evidence of legitimate, non-discriminatory reasons for the discharge, which Fields was unable to rebut to establish pretext under her discrimination charge. Fields then argued her retaliation charge should stand because she is not required to establish pretext as a jurisdictional requirement because the jurisdictional requirement applies only to a prima facie case. The court disagreed.

When an employer presents jurisdictional evidence rebutting the prima facie case, the presumption of retaliation disappears. The employee must present sufficient evidence of pretext to survive a plea to the jurisdiction. All elements of a circumstantial-evidence retaliation claim are jurisdictional. Because Fields failed to present any evidence of pretext on the part of HISD, she failed to establish a waiver of immunity. As a result, the plea was properly granted.

If you would like to read this opinion click **here**. Panel consisted of Justices Tracy Christopher, KenWise, and Jerry Zimmerer. Opinion by Justice Jerry Zimmerer.

Property owner failed to allege Ch. 211 or 245 claims for zoning change; failure-to-exhaust-remedies bar applied to inverse-condemnationclaim

Posted on **November 2, 2020** by **Ryan Henry**

City of Dickinson v Stefan, **14-18-00778-CV**, (Tex. App. – Houston [14th Dis.], Oct. 27, 2020)

Stefan operated his home computer business in a residential zone, but allowed his church group to host events, including weddings on the property. The City changed later changed the zoning code and created a registration process for non-conforming uses. The registration allows a property owner to continue the same nonconforming use after the City adopted the change but the owner cannot expand the nonconforming use. Stefan registered his home computer businessbut did not list any church activities. Stefan did not write "events," "wedding venue," "event center," or anything else that would indicate he had been using the Property for events. Neither party produced evidence the City approved the request. Stefan was later cited for operating a special event center against the zoning code without a special use permit. Stefan appealed to the Board of Appeals, which denied his request to operate special events. Stefan then sued the City for declaratory relief claimed inverse-condemnation. The city filed a plea to the jurisdiction, which was denied. The City appealed.

The Court first held that Stefan failed to allege a vested right determination under chapter 245 or a board of adjustment appeal under chapter 211 of the Texas Local Government Code. The operation of an ongoing business is not a "project" within the meaning of chapter 245. Rights to which a permit applicant is entitled under chapter 245 accrue on the filing of an original application or plan for development or plat application that gives the regulatory agency *fair notice of the project and the nature of the permit sought*. Stefan's pleadings do not mention chapter 245 or a vested right. Stefan does not cite § 211.011 or seek a writ of certiorari for a BOA appeal. He sued the City, not the BOA. As a result, he failed to seek judicial review of the BOA decision. The City challenged jurisdiction for the declaratory

judgment and takings claims for failure to timely appeal the City Board of Adjustment determination and that Stefan did not exhaust his administrative remedies regarding nonconforming uses. Even under a liberal construction of the pleadings, the court cannot create a claim Stefan's pleading did not contain, and it could not conclude that Stefan sought judicial review of the BOA decision under chapter 211. The exhaustion-of-administrative-remedies rule requires that a plaintiff pursue all available remedies within the administrative process before seeking judicial relief. Chapter 211 must be exhausted before a party may seek judicial review of a determination made by an administrative official. As a result, the trial court lacked jurisdiction over his declaratory claims and inverse-condemnation claims.

The concurrence believed Stefan's failure to allege 211 should not preclude consideration, but then held Stefan abandoned that consideration in his briefing.

If you would like to read this opinion click **here**. Panel consists of Chief Justice Frost and Justices Wise and Hassan (Hassan, J. concurring – opinion found **here**).