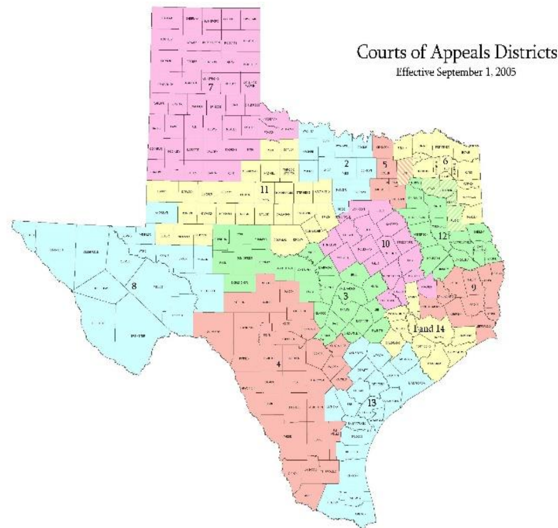

RECENT STATE CASES OF INTEREST TO CITIES

Presented to:
TCAA Summer Conference
Austin, Texas
August 4, 2021

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TML LEGAL DEPARTMENT

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

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

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TABLE OF CONTENTS

COVID	**1**
Civil Procedure	**4**
Constitutional	**9**
Elections	**11**
Employment	**14**
Firearms	**28**
Governmental Immunity-Contracts	**29**
Governmental Immunity-Torts	**37**
Land Use	**57**
Open Government and Ethics	**70**
Takings	**75**
Taxes	**78**
Utilities	**80**
Whistleblower	**80**

COVID CASES

***In re Republican Party of Tex.*, No. 20-0525, 2020 WL 4001050 (Tex. July 13, 2020).** In this case, the Supreme Court of Texas denied the Republican Party of Texas's petition for writ of mandamus in response to the City of Houston cancelling the agreement for the Party to use its convention center for its 2020 State Convention. The termination letter invoked a force majeure clause in the Agreement and cited "the unprecedented scope and severity of the COVID-19 epidemic in Houston." The next day, the Party sued for a declaration that the city had breached the agreement, an injunction prohibiting termination, and specific performance. The trial court denied the Party's temporary restraining order. The Party appealed directly to the Supreme Court of Texas for mandamus under Section 273.061 of the Election Code to order the city to perform under the contract. Section 273.061 gives the Supreme Court of Texas jurisdiction to "issue a writ of mandamus to compel the performance of any *duty imposed by law* in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer." Section 1.005(10) defines "law" in the Election Code to mean "a constitution, statute, city charter, or city ordinance." *Id.* § 1.005(10). Thus, "duty imposed by law" in Section 273.061 is limited to a duty imposed by a constitution, statute, city charter, or city ordinance. The agreement was not a law. Therefore, the Supreme Court of Texas lacked jurisdiction and dismissed the petition.

***Abbott v. Anti-Defamation League Austin*, No. 20-0846, 2020 WL 6295076 (Tex. Oct. 27, 2020)**. In July, Governor Abbott expanded the time to deliver mail-in ballots to a polling location for early voting as well as election day, but then limited the locations for delivery to just one location per county in October. Plaintiffs claimed the October proclamation: (1) was an ultra vires act because it exceeds the governor's authority under the Texas Disaster Act; (2) infringes on the right to vote, in violation of Article I, section 3 of the Texas Constitution; and (3) violates Article I, section 3 by disparately burdening voters in large counties. The Supreme Court of Texas overturned the appellate court and dissolved the trial court's temporary injunction because it found: (1) the July and October Proclamations expand the options otherwise available to voters and that Governor Abbott could amend his proclamations; (2) the burden of waiting in line on voting was de minimis, and thus, not unconstitutional; and (3) the state's county-based elections system did not disparately impact voters in larger counties.

***Brown v. Daniels,* No. 05-20-00579-CV, 2021 WL 1997060 (Tex. App.—Dallas May 19, 2021) (mem. op.).** Persons detained in the Dallas County jail sued the Dallas County sheriff in her official capacity for her handling of the COVID-19 pandemic within the jail. The sheriff filed a plea to the jurisdiction on the grounds that she was immune from suit: (1) for her actions in managing the COVID-19 crisis at the jail; (2) from plaintiffs' claims that she denied their rights under the Texas Constitution; and (3) from plaintiff's claims under the Texas Tort Claims Act (TTCA). The trial court denied her plea to the jurisdiction and the sheriff appealed. The appellate court reversed the trial court's denial and rendered judgment in favor of the sheriff because the plaintiffs' pleadings affirmatively negated jurisdiction, finding: (1) the plaintiffs' claims under the Texas Constitution were facially invalid and failed as a matter of law; (2) the plaintiffs had not provided a statute to support their claims that the sheriff acted ultra vires; and (3) the TTCA does not provide for injunctive relief.

***State v. Hollins*, No. 14-20-00627-CV, 2020 WL 5584127 (Tex. App.—Houston [14th Dist.] Sept. 18, 2020, pet. granted).** In this case, the Harris County Clerk proposed sending an application for a mail-in ballot to every registered voter in the county. The attorney general challenged the proposal, and both the trial court and court of appeals denied his request for an injunction. [Note: The attorney general immediately appealed the decision to the Supreme Court of Texas, which issued a temporary injunction on October 7. The Supreme Court concluded that "the Election Code does not authorize an early-voting clerk to send an application to vote by mail to a voter who has not requested one and that a clerk's doing so results in irreparable injury to the State. We grant the State's petition for review, reverse the court of appeals' judgment, and remand the case to the trial court for entry of a temporary injunction prohibiting the Harris County Clerk from mass-mailing unsolicited ballot applications to voters."]

Emergency Management: *State v. City of Austin*, No. 03-20-00619-CV, 2021 WL 22007 (Tex. App.—Austin Jan. 1, 2021, pet. filed) (per curiam). The Travis County Judge and the Mayor of the City of Austin issued orders that prohibited dine-in food and beverage services from 10:30 p.m. to 6:30 a.m., December 31 through January 3, but allowed takeout, curbside, and delivery. The State of Texas challenged the order in county court, and the trial court upheld the restrictions. The state appealed, and the court of appeals upheld the trial court's decision. The state filed a petition for mandamus with the Supreme Court of Texas, which granted the mandamus, directing the appellate court to issue relief under Texas Rule of Appellate Procedure 29.3, instanter, thereby enjoining enforcement of the orders pending final resolution of the appeal.

***State v. El Paso Cty.*, No. 08-20-00226-CV, 2020 WL 6737510 (Tex. App.—El Paso Nov. 13, 2020, no. pet. hist.**). Governor Abbott's Executive Order GA-32 allowed bars to open with reduced capacity. After El Paso County experienced a surge in COVID-19 cases, County Judge Ricardo Samaniego issued a stay-at-home order and prohibited social gatherings not confined to a single household. The State of Texas and a collection of restaurants sued the county and the judge asserting the order was contrary to the governor's order. 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[s]" for their counties. The Texas Disaster Act (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 principal. 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 preempts 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 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 that can be read in harmony remains enforceable. The court appeals held the trial court erred in denying the injunction sought by the State of Texas, and reversed the denial.

***State v. Hollins*, No. 20-0729, 2020 WL 5919729 (Tex. Oct. 7, 2020).** The State of Texas sued the Harris County Clerk to prevent the Clerk from mailing out mail-in ballot applications to all registered voters in Harris County. The trial court and appellate court ruled in favor of the Clerk on the State's preliminary injunction because those courts found the State would not be harmed. The Supreme Court of Texas reversed and found that the State would be harmed because the Election Code does not allow for sending all voters mail-in ballot applications (meaning the Clerk would be acting *ultra vires*) and the State has an interest in maintaining the uniformity of its elections.

***Lewis v. Dallas Cty. Sheriff*, No. 05-20-00855-CV, 2021 WL 1783106 (Tex. App.—Dallas May 5, 2021, no. pet. hist.).** Plaintiff, an employee at a jail, sued the sheriff who was his supervisor, for the conditions in the county jail during the COVID-19 pandemic, claiming that the sheriff failed to maintain the jail in a clean and sanitary condition. The trial court granted the sheriff's plea to the jurisdiction and the plaintiff appealed. The appellate court affirmed the trial court, finding that: (1) the sheriff's actions were not ultra vires; (2) she did not fail to perform a ministerial act; and (3) there is no liability under the Texas Tort Claims Act for failure to perform an act nor for a decision not to perform an act.

Elections: *Hughs v. Move Texas Action Fund*, No. 03-20-00497, 2020 WL 6265520 (Tex. App.—Austin Oct. 23, 2020, no pet.) (per curiam.). Move Texas Action Fund (MOVE) sought an injunction ordering Hughs, the Texas Secretary of State, to refrain from enforcing an Election Code provision that requires a physician certification be provided when an applicant requests a late mail-in ballot because the applicant has a disability that originates on or after the deadline for requesting a mail-in ballot. MOVE alleged that the physician certification requirement is satisfied by the existing public health orders regarding quarantine as to any voter who is diagnosed positive for COVID-19 after the 11-day cutoff or that the Election Code provision is unconstitutional. The district court granted a temporary injunction ordering Hughs to refrain from enforcing the physician's certificate requirement and from advising election officials to enforce the requirement. Hughs appealed, which automatically superseded the temporary injunction. MOVE filed an emergency motion seeking to reinstate the injunction. The court of appeals denied the request finding that granting the injunction at that time would change the longstanding requirements governing late mail-in ballots and risk voter confusion.

***In re Donalson*, No. 12-21-00040-CV, 2021 WL 1054438 (Tex. App.—Tyler Mar. 19, 2021, no pet.) (mem. op.)**. The Supreme Court of Texas on March 5, 2021 issued an emergency order allowing in-person hearings, but if a participant could show good cause, they could be permitted to participate remotely. Donalson, because of his concerns related to COVID-19 infection, argued that the lower court abused its discretion by ordering an in-person hearing. The trial court in this case had adopted health protocols requiring temperature screenings, face coverings, social distancing, and courtroom capacity restrictions in line with CDC recommendations. Donalson was unable to establish "good cause" to show that these precautions would be insufficient to protect him from infection or reinfection, and the lower court's requirement of an in-person hearing was upheld over his objections.

Elections: ***In re State*****, No. 20-0394, 2020 WL 2759629 (Tex. May 27, 2020)**. In this case, the attorney general filed a lawsuit directly with the Supreme Court of Texas, claiming that the fear of contracting COVID-19 is not a "disability" that would allow a voter to quality for a mail-in ballot. The attorney general asked that the court issue a writ of mandamus to five county clerks and election administrators to stop them from "misinforming the public to the contrary and improperly approving applications for mail-in ballots."

Texas voters can ask for mail-in ballots only if they are 65 years or older, have a disability or illness, will be out of the county during the election period, or are confined in jail. Texas election law defines disability as a "sickness or physical condition" that prevents a voter from appearing in person without the risk of "injuring the voter's health."

The court agreed with the attorney general that fear of contracting the virus, by itself, is insufficient for a voter to request a mail-in ballot. However, it declined to issue the writ of mandamus the attorney general requested.

In issuing its opinion, the court stated: "We agree with the State that a voter's lack of immunity to COVID-19, without more, is not a 'disability' as defined by the Election Code. But the State acknowledges that election officials have no responsibility to question or investigate a ballot application that is valid on its face. The decision to apply to vote by mail based on a disability is the voter's, subject to a correct understanding of the statutory definition of 'disability.' Because we are confident that the Clerks and all election officials will comply with the law in good faith, we deny the State's petition for writ of mandamus."

CIVIL PROCEDURE

Gomez v. City of Austin, **No. 08-19-00250-CV, 2021 WL 2134335 (Tex. App.—El Paso May 26, 2021).** Gomez sued the City of Austin for employment discrimination following his termination. During jury selection, the city used a peremptory strike on a prospective juror who was Hispanic. Gomez made a Batson challenge, arguing that the city had struck the juror on racial grounds. The trial court denied the challenge, and Gomez appealed.

Employing the Batson framework, the court concluded that Gomez had raised an inference of discrimination and that the city had provided a race-neutral explanation for its use of the strike. The court thus examined whether the totality of the circumstances suggested that the city had purposefully discriminated. It considered five factors: (1) statistical data about the city's use of peremptory strikes; (2) comparative juror analysis; (3) use of the jury shuffle; (4) quantity and quality of questions posed to minority panel members; and (5) the city's history of striking minority jurors. All but one of these considerations weighed in favor of the city. The court upheld the trial court's overruling of the Batson challenge.

TitleMax of Tex., Inc. v. City of Austin, **No. 07-20-00305-CV, 2021 WL 1899357 (Tex. App.—Amarillo May 11, 2021) (mem. op.).** TitleMax sued the city, seeking declaratory and injunctive relief relating to a city ordinance designed to regulate companies' credit-service activities. The trial court granted the city's plea to the jurisdiction on the grounds that the

ordinance was a penal law that could not be challenged in civil court. The appellate court reversed, relying on the Texas Supreme Court case Texas Propane Gas Association v. City of Houston, which held that a law that contains both civil and criminal aspects can be challenged in civil court if the "essence" of the law is civil.

Attorney Fees: *Kirk v. City of Lubbock*, No. 07-19-00069-CV, 2020 WL 5581352 (Tex. App.—Amarillo Sept. 17, 2020, pet. denied) (mem. op.). The Kirks, along with other plaintiffs, filed suit to enjoin the city from annexing their property. Initially, the district court granted a temporary restraining order (TRO) against the city, conditioned on plaintiffs posting an injunction bond. Six days after the bond was posted, the district court dissolved the TRO on the city's motion. Thereafter, the city filed a motion for forfeiture of the bond and an award of attorney's fees. Plaintiffs failed to appear or answer the motion. The district court ordered the bond to be forfeited and awarded attorney's fees to the city. The Kirks raised five issues on appeal regarding the bond forfeiture hearing and award of attorney's fee. The court of appeals overruled all five issues, and affirmed the judgment of the district court.

Evidence: *Hernandez v. County of Zapata*, No. 04-19-00507-CV, 2020 WL 3815932 (Tex. App.—San Antonio July 8, 2020, no pet.) (mem. op.). [<u>Comment: this opinion is helpful mainly to litigators who deal with standards for admission of evidence</u>]. This is a breach of contract/garbage collection case where the court of appeals upheld an order granting the County of Zapata's summary judgment against Hernandez.

Hernandez and the County of Zapata entered into a one-year written contract, granting Hernandez an exclusive franchise to provide garbage collection services to county residents. Hernandez agreed to pay the county a percentage of the sums he collected from the residents for his garbage collection services. When a dispute arose, the county sued Hernandez for breach of contract. The county filed a traditional motion for summary judgment, which was granted. Hernandez appealed.

A party opposing a motion for summary judgment may file a response "not later than seven days prior to the day of" the summary judgment hearing. Hernandez failed to timely file a response and failed to establish the trial court abused its discretion in denying his motion to file a late response. Hernandez's motion was unsupported by any probative evidence establishing good cause for the failure. The lack of factual support and explanation regarding counsel's alleged mistakes, "leav[es] the trial court without any means of determining whether an excusable accident or mistake had in fact occurred."

In comparison, the county's affidavits in support of its summary judgment were properly supported and included the underlying facts to justify the conclusions asserted in the affidavits. For example, the affidavit of the county auditor provided support by stating: (1) his primary duties are to oversee financial record-keeping for the county and to assure that all expenditures comply with the county budget; (2) he has continuous access to all county books and financial records and conducts a detailed review of all county financial operations; (3) he has general oversight of all books and records of all county officials and is charged with strictly enforcing laws governing county finance; and (4) after reviewing bank statements from Hernandez's

business and comparing them with county records and cross-checking corresponding franchise fee percentage owed by Hernandez pursuant to the contract, that the amount Hernandez owed the County was $361,439.07. As such, the trial court did not abuse its discretion in denying Hernandez's objections to the county's affidavits.

The court also found that the trial court did not abuse its discretion in overruling the objection to bank statements based on hearsay. Under the Texas Rules of Evidence, a statement by an opposing party is not hearsay if the statement is offered against the opposing party and "is one the party manifested that it adopted or believed to be true." Hernandez admitted that he produced the bank statements in discovery. By producing the bank statements and by adopting the bank statements as his own, Hernandez manifested an adoption or belief in their truth. The evidence is sufficient to conclusively establish the existence of a valid contract, that the county performed under the contract, and that Hernandez breached the agreement. Aside from the first-year payment, it is undisputed Hernandez did not pay the county the contracted percentages of the total gross receipts for the years 2011 to 2016. As a result, the trial court was within its discretion to grant the summary judgment. Finally, the court concluded that the record supports an award of attorney's fees.

***Claudia Brown, Justice of the Peace for Precinct 4, Place #1 v. State of Texas,* No. 08-19-00110-CV (Tex. App.---El Paso October 12, 2020).**

In this appeal from an elected official removal case, the *pro se* appellant appealed from her removal by the trial court for misconduct and incompetence. The Court of Appeals affirmed the trial court's removal because the appellant failed to adequately brief her appeal and failed to submit a reporter's record, which is required of all appellants, including *pro se* appellants.
The appellant was the Justice of the Peace for Bell County. The Bell County Attorney filed suit against the appellant to have her removed from office for official misconduct and incompetence. The charges were upheld by a jury after a three-day trial. The appellant appealed the decision as a *pro se* litigant (although the appellant was represented at the trial court). The clerk's office filed the clerk's record in the appellant's appeal, but the appellant did not file the reporter's record although it existed and the appellate court requested it multiple times. The appellant filed brief with attachments that either: (1) did not exist in the trial court; or (2) referenced the unfiled reporter's record. The court of appeals affirmed the trial court's judgment holding that the appellant waived her issues on appeal with inadequate briefing and the lack of a reporter's record.

"A *pro se* litigant is held to the same standards as licensed attorneys and must comply with applicable laws and rules of procedure. *Hughes v. Armadillo Prop. for Lina Roberts*, No. 03-15-00698-CV, 2016 WL 5349380, at *2 (Tex.App.--Austin Sep. 20, 2016, no pet.)(mem. op.); *Robb v. Horizon Comm. Improvement Ass'n, Inc.*, 417 S.W.3d 585, 590 (Tex.App.--El Paso 2013, no pet.)." The Texas Rules of Appellate Procedure require that briefing provide the issues for review with clear arguments and references to the record. If a reporter's record is not filed, the court can only review those issues that can be determined by the clerk's record. TEX.R.APP.P. 37.3(c)(1). Also, attachments that are not in the record cannot be considered by the appellate

court. TEX.R.APP.P. 34.1. The appellate court gave the appellant multiple chances to cure these issues.

The Court of Appeals held that the appellant's failure to clearly state her issues and the lack of a reporter's record narrowed the court's review to the clerk's record required them to find that the trial court acted appropriately. The Court of Appeals affirmed the trial court's order of removal.

SOAH: ***In re City of Galveston*****, No. 20-0134, 2021 WL 1822939 (Tex. May 7, 2021).** The city entered into a block grant agreement with the State, which required the city to administer federal disaster grant funds. The city hired a private contractor to perform some of this work, and agreed to certify the contractor's application for payment from State funds. A dispute regarding payment and the proper certification procedure for the work arose among the contractor, the city, and the General Land Office (GLO), with the city claiming that the GLO bore ultimate responsibility for paying the contractor. The GLO responded that the city had failed to properly certify the contractor's work. The private contractor later sued the city for amounts it claimed the city owed it under their agreement. The city settled with the private contractor and sought reimbursement from GLO for the settlement amount that the city paid. As part of the settlement agreement, the city agreed not to sue any GLO employees as defendants in any related proceeding. The city sent the GLO a notice of a claim under Chapter 2260 of the Government Code, which establishes a mediation process for certain disputes between state agencies and their contractors, and allows a contractor to request that the state agency refer the contractor's claim to the State Office of Administrative Hearings (SOAH). After the negotiation period ended, the city requested that the GLO refer the claim to SOAH, but GLO refused to do so. The city filed suit against GLO Commissioner Bush to compel him to refer the claim.

The Supreme Court of Texas found that absent legislative authorization, a state agency may not refuse to refer a claim to SOAH based on its unilateral interpretation of Chapter 2260. However, the court denied the petition for a writ of mandamus, because the city agreed not to take the commissioner into court in any proceeding related to this dispute.

Expedited Declaratory Judgment Act: ***City of Magnolia v. Magnolia Bible Church*****, No. 03-19-00631-CV, 2021 WL 7414730 (Tex. App.—Austin Dec. 18, 2020, no pet.).** This is an interlocutory appeal from an order granting a new trial and denying the city's plea to the jurisdiction in a water rate case in which the appellate court affirmed the granting of a new trial and the denial of the city's plea. The appellate court 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." As such, notice by publication is insufficient when the name, address and interest are known.

Dismissal for Want of Prosecution: ***Sanchez v. City of Snyder*****, No. 11-19-00013-CV, 2021 WL 126429 (Tex. App.—Eastland Jan. 14, 2021, no pet.) (mem. op.)**. Sanchez filed an inverse condemnation suit against the city related to the demolition of a vacant mobile home. The city filed a motion to dismiss for want of prosecution (DWOP). Sanchez argued that various

personal circumstances and financial issues had caused the delay in trying the case. The trial court granted the city's motion, noting that Sanchez's explanations were no excuse for a total delay of the case. Sanchez appealed, arguing the trial court abused its discretion. The court of appeals held the trial court did not abuse its discretion because: (1) when the trial court granted the DWOP, the suit had remained unresolved for more than four years; (2) five and one-half years had passed since the demolition of the home; and (3) there was no expectation of when Sanchez would be ready to try the case. The judgment of the trial court is affirmed.

Confederate Monuments: *In re Carter*, No. 05-20-00279-CV, 2020 WL 7693178 (Tex. App.—Dallas Dec. 28, 2020, orig. proceeding). The plaintiffs sought injunctive and declaratory relief from the city to prevent the city from removing and destroying a confederate monument. The trial court granted the city's plea to the jurisdiction dismissing all claims except for the cause of action concerning the city's plan to remove and demolish the monument. The court of appeals granted the petition for injunctive relief and ordered the city not to sell, dispose of, or damage the monument until the final disposition of the underlying appeal.

Appellate Procedure: *Franco v. State*, No. 01-20-00633-CR, 2021 WL 922394 (Tex. App.—Houston [1st Dist.] Mar. 11, 2021, no pet.) (mem. op.). Carmen Franco appealed the county criminal court's dismissal of an untimely filed appeal from a municipal court for the conviction of a moving violation. The appellate court dismissed the appeal for lack of jurisdiction because the county court's record contained no motion for a new trial and the Franco's notice of appeal was not filed with a motion for extension of time in compliance with Rule 10.5(b) of the Texas Rule of Appellate Procedure. The time for filing a notice of appeal may be extended if the notice is filed within 15 days after the deadline and a motion for extension of time complying with Rule 10.5(b) is filed. The Court of Criminal Appeals has interpreted Rule 26.3 similarly to the Texas Supreme Court in regard to amending a defective notice of appeal, but it has not held that an extension is implied when a notice of appeal is filed within the 15-day period after it is due. Therefore, to extend the time to file a notice of appeal, the appellant must file a motion for extension.

Housing Authority Evictions: *Ledezma v. Laredo Hous. Auth.*, No. 04-19-00563-CV, 2021 WL 1199043 (Tex. App.—San Antonio Mar. 31, 2021, no pet.) (mem. op.). For over fifteen years, Miriam Ledezma has lived at the Ana Maria Lozano complex, a federally-subsidized housing project operated by Laredo Housing Authority (LHA). In February 2017, Ledezma received a notice of termination of lease, in which she was accused of "repeatedly threatening the rights of other tenants to the peaceful enjoyment of their community facilities and the social environment of their Housing Project, as called for by Section IX (l) and (m) of the Lease." In October 2017, Ledezma received another notice of termination stating that, because "the reason for the proposed eviction involve[d] a threat to the health, safety and rights of peaceful enjoyment of the premises by [her] neighbors," she was not entitled to a grievance hearing. The notice further stated that LHA would "file proceedings in state court to evict [her] from the premises." In April 2018, Ledezma was sued for forcible entry and detainer. The justice of the peace court ordered her to vacate her housing unit. Ledezma appealed, and the trial court found that Ledezma breached Sections IX(l) and (m) of her lease agreement by threatening the rights of

other tenants to the peaceful enjoyment of their community facilities and the social environment of their housing project.

Ledezma argued the trial court lacked subject-matter jurisdiction because the LHA did not comply with federal regulations related to notice in proceeding with the eviction suit. The court of appeals concluded that the notice letter did not comply with the specific notice requirements of 24 C.F.R. § 966.4(l)(3)(v). The court then turned to whether the record showed Ledezma was harmed by the inadequate notice, and ultimately held that she was, resulting in the case being remanded back to the trial court.

Excessive Fine: *Duisberg v. City of Austin*, No. 07-20-00171-CV, 2020 WL 6122951 (Tex. App.—Amarillo Oct. 16, 2020, no. pet. hist.) (mem. op.). Duisberg seeks to nullify civil penalties which accrued after he allowed his house to deteriorate to the level of becoming a "public nuisance." He argues the penalties imposed by the city are excessive and violate the Eighth Amendment of the United States Constitution. Noting it was Duisberg's own delay in bringing his house into compliance over the course of many years that created the $33,000+ in penalties, the court of appeals affirms the trial court's order granting the city's summary judgment motion.

CONSTITUTIONAL

Public Camping: *In re Durnin*, No. 21-0170, 2021 WL 791979 (Tex. Mar. 2, 2021). Petitioners sought an initiative election on an ordinance regarding camping in public places (including sidewalks) and aggressive solicitation for money. The City of Austin called an election for the initiative. When the City approved the ballot language, it stated that 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 court held the wording of the proposed ordinance does not apply to just anyone; rather, 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 City's ballot language threatens to "mislead the voters" by misrepresenting the measure's character and purpose or its chief features. Thus, the court issued a mandamus to strike the word "anyone" in two locations on the ballot.

***Washington v. Associated Builders & Contractors of S. Texas, Inc.*, No. 04-20-00004-CV, 2021 WL 881288 (Tex. App.—San Antonio Mar. 10, 2021, no. pet. hist.).** In this case, the Fourth Court of Appeals considered the legality of the City of San Antonio's paid sick leave (PSL) ordinance. 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 enumerated reasons. Under the ordinance, a business's failure to comply with the provision of the PSL ordinance could result in fines. Instead of putting the ordinance on the ballot for a vote pursuant to the city charter, the city council decided to adopt the PSL ordinance verbatim. In response, multiple businesses and

business associations sought and obtained temporary and permanent injunctions to prevent its enforcement.

The court of appeals concluded that the PSL ordinance was unconstitutional because it established a minimum wage that is inconsistent with the Texas Minimum Wage Act (TMWA). 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. As a result, the ordinance was preempted by state law.

***Concerned Citizens of Palm Valley, Inc. v. City of Palm Valley*, No. 13-20-00006-CV, 2020 WL 4812641 (Tex. App.—Corpus Christi Aug. 13, 2020, no pet.) (mem. op.)**. In this taxpayer suit, the plaintiffs allege that the City is spending money on a private golf course in an unconstitutional manner, but the Court held that the denial of a temporary injunction was appropriate because the plaintiffs failed to show an injury distinct from the general public.

The plaintiffs are a group who oppose the City's use of funds on a private golf course. They sued the City under Texas Constitutional Article 3, Section 52 that states that A City cannot spend money on private property. The plaintiffs sought a declaratory judgment preventing expenditures as well as temporary and permanent injunctions. The trial court denied the temporary injunction because there was insufficient proof that the City was in violation the Texas Constitution. The plaintiffs appealed. The Court of Appeals affirmed the trial court's order, but on the ground that the plaintiffs have not alleged standing for its claims.

To present a claim for a declaratory judgment or to be able to be granted a temporary injunction, a plaintiff has to prove an injury distinct from the general public. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). A citizen cannot bring suit against a governmental entity to require it follow legal requirements if it does not have a separate injury. While these arguments were not made by the City, the Court of Appeals held that there was insufficient evidence of a particularized injury for standing for the temporary injunction. The Court affirmed the trial court's denial of the temporary injunction.

***Zimmerman v. City of Austin*, No. 08-20-00039-CV, 2021 WL 1016443 (Tex. App.—El Paso Mar. 17, 2021, no. pet. hist.)**. As part of its Fiscal Year 2019-2020 budget, the City of Austin allocated $150,000 for "abortion access logistical support services" and directed the city's health department to disperse the funds to qualified organizations through a competitive bidding process. Don Zimmerman filed a lawsuit against the city and its city manager, in which he sought a declaration that the proposed expenditure violates state law for two distinct reasons: (1) it conflicts with various Texas statutes that make it a crime to aid and abet the procurement of an abortion, which he alleges are still viable even after the Supreme Court of the United States found them unconstitutional; and (2) the expenditure of these funds violates the prohibition in the Texas Constitution against providing "gifts" of public money to private individuals or associations. For different reasons, the trial court granted the city's plea to the jurisdiction, dismissed Zimmerman's first cause of action with prejudice, and dismissed the second cause of action without prejudice. Zimmerman appealed.

The court of appeals concluded that the criminal abortion statutes upon which Zimmerman's first claim is premised are ineffective to impose a duty on the city as it is an attempt to enforce a criminal statute, albeit in a civil context. Additionally, the court of appeals concluded that the highest criminal court in the state had concluded that the statutes were no longer in force and effect, and the court of appeals was unable to find any instance where the Texas abortion statutes have been substantively applied in any criminal case for the almost 47 years since the Supreme Court found them unconstitutional.

With regard to the allegations of an unconstitutional gift, the court of appeals concluded that the claim was not ripe because the city had yet to bid out the contract under which these funds could be expended. Accordingly, unless and until the city enters into a contract obligating it to disperse funds to an abortion-assistance organization, any decision would be an advisory opinion, which would not only violate the Texas Constitution, but would be an unpractical and unwise use of judicial resources.

ELECTIONS

***In re Hotze*, No. 20-0739, 2020 WL 5919726 (Tex. Oct. 7, 2020).** The relators filed a mandamus petition in the Supreme Court of Texas at the end of September to prevent expanded early voting and the time to drop off mail-in ballots on the grounds that the Governor's proclamation violated their due process rights and the Governor's actions were unconstitutional. The Supreme Court of Texas denied the petition because the relators were dilatory in pursuing their rights; they waited 10 weeks after the proclamation was issued to file their lawsuit. Additionally, at the time of the decision, the election had already started, and the United States Supreme Court has repeatedly warned against judicial interference in an election that is imminent or ongoing.

Referendum Petition: *Carruth v. Henderson*, No. 05-19-01195-CV, 2020 WL 4199065 (Tex. App.—Dallas July 22, 2020, no. pet. hist.). This is a mandamus action (and second interlocutory opinion) where the Dallas Court of Appeals issued a mandamus against the city secretary of the City of Plano regarding a citizen's referendum petition and granted summary judgment for the plaintiff citizens.

The City of Plano, a home-rule municipality, has a comprehensive plan for land and use development under Chapter 213 of the Texas Local Government Code. The City of Plano's charter permits qualified voters to submit a referendum petition seeking reconsideration of and a public vote on any ordinance, other than taxation ordinances. After the city passed an ordinance amending and adopting a new comprehensive plan, several citizens submitted a petition to the city secretary for a referendum to repeal the new plan. The city council held an executive session and was advised by outside legal counsel that the petition was not subject to a referendum vote. When no action was taken on the petition, the citizens filed suit to compel formal submission to the city council and to have the city council either take action or submit the issue to a popular vote. The city secretary filed a motion for summary judgment, which was granted. The citizens appealed.

The legislature may preempt municipal charters and ordinances. However, when preempting a home-rule charter, the language must be clear and compelling. The Plano City Charter itself excepts only ordinances and resolutions levying taxes from the referendum process. And while Chapter 213 of the Texas Local Government Code regulates the adoption of comprehensive plans, the mere fact that the legislature has enacted a law addressing comprehensive plans does not mean the subject matter is completely preempted (which would have foreclosed a referendum application). The city secretary claims Section 213.003 impliedly withdraws comprehensive development plans from the field of initiative and referendum by mandating procedural requirements, including a public hearing and review by the planning commission before cities can act on such plans. This argument ignores that the Section 213.003(b) also allows a city to bypass the procedures set forth in subsection (a) and adopt other procedures in its charter or by ordinance. Thus, the legislature did not limit the power of home-rule cities to adopt comprehensive plans. Further, comprehensive plans, while linked to, are to be treated differently than zoning regulations. So, the cases cited by the city secretary related to zoning referendums are not applicable. The order granting the city secretary's motion for summary judgment is reversed.

Because the original interlocutory opinion held the city secretary has a ministerial duty to present the petition to the city council, the law-of-the-case doctrine prevents the panel from holding otherwise. As a result, the appellate court must grant the citizen's motion for summary judgment.

***Jefferson-Smith v. City of Houston*, No. 01-20-00136-CV, 2020 WL 4589745 (Tex. App.—Houston [1st Dist.] Aug. 11, 2020, no. pet. hist.).** In this election contest case, the Houston Court of Appeals dismissed an election contest because a City's administrative declaration of candidate eligibility cannot include fact finding, and the documentation of a felony conviction, alone, is insufficient to prove ineligibility without conclusive proof through documentation that the disabilities of the felony conviction have not been removed.

The plaintiff was a candidate for city council in Houston with two other candidates. After the November 2019 general election, the other two candidates received more votes and were scheduled for a runoff. The plaintiff brought multiple causes of action against one of the other candidates, arguing that she was ineligible because she is a convicted felon. The plaintiff brought two causes of action in the courts and also sought a Demand for Administrative Declaration of Ineligibility with the Mayor's Office. As part of the plaintiff's evidence for the Administrative Declaration she included the felony conviction and a statement from the other candidate that she was convicted of a felony but had the felony conviction disability removed because she completed her sentence and was able to vote again. The Mayor did not administratively disqualify the alleged felon and the plaintiff filed this election contest.

At the trial court, the plaintiff submitted additional evidence that was not presented to the Mayor, by reading into the record testimony from the other candidate (from a parallel injunction hearing) a statement that "she had never sought a pardon or been issued judicial clemency." The Mayor did not have this statement when considering the Declaration although the city attorneys' office

had been active in the injunction case. The trial court held against the plaintiff because the evidence did not conclusively prove ineligibility, primarily because the other candidate's testimony regarding her eligibility status was not presented to the Mayor. The plaintiff appealed.

For a governmental entity to remove someone from a ballot or declare a candidate ineligible if "facts indicating that the candidate is ineligible are conclusively established by another public record." TEX. ELEC. CODE § 145.003(f). For a candidate to be declared eligible they cannot have been "finally convicted of a felony from which the person has not been pardoned or otherwise released from the resulting disabilities." TEX. ELEC. CODE § 141.001(a)(4). Therefore, for an election contest to be successful, a plaintiff has to prove that the Mayor's office had conclusive documentation that the candidate was a felon whose disability had not been removed. The Court of Appeals stated "if the documentation presented to the election official leaves a fact question to be determined, the fact at issue has not been 'conclusively established.'" The Court of Appeals affirmed the trial court's dismissal of the plaintiff's claim because the plaintiff did not provide documentation to the Mayor's Office that conclusively established that the other candidate had never had her disability of felony conviction removed. When discussing the evidence that was presented to the trial court, but not the Mayor's office, the Court of Appeals held that just because the city attorney's office was aware of evidence from a different judicial proceeding is not the same as presenting the evidence to the Mayor when asking for the Administrative Declaration of Ineligibility.

The Court of Appeals also stated related to these types of election actions:

> Because fact-finding is often required to determine whether a contestee has been pardoned, an injunction may be more appropriate vehicle in which to challenge a candidate's ineligibility based on a felony conviction rather than by administrative declaration of ineligibility.

***City of Floresville v. Gonzalez-Dippel*, No. 04-20-00070-CV, 2020 WL 4606902 (Tex. App.—San Antonio Aug. 12, 2020, no pet.) (mem. op.)**. The city's charter requires municipal elections be held on the May uniform election date, but, in 2011, the city council, adopted a resolution changing the date of its May election to November. In 2019, the city council repealed the 2011 resolution, changing the date for all future municipal elections back to May. Candidates for places 3, 4, and 5 who had filed for a place on the ballot for the November 2019 election before the 2019 resolution was passed, and the city's mayor, Gonzalez-Dippel, in her official capacity, sued the city and each of the other city council members and the city secretary in their official capacities, seeking declaratory and injunctive relief for the 2019 resolution was allegedly passed in violation of the Election Code and the Texas Open Meetings Act (TOMA). The city filed a general denial and a plea. The trial court denied the city's plea and granted a temporary injunction declaring the 2019 resolution void, places 3, 4, and 5 vacant, and ordering the city to hold a special election in May 2020. The court of appeals reversed in part the trial court's order denying the plea, holding that the mayor had no standing to sue in her official capacity and the claims for declaratory and injunctive relief were improper attempts to pursue a quo warranto claim. The court remanded to the trial court the city's mootness challenge to the TOMA claims,

and affirmed the trial court's order as to the claim that the 2019 resolution violated the Election Code.

Quo Warranto: ***City of Leon Valley v. Martinez,*** **No. 04-19-00879-CV, 2020 WL 4808711 (Tex. App.—San Antonio Aug. 19, 2020, no pet.)**. After the city council removed Martinez from his elected office as council member and appointed his replacement, Martinez sued the city seeking reinstatement. The city filed a plea, arguing that a quo warranto proceeding was Martinez's exclusive remedy. The trial court denied the appeal. The court of appeals held the remedy to seek reinstatement was a quo warranto action.

In Re Martinez**, No. 04-20-00424-CV, 2020 WL 6048768 (Tex. App.—San Antonio Oct. 14, 2020, no pet.) (mem. op.)**. Martinez, a candidate for Val Verde County Attorney, sought, by a writ of mandamus, to decertify and remove his opponent, Smith, from the ballot, asserting that Smith's ballot petition signatures were invalid because two of her circulator's affidavits did not contain dates, which would have resulted in the total number of valid signatures falling below the requisite number. The court denied the writ of mandamus. It considered the affidavits in the context of their purpose, which is to ensure that a candidate has submitted a sufficient number of valid ballot petition signatures, and determined that invalidating the signatures due to the missing dates would not be a just and reasonable result.

EMPLOYMENT

Texas Dep't of Transp. v. Lara, **No. 19-0658, 2021 WL 2603689 (Tex. June 25, 2021).** A former employee brought an action against the Texas Department of Transportation (Department) under the Texas Commission on Human Rights Act (TCHRA), alleging that the Department terminated his employment after he exhausted his five months of sick leave while recovering from surgery, that the Department failed to reasonably accommodate his disability by granting him additional leave without pay in accordance with its policy, and that the Department discharged him in retaliation for his request for additional leave. The trial court denied the Department's combined plea to the jurisdiction and motion for summary judgment based on sovereign immunity. The Austin Court of Appeals affirmed in part and reversed and rendered in part. Both parties petitioned for review.

The Texas Supreme Court affirmed in part, reversed in part, and remanded, holding that: (1) a genuine issue of material fact exists as to whether the former employee requested leave without pay (LWOP) as a reasonable accommodation, which precludes summary judgment on his disability-discrimination claim; (2) a genuine issue of material fact exists as to whether the former employee's request for LWOP was a reasonable accommodation or request for indefinite leave, which precludes summary judgment on his disability-discrimination claim; (3) the former employee failed to show that he engaged in activity protected by TCHRA when he requested LWOP as a reasonable accommodation for his medical issues, and thus failed to establish a prima facie case of retaliation based on the Department's denial of his request and termination of his employment; and (4) the former employee's pleadings gave fair notice of a claim for disability discrimination under the TCHRA.

Goodlett v. NE. Indep. Sch. Dist., No. 04-20-00203-CV, 2021 WL 2117927 (Tex. App.—San Antonio May 26, 2021) (mem. op.). Goodlett was a custodian at Northeast Independent School District (Northeast). He was autistic and had a limited ability to navigate social situations as a result of his disability, but performed capably in his job. After completing a task, one of his coworkers challenged him and several other employees to a race. While running, Goodlett pushed one of his coworkers from behind, injuring her. During an investigation of the incident, it was discovered that Goodlett had previously made two threatening remarks. He was terminated from his employment and sued Northeast under Chapter 21 of the Texas Labor Code, alleging employment discrimination based on his disability. Northeast filed a plea to the jurisdiction, arguing that Goodlett had failed to present a prima facie case of discrimination. The trial court granted the plea to the jurisdiction.

The court affirmed. In order to establish a prima facie case of discrimination, Goodlett had to show that he was treated less favorably than other similarly situated employees who were not members of the protected class under nearly identical circumstances. This required that Goodlett identify a comparator employee who was not terminated under nearly identical circumstances. Goodlett attempted to do so by alleging that the other employees who participated in the horseplay leading up to the pushing incident had not been disciplined, but the court held that these employees were not similarly situated because they had not pushed a coworker or made threats. As such, Goodlett failed to establish a prima facie case. The court also found that Goodlett had not established a prima facie case for a failure-to-accommodate claim because he had never requested any accommodation.

***Rickert v. Meade*, No. 06-20-00002-CV, 2020 WL 4354946 (Tex. App.—Texarkana July 30, 2020, no pet.) (mem. op.)**. In this Section 1983 case on an attorney fees award, the appellate court upheld the trial court's grant of attorney fees in favor of the defendant, City of Bonham, because the plaintiff did not establish even a prima facie case.

The plaintiff was terminated from his city employment after a co-worker filed a sexual harassment claim against him based on an allegedly consensual relationship. The Texas Workforce Commission determined that the sexual harassment claim against the plaintiff was baseless. The plaintiff sued the city under Section 1983 asserting entitlement to a name-clearing hearing. The trial court dismissed the claim for lack of evidence and awarded attorney's fees to the city. The plaintiff appealed the attorney fee award.

In order for an attorney fee award to be upheld against a plaintiff in favor of a defendant, it has to be shown that "the plaintiff's action was frivolous, unreasonable, or without foundation even though not brought in subjective bad faith." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (per curiam) (quoting Christiansburg, 434 U.S. at 421). The plaintiff's action was based on the lack of a name-clearing hearing after his termination. A terminated individual has the right to a name-clearing hearing where the employee's "good name, reputation, honor, or integrity" is questioned during a termination. *Bledsoe v. City of Horn Lake, Miss*., 449 F.3d 650, 653 (5th Cir. 2006). In this case, the plaintiff provided no evidence that he was denied a name-clearing hearing, or that he even requested one. Evidence was presented that he was provided a chance to be heard at a

hearing prior to termination. The court of appeals held this lack of evidence was sufficient to show that the trial court did not abuse its discretion.

Houston Cmty. Coll. v. Lewis, **No. 01-19-00626-CV, 2021 WL 2654141 (Tex. App.—Houston [1st Dist.] June 29, 2021) (mem. op.).** This appeal stems from a trial court's holding denying the college's plea to the jurisdiction on a racial discrimination claim and a whistleblower retaliation claim. The appellate court reversed the trial court's judgment and dismissed the case finding that the plaintiff provided insufficient evidence of discriminatory intent in her termination and failed to provide causation related to the whistleblower retaliation claim. The court determined that evidence that a subordinate employee had made a derogatory remark was insufficient to show discriminatory intent, the employer established a reasonable basis for the plaintiff's termination, and her replacement was also African-American.

The court also found that the plaintiff 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. To establish a claim under the Texas 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. 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 the whistleblower claim was not met.

***City of Pharr v. Cabrera*, No. 13-18-00559-CV, 2020 WL 2988641 (Tex. App.—Corpus Christi June 4, 2020, no pet.) (mem. op.)**. Gabriel Cabrera, an employee with the City of Pharr, was terminated by the city and the city refused to pay Cabrera accrued sick leave. Cabrera alleged that he was entitled to be paid for his accrued sick leave based upon the city's personnel policy, which provided for payment of accrued sick leave for certain qualified retirees. Cabrera sued the city, arguing that the city's personnel policy constituted a contract between him and the city for the payment of benefits. The city filed a plea to the jurisdiction on the grounds of sovereign immunity, which was denied by the trial court. The city appealed.

On appeal, the first issue considered by the court was whether the city entered into a unilateral contract with Cabrera by passing the ordinance adopting the personnel policy. The city's personnel policy contained a disclaimer, which Cabrera signed, indicating that the manual was not a contract. The court pointed out that Texas law disfavors employee manuals forming contractual obligations, particularly when there is a specific disclaimer. Due to the disclaimer language, and because the city's policy did not specify compensation for Cabrera's classification or specify hours of service, the court held that the city did not waive sovereign immunity under Local Government Code Section 271.152, and therefore, the trial court erred by denying the city's plea to the jurisdiction. The trial court's judgment was reversed, and the court dismissed all claims against the city for want of jurisdiction.

***City of Haltom City v. Forrest*, No. 02-20-00084-CV, 2021 WL 733057 (Tex. App.—Fort Worth Feb. 25, 2021, no pet.) (mem. op.).** A terminated police officer filed a religious

discrimination complaint with the Texas Workforce Commission. The parties entered into a settlement agreement in which Haltom City agreed to pay the former officer nearly $30,000 and process any employment inquiries through Haltom City police department's human resources department, which was to provide only neutral, non-disparaging information regarding the officer's title, salary, and dates of employment. The former officer filed suit, alleging that Haltom City police department provided a disparaging job reference which he claimed was retaliatory and a breach of the terms of their settlement agreement.

The City filed a plea to the jurisdiction and hybrid traditional and no-evidence motion for summary judgment, both of which the trial court denied. The court of appeals affirmed the trial court's denial of the plea to the jurisdiction and motion for summary judgment.

F-5: *McCall v. Hays Cty. Constable Precinct Three*, No. 03-18-00355-CV, 2020 WL 2739868 (Tex. App.—Austin May 21, 2020, no pet.) (mem. op.). In this appeal, the court affirms the trial court's order finding that a law enforcement officer's termination was correctly categorized as a "general discharge."

Brian McCall was a volunteer reserve officer for Hays County Constable Precinct Three (Constable). His employment with the Constable was terminated after an investigation revealed that he had provided and failed to prevent others from providing his 18-year old girlfriend, Vivian Sanchez, with alcohol, and that he had failed to return his equipment when requested to do so. The Constable filed an employment termination report (F-5 Report) with the Texas Commission on Law Enforcement (TCOLE) stating that McCall was terminated with a "general discharge." McCall filed an administrative appeal seeking to correct the "general discharge" to an "honorable discharge." The administrative law judge (ALJ) concluded that the Constable had established by a preponderance of evidence that McCall's termination was appropriately categorized as a "general discharge" and should not be changed to "honorable discharge." McCall appealed the ALJ's order in district court. The district court affirmed the ALJ's order. McCall appealed.

The court determined that McCall's explanation for never objecting to allowing others to provide alcohol to his girlfriend failed because the doctrine of in loco parentis did not permit McCall's mother to authorize Sanchez's drinking. The court also determined that the ALJ was not authorized or required to determine whether the Constable met the requirements of Chapter 614 of the Government Code in the F-5 hearing as an F-5 hearing is a proceeding to contest information in an employment termination report and not a proceeding to challenge disciplinary action. Accordingly, the court affirmed the order denying McCall's petition to correct the "general discharge" in his F-5 Report to an "honorable discharge."

***Democratic Schools Research, Inc. d/b/a The Brazos School for Inquiry and Creativity v. Tiffany Rock,* 01-19-00512-CV (Tex. App.---Houston [1st Dist.], Aug. 4, 2020).**

In this employment discrimination case, the Houston First Court of Appeals overturned a trial court's denial of a plea to the jurisdiction by a school because participation in discovery by the

school did not waive its governmental immunity and its immunity had not otherwise been waived as it related to the plaintiff's state law employment discrimination and retaliation claims.

The plaintiff was an African-American principal at a public charter school. During her employment, the plaintiff sent emails to the school's administration complaining about understaffing at the school and low morale at the school, including complaining of the school's administration calling the school "too black" and that African American teachers were paid less. The school administration responded to the complaints stating that the statement occurred but that it referenced the lack of Hispanic teachers at a different school campus and that there was no proof that African American teachers were paid less or that there was any bias in the school's salaries. The plaintiff never filed a formal grievance although being urged to do so by the school administration. After ongoing discussions with the school's administration regarding issues at her school, she was terminated for having a hostile attitude and insubordination. After her termination, a Caucasian member of the school's administration took on her duties until a permanent principal, who was African-American, could be hired. The plaintiff sued the school for employment discrimination and retaliation. The trial court denied the school's plea to the jurisdiction, and the school brough this interlocutory appeal.

Governmental immunity is not waived by participation in the discovery process by the governmental entity, because sometimes a court may need to consider evidence when ruling on a plea to the jurisdiction. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554, 555 (Tex. 2000); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 233 (Tex. 2004). The Court of Appeals looked to the employment discrimination and retaliation claims to determine whether immunity had been waived. The Texas Commission on Human Rights Act (TCHRA) waives governmental immunity if a government employer engages in an unlawful employment practice including discrimination. TEX. LAB. CODE § 21.051. To establish an action for discrimination the employee must show that: (1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) was treated differently than other employees who are not in the protected class. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 640 (Tex. 2008). If this burden is met, the burden then shifts to the employer.

The "too black" comment was not sufficient evidence of discrimination because it was unrelated to the plaintiff's termination and because the comment related to the school's diversity guidelines. The Court also dismissed the allegation of lower pay because it was unproven and was not related to the plaintiff who was one of the highest paid individuals in the school district. The plaintiff's replacement was in her protected class, and temporary replacements are not considered when using proof of replacement by someone not in a protected class as evidence of discrimination. Finally, the plaintiff presented no proof that she was treated differently from similarly situated employees in her termination. The Court of Appeals held that the trial court erred when it did not grant the school's plea to the jurisdiction because the plaintiff did not state an employment discrimination claim. The Court of Appeals also held that the plaintiff's allegations and complaints did not raise a claim of retaliation because the plaintiff failed to file a formal complaint and the school had no notice that she was alleging unlawful discrimination.

***Donna Indep. Sch. Dist. v. Castillo*, No. 13-19-00395-CV, 2020 WL 4812638 (Tex. App.—Corpus Christi Aug. 13, 2020, pet. denied) (mem. op.)**. In this employment discrimination and retaliation case, the plaintiff brought some claims that occurred outside of the required 180 day lookback under the Texas Labor Code, but was able to bring a retaliation claim that was within the 180 day window even though the claim was not heard by the Texas Workforce Commission.

The plaintiff was a police officer with the Donna Independent School District who made multiple complaints against the School District and was later transferred and then terminated by the District. While she was still employed by the District, but after the transfer she complained of, the plaintiff filed charges of discrimination for sexual harassment, age discrimination, and retaliation at the Texas Workforce Commission (TWC). During TWC's review, the District terminated the plaintiff. The TWC issued a right to sue letter stating that TWC did not have jurisdiction because the plaintiff was outside the 180 day requirement when she filed at the TWC. The plaintiff brought suit in the trial court including the TWC claims and an additional claim of retaliation claim related to her termination after the TWC claims were filed. Her additional retaliation claim was not taken to TWC. The trial court denied the District's plea to the jurisdiction and the District appealed. The District's sole argument on appeal was that the trial court does not have jurisdiction because the plaintiff had not exhausted her administrative remedies. The Court dismissed all of the claims except the two retaliation claims that were brought in a timely manner.

To present a claim under the Texas Labor Code for discrimination the claim has to be brought before the Texas Workforce Commission within 180 days of the last related discriminatory activity. TEX. LAB. CODE §§ 21.201(a), (g); 21.202. All statutory requirements, including the 180 day period, are jurisdictional. TEX. GOV'T CODE § 311.034. The Court of Appeals held that the discrimination claims were not valid because the incidents that were the subject of the claim were alleged to have occurred more than 180 days before the claim. However, the retaliation claim due to the transfer occurred within the 180 day window. The Court also held that the retaliation claim brought in response to the termination that occurred after her other claims were already being reviewed by the TWC could move forward, despite the fact that this claim never having been reviewed by the Texas Workforce Commission. The Court quoted "under both state and federal law, courts have held that a claim of retaliation for filing a charge of discrimination is sufficiently related to the charge of discrimination to exhaust remedies for the retaliation claim, even though the charge contains no reference to the alleged retaliation." *Tex. Dep't of Transp. v. Esters*, 343 S.W.3d 226, 230–31 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

***City of Houston v. Trimmer-Davis,* No. 01-19-00088-CV, 2020 WL 4983253 (Tex. App.—Houston [1st Dist.] Aug. 25, 2020, no pet.) (mem. op.)**. In this employment retaliation case, the plaintiff sued the City after being suspended after making a complaint and terminated after failing to follow drug testing procedures. The Court of Appeals allowed the retaliation claim related to the suspension move forward but dismissed the claim related to the termination for lack of evidence that the protected activity was the but for cause of the termination.

The plaintiff was a civil service employee of the City who made a complaint related to the treatment of females in the City department in which she worked. After investigating the complaint, the City determined that the claim was untruthful and suspended the plaintiff for one day. The Civil Service Commission overturned the suspension, but the untruthfulness complaint was left in the plaintiff's personnel file. The employee sued the City of Houston for retaliation for the suspension and for refusing to remove the untruthfulness complaint from her files. Three weeks later, the employee was selected to take a random drug test and failed to follow the proper testing procedure multiple times. She was terminated for her failure to properly follow the drug testing requirements. The plaintiff filed another complaint related to her termination. The City argued that it had nonretaliatory reasons for the suspension, the recordkeeping of the complaint, and for the termination. The trial court granted the City's plea to the jurisdiction as to the record-keeping, but denied the plea for the one-day suspension and the termination. Both parties appealed to the Court of Appeals. The Court of Appeals held that sufficient evidence existed for the suspension and recordkeeping retaliation claims, but not for the termination claim.

To show retaliation, the employee has to show an adverse employment action was caused in retaliation for protected activity. There is no disagreement that adverse employee actions occurred or that protected activity occurred prior to the actions. The process for proving retaliation through circumstantial evidence is that: (1) the plaintiff prove that the adverse employment action and the protected activity occurred; (2) the employer then present non-retaliatory reasons for the actions; and (3) finally the plaintiff shows that the non-retaliatory reasons are pretextual. The City argued that it had non-retaliatory reasons for the terminations.

The plaintiff argued that the non-retaliatory reasons were a pretext for all three activities (suspension, keeping the untruthfulness complaint in her file, and the termination). The Court of Appeals held that the suspension occurred in a manner inconsistent with the City's own policies, which provides sufficient evidence of pretext. The Court also held that the City's arguments regarding its recordkeeping was insufficient to definitely prove there was no retaliatory intent in keeping the untruthfulness complaint in its files because the City's policies related to recordkeeping were vague and contradictory. Finally, the Court of Appeals held that there was sufficient evidence that the City had non-retaliatory reasons for the termination related to the drug testing and that the plaintiff had not provided sufficient evidence that her earlier complaints were a but-for cause of her termination. The case was sent back to the trial court on the recordkeeping and suspension retaliation claims.

***Webb Cty. v. Romo*, No. 04-19-00849-CV, 2020 WL 5027389 (Tex. App.—San Antonio Aug. 26, 2020, no pet.)**.Romo, who was running for office of county constable, sued Webb County after he was terminated from his position as chief investigator for the county attorney's office, claiming, among other things, violation of the Texas Constitution's first amendment rights to free speech, freedom of association, and free and due process speech claims, and breach of contract. The county argued that it was immune from Romo's claims. The trial court denied the county's plea to the jurisdiction. The court of appeals held that Romo's request for money damages for the alleged violations of his free speech and association rights are barred by governmental immunity, but the remedy of reinstatement was valid. The court also found that the county was immune from the contract claim.

***University of North Tex. Sys. v. Barringer*, No. 02-19-00378-CV, 2020 WL 5414973 (Tex. App.—Fort Worth Sept. 10, 2020, no pet.) (mem. op.)**. In this discrimination case, the plaintiff sued the University for age discrimination after resigning from her position. The Court of Appeals held that she had failed to provide sufficient evidence of constructive discharge for his resignation and dismissed the case.

The plaintiff was an HR employee with the University. She alleges that she was subjected to age discrimination. She was placed on paid administrative leave prior to an investigation related to a presentation where it was alleged that she was unprepared and made inappropriate comments. After being placed on paid administrative leave, she resigned. After she resigned, she filed a claim with the EEOC/Texas Workforce Commission which issued a right to sue letter. The plaintiff sued the University for discrimination claims under the Texas Commission on Human Rights Act. The trial court denied the University's plea to the jurisdiction and the University appealed. The Court of Appeals reversed the trial court holding that the plaintiff had presented insufficient evidence of an adverse employment action.

An age discrimination claim under the Texas Commission on Human Rights Act (TCHRA) requires the showing that the individual has suffered an adverse employment action. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 636 (Tex. 2012). Proof of constructive discharge, where an employee reasonably feels compelled to resign, can demonstrate an adverse employment action. *Baylor Univ. v. Coley*, 221 S.W.3d 599, 604–05 (Tex. 2007). "But potential disciplinary action, investigations into alleged work-place violations, or work-place criticisms are insufficient alone to cause a reasonable person to resign." Also, personality conflicts or arguments are insufficient to create proof of constructive discharge.

The Court of Appeals held that the plaintiff's evidence that she was placed on administrative leave while waiting on an investigation into a complaint was insufficient to prove constructive discharge. The Court of Appeals reversed the trial court's denial of the plea to the subdivision and dismissed the plaintiff's case.

***Univ. of Texas Sw. Med. Ctr. v. Vitetta*, No. 05-19-00105-CV, 2020 WL 5757393 (Tex. App.—Dallas Sept. 28, 2020, no pet.) (mem. op.).** After the University of Texas Southwestern Medical Center cut her salary, lab space, and staff, and allegedly sabotaged her role as president of the faculty senate, Dr. Vitetta sued the university for age and sex discrimination and retaliation. The university filed a plea to the jurisdiction, which was denied by the trial court. On appeal, the court affirmed the trial court's order denying the plea on Dr. Vitetta's age discrimination and sex discrimination claims related to cuts to her salary and lab, and reversed the trial court's decision related to retaliation.

***City of Dallas v. Siaw-Afriyie*, No. 05-19-00244-CV, 2020 WL 5834335 (Tex. App.—Dallas Oct. 1, 2020, no pet.) (mem. op.)** Siaw-Afriyie sued the City of Dallas alleging race discrimination, national origin discrimination, and retaliation after he was not selected for a senior manager position and his position was subsequently eliminated. The city filed a plea to the jurisdiction asserting that the city had a legitimate, non-discriminatory reason for not selecting

Siaw-Afriyie for the position, and a non-discriminatory and non-retaliatory reason for eliminating his position, and that he had presented no evidence of pretext. The trial court denied the plea. On appeal, the court affirmed the trial court's denial finding that Siaw-Afriyie had provided evidence that the city's decision not hire him for the position and to subsequently eliminate his position was a pretext for discrimination and retaliation.

***Fields v. Houston Indep. Sch. Dist.*, No. 14-19-00010-CV, 2020 WL 6073758 (Tex. App.—Houston [14th Dist.] Oct. 15, 2020, no pet.)**. Fields was dismissed from the Houston Independent School District (HISD) alternative-certification program for teachers. After receiving a right to sue letter, Fields sued for discrimination and later retaliation. The court of appeals first holds that Fields' retaliation charge was factually related to her discrimination charge. Next, the court finds HISD presented evidence of legitimate, non-discriminatory reasons for the discharge, which Fields was unable to rebut to establish pretext under her discrimination charge. 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, HISD's plea to the jurisdiction was properly granted by the trial court.

Civil Service: *Perrin v. City of Temple*, No. 03-18-00736, 2020 WL 6533659 (Tex. App.—Austin Nov. 6, 2020, no. pet. hist.) (mem. op.). Perrin and Powell, both serving as police officers for the City of Temple, participated in a promotional test that includes a written examination and an assessment for promotional eligibility to the rank of corporal. Five officers, including Perrin and Powell, passed the written examination, and after adding seniority points, the publicly posted results showed Powell in third position and Perrin in fifth. After completing the assessment, the final promotional eligibility list showed that Perrin moved up the list to third, and Powell moved down to fourth. Before the eligibility list expired, the city eliminated four corporal positions and created two new lieutenant and two new sergeant classifications. In response, the police chief determined that this sequence of events should have resulted in the promotion of officers Mueller, Perrin, Powell, and Hickman to corporal, then their immediate demotion back to the rank of police officer, and subsequently placement on a re-instatement list for a period of one year in the order of seniority in the department. When the re-instatement list was published, Perrin was ranked last. Perrin sued the city and additional defendants (city defendants) for an ultra vires claim and seeking declaratory, injunctive, and mandamus relief, asserting that the re-instatement list should be based on seniority in the position and not seniority in the department. The city defendants counterclaimed, seeking declaratory relief that Powell was entitled to the promotion, and thereafter 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 of appeals determined that under the redundant remedies doctrine, the trial court did not have jurisdiction over Powell's claim challenging the order of the promotional eligibility list under the UDJA because Section 143.034(a) of the Local Government Code provides a redundant remedy. Similarly, the court found that the trial court had erred in granting summary judgment on Powell's ultra vires claim and the city defendants' UDJA claim because the court did not have

jurisdiction over an eligibility list that had expired and that the civil service commission had no authority to make changes. The court also found that "seniority" under Section 143.085(a) refers to seniority in the corporal position, and not seniority in the department. Accordingly, the court reversed the trial court's finding, granting Perrin's motion for summary judgment and denying Powell's and the city defendants' motion for summary judgment.

***Metropolitan Transit Auth. of Harris Cty. v. Carter*, No. 14-19-00422-CV, 2021 WL 126687 (Tex. App.—Houston [14th Dist.] Jan. 14, 2021, no pet.) (mem. op.).** Carter was working as a bus operator when he was administratively terminated for alleged "medical restrictions prohibiting him from performing the essential duties of a bus operator." In its termination letter, Metro did not identify any specific restrictions or essential job functions that Carter could not perform, instead, informing him, that he must be qualified to perform the prospective job requirements and be physically capable of performing the essential functions for an extended period of time. Carter filed suit, alleging disability and age discrimination and retaliation. Metro filed a plea to the jurisdiction, and an amended plea to the jurisdiction arguing that the trial court lacked jurisdiction because Carter had failed to demonstrate Metro's governmental immunity had been waived. At the oral hearing on Metro's plea, Carter non-suited his age discrimination claim. The trial court denied Metro's plea, and Metro filed an interlocutory appeal. The Court of Appeals affirmed the trial court's order and remanded the case for further proceedings, finding that Carter's claims were not time barred, that there was a fact issue as to whether Carter was qualified for the position of bus operator, and that there was at least a fact issue on Carter's retaliation cause.

***Van Deelen v. Texas Workforce Comm'n*, No. 14-18-00489-CV, 2021 WL 245n483 (Tex. App.—Houston (14th Dist.) Jan. 26, 2021, pet. denied) (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 *de novo* 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 contrary to the TWC's decision.

The court of appeals upheld the trial court's approval of TWC's motion for summary judgment on the unemployment compensation claim holding that sufficient evidence of misconduct was reviewed by the TWC.

***City of Fort Worth v. Fitzgerald*, No. 05-20-00112-CV, 2021 WL 486396 (Tex. App.—Dallas Feb. 10, 2021, pet. denied).** The City terminated its police chief and he sued for violations of the Texas Whistleblower Act, the Open Meetings Act, the Public Information Act, and the Texas Constitution. The City filed a plea to the jurisdiction against the chief's whistleblower claims on the grounds that he failed to properly follow the internal grievance process under the City's Personnel Rules and Regulations for General Employees (PRRs). The appellate court denied the City's plea, finding that the PRRS specifically exempted police officers from them; therefore, Fitzgerald did not have to follow the grievance procedures set forth in the PRRs.

Pregnancy Discrimination: *South Texas Coll. v. Arriola*, No. 12-19-00222-CV, 2021 WL 497237 (Tex. App.—Corpus Christi-Edinburg Feb. 11, 2021, pet. denied). In this appeal from a trial court's holding that being able to become pregnant is a protected class under 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 to become 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.

The court of appeals upheld the trial court's denial of the employer's plea to the jurisdiction on the sex discrimination claim because the ability to become pregnant is a protected category.

Employment: *San Benito Consol. Indep. Sch. Dist. v. Cruz*, No. 13-20-00310-CV, 2021 WL 921793 (Tex. App.—Corpus Christi Mar. 11, 2021, no. pet. hist.) (mem. op.). Maria Cruz filed an employment retaliation and age discrimination case against her former employer, San Benito Consolidated Independent School District (SBCISD), and in response, SBCISD filed a plea to the jurisdiction and motions for summary judgment. The trial court granted summary judgment on the retaliation claim but denied judgment for SBCISD for the discrimination claim. SBCISD appealed. Cruz was able to present a prima facie case of age discrimination, which shifted the burden to SBCISD to prove a legitimate, non-discriminatory reason for Cruz's demotion. The court detailed the history of Cruz's performance with SBCISD as shown through the lower court's evidentiary record, and ultimately found evidence that SBCISD's non-discriminatory reasons for terminating Cruz could be a pretext for discrimination. The court affirmed the lower court's denial of SBCISD's plea to the jurisdiction.

***Herczeg v. City of Dallas*, No. 05-19-01023-CV, 2021 WL 1169396 (Tex. App.—Dallas Mar. 29, 2021, pet. filed) (mem. op.)**. Herczeg was a police officer who sued the city, alleging gender discrimination, wrongful termination, retaliation, and aiding and abetting retaliation. The city filed a plea to the jurisdiction, attacking the merits of the plaintiff's claims, and asserting that the plaintiff did not timely present them to the Texas Workforce Commission and that she failed to exhaust her administrative remedies. The trial court granted the plea without specifying the grounds and the plaintiff appealed.

The city argued that the appellate court must affirm because the plaintiff did not address all of the city's independent arguments on appeal. The appellate court affirmed because the plaintiff did not address the city's arguments of untimeliness or failure to exhaust grounds, both of which were separate and independent grounds for the trial court to grant the plea.

***Texas State Technical Coll. v. Owen*, No. 13-20-00264-CV, 2021 WL 1567505 (Tex. App.—Corpus Christi Apr. 22, 2021, no. pet. hist.) (mem. op.).** While Texas State Technical College (TSTC) is a public entity, not all aspects of governmental immunity jurisprudence that apply to TSTC are equivalent to those that apply to municipalities. Those diverging immunity rules are not discussed in this case. After Owen was terminated by TSTC, he sued TSTC under the Texas Commission on Human Rights Act complaining of discrimination and retaliation. TSTC's plea to the jurisdiction was denied by the trial court, and TSTC filed an accelerated interlocutory appeal of that decision on the grounds that Owen failed to exhaust administrative remedies related to the retaliation claim. Regarding Owen's age discrimination claim, the court observed that while the plea to the jurisdiction requested dismissal of the claim, the plea did not contain arguments challenging the claim and instead asserted that Owen could not meet the elements. A defendant may not advance a "no-evidence" plea to the jurisdiction; consequently, the trial court did not err in denying the plea with respect to the age discrimination claim.

Collective Bargaining: ***City of Houston v. Reyes*****, No. 14-19-00291-CV, 2021 WL 1685230 (Tex. App.—Houston [14th Dist.] Apr. 29, 2021, no. pet. hist.).** The City of Houston and the Houston Professional Fire Fighters' Association, Local 341 (Association) entered into a Collective Bargaining Agreement (CBA) in 2011 that governed point calculations for promotional examination test scores. The CBA expired on June 30, 2017. Reyes and Rodriguez took the promotional exam on July 12, 2017, and the exams were scored by the Civil Service Commission (Commission) in accordance with the rules of the then-expired CBA, which cost them each ten additional points on the exam. They appealed the Commission's decision. The Commission reversed itself and rescored the exams pursuant to Chapter 143 of the Texas Local Government Code. Other firefighters appealed this reversal, and Commission reversed itself again, holding that the exams would be scored according to the CBA. Reyes and Martinez filed suit. The city moved for summary judgment on the grounds that the Commission lacked subject matter jurisdiction to issue the orders they had issued. The trial court denied this motion, and the City filed this interlocutory appeal, arguing that the Commission did not have jurisdiction to issue said orders, because Reyes and Martinez should have followed the CBA's notice filing rules and deadlines rather than Chapter 143.

When deciding whether notice provisions are jurisdictional, the court considers: (1) the plain language of the statute; (2) whether there was a statutory prerequisite for filing a lawsuit or appeal; (3) whether there was a specific consequence for noncompliance; and (4) the consequences flowing from interpretation of the statute. The appellate court affirmed the trial court's dismissal and declined to impose a jurisdictional requirement on the notice of appeal as there was no clear statutory requirement to do so.

Sewell v. City of Odessa**, No. 11-19-00121-CV, 2021 WL 1706913 (Tex. App.—Eastland April 30, 2021, no. pet. hist.) (mem. op.).** Sewell resigned his job with the City of Odessa animal control division and subsequently filed suit against the city and six employees of the city claiming, among other things, constructive discharge, intentional infliction of emotional distress, Section 1983 claims, and slander. The trial court entered a take nothing judgment and dismissed the claims against the individual city employees under Section 101.106(e) of the Texas Tort Claims Act.

Sewell appealed, challenging the trial court judgment in nine issues. Sewell did not challenge the dismissal of the individual city employees. Sewell's first claim is that the city's summary judgment evidence contained hearsay and was conclusory. The appellate court overruled the objections. His second claim is that the trial court erred by granting the city's motion to strike his summary judgment evidence (an affidavit by Sewell). The appellate court upheld the trial court's rulings as to some portions of the affidavit, but not others. Sewell's third claim is that an inadequate time for discovery had elapsed. The appellate court found the case had been on file for two years; this issue was overruled. His fourth and fifth claims are that the trial court erred in granting the city's motion for summary judgment on his Section 1983 claims. The court overrules both issues concluding, among other things, that Sewell did not have a protected property interest in his job as he did not dispute he was an at-will employee. All of Sewell's remaining claims are subject to the Texas Tort Claims Act. The appellate court held that the city

retained its immunity as to his claims for intentional infliction of emotional distress; negligent hiring, training, supervision, and retention; and respondeat superior. The claims against the individual city employees were dismissed. The judgment of the trial court is affirmed.

Ultra Vires: *Pidgeon v. Turner*, No. 14-19-00214-CV, 2021 WL 1686746 (Tex. App.—Houston [14th Dist.] Apr. 29, 2021, no. pet. hist.). The parties to this appeal have been engaged in related litigation since 2013, when the City of Houston extended benefits to spouses in same-sex marriages on the same terms as spouses in opposite-sex marriages. The plaintiffs sued specifically to: (1) enjoin the mayor's allegedly ultra vires expenditures of public funds and claw those funds back; (2) declare the mayor's directive extending the benefits to be in violation of state law; and (3) declare that city officials have no authority to disregard state law merely because it conflicts with their personal beliefs. The city filed a plea to the jurisdiction and motion for summary judgment, which the trial court granted, dismissing all plaintiffs' claims with prejudice. Plaintiffs appealed.

The appellate court found that, in providing same-sex benefits, the mayor and the city had not committed any ultra vires impermissible acts in light of the United States Supreme Court's decision upholding same-sex marriage, and that there is no basis to eliminate spousal benefits for all city employees.

***Norris Rogers v. Houston Community College*, 14-18-00591-CV (Tex. App.---Houston [14th Dist.], July 14, 2020) (mem. op.).**

This case contains two claims: (1) review of the requirements to present a claim for disability employment discrimination under Texas Labor Code Section 21.105 in a no evidence summary judgment; and (2) requirements for a breach of contract claim under Chapter 271 of the Texas Local Government Code. The trial court disposed of both of plaintiff's claims in favor of the employing College.

The plaintiff argued he was terminated from the College because of his disabilities that prevented him from performing carpentry work or general construction work. He also argued that he had a unilateral employment contract with the College for his employment as an adjunct electrical instructor. The College filed a no evidence summary judgment on the disability claim and a plea to the jurisdiction on the contract claim. The motions claimed: (1) that causation was not proved in the employment discrimination claim; and (2) that there was no contract because it was not properly approved or executed.

To establish a prima facie case of discrimination based on disability, a plaintiff must show that the plaintiff suffered an adverse employment decision because of the disability. *Donaldson v. Tex. Dept. of Aging & Disability Srvs.*, 495 S.W.3d 421, 436 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). The Court held that the plaintiff did not adequately argue based on his presented evidence that he was terminated because of his disabilities. During this analysis the Court also discussed how such a no evidence summary judgment argument, lack of causation, can be presented to give fair notice to the plaintiff and for the Court to review. The Court affirmed the trial court's approval of the no-evidence summary judgment in favor of the College.

To establish a contract, and waive immunity, under Chapter 271 of the Texas Local Government Code the plaintiff must prove that the contract: (1) is in writing, (2) states the essential terms of the contract, (3) provides for goods or services for the entity; and (4) was properly executed for the entity. The plaintiff presented evidence that a unilateral contract existed. The College stated that its policies and procedures would not allow this type of contract, but the Court held that the policies presented did not sufficiently disprove that the contract could exist. Because there was sufficient evidence that the contract could exist, the Court overturned the trial court's approval of the plea to the jurisdiction sent the case back to the trial court.

***Suran Wije v. David A. Burns and Univ. of Texas,* No. 01-19-00024-CV (Tex. App.---Houston [1st Dist.] September 3, 2020) (mem. op.).**
In this employment discrimination claim, the plaintiff sued a University official and the University for discrimination after he was unable to be re-employed by the University. The Court of Appeals held that the University retained its immunity because: (1) the State, and thus University, is not subject to 1983 claims; and (2) the election of remedies provisions of the Texas Commission on Human Rights Act (TCHRA) Chapter 21 of the Texas Labor Code prohibits the same claims to be brought in state court after being brought and dismissed federal court.

The plaintiff was an employee at the University from 2000-2005. While there he made complaints regarding IT issues to his boss. Years after resigning from the University in 2005, the plaintiff attempted to get a new position at the University but was unsuccessful. The plaintiff found out he had been blacklisted from the University and sued the University in federal court after receiving a right to sue letter from the EEOC. The plaintiff alleged that he was being discriminated against by the University and that his personnel file had misinformation in it. The federal court dismissed his claims with prejudice and so he filed his claims in state court. The claims included TCHRA claims, a 1983 claim, and fraud, defamation, and negligence claims under the Texas Tort Claims Act. The trial court granted the University's plea to the jurisdiction and the plaintiff appealed.

The State and state agencies, like the University, retain their immunity from federal 1983 claims. *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). University officials also retain immunity. The TCHRA contains an election of remedies provision that requires the plaintiff to choose at the beginning where to sue the defendant and disallows suits under the TCHRA if the claims involved have already been adjudicated by a different court. TEX. LABOR CODE § 21.211; *City of Waco v. Lopez*, 259 S.W.3d 147, 155 (Tex. 2008). The Texas Tort Claims Act claims must be negligence claims that cause injury to a person or damage to property under its narrow waiver and does not allow for intentional tort claims. TEX. CIV. PRAC. & REM. CODE Ch. 101. The Court of Appeals held that the University's immunity had not been waived for any of the claims because: (1) they retain immunity for 1983 claims; (2) his TCHRA claims were barred because they had already been brought to another court; and (3) neither his negligence or intentional claims met the requirements of the Texas Tort Claims Act.

FIREARMS

Concealed Handguns: *Paxton v. Waller Cty.*, No. 07-20-00297-CV, 2021 WL 833978 (Tex. App.—Amarillo Mar. 4, 2021, pet. filed). This is a conceal/carry notice case where the Amarillo Court of Appeals reversed the denial of the Texas 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 that the signs do not violate Section 411.209, which was resolved in a prior case. Separate from the declaratory judgment action, the Texas Attorney General brought a mandamus action against Waller County and various county officials. Waller County filed counterclaims seeking a declaratory judgment. The attorney general filed a plea to the jurisdiction as to the counterclaims, which was denied. The attorney general 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 Section 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.

GOVERNMENTAL IMMUNITY-CONTRACTS

***Nettles v. GTECH Corp.*, No. 17-1010, 2020 WL 3116609 (Tex. June 12, 2020)**. In this case, the Supreme Court of Texas held a contractor providing certain functions of the Texas Lottery Commission was not entitled to derivative sovereign immunity.

GTECH Corporation (GTECH) provided instant ticket manufacturing and services to the Texas Lottery Commission (TLC). GTECH was sued by multiple plaintiffs (in multiple suits after consolidated on appeal) alleging that the instructions on a scratch-off lottery ticket were misleading, causing them to believe they had winning tickets when they did not. GTECH created draft tickets, which the TLC commented on and made changes to, but ultimately approved after the back-and-forth concluded. After several complaints, the TLC shut down the game within 60 days of its release. The plaintiffs asserted claims for fraud, fraud by nondisclosure, aiding and abetting fraud, and conspiracy. GTECH filed pleas to the jurisdiction, asserting it was entitled to the same immunity held by the TLC. Due to the multitude of suits, some pleas were granted, some denied, but all ended up on appeal.

The Court first noted it had not yet had the opportunity to address whether a Texas government agency's immunity from suit might extend to its private contractors and, if so, under what circumstances. In the instances of derivative immunity, it only applies to a private company operating "solely upon the direction" of a government, and exercising "no discretion in its activities." It applies when the private company was "not distinguishable" from the governmental entity such that "a lawsuit against one [was] a lawsuit against the other."
Here, the contract required GTECH to provide suggested game designs. After receiving approval from the TLC, GTECH provided drafts and received comments. GTECH's role also included crafting, designing, and choosing wording. TLC's instant product coordinator testified he would expect GTECH to notify them if it saw concerns with a game, including misleading instructions.

Based on the contract and other evidence in the record, the Court held GTECH had some discretion with regard to the conduct at issue. The Court held that close supervision and final approval of work over which a contractor has discretion are not the same as the government specifying the manner in which a task is to be performed.

Importantly, the Court stated "[t]hus, even if we recognized derivative sovereign immunity for contractors, GTECH would not be entitled to immunity from suit on the fraud claims under the control standard." This seems to indicate the issue of derivative immunity for contracts with state agencies remains an open question. The Court also stated "[a] challenge to an element of a plaintiff's claim by a defendant who lacks immunity from suit does not implicate the jurisdiction of the court; it should be raised in a motion for summary judgment rather than a plea to the jurisdiction." Finally, the majority held that extending immunity to contractors for fraud could not further the purpose of immunity.

However, the Court did say that GTECH was entitled to derivative immunity from the allegation of conspiracy and aiding and abetting because such claims require a finding of the underlying fraud claim being viable against the TLC. Since the TLC has immunity from fraud claims, the conspiracy claims, and aiding and abetting claims cannot be sustained against GTECH.
Chief Justice Hecht's opinion, concurring in part and dissenting in part, notes that he believes since the ultimate decision and approval of the final ticket form rested with the TLC that GTECH should have been provided immunity as to the fraud claims. He stated "Today's lesson is that if the government acts only through its own employees, it is immune from suit, but if it consults experts before it acts, it is still immune from suit but the experts are not, except that the experts are immune from suit for helping the government defraud but not for giving the government advice that it uses to defraud. And there you have it." He agreed GTECH was immune from the conspiracy and aiding and abetting claims.

Justice Boyd's opinion essentially stated his opinion is that "the simple and logical conclusion" is that sovereign immunity only protects the sovereign, no one else. He clarified that this does not affect his opinion on official or qualified immunity, which applies to individuals.

***City of Fredericksburg v. E. 290 Owners' Coalition,* No. 04-20-00349-CV, 2021 WL 2445621 (Tex. App.—San Antonio June 16, 2021).** On June 4, 2018, the city sent letters to property owners in the city's extraterritorial jurisdiction (ETJ) informing them that the city was going to

begin annexation procedures on an area that included their property. Because the property owners' land was under an agricultural property tax exemption, the city provided the property owners a pre-annexation development agreement in lieu of annexation that informed the property owners that if they did not respond, the city would assume the owners had declined to enter into the agreement and their property might be annexed and public services provided in accordance with a statutory annexation service plan. Under the terms of the proposed pre-annexation development agreement, the city agreed to the continuation of the ETJ status of the owner's property, to immunity of the property from annexation by the city, and to immunity of the property from city property taxes. In return, the property owner would agree not to use the property for any use other than for agriculture, wildlife management, and/or timber land, except for any existing single-family residential use of the property. Unless terminated earlier, the term of the agreement commenced on the date of execution by both parties and terminated on. May 1, 2033. Some property owners elected not to enter into the proposed pre-annexation development agreement and, instead, began negotiations with the city over other acceptable terms and conditions. On February 26, 2019, the city sent an email explaining what terms and conditions the city would require as part of a "Voluntary Annexation Agreement" with the owners of properties along East U.S. Highway 290. On March 12, 2019, the owners sent a proposed "Voluntary Annexation Agreement" to the city, which the owners contended tracked the proposed terms and conditions. One month later, on April 12, 2019, the E. 290 Owners' Coalition (Coalition), comprised of unnamed property owners, filed suit against the city, alleging: (1) breach of contract as the February 26, 2019 email constituted an "offer" and the March 12, 2019 responsive email constituted an "acceptance," thereby creating contractual rights and responsibilities between the parties; and (2) violation of the annexation statute.

The city filed a plea to the jurisdiction alleging: (1) the Coalition lacked associational standing to sue on behalf of unnamed property owners; (2) the trial court lacked subject-matter jurisdiction over the Coalition's causes of action for breach of contract and its claim for damages because the city had immunity and there is no waiver of its immunity; (3) the lawsuit was not a proper ultra vires suit; (4) the Coalition lacked standing to challenge an annexation proceeding based on alleged procedural defects; (5) enjoining a legislative act violated the separation of powers; and (6) the Coalition's takings claim is not ripe. The trial court denied the plea, and the city filed an appeal. The court of appeals reversed the trial court's order judgment granting the city's plea to the jurisdiction and dismissing without prejudice appellee's claims for breach/anticipatory breach of contract, regulatory takings, and requests for declaratory relief.

***City of Corpus Christi v. Graham Constr. Servs., Inc.,* 2020 WL 3478661, No. 13-19-00367-CV (Tex. App.---Corpus Christi June 25, 2020) (mem. op.) *pet. denied*.**
This is a breach of contract claim under Chapter 271 of the Local Government Code involving a wastewater plant replacement project where the Court of Appeals affirmed the trial court's denial of the city's plea to the jurisdiction.

The City of Corpus Christi (City) entered into a contract with Graham Construction Services (Graham) for replacement of a wastewater plant. In the agreement, the City hired Carollo to provide engineering and contract administration services and Carollo was considered the owner's representative in the agreement with Graham. The agreement had strict deadlines for completion

of the project in two different phases. The agreement also had strict notice of claim requirements that required the contractor, Graham, to provide notice in less than 90 days after the event causing the claim. Graham submitted over a dozen delay claims, arguing that it faced delays due to "unclear or conflicting specifications in the contract, unnecessarily burdensome testing requirements, and an uncooperative and obstructionist attitude on the part of Carollo", but not within the time frames required by the agreement. At some point, the City replaced Carollo with Freese & Nichols (Freese), but Carollo was still involved in the project. After the first deadline was missed by Graham, they met with the City, Carollo, and Freese. Graham also submitted to reports to the City requesting an increase in price and extensions of the schedule. The City reviewed the reports and met with Graham regarding these reports. After what Graham considered substantial completion of the first phase, the City refused to issue a certificate of substantial completion, and Graham left the job site. Graham then sued the City for breach of contract damage and attorney's fees. The City filed a counterclaim which included a third-party petition against Carollo. Three years after the suit filing, the City filed a plea to the jurisdiction. The trial court denied the plea as to the breach of contract and attorneys fee claims and the City appealed.

Chapter 271 of the Texas Local Government Code waives governmental immunity for contracts entered into by governmental entities for the provision of goods and services. TEX. LOC. GOV'T CODE §§ 271.151; 152. Contract damages are limited to: (a) balance due including increased costs from owner caused delays; (b) change orders; (c) attorney's fees; and (d) interest. *Id.* § 271.153. The chapter does not waive a contractor's defense, but does require a contractor to comply with the adjudication methods found in the contract. *Id.* §§ 271.154; .155. However, a requirement that a notice of claim be filed less than 90 days after the incident is unenforceable. TEX. CIV. PRAC. & REM. CODE § 16.071. The City argued that it was not responsible for owner-caused delays because the delays were allegedly caused by an independent contractor. The Court held against the City and held that there was a fact issue related to owner-delay because the independent contractor, Carollo, was listed as an Owner Representative in the agreement. The Court also held against the City in its claims that Graham failed in its compliance of the contract adjudication requirements because: (a) the City's thirty and sixty day notice of claim requirements are prohibited by Section 16.071 of the Texas City Practices and Remedies Code; and (2) the City did not tell Graham at the time of filing of his claims that he was outside the contract notice of claim, but instead worked through the claims and met with Graham. These defenses raised by Graham were allowed by Section 271.155. The Court compared this case to a recent contract case where the City did notify a contractor of the lateness of their claims. *See Mission Consol. Indep. Sch. Dist. v. ERO Int'l, LLP*, 579 S.W.3d 123, 129 (Tex. App.—Corpus Christi–Edinburg 2019, no pet.). Finally, the Court held that the contractor's request for attorney's fees was allowed because Section 271.153 states that fair and equitable attorney's fees are recoverable.

The Court of Appeals upheld the decision of trial court which denied the City's plea to the jurisdiction as to breach of contract and attorney's fees.

***City of San Antonio v. Von Dohlen*, No. 04-20-00071-CV, 2020 WL 4808722 (Tex. App.—San Antonio Aug. 19, 2020, pet. filed)**. The city council voted to approve a concession

agreement that would exclude a subcontractor from operating a Chick-Fil-A restaurant at the city's airport. Subsequently, the Texas Legislature passed legislation prohibiting governmental entities from discriminating against any person on the basis of its membership in, affiliation with or support provided to a religious organization. Shortly thereafter, the appellees sued the city for declaratory and injunctive relief, arguing that the city was violating state law by continuing to exclude Chick-Fil-A from operating at the airport. The city filed a plea based on governmental immunity and a Rule 91 motion to dismiss. The trial court denied the plea and the motion. The court of appeals only addressed the plea as it was dispositive, finding that a claim to effectively nullify the concession agreement, which was made prior to the enactment of the new legislation, was barred by governmental immunity.

***City of Port Isabel v. Meza*, No. 13-19-0070-CV, 2020 WL 3786249 (Tex. App.—Corpus Christi July 2, 2020, pet. denied) (mem. op.).** This is a breach of contract case related to an employment agreement with a city manager that was unilaterally terminated by the City. After the termination of the agreement, the city manager filed suit against the City and the City filed a plea to the jurisdiction, which the trial court denied. The City appealed the denial to the court of appeals.

Edward Meza was hired by the City in September 2008. In July 2010, the City Commission approved an employment/severance package for Mr. Meza. The agreement was drafted and the Mayor signed the agreement, but the agreement was never taken back to the City Commission for approval. Mr. Meza was terminated by the City on May 16, 2015 and the severance policy was rescinded by the City Commission. Meza sued the City for breach of contract related to the employment/severance agreement. The City argued that the agreement was not properly executed by the City where the general provisions were approved by the Commission, but the actual contract was signed by the Mayor without ever being returned to the City Commission for approval. The City filed a plea to the jurisdiction which was denied by the trial court.

Chapter 271 of the Local Government Code waives immunity for governmental entities for certain contracts. However, to be a valid contract under the Code: "(1) a contract must be in writing, (2) state the essential terms of the agreement, (3) provide for goods or services, (4) to the local government entity, and (5) be executed on behalf of the local governmental entity." *City of Houston v. Williams*, 353 S.W.3d 128, 135 (Tex. 2011). Section 271.151 further states that a contract has to be "properly executed" by the governmental entity. The issue in this case is whether there is sufficient evidence of proper execution of the employment/severance agreement to defeat the plea to the jurisdiction filed by the City.

The court of appeals reviewed the agreement, the meeting minutes, the City's Charter, and the affidavits of appointed and elected officials. The July 2010 meeting minutes showed approval of the basics of the employment/severance agreement. The City Charter provided that the mayor can sign documents for the City. The court of appeals held that this evidence raised a fact issue that the agreement was properly executed sufficient to overcome the City's plea to the jurisdiction. The court of appeals affirmed the trial court's denial of the plea to the jurisdiction.

***Mclennan Cty. Water Control & Improvement Dist. v. Geer*, No. 10-17-00399-CV, 2020 WL 4218085 (Tex. App.—Waco July 22, 2020, no pet.) (mem. op.).** In this governmental immunity case, the Waco Court of Appeals dismissed the case against the Water District because the plaintiff failed to allege a cause of action that waives governmental immunity for breach of contract (Chapter 271 of the Local Government Code) or for negligence (Texas Tort Claims Act) for actions surrounding the turning off of the plaintiff's water by the Water District.
The plaintiffs are owners of property in the Water District. The Water District turned off the plaintiffs' water after it was discovered that the plaintiffs had two buildings hooked up to the same meter. The Water District also sent an employee to the plaintiffs' property and took pictures on site without the plaintiffs' consent. The plaintiffs' sued the Water District for breach of contract for turning off their water and for trespass under the Tort Claims Act for entering their property without permission. The trial court denied the Water District's plea to the jurisdiction and the Water District appealed. The Court of Appeals held that the District's governmental immunity had not been waived and dismissed the case.

To present a claim for breach of contract that waives immunity under Texas Local Government Code Chapter 271, a plaintiff has to allege that the contract in question is a contract "stating the essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." TEX. LOC. GOV'T CODE § 271.151. To present a claim under the Tort Claims Act, the claim has to be based on a negligent, not intentional act. TEX. CIV. PRAC. & REM. CODE § 101.021. The Court of Appeals held that a contract for water service where the service is provided by the Water District to an individual is not a contract for which immunity is waived under Chapter 271 because the Water District is not contracting to receive goods or services. The Court also held that the intentional act of entering someone's property without permission is not a valid claim under the Tort Claims Act, because the Tort Claims Act is for negligent acts.

Non-Disclosure Agreement: *Fitzsimmons v. Killeen Indep. Sch. Dist.*, No. 03-19-00535-CV, 2020 WL 4726697 (Tex. App.—Austin Aug. 14, 2020, pet. denied) (mem. op.). In this governmental immunity case, the Austin Court of Appeals dismissed the case against the School District because the plaintiff failed to allege recoverable damages for breach of contract (Chapter 271 of the Local Government Code).

The plaintiff was a school teacher for the School District who was given the opportunity to resign after an accusation of "viewing inappropriate materials." The School District and the plaintiff entered into a "Settlement and Resignation Agreement" that included nondisclosure clauses to protect both the School District and the plaintiff. The plaintiff later lost a job opportunity based on the allegations related to his prior position. He sued the School District for breach of contract based on the Settlement Agreement. The School District filed a plea to the jurisdiction arguing that its governmental immunity was not waived. The trial court granted the School District's plea to the jurisdiction.

To present a claim for breach of contract that waives immunity under Texas Local Government Code Chapter 271, a plaintiff has to allege that the contract in question is a contract "stating the

essential terms of the agreement for providing goods or services to the local governmental entity that is properly executed on behalf of the local governmental entity." TEX. LOC. GOV'T CODE § 271.151. Also, a claim has to include an allegation of recoverable damages. *Id.* § 271.153. The plaintiff did not allege recoverable damages at the Court of Appeals, thus the Court dismissed the plaintiff's claim without determining whether the contract was one that would waive immunity.

Collective Bargaining: *City of Houston v. Houston Prof'l Fire Fighters' Ass'n*, Nos. 14-18-00976-CV; 14-18-00990-CV, 2021 WL 1807311 (Tex. App.—Houston [14th Dist.] May 6, 2021, pet. filed). The city and the Houston Professional Fire Fighters' Association, Local 341 (Association) attempted to negotiate and mediate a collective bargaining agreement in 2017 but could not come to an agreement. The Association sued the city for violation of Chapter 174 of the Local Government Code. The Association filed a motion for summary judgment on the city's governmental immunity defense, and the city filed a plea to the jurisdiction and its own motion for summary judgment. The trial court denied the city's motion for summary judgment and the city filed this interlocutory appeal, arguing that the Association failed to establish a waiver of governmental immunity by failing to present evidence of good faith collective bargaining for compensation and benefits based on private sector labor standards, and that Chapter 174 violates the Texas Constitution's separation of powers doctrine.

The appellate court affirmed the trial court's denial of the city's plea, finding that, because Chapter 174's governmental immunity waiver language does not require good faith collective bargaining based on private labor standards, the Association had no duty to plead such facts. The appellate court also determined that because the legislature chose sufficiently detailed, yet not-too-confining, language to create reasonable standards for the delegation of authority to the judicial branch within Chapter 174, the statute does not violate the separation of powers doctrine.

***City of Palestine v. LS Equip. Co., Inc.*, No. 12-19-00264-CV, 2020 WL 5047905 (Tex. App.—Tyler Aug. 26, 2020, no pet.) (mem. op.)**. This appeal results from a breach of contract dispute between the City of Palestine and Lone Star Equipment (a paving company) regarding a road construction project. After numerous disputes involving the location of the road, materials, and construction methods, Lone Star sued the city for breach of contract and prevailed. The court of appeals affirmed the trial court's decision based on procedural grounds, specifically sufficiency of the evidence and jury charges.

***Dowtech Specialty Contractors, Inc. v. City of Weinert*, No. 11-18-00246-CV, 2020 WL 5740865 (Tex. App.—Eastland Sept. 25, 2020, pet. denied) (mem. op.)**. In this case, Dowtech sued the city for breach of contract and sought to recover both the contract balance and charges for additional work to the city's water system. The trial court awarded Dowtech $ 2,052.50 for certain work, but held Dowtech did not complete all work required by the contract so was not entitled to the contract price. It also denied the request for attorney's fees and interest. The court of appeals affirmed the trial court judgment holding, in part, that attorney's fees for breach of contract under Local Government Code Section 271.153 are valid only if equitable and just.

***City of Mason v. Blue Oak Eng'g, LLC*, No. 04-20-00227-CV, 2020 WL 7365452 (Tex. App.—San Antonio Dec. 16, 2020, pet. filed).** The plaintiff sued the city for breach of contract to recover an unpaid amount related to a contract for a landfill permit. The city filed a plea to the jurisdiction, arguing it had not waived immunity because the permit the plaintiff worked on was not the same permit as detailed in the contract. The trial court denied the plea. The city appealed. The appellate court rejected the city's claims that the plaintiff sued on a new contract or a contract amendment, and affirmed the denial of the plea finding that the contract falls under Chapter 271 of the Local Government Code and that the city waived immunity for adjudicating a claim for breach of contract.

***City of Cleburne v. RT General, LLC*, No. 10-20-00037-CV, 2020 WL 7394519 (Tex. App.—Waco Dec. 16, 2020, no pet.) (mem. op.).** In this appeal from a trial court's judgment denying the city's plea to the jurisdiction on a breach of contract and related claims, the Waco Court of Appeals affirmed the trial court's denial because the essential terms of the contract were stated in the lease agreement waiving the city's immunity under Chapter 271 of the Texas Local Government Code and this waiver extended to the plaintiff's other claims for declaratory judgment and inverse condemnation.

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 can 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. The court of appeals upheld the trial court's denial of the city's plea to the jurisdiction on all claims because the city's immunity was waived under state law breach of contract provisions.

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 and thus further review of this issue should be done prior to a determination on whether this lease agreement was a contract waiving immunity under Chapter 271 of the Texas Local Government Code. 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.

Development Agreement: *City of League City v. Jimmy Changas Inc.* No. 14-19-00776-CV, 2021 WL 629618 (Tex. App.—Houston [14th Dist.] Feb. 18, 2021, pet. filed). The City entered into a "Chapter 380 Economic Development Incentives Grant Agreement" with Jimmy Changas, Inc., (Changas) in which the City offered incentives to Changas to develop a restaurant within the city limits. Changas later sued the City for breach of contract, alleging that it had fully performed the contract, but the City had failed to pay as agreed, and that the City was not immune from suit because the City performed a proprietary function in entering into the Grant Agreement, or alternatively, the Legislature waived the City's immunity under Chapter 271 of the Local Government Code. The City filed a plea, later amending it and combining it with a motion in the alternative for summary judgment on the merits. The trial court denied the City's plea and summary judgment motion. The City filed an interlocutory appeal.

The court of appeals affirmed the trial court finding that the contract was not a governmental function within the scope of the Texas Tort Claims Act, and as the contract was primarily intended to benefit the city and not the general public, the city's action in entering the contract was proprietary. As a result, the city did not have governmental immunity from suit.

***Saum v. City of College Station*, No. 10-17-00408-CV, 2020 WL 7688033 (Tex. App.—Waco Dec. 22, 2020, pet. filed) (mem. op.).** The city offered to purchase two tracts of land from Saum. Saum signed and returned the agreement on August 19, 2017. The city council met and approved the contract on September 11, 2017. No one from the city physically notified Saum of the city council's vote. The city manager and the mayor signed the contract on September 12, 2017, and September 14, 2017, respectively. On September 13, 2017, Saum sent a letter to the city revoking her acceptance of the contract as she had received a more favorable offer from another party. The city filed suit to obtain a temporary injunction preventing Saum from disposing of the property until the lawsuit had been resolved. The trial court granted the temporary injunction. Saum appealed. The appellate court held that the trial court did not abuse its discretion in finding that: (1) Saum's revocation was ineffective as it occurred subsequent to the contract being "fully executed" by adoption of the city council; (2) the parties did not agree to require signatures as a condition of mutual consent; and (3) the contract was valid even though a copy was not delivered to Saum before her attempted revocation. The trial court's order granting a temporary injunction is affirmed.

***City of McKinney v. KLA Int'l Sports Mgmt., LLC*, No. 05-20-00659-CV, 2021 WL 389096 (Tex. App.—Dallas Feb. 4, 2021, no. pet. hist.).** The City and KLA entered into a non-exclusive revocable license giving KLA recreational use of soccer fields, which included terms for how KLA would construct, rehabilitate, and maintain the fields. The City issued a notice of default and terminated the agreement. KLA sued for breach of contract and the City filed a plea to the jurisdiction, arguing the suit involved a governmental function of parks and recreational facilities. The appellate court found that the City was acting in a governmental function when it entered into the license agreement. However, the Court concluded that the City was not immune from suit for goods and services under Chapter 271. The Court found that improving,

rehabilitating, and maintaining the soccer fields as consideration for non-exclusive use of the fields satisfied the requirements of an agreement for providing goods and services to the City.

***City of Dallas v. Asemota*, No. 05-20-00664-CV, 2021 WL 777089 (Tex. App.—Dallas Mar. 1, 2021, no pet.).** The City impounded a vehicle and sold it at auction to Asemota. A finance company repossessed the vehicle, asserting it did not receive notice that the City had impounded the vehicle. Asemota sued the City for breach of contract because the City had not provided notice to the finance company and created a cloud of title. The trial court denied the City's plea, and the City appealed. The appellate court reversed because the contract was not for the provision of goods to the City, as required by Chapter 271 of the Local Government Code for a waiver of immunity.

Proprietary: *City of Carrollton v. Weir Bros. Contracting, LLC*, No. 05-20-00714-CV, 2021 WL 1084554 (Tex. App.—Dallas Mar. 22, 2021, pet. filed) (mem. op.). The city appealed the trial court's denial of its plea to the jurisdiction against plaintiff's breach of contract claims for grading work the plaintiff performed for a sports complex on land owned by the city but leased to another entity. On appeal, the city claimed the trial court erred in denying its plea because plaintiff's claims are based on the lease of land for recreational purposes, which is a governmental function. The appellate court concluded the plaintiff's claims for breach of contract for performance of grading were based on a proprietary function because the right to operate, manage, and control the sports complex belonged to the entity leasing the land for the sports complex, not the city.

***City of Heath v. Williamson d/b/a PCNETSYS*, No. 05-20-00685-CV, 2021 WL 1731796 (Tex. App.—Dallas May 3, 2021, no. pet. hist.).** 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 §A271.153. 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.

GOVERNMENTAL IMMUNITY-TORTS

***VIA Metropolitan Transit v. Curtis Meck*, No. 18-0458, 2020 WL 3479509 (Tex. June 26, 2020)**. This is a Texas Tort Claims Act (TTCA) case involving a VIA bus accident where the Supreme Court of Texas affirmed a jury award against VIA.

VIA Metropolitan Transit is a governmental entity that operates public transportation services in San Antonio and Bexar County. Curtis Meck boarded a VIA bus operated by Frank Robertson, who was new to the job and still in training. Robertson began to pull away from the stop when another passenger shouted, "Back door!" apparently to notify Robertson that a passenger was still trying to exit. Traveling just under five miles per hour, Robertson made an abrupt stop, causing Meck to fall forward into the partition behind Robertson's seat. Meck asserts this caused a herniated disc in his neck. Meck sued VIA asserting negligence and that VIA was a "common carrier" with a high degree of care imposed for the benefit of the passengers. After a trial on the merits, the jury found for Meck. VIA appealed. VIA did not object to the designation as a common carrier and did not object during jury selection when Meck's attorneys told the jury of the higher duty imposed on VIA. VIA moved for a directed verdict asserting it was not a common carrier and the jury instruction was incorrect. The motion was denied.

Under the Texas Transportation Code, the duties and liabilities of a common carrier are the same as provided for under common law. TEX. TRANSP. CODE §5.001(a)(1). A common carrier owes a duty to its passengers to act as "a very cautious and prudent person" would act under the same or similar circumstances. To qualify as a common carrier (in contrast to a private carrier), the entity must provide transportation services to the general public, as opposed to providing such services only for particular individuals or groups and as its primary function. VIA argued it is not a common carrier because: (1) it is not "in the business" of providing such services, (2) providing such services is not its "primary function," and, (3) in any event, it cannot be a common carrier because it is a governmental body that performs only governmental functions. While the Court agreed that VIA is statutorily prohibited from generating revenue greater than an amount "sufficient to meet [its] obligations," it disagreed that profit is necessary to qualify for the "in business" designation. The Court held VIA was indisputably in "the business of transporting people" and therefore met the first prong. And while VIA argued it performs numerous governmental functions that include constructing roads, issuing bonds, collecting taxes, and promoting economic development, for the purpose of "implementing the State's transportation policy," the Court held it must only do so to fulfill its obligation to operate as a "rapid transit authority." As a result, transporting people is its primary function. The Court agreed that VIA is a governmental entity and that it was performing governmental functions that provided, by default, governmental immunity. However, that status does not prevent it from being a common carrier with a higher degree of care to its passengers. The Court further declined to change the

law by requiring a lower, ordinary standard of care. The Court then held the TTCA does not define what type of negligence is subject to the waiver of immunity. However, the common law has long used the term "negligence" to refer to "three degrees or grades of negligence," including gross negligence, ordinary negligence, and slight negligence (which applies to common carriers). As a result, all three types are subject to the waiver in the TTCA. Finally, the Court held the evidence was legally sufficient to uphold the jury award.

Chief Justice Hecht wrote a concurring opinion noting the "slight negligence" or "high degree of care" standards are misleading, unnecessary and should be abandoned. They suggest that common carriers are to "exercise all the care, skill, and diligence of which the human mind can conceive," which invites the jury "to scrutinize the carrier's conduct in an endeavor to find it defective." However, he notes that given the evidence, an instruction on a "reasonable care" standard would not have changed the outcome.

***City of Houston v. Gonzales,* No. 14-20-00165-CV, 2021 WL 2154155 (Tex. App.—Houston [14th Dist.] May 27, 2021) (mem. op.).** Appellee slipped and fell at the salad bar of a restaurant located in the George Bush International Airport and sued the city for negligence and gross negligence, invoking the Texas Tort Claims Act's (TTCA's) immunity waiver. United Airlines controlled the area where the incident occurred pursuant to a lease with the city, and based on its lack of control over the area, the city filed a plea to the jurisdiction arguing governmental immunity and seeking dismissal of appellee's claims. The trial court denied the city's plea, and the city appealed. A governmental unit is immune from suit unless the TTCA expressly waives immunity, which it can for premises defects. However, when a landlord, such as the city in this case, does not control the leased premises, they owe no duty to tenants or their invitees for dangerous conditions. The appellate court remanded the case to the trial court with instructions to dismiss the suit against the city.

***Rogers v. City of Houston*, No. 14-19-00196-CV, 2021 WL 2325193 (Tex. App.—Houston [14th Dist.] June 8, 2021).** Noris Rogers sued defendants, including the City of Houston, for several torts, among other claims, based on events that occurred when employees of a tree trimming service contracting for the power company, accompanied by a City of Houston police officer, came to Rogers' property to trim an oak under a power line. The city filed a plea to the jurisdiction, which was granted by the trial court. Rogers filed a 15-point appeal, most of which will not be discussed here. In his claims against the city, Rogers argued that the off-duty police officer was acting in a proprietary function rather than a governmental function. The appellate court disagreed, holding that even though the officer was off duty and being paid by the power company, the provision of police services is closely related to the governmental function of "police and fire protection and control" for which the city is immune from suit or liability in tort. The appellate court affirmed the trial court's dismissal of all claims against the city.

***Town of Highland Park v. McCullers*, No. 05-19-01431-CV, 2021 WL 2766390 (Tex. App.—Dallas June 29, 2021).** The Town of Highland Park hired a Southern Methodist University police officer to perform extra duty work to guard a private residence under construction. While guarding the residence, a storm flooded the area and the officer died. The officer's estate sued and the town filed a plea to the jurisdiction on the grounds that the plaintiff failed to provide the

city notice. The trial court denied the plea. The appellate court reversed the trial court and granted the plea. It found that: (1) the plaintiffs did not provide notice within six months as required by statute or within 30 days as required by the town's charter; and (2) the town did not have actual or subjective awareness of the incident. The appellate court also rejected the plaintiff's argument that the town was acting in a proprietary capacity when providing private security.

***City of Houston v. Ayala,* No. 14-20-00164-CV, 2021 WL 2472804 (Tex. App.—Houston [14th Dist.] June 17, 2021).** Ayala slipped and fell on an orange substance when exiting an escalator in the George Bush International Airport and sued the city for negligent activity and premises liability. The city filed a plea to the jurisdiction arguing governmental immunity, which was denied by the trial court, and the city appealed. A governmental unit is immune from suit unless its immunity is expressly waived. The Texas Tort Claims Act can waive immunity for cases based on premises defects. Because Ayala was merely the holder of a plane ticket and did not specifically pay for entry to the airport, the city owed her the duty of care due to a licensee rather than an invitee, which means the city had to protect her from a dangerous condition of which it actually knew. The court determined that because Ayala failed to establish actual knowledge of the dangerous condition, her claims should have been dismissed. Furthermore, the court held that because Ayala's claims were founded in premises liability, the negligent activity claims should also be dismissed. Accordingly, the appellate court reversed the trial court's order and rendered judgment dismissing the case.

***City of Houston, v. Gonzales*, No. 14-19-00768-CV, 2021 WL 2586242 (Tex. App.—Houston [14th Dist.] June 24, 2021) (mem. op.).** Gonzales sued the City of Houston asserting negligence after a city crane operator allegedly swung a crane arm in his direction to scare or strike him. The city filed a Rule 91a motion to dismiss a baseless cause of action, asserting immunity from intentional tort claims, which was denied by the trial court. The city appealed. The Texas Tort Claims Act does not waive governmental immunity for intentional torts; therefore, the trial court lacked jurisdiction over the claim. The appellate court reversed the trial court's order and rendered judgment dismissing the case.

***Chappell Hill Sausage Co., v. Durrenberger*, No. 14-19-00897-CV, 2021 WL 2656585 (Tex. App.—Houston [14th Dist.] June 29, 2021) (mem. op.).** Chappell Hill Sausage Company (Landowner) filed suit against seven Washington County officials in their official capacities alleging ultra vires failures to maintain a culvert in a county road. The county filed a plea to the jurisdiction based on governmental immunity, which was granted. The Landowner appealed. Even if a governmental entity's immunity has not been waived, a suit may be brought against an official if the official engages in ultra vires conduct (i.e. acting without legal authority or failing to perform a purely ministerial act). The Landowner's original petition failed to plead facts establishing jurisdiction, but also did not demonstrate incurable defects in jurisdiction. Construing the Landowner's pleadings liberally in their favor, the appellate court reversed the trial court's order dismissing the case.

***City of Austin d/b/a Austin Energy v. Lopez,* No. 03-19-00786-CV, 2021 WL 2587718 (Tex. App.—Austin June 24, 2021).** Plaintiff, on behalf of her minor son, sued the city for

negligence and negligence per se in relation to the decedent's death as a result of an alleged accident that occurred on a construction site. Decedent was working as part of a stucco crew and standing on a metal scaffold that the stucco crew had erected near the city's power line. Decedent was electrocuted when he contacted the power line with a 10-foot roll of metal mesh that he was holding while cutting it with metal wire-cutters.

At trial, the city moved for a directed verdict, contending that the plaintiff's theory alleging that the city's failure to maintain its power lines and poles created the dangerous condition that caused the accident was a premises-liability claim, not a general-negligence claim, and that judgment should be rendered in its favor because plaintiff had not alleged or adduced any evidence as required to recover on a general-negligence claim. Nonetheless, the jury found the city negligent and assigned the city with 26 percent responsibility for the accident. The trial court signed a final judgment: (1) awarding Plaintiff $2,433,600 in damages against the city plus costs, prejudgment interest, and post judgment interest; and (2) ordering the other defendants to indemnify the city for the same amount as required by state law. The city appealed asserting jury charge error and three evidentiary-sufficiency issues.

The appellate court affirmed the trial court's judgment holding that the city, as a public utility, had a duty to exercise ordinary and reasonable care, but the degree of care required must be commensurate with the danger. The "commensurate with the danger" standard does not impose a higher duty of care; rather, it more fully defines what is ordinary care under the facts presented. Here, the city's failure to remedy the leaning pole was a relevant breach of duty because if the pole had been straightened even five degrees and brought back roughly three and a half feet (which would have placed the line nearly 11 feet away from the overhang), the accident would never have happened.

***City of San Antonio v. Anderson*, No. 04-20-00320-CV, 2021 WL 883472 (Tex. App.—San Antonio Mar. 10, 2021, no pet.) (mem. op.).** Anderson was on crutches and exiting a terminal at the San Antonio International Airport. There was deposition testimony that provided that it was raining on that day. Anderson stated that he noticed a rubber mat outside the terminal door, that the ground was wet when he moved his crutches, and that when he moved forward he 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 where one 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, he 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 Texas Tort Claims Act 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 the 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.

***City of San Antonio v. Realme*, No. 04-20-00119-CV, 2021 WL 1009330 (Tex. App.—San Antonio Mar. 17, 2021, no. pet. hist.) (mem. op.)**. Nadine Realme paid to participate in a 5K run/walk that took place on the City of San Antonio'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. The trial court denied the city's plea to the jurisdiction.

The specific Texas Tort Claims Act 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." After analyzing the plain language of that provision, the court of appeals concluded 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. 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 further proceedings.

***Flores v. Verastegui*, No. 11-18-00166-CV, 2020 WL 5057375 (Tex. App.—Eastland Aug. 27, 2020, no pet.) (mem. op.)**. Plaintiff was injured as a result of an accident involving a City of Abilene roll-off style garbage truck. A jury determined that no negligence on the part of the city's employee was a proximate cause of the accident, and the trial court entered judgment against another defendant (Verastegui). Plaintiff challenges the judgment asserting: (1) that the trial court abused its discretion by admitting certain expert testimony, reports, and an animation prepared by the city's expert; and (2) that the evidence was factually insufficient to support the jury's finding as to the city. The appellate court affirms the judgment of the trial court.

***Texas Dep't of Transp. v. Ives*, No. 05-18-01527-CV, 2020 WL 2715367 (Tex. App.—Dallas May 26, 2020, pet. denied) (mem. op.)**. [Note: On the court's own motion, the court withdrew its original opinion and judgment from April 20, 2020, and substituted this new opinion and corresponding judgment in its place. The court reverses the trial court's order, grants the city's plea to the jurisdiction, dismisses Rodriguez's claims for want of subject matter jurisdiction, and remands the case to the trial court for further proceedings consistent with this opinion.]

In this appeal, the court found that the Texas Department of Transportation's (TxDOT) immunity was not waived under the Texas Tort Claims Act (TTCA) in a personal injury case.

Ives was driving his car in Collin County when he ran out of gas. He left his car on the shoulder of the road, and as he walked in the grass along the road toward a gas station, he fell into a drop

inlet grate and badly injured his leg. TxDOT owned the drop inlet grate. An engineer for TxDOT testified that the area where Ives walked was intended to facilitate water drainage and was not intended for pedestrian traffic.

After a jury trial, TxDOT filed a motion for judgment notwithstanding the verdict, arguing it retained its sovereign immunity. The trial court denied the motion. TxDOT appealed, arguing that it retained its sovereign immunity because there was no evidence that it had the requisite actual knowledge of the alleged danger posed by the drop inlet grate.

The court first addressed whether there was evidence that TxDOT had actual knowledge of the alleged danger posed by the grate. To show that TxDOT had actual knowledge that the drop inlet grate was unreasonably dangerous, Ives relied on google images showing three orange traffic control panels on the side of the road near a drop inlet grate to show that TxDOT attempted to warn of the dangerous condition, make it safe, or maintain it in a reasonably safe manner by placing the panels on either side of the grate where he fell. However, Ives did not identify the location of the panels, and did not know why they were placed where they were when the image was taken. Further, a TxDOT engineer opined that the panels were used by maintenance crews to divert traffic to another lane in the event of a flood, not to warn pedestrians of the grate. He also opined that once the excess water cleared, someone saw the panels on the road and tossed them to the side. The appeals court agreed with TxDOT finding that there was no evidence that TxDOT had actual knowledge of the alleged danger posed by the drop inlet grate.

The court then addressed whether the grate constituted a special defect which only requires proof that the governmental unit should have known of the dangerous condition. The court determined that because the grate was located in the grass a couple of feet off the roadway, it did not pose a threat to an ordinary user travelling on the road in the normal course of travel. Ives walking beside the road in the grass was not an ordinary user on the road. The court, therefore, concluded that the grate was not a special defect, in the same class as an excavation or obstruction on the roadway.

Because the court found that there was no evidence showing TxDOT had the actual knowledge required to waive its immunity under the TTCA and that the grate was not a special defect, the court did not consider whether TxDOT is immune from suit because its conduct fell within the discretionary function exception to the TTCA's waiver of immunity. As such, the court reversed the trial court's judgment, and dismissed the case.

***City of Dallas v. Kennedy*, No. 05-19-01299, 2020 WL 3286515 (Tex. App.—Dallas June 18, 2020, no. pet. hist.) (mem. op.)**. This is a personal injury case in which the court of appeals reversed the trial court's order denying the City of Dallas' plea to the jurisdiction.

Kennedy purchased a train ticket in Longview and travelled from Kilgore via train to Dallas, arriving at Union Station, a train station that is owned and operated by the City of Dallas. She did not pay the city any fee to enter and exit Union Station. As she was leaving the train station, she fell through a broken area of tile and sustained injuries that required medical care. Kennedy sued the city for negligence, asserting that the city had failed to repair the floor and failed to warn her

of the dangerous condition. The city filed a plea to the jurisdiction. Kennedy amended her petition, dropping another defendant but continuing to assert the same claims against the city.

The city filed a supplemental plea to the jurisdiction with evidence attached. Kennedy filed her own evidence, which the city objected to. The trial court denied the city's supplemental plea and overruled the city's evidentiary objections. The city appealed.

The court held that the city owed to Kennedy the duty it owes to a licensee, finding that Kennedy's purchase of a train ticket in Longview did not constitute paying for the use of Union Station that would trigger invitee status. The court then looked at whether the city had actual knowledge of defects in the flooring area that Kennedy fell through. The court determined that the city's evidence, which showed that no reports of defects in the flooring had been made in the two years prior to Kennedy's accident, conclusively showed that the city lacked actual knowledge of the alleged dangerous condition. Additionally, the court refused to infer actual knowledge based on the apparent age of the defect.

City of Houston v. Houston, **No. 01-19-00255-CV, 2020 WL 4982675 (Tex. App.—Houston [1st Dist.] Aug. 25, 2020, no pet.)**. In this medical negligence case, the plaintiff sued the City after being injured during her ambulance transport. The Court of Appeals held that she had to bring her claim as a health care liability claim with an expert report and dismissed her claim as she failed to provide the expert report.

The plaintiff was injured by City emergency medical professionals while being transported. The emergency medical staff dropped her from a gurney they were using to transport the plaintiff into the ambulance. The plaintiff sued the City as a negligence claim and not as a health care liability claim. The City argued that the claim should be dismissed because the plaintiff was injured during the provision of medical services and should have filed the claim as a health care liability claim for which she did not file the statutorily required expert report. The trial court denied the City's motion to dismiss. The Court of Appeals reversed the trial court holding that the claim was a health care liability claim that required an expert report.

A claim is a health care liability claim under the Texas Medical Liability Act if the injury is caused by "(1) whether the defendant is a physician or health care provider; (2) whether the claim at issue concerns treatment, lack of treatment, or a departure from accepted standards of medical care, or health care, or safety, or professional or administrative services directly related to health care; and (3) whether the defendant's act or omission complained of proximately caused the injury to the plaintiff." *See* TEX. CIV. PRAC. & REM. CODE Chapter 74. The Court of Appeals held that the EMS for the City is a "health care provider" because emergency services providers are included in the definition of health care institution, regardless of the fact that the City is a political subdivision. *Id.* The Court provided a long list of health care liability claims brought against political subdivisions as examples. Next, the Court held that the claim involves an allegation with a nexus between the injuries and the provision of medical care including that the gurney was a piece of medical equipment and she was being transported for medical care when the injuries occurred. *See Ross v. St. Luke's Episcopal Hosp.,* 462 S.W.3d 496, 505 (Tex. 2015). Finally, the Court held that the location of the injury does not determine whether it is a

health care liability claim. Because the Court determined that the claim is a health care liability claim, an expert report was required, but never filed by the plaintiff. The claim was dismissed by the Court.

***City of Saginaw v. Cruz*, No. 05-19-01141-CV, 2020 WL 5054802 (Tex. App.—Dallas Aug. 27, 2020, no pet.) (mem. op.)**. Cruz was allegedly injured when a manhole cover flipped open in front of the vehicle he was driving causing the vehicle to flip over and skid down the road on its roof. He sued the city for negligence and premise liability. The city filed a plea to the jurisdiction alleging governmental immunity and abuse of discretion in denying its motion to amend its admissions. The trial court denied the city's plea. The court upheld the trial court's order, finding that there was sufficient evidence to raise a fact question as to whether the city had constructive knowledge that the manhole did not conform to contract requirements before it was put to use, and that the trial court did not abuse its discretion in denying the motion.

***White v. City of Houston,* No. 01-20-00415-CV, 2021 WL 1133152 (Tex. App.—Houston [1st Dist.] Mar. 25, 2021, no. pet. hist.)**. In this appeal from a trial court's holding that the city retained immunity under the emergency exception to the 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 related to the claim and the plaintiff appealed.

The Texas Tort Claims Act waives a city's immunity when there are injuries or damages caused by the 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 was during 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 because the hose was in use to an emergency when the injuries and damages occurred resulting in continued immunity.

***City of Victoria v. Redburn*, No. 13-20-00213-CV, 2021 WL 1217349 (Tex. App.—Corpus Christi Apr. 1, 2021, no. pet. hist.) (mem. op.)**. The City of Victoria intervened in a lawsuit to seek a declaration that it held a prescriptive drainage easement across the surface of a portion of Redburn's property. Redburn filed, among other things, a counterclaim for injunctive relief against the city, seeking an injunction ordering the city to extend underground drainage pipes under his property rather than using the surface for drainage. The city filed a plea to the jurisdiction in response to the claim for injunctive relief. At trial, the court affirmed the city's easement claims but denied its plea to the jurisdiction. The court analyzed the city's immunity claim through the lens of the abrogation of immunity rule set out in *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). The purpose of immunity is to protect public funds.

Governmental immunity can be abrogated when claims against public funds are offset by governmental claims for monetary relief. The city's claim of an easement and Redburn's claim for an injunction to require construction of subterranean drainage facilities, while logically linked, do not offset, because Redburn's claims involve a significant expenditure of public funds to build the facilities requested. For this reason, Redburn's claim did not fall within the scope of *Reata*, and the city's plea to the jurisdiction was sustained.

***City of Houston v. Manning*, No. 14-20-00051-CV, 2021 WL 1257295 (Tex. App.—Houston [14th Dist.] Apr. 6, 2021, pet. filed) (mem. op.)**. A City of Houston fire truck was involved in a collision with appellees. Appellees filed a negligence suit, and the city sought dismissal through summary judgment on immunity grounds, which the trial court denied.

The city brought two points of appeal: (1) that the city is immune, because the fire truck's driver has official immunity; and (2) that the trial court has no jurisdiction over the claims for negligent training, retention, and supervision. The appellate court overruled the city's first issue. Under an official immunity defense, the driver could be immune from suit arising from actions taken in the performance of his employment, if the discretionary duties are done in good faith within the scope of the employee's authority. The evidence establishing the driver's "good faith" is in dispute, so the city is not entitled to a judgment as a matter of law. The court sustained the city's second point of appeal, because negligent hiring, retention, training, and supervision of employees do not involve the operation of a motor vehicle, and thus are not cognizable claims under the Texas Tort Claims Act.

***City of Dallas v. West*, No. 05-19-01540-CV, 2020 WL 5834299 (Tex. App.—Dallas Oct. 1, 2020, no pet.) (mem. op**.). West was injured after she tripped over a protruding metal bolt on the sidewalk. She sued the City of Dallas for premises liability. The city filed a plea to the jurisdiction asserting that the protrusion was not a special defect, that West was a licensee, and that the city did not have actual, prior knowledge of the condition. The trial court denied the plea. On appeal, the court reversed the trial court's order finding that the protrusion was not a special defect and the duty the city owed to West was that of a licensee.

***Harris Cty. Hosp. Dist. v. Peavy*, No. 14-19-00953-CV, 2020 WL 6142887 (Tex. App.—Houston [14th Dist.] Oct. 20, 2020, no pet.) (mem. op.)**. Peavy was injured when she tripped and fell on the lip of a door brace on the premises of Lyndon B. Johnson Hospital, which is a part

of the Harris County Hospital District (HCHD). Peavy failed to raise a genuine issue of material fact showing that HCHD actually knew of the alleged defect/dangerous condition. Thus, Peavy's claim is barred by immunity and her suit is dismissed.

***City of Beaumont v. Isern*, No. 09-19-00451-CV, 2020 WL 4680200 (Tex. App.—Beaumont Aug. 13, 2020, no pet.) (mem. op.)**. Isern alleged he was injured when he struck a water valve street cover on a city roadway while riding his bicycle. He asserted claims for the negligent use of tangible personal property, special defect, and premise defect. The court of appeals held: (1) Isern's pleadings fail to allege facts that affirmatively demonstrate that his injuries arose from the city's use of tangible personal property; and (2) the valve cover is not a special defect. As to the premise defect claim, the court of appeals found the city's plea to the jurisdiction should not have been granted because Isern's pleadings are sufficient to meet his burden of showing a waiver of immunity.

***City of Kingsville v. Dominguez*, No. 13-19-00236-CV, 2020 WL 2776543 (Tex. App.—Corpus Christi May 28, 2020, no pet.) (mem. op.)**. This is a motor vehicle accident case under the Texas Tort Claims Act (TTCA) where the Corpus Christi Court of Appeals reversed the denial of a plea to the jurisdiction and dismissed the plaintiff's claims.

Dominguez alleged that Oscar Mendiola, while operating a city fire truck, failed to yield the right of way at a signal light which resulted in a collision with Dominguez's vehicle. The record demonstrated the fire truck was traveling behind an ambulance and the truck's siren and emergency lights were both activated. Mendiola slowed as he approached, visually confirmed traffic had stopped, then proceeded. According to the official accident report, the investigating officer concluded that the fire truck driver was facing a red light and failed to yield the right of way to Dominguez. The officer also concluded that Dominguez "disregarded an Emergency Vehicle while operating emergency lights." The officer did not issue a citation to either driver. The city filed a plea to the jurisdiction based on the emergency responder exception of the TTCA. The plea was denied and the city appealed.

Part of the policy behind the emergency responder exception is because imposing "liability for a mere failure in judgment could deter emergency personnel from acting decisively and from taking calculated risks" and would "allow for judicial second-guessing of the split-second and time-pressured decisions emergency personnel are forced to make." However, compliance with the requirements of Chapter 546 of the Texas Transportation Code does not relieve the driver of liability if they act recklessly (i.e. he understood the risks but did not care about the result). The city argued Mendiola acted to minimize the risk to others as he entered the intersection, thereby demonstrating that Mendiola "clearly did care about the result" of his actions.

Dominguez responded that Mendiola's actions of entering the intersection against a red light without stopping were evidence of recklessness. The court held the fire truck driver slowed below the speed limit, visually confirmed stopped vehicles, had the lights and sirens on, and therefore, did not act recklessly. As a result, the plea should have been granted.

***City of San Antonio v. Hurón*, No. 04-19-00570-CV, 2020 WL 3065426 (Tex. App.—San Antonio June 10, 2020, pet. denied) (mem. op.).** In this appeal, the court determines that although the city received no formal notice of a claim, the city had actual notice of the claim under Section 101.101(c) of the Texas Tort Claims Act.

David Arredondo was riding his bicycle westbound on Sioux Street shortly before midnight when he failed to stop at a stop sign, and rode across the unlit intersection. Police Officer Botello, driving southwest on another road, struck Arredondo with his vehicle, and Arredondo died at the scene. City investigators and a supervisor were dispatched to scene where they took a statement from Officer Botello regarding the accident and photographed and took videos of the scene. Thereafter, they filed their reports. Thirteen months after the accident, Arredondo's sisters, Hurón and Rico, sued the city for wrongful death asserting that the officer was negligent and grossly negligent. The city, in its plea to the jurisdiction, argued that immunity was waived because it did not receive formal notice of the sisters' claims within the ninety-day notice period required under the city's charter and it had no actual notice of its alleged fault within the notice deadline. The sisters did not present evidence of formal notice, but presented evidence of actual notice in the form of the city-generated reports. The trial court denied the city's plea, and the city filed an interlocutory appeal.

Under the Texas Tort Claims Act, actual notice exists only when a governmental unit has subjective awareness that its fault, as ultimately alleged by the claimant, produced or contributed to the claimant's injuries. To determine if there was legally sufficient evidence to support a finding that Officer Botello was not maintaining proper lookout at the intersection at the time of the accident in violation of his duty, the court reviewed the city-generated reports submitted into evidence. The court concluded that the vehicle accident report or loss notice completed by Officer Botello was legally sufficient to support such a finding. As a result, the court found that the city had timely notice of its fault in producing or contributing to Arredondo's death.

***City of Houston v. Mejia*, No. 14-19-00559-CV, 2020 WL 4092253 (Tex. App.—Houston [14th Dist.] July 21, 2020, pet. denied).** This is a Texas Tort Claims Act (TTCA) case involving a motor vehicle accident in which the 14th Court of Appeals affirmed an order denying the city's jurisdictional challenge on interlocutory appeal.

Isabel Mejia was driving her vehicle when Sergeant Michelle Gallagher (Gallagher) of the Houston Police Department failed to yield the right of way at an intersection and hit Mejia's vehicle. The Mejias sued Gallagher and the city for personal injuries. The Mejias' claims against Gallagher were dismissed pursuant to the city's motion under Texas Civil Practice and Remedies Code Section 101.106(e). The city originally admitted Gallagher was in the course and scope of her employment at the time, then later amended responses to Mejia's request for admissions and denied she was within the course and scope. The city then filed a motion for summary judgment asserting Gallagher was not within her course and scope of employment at the time of the accident. Essentially, the city found out that Gallagher's husband (a police lieutenant) asked her to drive his "take home" police vehicle from the mechanic's garage and was delivering it to their home when she was involved in the accident. Gallagher testified that at the time of the accident she was driving home, had no official duties, was not being paid, was not responding to a call for

service, criminal activity, or an emergency situation. The motion was denied and the city appealed.

Under the TTCA, "scope of employment" means the performance of "the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." Whether she was on duty, off duty, or using a police vehicle or not, is not dispositive. The focus is on the capacity in which the officer was acting at the time of the accident (i.e. what the officer was doing and why she was doing it.) Gallagher's affidavit reflects that her husband (a superior officer employed by Gallagher's employer) asked her to pick up his city-issued vehicle from the city garage so her superior officer would have the vehicle available at the beginning of his shift (a benefit to Gallagher's employer). Gallagher was not merely commuting to work, but running an errand for the city. As a result, the city did not conclusively negate Gallagher's course and scope.

Chief Justice Frost stated in his dissent that the majority used the wrong legal standard. Nothing in the record showed that in picking up her husband's work vehicle and driving it to their home, Sergeant Gallagher was acting on the instructions of a supervisor or other superior *in her chain of command*. The mere conferring of an employer benefit is not the proper legal test.

***Webb Cty. v. Lino*, No. 04-19-00891-CV, 2020 WL 4218714 (Tex. App.—San Antonio July 22, 2020, no pet.) (mem. op.).** This is a motor vehicle accident case under the Texas Tort Claims Act (TTCA) where the San Antonio Court of Appeals affirmed the denial of the county's plea to the jurisdiction.

Webb County Sheriff's Deputy Mauro Lopez witnessed Saldivar pass a vehicle from a no-passing lane on a three-lane highway. Deputy Lopez applied his brakes to make a U-turn prior to initiating his lights and siren. The video from Deputy Lopez's dash camera shows he slowed down from 70 miles per hour to 16 miles per hour in seven seconds. During this time, he began moving into the center turn lane, effectively blocking all traffic behind him. This caused drivers behind Lopez to brake suddenly, and an 18-wheeler truck to jackknife and skid into the westbound lane, directly into Saldivar's path. Saldivar's truck and the 18-wheeler collided, resulting in the death of killing Saldivar and all passengers. The families sued, and the county filed a plea to the jurisdiction. The plea was denied and the county appealed.

The county asserted Deputy Lopez did not control the 18-wheeler which caused the accident, so no waiver of immunity exists. The TTCA waives immunity if the injury "arises from the operation or use of a motor-driven vehicle." The TTCA does not define the term "arises from" but case law states it requires a nexus between the operation or use of the motor-driven vehicle or equipment and cause of the plaintiff's injuries. The Texas Supreme Court has "described the threshold as something more than actual cause but less than proximate cause." The necessary causal nexus requires a showing that the use of the vehicle actually caused the injury. Deputy Lopez testified that a vehicle going far below the speed limit poses a hazard to vehicles traveling behind it. The police crash report notes witnesses stated it was Deputy Lopez's drastic reduction in speed which caused following traffic to have to take evasive measures. Taking the pleadings in a light most favorable to the non-movants, the court held the evidence in this case raises a fact

question about whether Deputy Lopez's operation or use of his vehicle was "directly, causally linked to the accident and the damages sustained."

The court next considered whether Deputy Lopez possessed official immunity. Such immunity is governed by the needs/risk analysis. The court agreed Deputy Lopez was performing a discretionary duty in choosing to pursue the perceived traffic violation. However, Webb County did not conclusively establish that a reasonably prudent officer could have determined Deputy Lopez's actions were justified under these circumstances. There was no detailed analysis of the need for immediate apprehension versus the risks related to the U-turn at that point and in that manner. Finally, as to the county's assertion under the emergency responder exception, routine traffic stops were not listed as emergency calls in the department manual, Deputy Lopez did not activate his lights or siren, he did not call dispatch to notify the situation was an emergency, and nothing indicates there was an immediate need to pull in front of oncoming traffic as opposed to waiting for traffic to be more cleared or by activating lights/sirens. As such, the plea was properly denied.

***Shaw v. City of Dallas*, No. 05-19-01233-CV, 2020 WL 4281789 (Tex. App.—Dallas July 27, 2020, pet. denied) (mem. op.)**. In this Texas Tort Claims Act case, the court of appeals upholds the trial court's dismissal of the pro se plaintiff's action against the city.

The plaintiff called an ambulance after suffering severe stomach pain. He alleges that the driver of the ambulance hit potholes on the way to the hospital exacerbating his injuries. The plaintiff had surgery to fix the stomach issue. The plaintiff sued the city under the Tort Claims Act arguing that the bumpy ambulance ride exacerbated his stomach injury. The city argued that there was no evidence that the ambulance ride caused the stomach injury because the injury was a pre-existing condition. The trial court dismissed the plaintiff's claims for lack of sufficient evidence.

In order to waive the government's immunity through the Tort Claims Act, the plaintiff has to allege that the government employee caused an injury. Despite the court's liberal construction of the pro se plaintiff's petitions and evidence, the only evidence presented that alleged wrongdoing by the city occurred was the statement by the nurse practitioner that the bumpy ride might have "add[ed] more pain to the abdomen area." The court of appeals agreed with the trial court that this statement alone was insufficient to waive immunity. The court also noted that it does liberally construe pro se plaintiff pleadings but has to hold a pro se plaintiff to the same procedural standard as a plaintiff with counsel in order to avoid giving a pro se applicant an unfair advantage.

***City of Austin v. Anam*, No. 03-19-00294-CV (Tex. App.—Austin July 30, 2020, no pet.) (mem. op.)**. In this Texas Tort Claims Act case, the court of appeals upheld the trial court's denial of the city's plea to the jurisdiction for a detainee's death by suicide while in a patrol vehicle.

Anam was arrested for allegedly shoplifting. The arresting officer performed an inadequate search of Anam and failed to detect a handgun that was attached to the front of Anam's

waistband. The officer handcuffed Anam's hands behind his back, placed him in a patrol car, and fastened his seatbelt. During the ride, the lap belt portion of Anam's seatbelt unfastened, and after he revealed to the officer that he was suicidal, he told the officer that he had a loaded firearm pointed at his own head. The officer stopped and exited the vehicle. Anam then shot himself and died. His family sued the city under the Tort Claims Act alleging waiver of the Act applies for death caused by use of a motor-driven vehicle or, alternatively, for death caused by a condition or use of tangible personal property. The city filed a plea to the jurisdiction. The trial court denied the plea, and the city appealed.

The court of appeals concluded that the improper use or failure to use a vehicle's safety equipment can constitute use of a motor vehicle, and that the officer's failure to secure Anam's seatbelt constituted use or operation of a motor vehicle. Additionally, the court found that given the officer's testimony regarding the suicidal tendencies of detainees, his awareness that Anam was despondent, his general awareness that detainees are often in possession of weapons, and the video showing that for most of the drive, Anam was not property restrained by the seatbelt and was in possession of a weapon, the family had met their burden of raising a fact issue regarding foreseeability. Accordingly, the court affirmed the trial court's order. The appellate court did not address the issue of whether Anam's death was caused by a condition or use of tangible personal property.

***City of El Paso v. Cangialosi*, No. 08-19-00163-CV, 2020 WL 5105217 (Tex. App.—El Paso Aug. 31, 2020, no pet.).** The plaintiff alleges that the manner in which police officers conducted a pursuit proximately caused an automobile collision in which plaintiff was involved. The court of appeals held the city's plea to the jurisdiction was properly denied by the trial court because there was some evidence the officers were in pursuit at the time of the crash and that the officers had violated city policy.

***Jefferson Cty. v. Reyes*, No. 09-18-00236-CV, 2020 WL 5414985 (Tex. App.—Beaumont Sept. 10, 2020, no. pet. hist.) (mem. op.).** Reyes sued Jefferson County and a county employee, Lawrence Flanagan, under the Texas Tort Claims Act (TTCA) for injuries and property damage resulting from an automobile collision between Reyes and Flanagan. The county filed a plea to the jurisdiction arguing that Reyes failed to comply with the presentment requirement in Local Government Code Section 89.004 which was a statutory prerequisite to suit. On remand from the Supreme Court of Texas, the court of appeals holds that Section 89.004 is not a statutory prerequisite to suit contemplated by Section 311.034 of the Code Construction Act, and therefore, any failure to comply with this presentment provision did not operate as a jurisdictional bar to Reyes's TTCA lawsuit against the county.

***City of El Paso v. Aguilar*, No. 08-19-00262-CV, 2020 WL 5987623 (Tex. App.—El Paso Oct. 9, 2020, no pet.)**. Aguilar was helping with a float in the December 2016 City of Lights Parade when she was hit by a vehicle/float. Aguilar filed suit alleging the city was negligent in failing to oversee and control parade traffic, and in instructing the driver of the float (Ortega) to move forward when it was unsafe to do so. She alleged that her injury arose from the operation or use of a motor vehicle and the use of tangible personal property. Aguilar also alleged that the city was liable for the conduct of the person who instructed Ortega to move forward, either by

vicarious liability or respondeat superior, and that it was also directly liable for negligently training and supervising that person. The court of appeals affirms the order of the trial court insofar as it denies the city's plea to the jurisdiction challenging Aguilar's claim for negligence in instructing Ortega to move his vehicle when it was not safe to do so based on respondeat superior liability. The order is reversed insofar as it denies the city's plea to the jurisdiction challenging Aguilar's remaining claims. On remand, Aguilar was given an opportunity to replead those claims to allege sufficient jurisdictional facts in support of those claims.

***City of Brownsville v. Rattray*, No. 13-19-00556-CV, 2020 WL 6118473 (Tex. App.—Corpus Christi Oct. 15, 2020, pet. filed) (mem. op.)**. Rattray's and other homeowners' homes were flooded as a result of storm water accumulation. They sued the City of Brownsville claiming the city and its employees negligently operated motor-driven equipment by untimely activating such equipment. The city filed a plea to the jurisdiction, which was denied by the trial court. The city then filed an interlocutory appeal, asserting that its immunity from suit was not waived. The court of appeals reversed the trial court's decision, finding that the city's actions constituted non-use of property that does not invoke the Texas Tort Claims Act's waiver of immunity.

***City of Fort Worth v. Rust*, No. 02-20-00130-CV, 2020 WL 6165297 (Tex. App.—Fort Worth Oct. 22, 2020, no pet.) (mem. op.)**. Rust sued the City of Fort Worth for an injury when he fell out of a city-owned golf cart at a municipal golf course alleging the city negligently maintained the golf cart, should have removed the cart, and failed to warn him of the dangerous condition. The city filed a plea to the jurisdiction on the grounds that the Recreational Use Statute applied to the case, thus lowering the city's duty of care to gross negligence, malicious intent, or bad faith. The appellate court held that the Recreational Use Statute applied to Rust's claims, even though they were for the condition or use of tangible personal property. The court found that the plea should have been granted, but that Rust should have the opportunity to amend his petition.

***Texas Dep't of Pub. Safety v. Kendziora*, No. 09-19-00432-CV, 2020 WL 6494210 (Tex. App.—Beaumont Nov. 5, 2020, no. pet. hist.) (mem. op.)**.This is an interlocutory appeal from the denial of Texas Department of Public Safety'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 air horn, 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.

***Gonzales v. City of Farmers Branch*, No. 06-20-00054-CV, 2020 WL 6494922 (Tex. App.—Texarkana Nov. 5, 2020, no. pet. hist.) (mem. op.)**. In this appeal from a trial court's judgment dismissing the plaintiff's tort claims case, the plaintiff was the passenger in a car where a police officer shot and killed the driver and the plaintiff sued the city. The trial court granted summary judgment in favor of the city because the alleged claim was for an intentional tort, not for negligence as required by the Tort Claims Act. The Texarkana Court of Appeals affirmed the trial court's summary judgment on the plaintiff's procedural arguments because the trial court did not have a trial without the plaintiff and was not required to consider a late filed amended petition that was submitted the same day that the trial court entered judgment.

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 plaintiff's damages included low back injuries, stress, and anxiety. 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 is not liable. The summary judgment hearing was on May 22, 2020. On June 17, 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.

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 court of appeals first 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. 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.

***City of Houston v. Hussein*, No. 01-18-00683-CV, 2020 WL 6788079 (Tex. App.—Houston [1st Dist.] Nov. 19, 2020, pet. denied) (mem. op.).** The plaintiffs sued the city for negligent operation of a motor vehicle for injuries from when a city-owned ambulance struck a concrete barrier during their transport in the ambulance. The city filed: (1) a motion for summary judgment because it alleged the emergency response exception to the Texas Tort Claims Act (TTCA) applied; and (2) a motion to dismiss on the basis that the claims were healthcare liability claims for which the plaintiffs failed to serve the statutorily-required expert report. The trial court denied the city's motions and the city appealed. The appellate court concluded there was a fact issue regarding whether the emergency response exception applied based on the facts presented, including that the ambulance did not turn on its lights and sirens for the transport. The court also concluded that one of the plaintiffs' claims was a health care liability claim, and therefore the trial court erred in denying the motion to dismiss. The other plaintiff's claim was

not a health care liability claim and therefore the trial court correctly denied the motion to dismiss.

***City of Dallas v. Mazzaro*, No. 05-20-00103-CV, 2020 WL 6866570 (Tex. App.—Dallas Nov. 23, 2020, no. pet. hist.) (mem. op.)**. Mazzaro sued the city to recover damages for injuries suffered when she fell while walking on city-owned property. The city filed a plea to the jurisdiction. The court concludes that the evidence establishes Mazzaro did not meet the Texas Tort Claims Act's form notice requirement because, although it was sent, written notice of her claim was not actually received by the city within the required timeframe. The court also holds that, although the city EMS responded to the scene of the accident, the city had no subjective awareness of its alleged fault in causing or contributing to Mazzaro's injuries. Thus, the city had no actual notice of Mazzaro's claims. The trial court's order denying the city's plea to the jurisdiction is reversed.

***Ledesma v. City of Houston*, No. 01-19-00034-CV, 2020 WL 6878404 (Tex. App.—Houston [1st Dist.] Nov. 24, 2020, no. pet. hist.).** The plaintiffs sued a city employee and the City of Houston for a car accident when the city employee, wearing her City of Houston Police Department uniform, rear-ended the plaintiffs. The city moved to dismiss the employee under the election-of-remedies provision under Section 101.106(e). The plaintiffs then non-suited the employee. The city filed a motion for summary judgment alleging the employee was not acting in the scope of her employment at the time of the accident. The trial court granted summary judgment and the plaintiffs appealed. The appellate court held that, by moving to dismiss the plaintiffs' claims against the employee under Section 101.106(e), the city judicially admitted the employee was acting within the scope of her employment and could not later dispute that admission.

***City of San Antonio v. Smith*, No. 04-20-00077-CV, 2020 WL 6928400 (Tex. App.—San Antonio Nov. 25, 2020, no pet.) (mem. op.).** The plaintiff sued for injuries she sustained when a stolen, city-owned ambulance collided with her car. The city filed a plea to the jurisdiction alleging, among other things, that "operation or use" of a motor vehicle does not apply because a city employee was not using the vehicle – the thief was. The plaintiff countered that her claim also arose out of the "use or condition of tangible personal property" and that the city should have installed an anti-theft device. The appellate court found that the operation or use of a motor vehicle did not apply because a city employee was not operating or using the stolen vehicle at the time of the crash. The court also concluded the claim did not arise out of the use or condition of tangible personal property because the plaintiff's claim was "no more than a failure to use [a particular anti-theft device], which does not fall within the waiver." The court granted the city's plea to the jurisdiction and rendered judgment in favor of the city.

***City of Blue Ridge v. Rappold*, No. 05-19-00961-CV, 2020 WL 7065830 (Tex. App.—Dallas Dec. 3, 2020, pet. denied) (mem. op.)**. The Rappolds brought negligence-related claims under the Texas Tort Claims Act (TTCA) and takings claims against the City of Blue Ridge. They alleged the city's wastewater treatment facility failed, resulting in a combination of raw sewage and storm water covering portions of their property. The city filed a plea to the jurisdiction. At this stage in the litigation (pre discovery), the court holds that the Rappolds have sufficiently

alleged misuse and operation of motor-driven pumps, as well as the condition or use of the city's tangible personal property, caused their damages. In addition, the court overruled the city to the extent it complains that the TTCA specifically precludes an award of exemplary damages. Finally, the court held that, at this point in the proceedings, the Rappolds pleadings state a viable takings claim. The trial court's order denying the city's plea to the jurisdiction is affirmed.

***City of Laredo v. Sanchez*, No. 04-20-00402-CV, 2020 WL 7364660 (Tex. App.—San Antonio Dec. 16, 2020, pet. denied).** Sanchez sued the city on behalf of her son, alleging that he sustained injuries during a transport in a city-owned ambulance as a result of the ambulance abruptly stopping because of a chain across the driveway to the hospital. The trial court denied the city's plea to the jurisdiction arguing the emergency response exception applied, and the city appealed. The appellate court found that the trial court properly denied the plea to the jurisdiction because, even assuming the city met its burden that the city employee was responding to an emergency call, the son was transported as a precaution, he was not being treated in the ambulance, and the employee did not activate the ambulance lights and sirens.

***Garms v. Comanche Cty*., No. 11-19-00015-CV, 2020 WL 7413991 (Tex. App.—Eastland Dec. 18, 2020, no pet.) (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 the 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 non-use 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 on the tort claim because immunity was not waived by claims of nonuse or inaction.

***Rivera v. City of Houston*, No. 01-19-00629-CV, 2020 WL 7502054 (Tex. App.—Houston Dec. 22, 2020, no pet.) (mem. op.).** This appeal arises from a car accident and centers on whether a city police officer held official immunity when she drove her police vehicle through an intersection not realizing she had a red light because she was typing on her mobile data terminal. The city argued she held official immunity, and the trial court granted the city's summary-judgment motion, ruling that the city established its affirmative defense. The appellate court reversed the trial court's ruling and remanded for additional proceedings holding that the police officer could not have properly evaluated the risks of her actions against any need to check a priority-two call, thereby taking her actions outside the realm of a good-faith performance of a discretionary act. The court reversed the trial court's decision and remanded for additional proceedings.

***Self v. Wet Cedar Creek Mun. Util. Dist*., No. 12-20-00082-CV, 2021 WL 56213 (Tex. Ct. App.—Tyler Jan. 6, 2021, no. pet. hist.) (mem. op.)** Self and his wife sued the district for, among other things, negligence and premise defect, alleging that the district's prior repairs to the sewer's vault system resulted in sewage backing up into their home. The district filed a plea to the jurisdiction asserting governmental immunity under the Texas Tort Claims Act. The trial court granted the plea, and Self filed an appeal. The court of appeals affirmed the trial court's decision finding that immunity was not waived as Self did not meet the burden of establishing a fact issue as to whether the flooding of his home "arose" from the use of motor-driven equipment and that the district knew or should have known of a dangerous condition of the premises that created an unreasonable risk of harm to him.

***Metropolitan Transit Auth. of Harris Cty. v. Carr*, No. 14-19-00158-CV, 2021 WL 98076 (Tex. App.—Houston [14th Dist.] Jan. 12, 2021, no pet.).** In this appeal from a trial court's judgment denying the city's plea to the jurisdiction on a tort claims case, the 14th Court of Appeals affirmed the trial court's denial of the plea because the plaintiff provided adequate notice of her injury including the location of the injury.

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 that the notice provided by the plaintiff was insufficient because she gave the wrong bus number in her notice. The trial court denied the county's plea to the jurisdiction.

A plaintiff is required to present written notice to the governmental entity within six months of an injury 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.

The court of appeals upheld the trial court's denial of the city's plea to the jurisdiction on the tort claim because the plaintiff's notice to the governmental entity was sufficient.

***City of Austin v. Credeur*, No. 03-19-00358-CV, 2021 WL 501110 (Tex. App.—Austin Feb. 11, 2021, no. pet. hist.).** This is a premise defect case where Credeur was injured when she fell walking along a city sidewalk in front of private property owned by Riedel. She sued the City, Riedel, and a utility company. The City filed a plea to the jurisdiction, which was denied. The City appealed.

The Court of Appeals reversed the denial of the City's plea to the jurisdiction and dismissed the case as the City produced evidence that showed it had no actual knowledge of the defect, and Credeur failed to raise a fact question as to notice.

***City of Dallas v. De Garcia*, No. 05-20-00636-CV, 2021 WL 777087 (Tex. App.—Dallas Mar. 1, 2021, no. pet. hist.).** De Garcia sued the City when she tripped over a piece of metal pipe protruding from the sidewalk, which she claimed was owned and controlled by the City. The City filed a plea to the jurisdiction claiming it was immune from suit because it was not responsible for maintaining the sidewalk and was not aware of a defect at the time of De Garcia's injury. The City provided evidence of a contract with TxDOT and claimed TxDOT was responsible for maintaining the sidewalk. The trial court denied the City's plea and the City appealed. The appellate court reversed the trial court and dismissed the claims against the City because the City had presented sufficient evidence that it did not have actual knowledge of the defect and De Garcia failed to rebut the evidence.

***Dallas Cty. Hosp. Dist. v. Bravo*, No. 05-20-00640-CV, 2021 WL 822916 (Tex. App.—Dallas Mar. 4, 2021, no. pet. hist.).** This is a Texas Tort Claims Act (TTCA) case where the Dallas Court of Appeals reversed the denial of Parkland's plea to the jurisdiction and dismissed the claims.

Plaintiff Bravo visited a sick family member at a Parkland hospital and 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, Parkland had no actual knowledge of the condition.

***Pryor v. Moore*, No. 12-20-00137-CV, 2021 WL 1582722 (Tex. App. Tyler Apr. 21, 2021, no pet.) (mem. op.).** Pryor was involved in a motor vehicle collision with a City of Tyler garbage truck being driven by a city employee, Moore. Pryor sued the city and Moore for negligence. The city moved for dismissal of Moore and also moved for summary judgment. The trial court dismissed the employee from the case and granted the city's motions for summary judgment, and Pryor appealed. Section 101.106 of the Texas Tort Claims Act provides plaintiffs with the choice of defendants – the governmental entity or the employee acting within the scope of employment – but not both. When a plaintiff sues both a city and the city's employee, the employee must be dismissed from the case if they were acting within the scope of employment. The appellate court analyzed Moore's actions as the driver of the garbage truck, found him to have been acting within the scope of his employment, and affirmed the trial court's dismissal action.

***City of Dallas v. Estate of Yolanda Jeanne Webber*, No. 05-20-00669-CV, 2021 WL 1573064 (Tex. App.—Dallas Apr. 22, 2021, no. pet. hist.).** This is a Texas Tort Claims Act ("TTCA") case where the Dallas Court of Appeals held the City was immune 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.

LAND USE

***Powell v. City of Houston*, No. 19-0689, 2021 WL 2273976 (Tex. June 4, 2021).** Two homeowners challenged the City of Houston's historic preservation ordinance on the grounds that it was zoning enacted in violation of the city's charter, which only allows zoning to be adopted after public notice and a voter referendum, and it did not comply with certain provisions of Chapter 211 of the Local Government Code. The historic preservation ordinance allows for the creation of historic districts in which properties cannot be modified or demolished without the approval of a historical commission. The court of appeals held that the ordinance is not a zoning regulation because the purposes for which it was created, its function, and its way of regulating property use and development all differ from those of zoning laws.

The Supreme Court affirmed. The court concludes that the ordinary meaning of zoning is the district-based regulation of the uses to which land can be put and of the height, bulk, and placement of buildings on land, with the regulations being uniform within each district and implementing a comprehensive plan. Zoning regulations also tend to be comprehensive geographically by dividing an entire city into districts, though this need not always be the case. In contrast, the court finds that the historical preservation 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. Accordingly, the ordinance is not zoning and was not enacted in violation of the city charter.

Preemption: *Texas Propane Gas Ass'n. v. City of Houston*, No. 19-0767, 2021 WL 1432221 (Tex. Apr. 16, 2021). The Texas Propane Gas Association (TPGA) sued the city, seeking a declaratory judgment that the city's ordinances regulating liquefied petroleum gas, to include imposing criminal fines for violations, are preempted by state law. The city argued that: (1) civil courts lack subject-matter jurisdiction to adjudicate TPGA's preemption claim because the local regulations it challenges carry criminal penalties; and (2) TPGA lacks standing to challenge the city's regulations without showing injury to a TPGA member for each discrete regulation challenged. The appellate court determined that it had jurisdiction over the claim but that TPGA lacked standing, and consequently remanded the case to the trial court for TPGA to amend its pleadings. The city and TPGA filed petitions for review.

The Supreme Court of Texas held that TPGA's claim is not a "criminal law matter" that is outside a Texas civil court's subject-matter jurisdiction. Additionally, the court held that TPGA has demonstrated standing to bring the singular preemption claim it pleaded. Accordingly, the judgment of the appellate court is reversed, and remanded.

***Artuso v. Town of Trophy Club*, No. 02-20-00377-CV, 2021 WL 1919634, (Tex. App.—Fort Worth May 13, 2021) (mem. op.).** 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, 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 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 arguing that the trial court's oral statements about the grounds for granting the plea were improper as 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 had 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.

***London v. Rick Van Park, LLC*, No. 05-20-00813-CV, 2021 WL 1884650 (Tex. App.—Dallas May 11, 2021) (mem. op.).** The plaintiff sued the city secretary and former chair of the planning and zoning committee for declaratory and injunctive relief, claiming the city officials acted ultra vires for failing to issue a certificate of no action on a preliminary development plan in the city when the submitted plan was deemed deficient, not properly filed, and substantially incomplete per the Town of St. Paul's ordinances. The trial court denied the city officials' plea to the jurisdiction and the city officials appealed. The appellate court found that the officials the plaintiff sued were not the "municipal authority" responsible for the no action certificate. As such, the court granted the plea, and gave the plaintiff the opportunity to replead.

Vested Rights/Takings: *Bauer v. City of Waco*, No. 10-19-00020-CV, 2020 WL 7253430 (Tex. App.—Waco Dec. 9, 2020, no. pet. hist.) (mem. op.). In this appeal from a trial court's judgment dismissing the plaintiff's vested rights and takings case on summary judgment, the Waco Court of Appeals affirmed the trial court's summary judgment because the plaintiff had not disputed all of the possible bases for summary judgment on the vested rights and takings claims including that the previous owner had consented to the installation of the waterline of which the plaintiff complained.

The plaintiff 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 sued the city for vested rights and takings, because it argued that the regulations being applied to the project were inapplicable due to the vesting of its original permit and that it was a taking to require the easement for the waterline. 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 time of initial permit did not provide a different result. As to the required easement, the City argued that the plaintiff did not seek a variance from the easement required by the city and that the prior owner had agreed to the waterline placement so there was no taking. The trial court granted summary judgment in favor of the city but 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.

***Larry Mark Polsky, esq. v. Sheriff Omar Lucio and Cameron County,* No. 13-19-00062-CV (Tex. App.---Corpus Christi September 24, 2020) (mem. op.).**
In this sexually oriented business case, the plaintiff sued the County and the Sheriff after they denied his sexually oriented business permit based on proximity to a public beach. The Court of Appeals held that the trial court should have used the substantial evidence standard in reviewing the administrative task of reviewing the sexually oriented business permit application. The Court also held that the Sheriff was a necessary party to the suit.

The plaintiff filed with the County to open a sexually oriented business near a public beach in Cameron County. The Sheriff denied the permit on the basis that the public beach was a "public park" as defined by the County. The plaintiff appealed to the governing body of the County who held a hearing and upheld the denial of the permit. The plaintiff appealed the decision to the trial court, who used the abuse of discretion standard to uphold the County's decision because it did not abuse its discretion in denying the application. The plaintiff then appealed to the Court of Appeals.

Counties have authority to regulate sexually oriented business locations in Chapter 243 of the Texas Local Government Code. This County had a regulation prohibiting a sexually oriented business from opening within 1500 feet of a public park. The County interpreted the regulation to mean that a public beach is a public park. "Contrary to the County's position, when cities and counties undertake the regulation of SOBs, they do so in an administrative capacity, and as such, the denial of an SOB permit is reviewed under the substantial evidence rule." Under the substantial evidence rule, the analysis is whether substantial evidence supports the government's decision. This is in contrast to abuse of discretion which allows a court to overturn a decision only if the government abused its discretion in making the decision.

The Court of Appeals held that the trial court used the wrong standard in reviewing the County's decision and remanded the case to the trial court to be reviewed under a substantial evidence standard.

Authority of General Law Cities: *Builder Recovery Servs. LLC v. Town of Westlake*, No. 02-20-00051-CV, 2021 WL 62135 (Tex. App.—Fort Worth Jan. 7, 2021, pet. filed) (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 of Westlake's power to require licenses. The town passed an ordinance allowing third-party haulers to obtain licenses for temporary construction waste services and imposed certain regulations on the license. BRS brought suit asserting, among other things, that the license fee was not tied to actual administrative costs and that the 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 invalidated the license fee calculation. BRS appealed. The appellate court rejected BRS' argument that Section 361.113 of the Texas Health and Safety Code does not empower the town to issue licenses as a license is an inherent part of the town's regulatory power. The court further 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.

Nuisance Abatement: *Groba v. City of Taylor,* No. 03-19-00365-CV, 2021 WL 359203 (Tex. App.—Austin Feb. 3, 2021, pet. denied) (mem. op.). The City sought injunctive relief and civil penalties related to its nuisance determination, including an authorization for the City to demolish Groba's building and charge the costs for doing so to Groba. 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. The Court of Appeals affirmed the granting of the plea to the jurisdiction as Groba did not timely appeal the municipal court order thereby not complying with the jurisdictional prerequisites for judicial review of the nuisance determination.

Confederate Monuments: *Carter v. Dallas City Plan Comm'n*, No. 05-20-00190-CV, 2021 WL 777088 (Tex. App.—Dallas Mar. 1, 2021, pet. filed). 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, asserting that the City violated its own codes, 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.

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 of the 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.

Subdivision Regulations: *Korr, L.L.C. v. County of Gaines,* No. 11-18-00130-CV, 2020 WL 2836491 (Tex. App.—Eastland May 29, 2020, no pet.) (mem. op.). This case involves a claim under the Uniform Declaratory Judgment Act (UDJA) regarding an interpretation of a county regulation dealing with plats. The court of appeals held that the UDJA cannot be used if there is no ripe injury.

Korr, a land developer in the county, filed suit against the county under the UDJA based on a county regulation that requires a bond to cover the cost of electrical infrastructure prior to a plat being reviewed. Korr argued that the provision was preempted by the Public Utility

Commission's authority. Korr presented a plat that had already been approved and indicated but did not state Korr had an interest in this and other properties in the county. The county filed a plea to the jurisdiction, which was granted. Korr appealed.

Korr presented no proof of Korr's ownership of land in the county or active plat applications before the county. In addition, the listed plat had not required the type of bond at issue in the claim. Korr argued that despite not having a ripe injury, the UDJA should still allow the suit, because Korr wished to develop property in the future. The court of appeals reviewed the requirements for standing in a UDJA claim, including the ripeness of a controversy. The court held that a ripe controversy is still required and noted Korr's arguments in the trial court were all based on "hypothetical" situations. The court held that it could not issue an advisory decision and affirmed the trial court's dismissal.

Nonconforming Use: *Tejas Motel, L.L.C. v. City of Mesquite*, No. 05-19-00667-CV, 2020 WL 2988566 (Tex. App.—Dallas June 4, 2020, pet. denied) (mem. op.). In this appeal, the court affirms the trial court's order granting the city's plea to the jurisdiction in a case involving the amortization of a nonconforming use.

In 2006, Tejas acquired the property on which Tejas Motel is located and has been in operation since 1970. The use of the property as a motel was initially authorized under the city's 1973 Comprehensive Zoning Ordinance, but the continued use of the property as a motel became a nonconforming use when the zoning ordinance was amended in 1997. The city did not specifically address nonconformance until April 2018, when it passed an ordinance changing the manner in which the city's board of adjustment (BOA) could amortize nonconforming properties. The BOA scheduled and held a public hearing in June 2018, where it determined that Tejas Motel's continued operation as a nonconforming use would adversely affect other nearby properties. At the hearing, Tejas agreed to the amortization of the property provided that it could cease operations or bring the motel into compliance by May 1, 2019. After the hearing, Tejas's attorney reviewed and edited a draft of the BOA's decision and electronically signed that draft before Tejas and the city jointly submitted it to the BOA on July 30, 2018. The BOA executed the decision on July 31, and the city emailed the decision to Tejas's attorney the following day. In November, three months after the BOA's decision, Tejas appealed the decision asserting the following causes of action: (1) the decision was void based on a Texas Open Meetings Act violation; (2) declaratory judgment that the city's ordinances are unconstitutional as applied to Tejas and otherwise invalid; (3) a claim for monetary judgment based on the allegation that the city's ordinances were unconstitutional as applied to Tejas; and (4) a claim for declaratory relief based on ultra vires actions taken by the BOA. The city filed a plea to the jurisdiction and a conditional summary judgment motion as to the Open Meetings Act claim. Tejas responded to the motion for summary judgment, but two days prior to the hearing on the motions, Tejas amended its petition adding new claims against the BOA members in their official capacities, and a petition in intervention on behalf of a frequent guest of the motel seeking relief for the city's alleged violation of the Open Meetings Act. The day before the hearing, Tejas filed a supplement to its amended petition and a response to the city's plea, and within its response, requested a continuance to allow it to conduct additional discovery related to when the BOA filed its minutes on its hearing. The city objected to the amended petition and supplement as

untimely. A hearing was held, but no record was made. Shortly thereafter, the trial court granted the city's plea in its entirety, dismissed Tejas's claims for lack of jurisdiction, and denied the city conditional summary judgment motion as moot. Tejas appealed.

The court first considered the timeliness of the Tejas appeal challenging the BOA's decision. The court determined that because Tejas did not timely appeal the BOA decision within the statutorily-required 10 days after the decision is filed with the BOA, the trial court lacked jurisdiction over Tejas's state-law claims, including the Open Meetings Act claim and the as-applied constitutional challenges. The court next examined whether Tejas had any viable federal takings claim. The court determined that Tejas did not have a vested property interest in maintaining a nonconforming use as Tejas purchased the property long after it became a nonconforming use and it had no reasonable investment-backed expectations in continuing that use. Finally, the appellate court determined that the trial court did not abuse its discretion by denying Tejas's request for a continuation in order to conduct discovery as Tejas failed to specify what discovery it sought and provided no information about the steps it had taken to pursue discovery. Accordingly, the trial court's order granting the city's plea and dismissing Tejas's claims is affirmed.

Vested Rights: *River City Partners, Ltd. v. City of Austin*, No. 03-19-00253-CV, 2020 WL 3164404 (Tex. App.—Austin June 4, 2020, no pet.) (mem. op.). This appeal arises from a dispute over a City of Austin ordinance that limits the size of retail development in the Barton Springs Zone of Austin.

The property in question was annexed by the City of Austin in 1985. At the time of annexation, the property did not have a permanent zoning classification in place. On the recommendation of the city's land-development office, the city council made permanent zoning classification for several properties, including the property in question, contingent on meeting floor area ratio (FAR) standards more stringent than required by the city's general zoning ordinance.
In 1987, River City's predecessor in title applied to rezone the property to the "community commercial" classification. At the time, the city's zoning regulations for that classification set a 1:1 FAR. The city conditioned its approval on the owner impressing the land with a restrictive covenant that, among other things, limited development to no more than 0.2:1 FAR. The owner executed and recorded the requested covenant (1986 Covenant) and the city reclassified the property to community commercial. In April 2003, the property owner applied to the city for approval to create an eight-lot commercial subdivision. While the application was pending, the city council enacted the Barton Springs Zone ordinance (BSZ Ordinance), which designates twenty-two activities as retail uses and provides that a principal use and its accessory uses may not exceed 50,000 square feet of gross floor area. In 2004, the city approved the plat application and issued a final subdivision plat (2004 Subdivision Plan) with plat notes that provided that the development on the lots will be limited to 65 percent impervious cover with a maximum FAR not to exceed 0.2:1 pursuant to the 1986 restrictive covenant.

River City subsequently purchased six of the lots and in 2017 applied for permission to construct a 72,272 square foot automobile dealership and 14,866 square foot service center that exceeded the BSZ Ordinance limits on use size. River City sought an exemption on the ground that the

BSZ Ordinance conflicted with the 1986 Covenant. The city initially agreed and provided that the project was entitled to rights granted in the 1986 Covenant and would not be subject to the requirements of the BSZ Ordinance. Seven months later the city reconsidered, finding that the 1986 Restrictive Covenant was not applicable. River City sued to enjoin the city from enforcing the ordinance and sought relief under the Uniform Declaratory Judgment Act (UDJA). The city filed a plea to the jurisdiction. The trial court sustained the plea and dismissed River City's claims. River City appealed, seeking a declaration that: (1) Chapter 245 of the Local Government Code prohibits the city from enforcing the BSZ Ordinance; (2) River City's application fits into one of the ordinance's exemptions; or (3) the city should be estopped from applying the BSZ Ordinance.

The court first considered whether the 1986 Covenant or the 2004 Subdivision Plat constitutes a permit application sufficient enough to invoke Chapter 245's protections. The court found that the 2004 Subdivision Plat constitutes a permit under Chapter 245, and because the subdivision plat application was filed before the BSZ Ordinance's effective date, vested rights attached to the project on the filing of the application.

The court then considered whether the BSZ Ordinance was exempt from Subsection 245.004(2), which excludes from the requirements of Chapter 245, preexisting municipal zoning regulations that do not affect, among other things, lot size, lot dimensions, lot coverage, or building size or that do not change development permitted by a restrictive covenant required by a municipality. Construing the BSZ Ordinance in the context of the city's entire land development code, the court determined that River City failed to show that the BSZ Ordinance affects building size. Additionally, the court concluded that because the 1986 Covenant does not authorize River City to use the land as a car dealership and service center without size restrictions, River City failed to show that the BSZ Ordinance changes development permitted by the covenant. Accordingly, the court found that the trial court did not have jurisdiction under Chapter 245. Finally, the court declined to remand the case back to district court to allow River City an opportunity to amend its pleadings so as to cure jurisdictional effect. The court found that River City had received a reasonable opportunity to amend its pleadings after the city filed its plea to the jurisdiction, and that the amended pleading still did not allege facts that would constitute a waiver of immunity.

Uniform Declaratory Judgment Act: *Kehoe v. Kendall Cty.*, No. 04-19-00825-CV, 2020 WL 4045991 (Tex. App. —San Antonio July 15, 2020, no pet.) (mem. op.). This is a declaratory judgment case involving a private property easement where the San Antonio Court of Appeals affirmed the city's plea to the jurisdiction and awarded sanctions against the plaintiff.
Kehoe asserts Kendall County improperly accepted a 40-foot easement across her property and sought a declaration no easement exists. She brought suit under the Uniform Declaratory Judgment Act (UDJA) and the Texas Private Real Property Rights Preservation Act (PRPRPA). The county filed a plea to the jurisdiction, which was granted, and sought sanctions asserting that Kehoe previously sued over the easement and lost. The trial court granted sanctions and Kehoe appealed.

The court first held that Kehoe's arguments in her brief, even broadly construed, do not address the trial court's jurisdictional dismissal. The briefings consist solely of bare assertions of error,

without citations to applicable authority or the record. Since nothing was properly briefed for review, the plea to the jurisdiction remains properly granted. Likewise, Kehoe does not address the standards for sanctions and so they are likewise affirmed.

Land Rights: *City of Mansfield v. Savering*, No. 02-19-00174-CV, 2020 WL 4006674 (Tex. App.—Fort Worth July 16, 2020, pet. denied) (mem. op.). In this lengthy opinion, the Fort Worth Court of Appeals holds certain private property owners did not establish a right to declaratory relief regarding fee-simple ownership of lots over which the City of Mansfield exercised some regulatory control, asserting they were public paths.

A developer filed a final plat in Tarrant County, creating a planned housing development called The Arbors of Creekwood – Gated Community (the Development). The Development was in the city and had two Homeowners Associations (HOA). An amended plat divided the lots into R1 and R2 lots. All R2 lots were in the floodplain, which was governed by city ordinance. The developer created a lake and connected jogging paths ending at the lake. The developer testified the paths were for public use. The boundary line for the R2 lots abutting the lake was to the north of the lake; thus, the lake was not included within the boundaries of these R2 lots. The developer executed a declaration of covenants, conditions, and restrictions (the Declaration) for the Development and filed them in Tarrant County. The Declaration stated the HOAs owned fee-simple title to private streets in the Development and "common properties" which had a complicated definition. In 1997, the Arbors HOA forfeited its right to do business and became a terminated entity. The surviving HOA asserted the Arbors HOA property lots (R2) automatically transferred to it.

In January 2012, the city began planning for a "possible future trail connection" to the jogging path. Construction on the bridge began in 2013 and opened on January 25, 2014. Some owners of R1 lots noticed an increase in people using the jogging path and trespassing on the R1 lots. The R1 owners sued seeking a declaration they owned the R2 lots as common properties, and seeking to quiet title. The court of appeals issued an interlocutory opinion in review of a temporary injunction noting the R2 lots were included in the definition of "common properties."

The R1 Owners also raised claims against the city defendants for trespass and inverse condemnation. The city defendants filed a traditional and no-evidence motion for summary judgment, including arguments that the facts and law had substantially changed since the interlocutory order. They argued the R1 owners did not have a right to possess the R2 lots (which were originally owned by the defunct HOA) and that they did not have a private right to enforce a city ordinance on floodplain development. The trial court denied the city defendants' motions and granted the partial summary judgment of the R1 owners. The city defendants appealed.

The court first went through a detailed analysis of the evidence submitted, objections to the evidence, and what constituted judicial admissions. The court held the law-of-the-case doctrine only applied to claims fully litigated and determined in a prior interlocutory appeal; it did not apply to claims that have not been fully litigated. The law-of-the-case doctrine is flexible and directs the exercise of court discretion in the interest of consistency but does not limit its power. The interlocutory opinion (which was a complicating obstacle) did not address the R1 Owners'

UDJA claim regarding title to the R2 lots, only a probable right of relief for trespass claims based on an undeveloped record. The court noted they were substantially different arguments, issues, law, and review standards. The city argued the R2 lots owned by the defunct HOA could be distributed only under the terms of the articles of incorporation and could not pass to the live HOA automatically. The court agreed with the city that the R1 owners did not establish a proper conveyance under the articles.

Next, the court turned to the floodplain ordinance, where the R1 owners asserted the city failed to follow its own ordinance by obtaining studies before constructing structures in the floodplain connecting the jogging paths. The city defendants' argument that no private cause of action to enforce the ordinance exists is one of standing. The R1 Owners did not challenge the validity of the ordinance, but rather asserted that they wanted a construction of the ordinance and enforcement of it against the city defendants. The R1 Owners did not have a right to enforce the ordinance through a UDJA claim, which only waives immunity for ordinance invalidation. Alternatively, under the record, the R1 owners did not establish the city violated the ordinance. The city defendants proffered summary-judgment evidence raising a fact issue on their substantial compliance. Finally, since the court held the R1 owners could not bring a UDJA claim, the attorney's fee award was reversed.

Code Enforcement*: House of Praise Ministries, Inc. v. City of Red Oak, No.* 10-19-00195-CV (Tex. App.—Waco Aug. 6, 2020, no pet.) (mem. op.). In this substantive due process case, the Waco Court of Appeals affirmed a trial court's grant of a plea to the jurisdiction because the plaintiff did not bring any allegations that rose to the level of a violation of substantive due process as it relates to code enforcement on its property.

The plaintiff is the owner of a piece of property in Red Oak, Texas that was the subject of code enforcement actions including substandard building declaration in municipal court. The plaintiff initially brought claims for regulatory taking, procedural due process, and substantive due process based on the municipal court case determining that the buildings on its property were substandard. In an earlier ruling by the trial court and this court of appeals, the regulatory taking and procedural due process claims were dismissed, but the plaintiff was given the opportunity to replead the substantive due process claim. The plaintiff replead the substantive due process claim including allegations that the City's offered amortization agreement, overzealous code enforcement actions, and premature lis pendens filing violated its substantive due process rights. The trial court granted the City's plea to the jurisdiction related to the substantive due process claim.

To present a substantive due process claim, the plaintiff must proof that the government deprived the plaintiff of a constitutionally protectable property interest capriciously and arbitrarily. City of Lubbock v. Corbin, 942 S.W.2d 14, 21 (Tex. App.—Amarillo 1996, writ denied). The Court of Appeals held that none of the three allegations met this standard. The amortization agreement was never entered into by the plaintiff and so did not deprive it of any rights. The Court of Appeals then held that "conclusory allegations that the code enforcement officer enforced the City's regulations arbitrarily and capriciously are inadequate, standing alone, to support a substantive due process claim." The Court also noted that there was no allegation that the

regulations themselves were an issue. Finally, the Court held that a lis pendens filing, which puts potential property purchasers on notice that an action against a property is currently being brought, does not violate substantive due process even if filed prematurely, where no other evidence of capriciousness or arbitrariness in filing the lis pendens. The Court of Appeals affirmed the trial court's dismissal of the case.

Annexation: *City of Terrell v. Edmonds*, No. 05-19-01248-CV, 2020 WL 5361978 (Tex. App.—Dallas Sept. 8, 2020, pet. filed) (mem. op.). In response to the city's efforts to annex 1000-foot wide strips along specific state highways, property owners residing outside the city limits sued the city alleging that the proposed annexation violated the city charter and state law, and that the notice of the proposed annexation was insufficient under the Texas Open Meetings Act (TOMA). The city argued, among other things, that the suit was not ripe as city council had yet to vote on the annexation and that an injunction to stop council from voting on the annexation ordinance based on alleged violations of TOMA may only be asserted in a quo warranto proceeding. The trial court denied the plea. The court of appeals held that appellants' allegations were not ripe and that a quo warranto proceeding is the only proper method of attacking the validity of a city's proposed annexation based on TOMA violations.

Annexation-Standing: *Hill v. City of Fair Oaks Ranch*, No. 07-19-00037-CV, 2020 WL 5552887 (Tex. App.—Amarillo Sept. 16, 2020, pet. denied) (mem. op). In this case, landowners challenge five involuntary annexations. The issue is whether the landowners have standing. While the landowners did not properly brief some arguments, they did properly allege the annexations exceeded the area allowed within a given year under Local Government Code Section 43.055. If proven, those allegations establish the city's annexation ordinances are void, not merely voidable. As a result, the court of appeals reversed the grant of the city's plea to the jurisdiction and remanded the case for trial.

Platting: *Escalera Ranch Owners' Ass'n, Inc. v. Schroeder*, No. 07-19-00210-CV, 2020 WL 4772973 (Tex. App.—Amarillo Aug. 17, 2020, pet. filed). The Homeowner's Association of Escalera Ranch (HOA) sued the City of Georgetown Planning and Zoning Commission (commission) seeking a temporary injunction to halt a new development and mandamus relief to invalidate the associated plat. The plat provided access to a new subdivision via a residential street that provides access to and through the Escalera Ranch neighborhood. The court of appeals held: (1) the HOA has standing to sue the commission; and (2) if the plat doesn't comply with the applicable regulations, the commission's actions could constitute an abuse of discretion, subject to mandamus relief.

Subdivision Platting: *City of San Benito v. Cameron Cty. Drainage Dist. No. 3*, No. 13-19-00194-CV (Tex. App.—Corpus Christi Sept. 24, 2020, pet. denied). In this case, plaintiffs sought to require the city to re-instate a process by which the city would approve a plat only if it has received prior approval from overlapping drainage and irrigation districts (each of which have their own platting rules). The city filed a plea to the jurisdiction in the trial court, which rejected the plea. The court of appeals reversed the trial court's denial, but remanded for further consideration. The underlying issue is whether the city may "negate and require non-compliance with the rules and regulations" of the districts, and that the city's actions have placed subdividers

in the position of either bypassing/failing to follow the districts' rules regarding plats, or having the city refuse to approve a proposed plat.

Zoning: *Donalson v. City of Canton*, No. 12-20-00164-CV, 2020 WL 6164470 (Tex. App.—Tyler Oct. 21, 2020, no pet.) (mem. op.). The City of Canton sued a church and its owner, and later added additional defendants, because the church violated the city's zoning ordinance by using a former nursing home property as a residential complex. The city nonsuited some of the defendants without prejudice and the trial court entered a stipulated permanent injunction and final judgment against the remaining defendants. One of the dismissed defendants filed the appeal. The court dismissed the appeal as moot because there was no longer a justiciable controversy between the city and the dismissed defendant.

Zoning: *City of Dickinson v. Stefan*, No. 14-18-00778-CV, 2020 WL 6280945 (Tex. App.—Houston [14th Dist.] Oct. 27, 2020, no pet.).

In this appeal from a city's decision to prohibit a commercial use within a residential zoning district, the plaintiff wished to use its residential property for a commercial purpose and sued the City when he was not allowed to do so. The city filed a plea to the jurisdiction on the case, which the trial court denied. The Court of Appeals reversed the trial court's judgment on the plea to the jurisdiction holding that the plaintiff did not allege valid claims and had not exhausted his administrative remedies as it related to the board of adjustment holding.

The plaintiff is an owner of residential property in the city. Less than two years after the plaintiff purchased the property, the city rezoned the property as a conventional residential district which does not allow for commercial uses. As part of the process, the city allowed individuals to file for a certificate of occupancy for nonconforming use if the property was currently being used in a way that was no longer allowed. The certificate allowed an existing nonconforming use to continue, but did not allow an expansion or change in the nonconforming use. The plaintiff received a registration document for "business & multi-family" uses, but did not receive the certificate. The plaintiff later argued that he should have a vested right to run a commercial event business from his residence because he had one event of that type at his residence prior to the zoning ordinance amendment. The city first denied the request at the administrative level disallowing the use and refusing to issue a certificate non-conforming use. The city then stated that the plaintiff should seek a special use permit. The special use permit was recommended for denial by the Planning & Zoning Commission but was never taken to City Council on request of the plaintiff. The plaintiff then appealed the administrative determination that the use was not allowed to the board of adjustment. The board of adjustment upheld the administrative decision. The plaintiff filed suit in district court asking for a declaratory judgment that his property was vested from the city's zoning ordinance. The city filed a plea to the jurisdiction because it argued that the plaintiff did not exhaust his administrative remedies by not appealing the board of adjustment ruling. The trial court denied the plea and the city appealed. On appeal, the plaintiff argued that his suit was for a declaratory judgment under Chapter 245 und the Local Government Code for the first time.

To bring a vesting claim under Chapter 245 of the Local Government Code, the plaintiff has to reference Chapter 245 or at least reference a "project". This claim or argument cannot be brought for the first time on appeal. In order to exhaust administrative remedies for an appeal of a board of adjustment decision, the plaintiff: (1) has to appeal the decision within 10 days of the decision being filed with the city; and (2) file a verified petition for writ of certiorari. A plaintiff also must allege that the board of adjustment abused its discretion. Finally, a plaintiff must exhaust their administrative remedies, including appealing the board of adjustment decision in the manner prescribed in Chapter 211 of the Local Government Code, prior to filing a declaratory judgment action related to the land use action. "The exhaustion-of-administrative-remedies rule requires that a plaintiff pursue all available remedies within the administrative process before seeking judicial relief. *Murphy v. The City of Galveston*, 557 S.W.3d 235, 241 (Tex. App.—Houston [14th Dist.] 2018, pet. denied)." However, if a plaintiff proves that an administrative official lacked the authority to perform an action, such as deny a nonconforming use, the requirement to exhaust administrative remedies would be removed.

The court of appeals held that the plaintiff had not validly alleged a vesting claim under Chapter 245 because he did not mention 245 or that he was referencing a "project" at the trial court level and could not raise it for the first time on appeal. He also did not appeal the board of adjustment's decision because he did not: (1) cite the right section of the Local Government Code; (2) did not ask the court a writ of certiorari; or (3) indicate in any way that he was appealing the board of adjustment's decision. The court held that this lack of appeal of the board of adjustment's decision lead to a failure to exhaust his administrative remedies. The court finally also held that the administrative official did have the authority to make the decision that lead to this appeal.

The court of appeals reversed and rendered, dismissing the plaintiff's claims for failure to plead valid claims and failure to exhaust his administrative remedies.

In a concurring opinion by Justice Hassan, she stated that while she would have held that the suit filed was sufficient to be considered an appeal of a board of adjustment decision, the legal counsel for the plaintiff specifically said at trial that there was no reason to hear that part of the case.

Land Use/Contracts: *City of Buda v. N.M. Edificios LLC*, No. 07-20-00284-CV, 2021 WL 1522458 (Tex. App.—Amarillo Apr. 16, 2021, no. pet. hist.). A developer and the city entered into an agreement in which the developer would convey a drainage easement to the city and the city would construct drainage facilities on the easement. The developer then sold the property to another developer. The city refused to construct the drainage facilities and rejected the new developer's plans because of the drainage issues. The new developer sued and the city filed a plea to the jurisdiction, which the trial court denied in part. The appellate court found that: (1) the agreement was a permit under Chapter 245 of the Local Government Code, but the rules were not changed in a manner prohibited by Chapter 245; (2) the plaintiff had sufficient evidence for a regulatory taking claim because of its reasonable investment-backed expectation; (3) the plaintiff should have the opportunity to amend its pleadings for its land use exaction claim; and (4) the plaintiff's claims for attorney's fees against the city should be dismissed.

Code Enforcement: ***City of Dallas v. Stamatina Holdings, LLC*****, No. 05-20-00975-CV, 2021 WL 1826931 (Tex. App.—Dallas May 7, 2021, no. pet. hist.).** The city determined there were code violations at an apartment complex, including a gas leak. The city required that the apartment complex shut off the gas. The plaintiff sued to turn the gas back on. The trial court granted an injunction requiring that the code violations be remedied but also requiring that the gas be turned on within 24 hours of the order. However, the trial court did not set the matter for trial. The city appealed on the grounds that the trial court violated rules of civil procedure because it did not set the matter for trial and it did not set a bond for the injunction. Because the trial court order did not set the case for a trial on the merits, the appellate court reversed the trial court's order.

OPEN GOVERNMENT AND ETHICS

Open Meetings Act/Procurement: ***Carowest Land, Ltd. v. City of New Braunfels*****, No. 18-0678, 2020 WL 6811467 (Tex. Nov. 20, 2020).** The plaintiff sued the city for declaratory relief for violations of the Texas Open Meetings Act (TOMA) and the contract-bidding provisions of Local Government Code Chapter 252. Prior to trial, the city appealed the denial of its plea to the jurisdiction against the plaintiff's declaratory relief claims. The appellate court affirmed, permitting the plaintiff's declaratory-judgment claims to proceed. The plaintiff then tried its claims against the city and a developer before a jury and prevailed. Based on the jury's findings, the trial court awarded the plaintiff declaratory relief and attorney's fees. The city again appealed on the grounds that both TOMA and the procurement laws only allow for mandamus and injunctive relief, not declaratory relief. The appellate court agreed. The Supreme Court of Texas found that declaratory relief was not available to the plaintiff. It remanded the case to the trial court for further proceedings under TOMA and the procurement laws because existing precedents on which the plaintiff relied at trial had been overruled.

City of Odessa v. AIM Media Texas, LLC**, No. 11-20-00229-CV, 2021 WL 1918968 (Tex. App.—Eastland May 13, 2021) (mem. op.).** This is a Public Information Act (PIA) case where the Eastland Court of Appeals held the plaintiff is properly under the jurisdiction of the PIA.

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

The court noted that 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 that the city failed to obtain a ruling on its 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 that AIM Media pled the minimum jurisdictional requirements. The plea was therefore properly denied.

Jurisdiction: *Viswanath v. City of Laredo*, No. 04-20-00152-CV, 2021 WL 1393976 (Tex. App.—San Antonio Apr. 14, 2021, no. pet. hist.) (mem. op.). Viswanath is the founder of a government watchdog group known as Our Laredo. After Councilman Martinez defeated Viswanath in a runoff election for a council position, Gomez, a member of Our Laredo, filed an ethics complaint against the co-city managers arguing they were required to "ensure" that Councilman Martinez forfeited his seat due to his alleged conflict of interest. Thereafter, 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 that increased the overall utility rate. The co-city managers filed a response and requested sanctions against Viswanath and Gomez, arguing both ethics complaints were frivolous. The City of Laredo's Ethics Commission dismissed both complaints, concluding they did not allege violations of the City of Laredo Ethics Code and therefore did not invoke the commission's jurisdiction. The commission also found both complaints frivolous, and publicly admonished Gomez and ordered Viswanath to pay the maximum civil fine and attorney's fees to the commission's conflicts counsel.

Viswanath filed an appeal of the commission's decision in trial court, seeking a declaration under the Uniform Declaratory Judgments Act (UDJA) that the commission's decision was arbitrary, capricious, unlawful, and unsupported by substantial evidence, and attorney's fees. The city filed a plea to the jurisdiction and a motion for summary judgment. Viswanath also filed his own motion for summary judgment. The trial court denied the city's plea, granted the city's motion for summary judgment, and implicitly denied Viswanath's competing motion for summary judgment. Viswanath appealed.

The appellate court affirmed the portion of the trial court's summary judgment with regard to the commission's finding that Viswanath's complaint was frivolous; reversed the portion of the summary judgment ordering Viswanath to pay attorney's fees as sanctions; and remanded the issue regarding the amount of attorney's fees to the trial court to determine whether substantial evidence was presented to the commission to support its award of attorney's fees.

***Suarez v. Silvas*, No. 04-19-00836, 2020 WL 2543311 (Tex. App.—San Antonio May 20, 2020, no. pet. hist.).** This appeal arises from a decision by councilmembers of the City of Converse to declare that Silvas, a councilmember elected to Place 4 in the city, had forfeited her position on council for violating a provision of the city charter.

The Converse City Charter provides that except for inquiries and investigations into the official conduct of a city department, agency, office, officer or employee, the mayor and all councilmembers shall deal with city officers and employees who are subject to the direction of the city manager solely through the city manager. The charter further provides that a councilmember or the mayor shall forfeit his office if he or she violates any provision of the charter. In preparation for an October 15, 2019, city council meeting, John Quintanilla, the city's director of development services, submitted to council a report of total permits and inspections completed for a specific time period. Silvas contacted the city manager and asked that Quintanilla contact her regarding the report. Silva asked Quintanilla if the report included data on commercial reports. What transpired after is disputed. In an email to the city manager,

Quintanilla stated that Silvas requested that he run a report for the last five fiscal years and conduct an analysis for discussion at the upcoming council meeting. Silvas testified that Quintanilla voluntarily offered to run the five-year report and denied asking him to perform an analysis or that she even requested such an analysis. On October 22, 2019, the mayor called a special meeting of council with the sole item on the agenda being a closed meeting under the personnel exception "to hear a complaint or charge against . . . Silvas." At the end of the meeting, one of the councilmembers moved that council forfeit Silva's position on the council for violating the city charter provision because Silvas gave a directive to a city employee subject to the city manager. The decision was solely based on the "directive" referenced in Quintanilla's email.

Silvas filed suit seeking declaratory judgment or injunctive relief to compel a governmental official to cease ultra vires activity and comply with statutory or constitutional provisions. She also sought a temporary restraining order and temporary injunction to stop the city manager and city secretary from listing Place 4 on the council as vacant and a notice that council was accepting applications for Place 4. The trial court granted a temporary restraining order. Before the trial court's hearing on the temporary injunction, council held another special meeting to reconsider its declaration that Silvas forfeited her position on city council. At the conclusion of the temporary injunction hearing, the trial court enjoined the city, the mayor, the remaining councilmembers, the city manager, and the city secretary (collectively, appellants) from taking any action to obstruct, hinder, or remove Silvas from her duly elected office or blocking her access to city-issued electronic accounts and key cards. Eventually, the trial court denied the city's plea. The appellants appealed.

The court first looked at whether a city charter is an ordinance or statute for purposes of determining whether the charter's forfeiture provision was lawful under the Uniform Declaratory Judgment Act. The court determined that the trial court had erred in denying the plea to the jurisdiction as to Silvas's claims seeking declarations involving the construction or validity of the charter because a city charter is a city's constitution and not a statute or ordinance. Thus, injunctive relief was precluded. The court then looked at whether Silvas had alleged a proper ultra vires claims. The court found that she had alleged a proper ultra vires claim and was entitled to prospective injunctive relief against all the appellants, other than the city. The court also found that the appellants' actions were not protected by legislative immunity as the actions taken to enforce the city charter forfeiture provision were non-legislative acts. Finally, the court rejected the Silva's challenge to the constitutionality of the city charter under the Open Meetings Act, finding that injunctive relief was not available in this instant case. Accordingly, the court remanded the case to trial court for further proceedings.

Public Information: *Genuine Parts Co., Inc. v. Paxton*, No. 03-19-00441-CV, 2020 WL 3887973 (Tex. App.—Austin July 10, 2020, no pet.) (mem. op.). This a Texas Public Information Act (PIA) case in which the court of appeals affirms the trial court's finding that a settlement agreement was not excepted from disclosure.

Genuine Parts Company, Inc. (Genuine Parts) and the City of Houston entered into a settlement agreement that resolved litigation between the parties related to Genuine Part's provision of

automotive parts and services to the city's fleet vehicles. A request was made for a copy of the settlement agreement. The city informed Genuine Parts of the request, and Genuine Parts requested a ruling from the attorney general asserting that settlement agreement was excepted from disclosure under Sections 551.104 and 551.110. Genuine Parts argued that the settlement agreement contained information that if disclosed would give advantage to a competitor or bidder, and that it contained commercial or financial information that if disclosed would cause substantial competitive harm to Genuine Parts. The attorney general issued a ruling finding that the settlement agreement was not excepted from disclosure. Genuine Parts filed suit against the attorney general. The attorney general filed a motion for summary judgment arguing that, as a matter of law, the settlement agreement did not fall within an exception to disclosure under the PIA. The trial court granted the summary judgment motion declaring that the settlement agreement was public information. Genuine Parts appealed.

Genuine Parts bears the burden of establishing that this exception to public disclosure applies to the settlement agreement. The proper test is whether disclosure of the information would provide a competitor or bidder with an advantage, albeit not necessarily a decisive one. Genuine Parts provided examples of how competitors, in the past, had used the PIA to gain advantages in bids to which Genuine Parts was also applying. While that could potentially be true, the key issue is whether the settlement agreement actually contains such harmful information. The settlement agreement identifies the parties and generally describes their dispute, the details of which are contained in publicly available federal court filings. The settlement agreement sets forth the total amount of a payment to be made by one party to the other along with the manner and timing of the payment. The settlement agreement references a lump sum amount relating to inventory, but provides no description of the nature of the inventory or its pricing, and there is nothing that could be construed to constitute "performance figures." Genuine also failed to explain how the contents of the settlement agreement might give a competitive advantage. As a result, the evidence in the record fails to demonstrate that the settlement agreement contains information that "if released would give advantage to a competitor or bidder." As such, the court concluded that summary judgment was properly granted.

Public Information: *City of Austin v. Doe*, No. 03-20-00136-CV, 2020 WL 7703126, (Tex. App.—Austin Dec. 29, 2020, no pet.) (mem. op.). Jane Doe sued the City of Austin, its police department, and the police chief (collectively, the "city") for declaratory and injunctive relief related to the publication of booking photos (a.k.a. "mug shots") on the city's website. The city appealed the trial court's order denying the city's plea to the jurisdiction. The appellate court affirmed, in part, the trial court's order related to Doe's ultra vires claim against the police chief as to whether the information at issue is "confidential," but reversed the order as to her remaining claims and rendered judgment dismissing those claims.

Public Information: *San Jacinto River Auth. v. Yollick*, No. 09-19-00064-CV, 2021 WL 1031679 (Tex. App.—Beaumont Mar. 18, 2021, no. pet. hist.). Eric Yollick sued the San Jacinto River Authority (SJRA) claiming it failed to handle his request for information in accordance with its duties under the Public Information Act (PIA). The trial court agreed with Yollick and signed a judgment that requires the SJRA to disclose most of the information in the SJRA's Emergency Action Plan (the Plan). SJRA appealed.

SJRA asserted the evidence shows it received a request seeking the Plan a week before it received Yollick's request from Bradford Laney, who asked the SJRA for access to the Plan. The SJRA referred Laney's request to the Office of Attorney General (OAG) asserting exceptions in the PIA that authorized the SJRA to withhold the Plan when responding to Laney's request. The SJRA argued the trial court misinterpreted the PIA by requiring it to prove the OAG decided the Plan is subject to the PIA's exceptions before October 11, 2017, the day it refused to comply with Yollick's request. The appellate court affirmed the trial court's decision. The SJRA was not excused from referring Yollick's request to the OAG because it did not have a previous determination at the time it refused Yollick's request.

Procurement/TOMA: *City of Brownsville v. Brownsville GMS, Ltd.*, No. 13-19-0031-CV, 2021 WL 1804388 (Tex. App.—Corpus Christi May 6, 2021, no. pet. hist.) (mem. op.). At the time this case was filed in 2019, Brownsville GMS, Ltd. (GMS) had been providing commercial solid waste services to the City of Brownsville. The city's previous contract with GMS had expired in 2016, so in 2017, Brownsville twice issued requests for proposals (RFPs) for solid waste services. Both times, the city rejected all bids, including bids from GMS. GMS continued providing services month-to-month but filed suit in May 2019, alleging violations of the Texas Open Meetings Act (TOMA), violations of Chapter 252 of the Texas Local Government Code, ultra vires actions, and requesting injunctive relief.

To obtain injunctive relief, one must assert a cause of action; demonstrate a probable right to relief; and imminent injury in the interim. GMS asserted that by rejecting all of the bids responsive to the RFPs, the city ultra vires acts violated the competitive bidding procedures in Chapter 252. To succeed with an ultra vires claim, one must prove that a government officer acted without legal authority or failed to perform a purely ministerial act. Because Section 252.043(f) allows a city to reject all bids at a city's discretion, the appellate court rejected GMS's asserted causes of action. GMS was seeking to bar the city from taking any action to interfere with GMS's month-to-month agreement. The only relief available under Chapter 252 is to bar performance of an improperly procured contract, and there being no contract, GMS could not demonstrate a probable right to recovery. The court declined to extend injunction authority to proposed contracts that have not been awarded. GMS also alleged violations of the TOMA, which provides that actions taken by governing bodies in violation of its requirements are voidable. Because the relief granted by the trial court was well beyond what is allowable under TOMA, the appellate court reversed the trial court's orders, dissolved the temporary injunction, and remanded the case back to the lower court for further proceedings.

TAKINGS

***Jim Olive Photography d/b/a Photolive, Inc. v. Univ. of Houston Sys.,* No. 19-0605, 2021 WL 2483766 (Tex. June 18, 2021).** Photolive, Inc. (Photolive), a professional photographer, brought an action against the University of Houston System (University), a public university, alleging an unlawful taking based on the University's unauthorized use of a copyrighted aerial photograph of the City of Houston on the University's webpage. The district court denied the University's plea to the jurisdiction and the University filed an interlocutory appeal. The Houston Court of

Appeals vacated and dismissed, finding that a governmental unit's copyright infringement is not a taking. Photolive petitioned for review, which was granted. The Texas Supreme court affirmed, holding that a violation of a copyright, without more, is not a taking of the copyright.

***San Jacinto River Auth. v. Medina*, Nos. 19-0400; 19-0401; 19-0402, 2021 WL 1432227 (Tex. Apr. 16, 2021).** Downstream property owners brought separate suits for declaratory judgment under eminent domain statutes alleging that the river authority, by precipitously releasing water from a dam at an excessive rate in response to a hurricane, had caused or added to the flooding of their land and thereby caused a "taking." The court of appeals affirmed the trial court's dismissal of the river authority's motions to dismiss. The river authority appealed.

The Supreme Court of Texas affirmed, holding that: (1) statutory takings claims under the eminent domain statutes are not limited solely to claims for regulatory takings; and (2) the allegations in the downstream property owners' complaints did not conclusively establish that the river authority's actions met either the "reasonable good faith belief" test of one exception to eminent domain statutes or the "measured and appropriate response" test of another.

***San Jacinto River Auth. v. Ray*, No. 14-19-00095-CV, 2021 WL 2154081 (Tex. App.—Houston [14th Dist.] May 27, 2021) (mem. op.).** This case arises from flooding produced by the rainfall from Hurricane Harvey in 2017. Appellees (more than 300 property and business owners) asserted that the San Jacinto River Authority (SJRA) released water from Lake Conroe knowing that this action would flood thousands of downstream homes and businesses and alleged constitutional inverse condemnation claims under Article I, Section 17 of the Texas Constitution in Harris County district court. SJRA filed a plea to the jurisdiction: (1) challenging the subject matter jurisdiction of the district court over constitutional inverse condemnation claims; and (2) alleging that appellees failed to plead sufficient facts demonstrating a waiver of governmental immunity. Appellees countered that: (1) fair notice pleading should save their constitutional takings claim; and (2) they also pleaded statutory takings under Government Code Chapter 2007. SJRA replied that if Appellees filed statutory takings claim, only one of the appellees filed their case in time and the others should be time-barred. The trial court denied SJRA's plea to the jurisdiction, which SJRA appealed.

Texas Government Code Section 25.1032 squarely places jurisdiction over eminent domain proceedings brought in Harris County with the county civil court at law rather than the district court. Additionally, in their original petition, appellees made no reference to Chapter 2007 of the Government Code, nor did they allege waiver of SJRA's immunity under that chapter. The appellate court held that appellees failed to make a statutory takings claim, reversed the trial court's order denying SJRA's plea to the jurisdiction, and rendered judgment dismissing appellees' claims for lack of subject matter jurisdiction.

Exactions: *Selinger v. City of McKinney*, No. 05-19-00545-CV, 2020 WL 3566722 (Tex. App.—Dallas July 1, 2020, no. pet. hist.) (mem. op.). This is an exactions case in which the court of appeals reversed the trial court's order granting the City of McKinney's plea to the jurisdiction.

Nancy Dail owned a tract of land in the City of McKinney's extraterritorial jurisdiction (ETJ). Selinger, a developer, was under contract to purchase the land, and submitted his plans to the city to subdivide the land into approximately 331 lots. The plans included construction of necessary sewer infrastructure because the tract of land was not served by the city's water and sewer services, and the city had no plans to extend those services to it. Selinger reached an agreement with the North Collin Special Utility District to supply water to the subdivision. The city denied Selinger's plat application when Selinger refused to agree to pay the city approximately $482,000 if and when the city's water and sewer transmission lines were extended to the development. Ten days later, Dail and Selinger sued the city alleging, among other things, a takings claim. The city filed a plea to the jurisdiction, asserting lack of ripeness and lack of standing as to Selinger. The trial court granted the city's plea and dismissed the lawsuit with prejudice for lack of subject matter jurisdiction. Dail and Selinger appealed. Subsequently, a new subdivision plat was filed by Norhill Energy, LLC that was substantially the same as the initial plat except that it did not request any variances.

The court first addressed whether the case was ripe. The court found that the takings claim was ripe because the city's demand for Selinger's commitment to pay $482,000 as a condition of plat approval constituted an exaction and sufficient injury for ripeness purposes even though the demanded payment was contingent rather than definite. The court then addressed standing. It concluded that, even though Selinger was only under an option contract to purchase the land and had no property rights in the land itself, he had standing because the city had injured his rights in his plat application and the money he spent to prepare and submit the application. The court then looked at the applicability of the Private Real Property Rights Preservation Act (Chapter 2007 of the Government Code), which waives sovereign immunity to suit and liability in instances where a city enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions in the entire ETJ of the city. The court determined that Chapter 2007 was applicable because there was evidence that there was other property in the city's ETJ that did not have the same requirements imposed on it. The court then turned to whether the court had jurisdiction over Selinger's claims under Section 212.904 of the Local Government Code, which establishes rules and procedures regarding apportionment of municipal infrastructure improvement costs. The court determined that Selinger had sufficiently pled a declaratory judgment claim challenging the city's subdivision ordinance, and as a result the trial court had jurisdiction over Selinger's claims for attorney's fees. Additionally, the court found that Section 212.904 does not specify a particular procedure for an appeal to the city's governing body, and that Selinger had exhausted his administrative remedies once city council denied his plat application. The court also found that the trial court had jurisdiction over the Selinger's state due process claims. Finally, the court ruled that, even though the city had received a new plat application, the case was not moot because the city's treatment of the new plat application will not affect the present controversy.

***Lamar Advantage Outdoor Co., L.P. v. Texas Dep't of Transp.*, No. 02-19-00368-CV, 2020 WL 5666554 (Tex. App.—Fort Worth Sept. 24, 2020, no. pet. hist.).** The owner of a billboard filed suit seeking a declaratory judgment against Texas Department of Transportation (TxDOT) to void a highway construction project because TxDOT failed to prepare a Takings Impact Assessment pursuant to the Private Real Property Rights Preservation Act. The billboard owner

claimed the project reduced its revenue because the project reduced the billboard's visibility. The Second Court of Appeals affirmed the trial court's grant of the plea to the jurisdiction. The court held the billboard owner lacked standing because it holds only a leasehold interest in a billboard located on real property where TxDOT's project took neither the land on which the billboard sits nor the billboard itself.

***Santander Consumer USA, Inc. v. City of San Antonio*, No. 04-20-00341-CV, 2020 WL 7753730 (Tex. App.—San Antonio Dec. 30, 2020, no. pet. hist.).** The plaintiff sued the city for money damages after the city impounded and sold vehicles the plaintiff owned, alleging it amounted to a taking. The plaintiff also challenged the validity of the city's ordinance. The trial court granted the city's plea. The appellate court affirmed on the grounds that the plaintiff did not follow the applicable procedures in the city ordinance to recover the vehicles before it filed its lawsuit, thus depriving the court of jurisdiction. Likewise, the court affirmed the dismissal of the declaratory judgment claims finding that there was no existing conflict because the plaintiff was trying to prevent future takings. The court also rejected the plaintiff's money damages claim because the city was exercising the governmental functions of police protection and regulation of traffic when it impounded the vehicles.

***Carrasco v. City of El Paso*, No. 08-20-00062-CV, 2021 WL 1712209 (Tex. App.—El Paso Apr. 30, 2021, no. pet. hist.).** Carrasco purchased a lot located at the end of a sloping cul-de-sac, where he constructed a residential home. Because the city's sewage system slopes downward, it is not possible to gravitationally disperse the sewage originating from his premises to the sewer main. Additionally, his connection to the sewer main results in accumulation of sewage from the entire subdivision onto his property. Carrasco installed grinding pumps to discharge his own sewage, but they failed to pump upstream and routinely burned out. As a result, he was forced to cap the sewage line to prevent the accumulation of public sewage on his property and thus, does not have access to the sewage system. Because he was unable to obtain a certificate of occupancy, his home is uninhabitable. After reporting the issue to the city numerous times, Carrasco filed suit, requesting injunctive relief. The city filed a plea, which was granted by the trial court. Carrasco appealed, asserting waiver of governmental immunity and a takings claim.

The appellate court held that there was no waiver of immunity because Carrasco did not provide evidence of a cause of action that falls within the three categories that establish waiver of immunity. Additionally, the court concluded that public work design issues are a protected discretionary function for which governmental immunity applies. The court also determined that Carrasco did not plead a viable takings claim because, pursuant to a conveyance agreement, the city only agreed to operate and maintain the sewer mains installed within the public street, and the intentional operation of a sewer system is insufficient to support liability for a takings claim. Lastly, the court found that Carrasco did not have a viable negligence claim as cities are immune from liability for negligence in the operation of a sanitary sewer system, which is a governmental function.

TAXES

***NMF P'ship v. City of Dallas*, No. 05-19-01578-CV, 2021 WL 1015862 (Tex. App.—Dallas Mar. 17, 2021, pet. filed) (mem. op.)**. NMF Partnership (NMF) lost a lawsuit for delinquent ad valorem taxes in the 1990s where the trial court ordered the sale of NMF's property as part of the judgment. More than five months later, the same trial court signed an order to void the sheriff's sale and deed (Post Judgment Order). In 2016, NMF sued and sought to have the court declare the Post Judgment Order void. The trial court denied the relief and NMF appealed. The appellate court determined that the trial court did not have plenary jurisdiction or any jurisdiction to issue the Post Judgment Order. It reversed the trial court's order denying all relief requested by the plaintiff, rendered judgment in favor of the plaintiff declaring as void the Post Judgment Order, and remanded the issue of the award of attorneys' fees to NMF.

***Ellis v. Wildcat Creek Wind Farm LLC*, No. 02-20-00050-CV, 2021 WL 1134416 (Tex. App.—Fort Worth Mar. 25, 2021, no. pet. hist.) (mem. op.)**. A group of property owners in Cooke County sought to challenge the creation of a reinvestment zone created pursuant to Chapter 312 of the Texas Tax Code. The purpose of the reinvestment zone was to create tax incentives for Wildcat Creek Wind Farm LLC in order to build a wind power plant or "wind farm" in Cooke County. The trial court granted the property owners' dispositive motions for unjust enrichment and regulatory estoppel claims, but denied or dismissed the property owners' pleas to the jurisdiction as to the mandamus and inverse condemnation claims. The appellate court vacated the trial court's judgment and dismissed the case as the property owners did not establish standing and ripeness to bring forth their claims.

Property Tax Exemption: *Dallas Cent. Appraisal Dist. v. City of Dallas*, No. 05-19-00875-CV, 2020 WL 6334805 (Tex. App.—Dallas Oct. 29, 2020, pet. filed) (mem. op.). The City of Dallas leases property from a private party and used the property exclusively for public purposes. The city's lease with the property owner provides that the city is responsible for paying taxes on the property. Upon receipt of notice of property taxes due on the property, the city filed a protest with the Dallas Central Appraisal District Review Board (DCAD), asserting that it is entitled to a tax exemption because a leasehold held by a public entity and used for a public purpose constitutes public property. DCAD denied the city's request, and the city filed a petition for judicial review. The trial court ruled that the city was entitled to a public property exemption from paying property taxes on its leasehold interest in the property. DCAD appealed, arguing that the property is not exempt because it is not owned by the city. The court of appeals reversed the trial courts order finding that the city is not entitled to a tax exemption because it does not hold legal or equitable title to the property.

***Collin Cent. Appraisal Dist. v. Garland Hous. Fin. Corp.*, No. 05-19-01417-CV, 2021 WL 711478 (Tex. App.—Dallas Feb. 22, 2021, pet. filed).** Garland Housing Finance Corporation (GHFC) and TX Collin Apartments, L.P. (collectively Plaintiffs) challenged the Collin Central Appraisal District's (CCAD) denial of the exemption from property taxes for their housing project. The City of Plano had passed a resolution in support of a four percent housing tax credit for the housing project. The Plaintiffs also got approval for a tax-exempt bond from the attorney general's office and later refinanced the bond. The CCAD canceled the exempt status after the Plaintiffs refinanced the bond. The trial court denied CCAD's motion for summary judgment. On appeal, the Court rejected CCAD's argument that the Chapter 394 exemption was absolute

because it was limited by Section 394.005. The Court affirmed the trial court's decision, finding there was no evidence Plano was required to approve the application of Chapter 394 to the Plaintiffs' property for the property to receive the tax exemption.

Drainage Fees: *Beck Steel, Inc. v. City of Lubbock*, No. 14-19-00060-CV, 2020 WL 4461277 (Tex. App.—Houston [14th Dist.] Aug. 4, 2020, no pet.) (mem. op.). Beck Steel and John Beck sued the City of Lubbock claiming that the city improperly levied certain assessments against the Storm Water Utility Fund. More specifically, Beck asserted claims for reimbursement, money had and received, unconstitutional taking, and injunctive relief relating to payments from drainage fee revenue in the form of payments in lieu of taxes, payments in lieu of franchise fees, and pledges towards general obligation debt. The trial court denied Beck's motion for summary judgment and granted the city's motion. Beck appealed.

On appeal, Beck argued that the city couldn't collect payments in lieu of taxes and franchise fees from the drainage fee fund, because those assessments represent "fictional amounts," and "[o]nly actual costs can be included" in the city's drainage fee assessments. Beck also asserted that the city improperly used drainage-fee revenue to repay general-obligation debt. However, the court agreed with the city's contention that the challenged assessments could be properly levied against the Fund's drainage-fee revenue under Section 552.054, which states that the subchapter "does not: …preclude a municipality from imposing impact fees or *other charges for drainage authorized by law*." (emphasis added.) The court held that the plain language of this provision — read in light of the deference afforded city ordinances — supports the conclusion that the payments in lieu of taxes, payments in lieu of franchise fees, and repayment of general-obligation debt fall within the phrase "other charges for drainage authorized by law." The court affirmed the trial court's judgment.

UTILITIES

MOU Electric Rates: *Data Foundry, Inc. v. City of Austin*, No. 19-0475, 2021 WL 1323405 (Tex. 2021). The City of Austin, through its city council, sets the rates that Austin Energy, an electric utility owned by the city, charges to city residents for retail electric services. Data Foundry, Inc., an internet service provider, purchases electricity from Austin Energy for its facilities in the city. Data Foundry filed suit against the city alleging that the rates charged by the city were illegal.

The court of appeals concluded Data Foundry suffered a particularized injury sufficient to confer standing but affirmed the dismissal of Data Foundry's claims in part on other grounds. The Texas Supreme Court concluded that Data Foundry has standing to bring its claims, and remanded the case to the trial court.

Data Foundry satisfied the standing requirement of a particularized injury by alleging it was required to pay a rate for electric services to Austin Energy that was unreasonable, excessive,

discriminatory, and confiscatory. But the most interesting discussion in the opinion relates to the city's request that the Texas Supreme Court conclude that, by enacting the Public Utility Regulatory Act (PURA), the legislature intended that city residents such as Data Foundry no longer have any judicial remedy when a municipally owned utility charges a rate that is alleged to be unreasonable or discriminatory. Essentially, the city argued that PURA has preempted the common law and precludes Data Foundry's requested judicial remedy. Before PURA's enactment, the court had recognized that, while the setting of utility rates is strictly a legislative function, courts may review challenges to those rates to determine if they are unreasonable or discriminatory. However, the city argued that: (1) PURA created a pervasive regulatory scheme that preempts the common law on this issue; and (2) with respect to municipally owned utilities, the legislature created a specific procedure for an administrative appeal to the Public Utility Commission by non-city residents, but – because it provided no such procedure for an administrative appeal by city residents – the legislature intended that city residents would have no judicial recourse.

The court declined the city's invitation to address whether the trial court could have properly dismissed Data Foundry's claims based on PURA preemption, and expressed no opinion on this issue. But, the court provided that "our decision does not preclude the city from raising this argument in the trial court on remand.

WHISTLEBLOWER

***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.

***City of Fort Worth v. Pridgen*, No. 05-19-00652-CV, 2020 WL 3286753 (Tex. App.—Dallas June 18, 2020, pet. filed) (mem. op.)**. This is a whistleblower case in which the court of appeals affirms the trial court's order denying the City of Fort Worth's motion for summary judgment.

Before they were demoted, Pridgen and Keyes were serving as assistant police chief and deputy chief, respectively, in the Fort Worth Police Department (department), where they both supervised the Internal Affairs (IA) and Special Investigations Unit (SIU) divisions. Pridgen and Keyes participated in the internal department investigation of an arrest conducted by Officer Martin. Officer Martin had been dispatched on a disturbance call to Jacqueline Craig's residence following a 9-1-1 call by Craig to report that her seven-year old son had been choked by an adult neighbor. Officer Martin arrived at the scene to investigate, but soon thereafter engaged in an argument with Craig, which subsequently resulted in his pushing Craig to the ground; removing his Taser from his gun belt and placing it on Craig's back; pointing the Taser at Craig's 15-year old daughter and ordering her to the ground; and then placing Craig under arrest. In addition to being recorded on Officer Martin's body worn camera, the incident was shown on Facebook livestream and gained national attention and media coverage leading to allegations of racism against Officer Martin by many members of the public. Following the department's investigation, both Pridgen and Keyes recommended that Officer Martin be fired. Instead, the police chief suspended him for ten days. Ninety days later, both Pridgen and Keyes were demoted based on the department's contention that they had disseminated confidential documents regarding the investigation without the department's authorization.
Pridgen and Keyes sued the city alleging violations of the Texas Whistleblower Act. The city filed a motion for summary judgment arguing that Pridgen and Keyes were not whistleblowers

because they did not make a good faith report of a violation of law to the police chief and there was no causation between the report and the adverse employment action. The trial court denied the city's motion, and the city appealed.

The court first looked at whether the reports made to the police chief by Pridgen and Keyes regarding Officer Martin's conduct were reports of a violation of law protected by the Whistleblower Act or opinions about the discipline and consequences of Officer Martin's conduct. The court found that Pridgen and Keyes presented evidence that they had reported conduct that constituted violations of law to the police chief, including assault, official oppression, and perjury based on their viewing of Officer Martin's body camera video and arrest affidavits and on what Officer Martin did and said. The court then looked at whether Pridgen and Keyes' reports of Martin's violations of law were objectively made in good faith. The court concluded that Pridgen and Keyes had raised a fact issue as to their objective good faith in reporting Martin's violations of law. Finally, the court looked at whether Pridgen and Keyes raised a fact issue on causation. The court determined that they had offered evidence from which a jury could conclude that their engaging in protected activity at least partially motivated the police chief to demote them, and that the police chief would have reached a different decision in the absence of their protected activity. Accordingly, the court upheld the trial court's decision to deny the city's motion for summary judgment.

***OakBend Med. Ctr. v. Simons*, No. 01-19-00044-CV, 2020 WL 4457972 (Tex. App.—Houston [1st Dist.] Aug. 4, 2020, no. pet. hist.) (mem. op.).** In this case, the First Court of Appeals overturned the jury verdict in favor of Simons for her whistleblower claims.
Simons was a staff nurse with OakBend Medical Center (the hospital). Simons made complaints to OSHA for violations because she contended the hospital: (1) did not have adequate security or security guards, which made the workplace unsafe; and (2) retaliated against her for her first complaint by refusing to pay for tuition for her to become a nurse practitioner. After an investigation, OSHA and the Department of Labor determined there was not enough evidence to substantiate either complaint.

Separately, Department of State Health Services investigated a complaint against Simons that she kicked a patient in the foot. The DSHS investigation determined that the hospital had an "immediate jeopardy" situationand instructed the hospital to submit a plan to address how it intended to remove the threat. The hospital suspended Simons on the same day and later terminated her employment.

Simons filed a whistleblower lawsuit claiming the hospital retaliated against her for filing OSHA complaints. At trial, the jury found in favor of Simons. The jury determined that she had made her complaints in good faith and suffered damages because of the retaliation. The hospital appealed the jury verdict.

The hospital argued on appeal that the Texas Whistleblower Act does not protect Simons because she failed to present any evidence that she acted in good faith in filing either of her complaints with OSHA. To prove a claim under the Whistleblower Act, a public employee must demonstrate that she reported a violation of law in good faith and that the adverse employment

action by the employer would not have occurred had the report not been made. *City of Houston v. Levingston*, 221 S.W.3d 204, 226 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also* TEX. GOV'T CODE §§ 554.002, 554.004.

Regarding the first complaint, the hospital argued that Simons did not file her first complaint to OSHA regarding the hospital's alleged lack of security in good faith because she did not subjectively believe the hospital had violated a law. The First Court of Appeals agreed. Although Simons felt that the security was inadequate, she cited to no law that the hospital violated. Next, the hospital contended that Simons's second complaint to OSHA for the denial of her tuition reimbursement cannot form the basis of a retaliation cause of action because she failed to present evidence that the hospital knew about her second complaint before it suspended her and terminated her employment. The appellate court agreed.

Having ruled in favor of the hospital on both issues, the First Court of Appeals reversed the trial court's judgment and rendered judgment that Simons take nothing on her claims.

***Herrera v. Dallas Indep. Sch. Dist.*, No. 05-19-01290-CV, 2020 WL 5054798 (Tex. App.—Dallas Aug. 27, 2020, pet. filed)**. Herrera sued the Dallas Independent School District (district) after he was terminated at the end of his probationary period, claiming whistleblower retaliation for making complaints to Child Protective Services regarding suspected child abuse by other district teachers. The district filed a plea to the jurisdiction asserting that Herrera failed to follow the district's grievance process before filing suit. The trial court granted the district's plea. The court of appeals reversed and remanded, finding that a fact issue exists regarding whether Herrera complied with the jurisdictional prerequisites for a whistleblower suit.

***Hennsley v. Stevens*, No. 07-18-00346-CV, 2020 WL 5949242 (Tex. App.—Amarillo Oct. 7, 2020, pet. denied)**. Chris Hennsley, a former police officer with the City of Lubbock, sued the city under the Texas Whistleblower Act. With regard to Hennsley's claim that he was terminated from employment for reporting Police Chief Stevens's alleged tampering with witnesses in a pending criminal trial, the court of appeals holds that Hennsley sufficiently alleges the first part of showing a waiver of immunity under the Whistleblower Act. However, Hennsley's pleadings do not affirmatively show or negate his compliance with the prerequisites for suing (Government Code Sections 554.005 and 554.006 set out the timeframe within which an employee "must sue" the governmental entity; it depends on the timing of when the grievance/appeal process was initiated). Thus, the court of appeals vacates the district court's judgment of dismissal, and remands this matter solely for the district court to determine whether Hennsley complied with Government Code Sections 554.005 and 554.006.

***Shobassy v. City of Port Arthur,* No. 09-18-00363-CV, 2020 WL 6787522 (Tex. App.—Beaumont Nov. 19, 2020, pet. denied) (mem. op.).** In this appeal from a trial court's judgment dismissing the plaintiff's retaliation-in-employment case the Beaumont Court of Appeals affirms 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 given a termination notice that 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 alleging 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 the employer'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. The report has to be a "but-for" cause of the termination. 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. The speech in question is not protected if it is spoken within the context of the employee's official duties. 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 his employment position. The dismissal of both was proper.

***Raymondville Indep. Sch. Dist. v. Ruiz*, No. 13-19-00597, 2021 WL 822699 (Tex. App.—Corpus Christi-Edinburg Mar. 4, 2021, pet. filed).** Ruiz sued his employer, Raymondville Independent School District (Raymondville ISD), under the Texas Whistleblower Act, claiming that Raymondville ISD terminated his employment after he complained to the Raymondville ISD Chief of Police of conduct by a Raymondville ISD police officer that allegedly constituted official oppression. Raymondville ISD filed a plea to the jurisdiction, asserting sovereign immunity. The trial court denied the plea. Raymondville ISD filed an interlocutory appeal. The court of appeals affirmed the trial court, finding that there was a good faith belief that Ruiz believed that the officer's treatment of him constituted as "mistreatment" under the official oppression statute, and that the Chief of Police qualified as an "appropriate law enforcement authority" under the Texas Whistleblower statute.

***City of Valley Mills v. Chrisman*, No. 10-18-00265-CV, 2021 WL 1807365 (Tex. App.—Waco May 5, 2021, no. pet. hist.) (mem. op.).** Chrisman and Troxell, while employees of the City of Valley Mills, placed deer feeders on city-owned property. The city administrator moved the feeders and refused to return them until Chrisman and Troxell signed a release of liability. Chrisman and Troxell were both terminated after refusing to sign the release. Prior to their termination, they reported to the mayor and the Valley Mills Police Department that the city administrator had taken their personal property. Chrisman and Troxell sued for wrongful retaliation under the Texas Whistleblower Act. The city appealed, arguing that the trial court improperly denied the city's plea to the jurisdiction. The city argued Chrisman and Troxell failed to adequately allege and present sufficient jurisdictional facts to bring their claim. The appellate court agreed that the pleadings are insufficient because they do not allege facts that the conduct reported was a violation of the law or that they had a good faith belief they were reporting to an appropriate law-enforcement authority. The appellate court reversed the denial of the city's plea

to the jurisdiction and remanded the case to the trial court to allow Chrisman and Troxell the opportunity to amend their pleadings.