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Governmental Immunity Update

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I. Overview of Governmental Immunity in Texas.

Under common law stretching back centuries, sovereign immunity, as it developed in England, deprives the judiciary of power to adjudicate disputes against the government, the original theory resting on the premise that the sovereign was above the courts and, thus, not susceptible to being sued in his or her own courts. The doctrine of sovereign immunity was first recognized by the Texas Supreme Court in 1847 in *Hosner v. DeYoung*, where the Texas Supreme Court stated, without citation to authority, that "no state can be sued in her own courts without her consent, and then only in the manner indicated by that consent."[1] Rooted in the feudal fiction that the "king can do no wrong,"[2] modern justifications for sovereign immunity are political, pecuniary, and pragmatic.[3] In fact, the justification for the continued existence of sovereign immunity in Texas rests on separation of powers principles.[4] Specifically, sovereign immunity now exists in order to preserve the Legislature's control over the public fisc.[5]

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1 *Hosner v. De Young*, 1 Tex. 764, 769 (Tex. 1846),

2 *Wasson Interests, Ltd. v. City of Jacksonville (Wasson I)*, 489 S.W.3d 427, 431 (Tex. 2016) (observing rationales for sovereign immunity originated from the English legal fiction that "[t]he King can do no wrong" (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 246)).

3 *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex.2008).

4 *Hall v. McRaven*, 508 S.W.3d 232, 253 (Tex. 2017) (Brown, J. & Green, J., concurring) (explaining that sovereign immunity serves separation of powers principles).

5 *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015) (explaining that the modern justification for immunity is to protect the public fisc); *see also Hall*, 508 S.W.3d at 244 (Willett, J., concurring) (explaining that sovereign immunity not only protects the public fisc, but insulates imprudence).

a. Sovereign Immunity v. Governmental Immunity.

Although often used interchangeably, the terms sovereign immunity and governmental immunity involve two distinct concepts.[6] Sovereign immunity protects the State and divisions of state government (including agencies, boards, hospitals, and universities) from lawsuits for damages.[7] Governmental immunity protects political subdivisions of the State, including counties, cities, and school districts.[8] However, this appears to be a distinction without a substantive difference, and Texas case law recognizes that the two concepts function identically, albeit for different entities.[9] For purposes of this paper, governmental immunity and sovereign immunity will be used interchangeably.

b. Immunity from suit and immunity from liability.

Governmental immunity embraces two distinct types of immunity: immunity from suit and immunity from liability. Immunity from suit bars a suit against a governmental entity without the State's consent. Even if the State concedes liability, immunity from suit prevents a lawsuit from being maintained to seek a remedy by depriving the court of subject matter jurisdiction, unless the State consents, either through a constitutional provision or legislative action.[10]

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6 *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 n.3 (Tex. 2003).
7 *Id.*; *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997).
8 *Wichita Falls State Hosp.*, 106 S.W.3d at 694 n.3.
9 *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdivisions Property/Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323 n.2 (Tex. 2006).
10 *Fed. Sign*, 951 S.W.2d at 405.

Immunity from liability prevents enforcement of a judgment, even if the Legislature has given consent to sue.[11] The Legislature does not create or admit liability by granting permission to sue.[12] The state may waive either type of immunity. A waiver of immunity from suit does not, however, imply a waiver of immunity from liability.[13] The Texas Tort Claims Act is an example of a statute that offers a limited waiver from suit and immunity from liability under certain circumstances.[14]

c. Waiving Immunity.

Absent a clear and unambiguous expression of the Legislature's intent to waive immunity, either from suit or liability, sovereign immunity will protect the State and its subdivisions from both suit and liability.[15] Even though sovereign immunity is a judicially-created common law doctrine,[16] "[the Texas Supreme] Court has long recognized that 'it is the Legislature's sole province to waive or abrogate sovereign immunity.'"[17] As recognized by the Texas Supreme Court, "sovereign immunity, unless waived, protects the State of Texas, its agencies and its officials from lawsuits for damages, absent legislative consent to sue the State."[18] A non-exhaustive list of recognized statutory waivers of immunity in Texas include:

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11 *Id.* at 405.
12 *Id.*
13 *State v. Isbell*, 94 S.W.2d 423, 425 (Tex. 1936).
14 *See* Tex. Civ. Prac. & Rem. Code §§ 101.021, 101.025.
15 Tex. Gov't Code § 311.034.
16 *Reata Constr. Corp. v. City of Dall.*, 197 S.W.3d 371, 374 (Tex. 2006) ("Sovereign immunity is a common-law doctrine that initially developed without any legislative or constitutional enactment.").
17 *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002).
18 *Fed. Sign*, 951 S.W.2d at 403.

(1) Chapter 271 of the Texas Local Government Code (breach of contract claims);

(2) Texas Administrative Procedure Act § 2001.171;

(3) Texas Labor Code, Chapter 21 (formerly Texas Commission on Human Rights Act);

(4) Texas Open Meetings Act – Tex. Gov't Code §§ 551.141-.142(a);

(5) Texas Tort Claims Act, Tex. Civ. Prac & Rem. Code §§ 101.021, 101.051; and

(6) Texas Whistleblower Act – Chapter 554 Tex. Gov't Code

d. Breach of Contract Claims under Chapter 271.

The Texas legislature has established a single, limited waiver of immunity from suit for breach of contract claims brought against local governmental entities such as school districts under Subchapter I of Chapter 271 of the Local Government Code. More specifically, immunity from suit is waived when (i) the local governmental entity enters into a contract; (ii) the local governmental entity is authorized to enter into the contract; and (iii) the contract is subject to subchapter I of section 271. The second element is satisfied if the party seeking to sue the government proves the existence of a ***valid*** contract for which the governmental entity ". . . is authorized by statute or the constitution to enter . . ."[19] The third element applies if there is a "a written 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 . . . ." [20]

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19 Tex. Loc. Gov't Code § 271.152.

20 *Id.* at § 271.151(2)(A).

Damages available under Chapter 271 are limited to:

> (1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration; (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; (3) reasonable and necessary attorney's fees that are equitable and just; and (4) interest as allowed by law, including interest as calculated under Chapter 2251, Government Code.[21]

An award of damages "may not include (1) consequential damages, except as expressly allowed under Subsection (a)(1); (2) exemplary damages; or (3) damages for unabsorbed home office overhead.[22] A suit seeking any of these barred damages will be deemed to be a suit for which immunity from suit has not been waived.[23]

As to claims brought in federal court, Section 271.156 of the Local Government Code provides that "[t]his subchapter does not waive sovereign immunity to suit in federal court." [24]

e. Where immunity does not apply.

It is important to remember that state and local entities, including school districts, are not immune from suit or liability for violations of federal law or the United States Constitution and the Texas Constitution. Common federal claims against state and local entities include civil rights actions under 42 US.C. § 1983, Title VI, Title VII, Title IX,

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21 *Id.* at § 271.153(a).
22 *Id.* at § 271.151(b).
23 *See, e.g.*, *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 413 (Tex, 2011).
24 Tex. Loc. Gov't Code § 271.156.

suits for violations of federal copyright law, suits alleging violations of the Americans with Disabilities Act and Section 504, or the Individuals with Disabilities Education Act. Governmental entities are susceptible to actions under these statutes.

The Texas Constitution contains waivers of immunity that are effective irrespective of any statutory waivers.[25] Such constitutional waivers are self-executing if they provide "a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which these principles may be given the force of law."[26] Examples of these self-executing waivers are the waivers that relate to the Texas Constitution's Takings Clause and the Bill of Rights.[27] For claims alleging a taking, these claims will not be permitted if they are breach of contract claims disguised as takings claims in order to avoid immunity.[28] For claims alleging a violation of the Bill of Rights, a waiver exists only for the purpose of holding acts contrary to the Bill of Rights to be void, thus permitting equitable relief but providing no private right of action for damages.[29]

f. ***Ultra Vires*** **claims.**

The *ultra vires* doctrine is a long recognized narrow exception to governmental immunity, under which a claimant may sue a government official for injunctive relief if the official has either acted without legal authority or failed to perform a ministerial

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25 *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist*., 176 S.W.3d 746, 782 (Tex. 2005).
26 *Id.*
27 *See City of Beaumont v. Boullion*, 896 S.W.2d 143, 148-49 (Tex. 1995).
28 *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 860 (Tex. 2002).
29 *See City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007).

duty.[30] In such instances, a suit alleging such an *ultra vires* act is not barred by immunity, even if it seeks monetary damages.[31] However, since such suits are premised on the idea that the official lacked the authority to take the action at issue, such suits must be brought against the individual official, while the governmental entity retains its immunity.[32] In addition, such suits must allege that the official at issue acted without legal authority or failed to perform a purely ministerial task – it is not enough to complain of a government official's exercise of discretion.[33]

g. Governmental immunity and procedure.

Because governmental immunity impacts a court's subject matter jurisdiction, it can be raised by way of a plea to the jurisdiction under Texas Rule of Civil Procedure 85, a traditional motion for summary judgment under Rule 166a(c), or a no evidence motion for summary judgment under rule 166a(i).[34] And, when a trial court denies a governmental

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30 *See, e.g.*, *State v. Epperson*, 42 S.W.2d 228, 231 (Tex. 1931); *Cobb v. Harrington*, 190 S.W.2d 709, 712 (Tex. 1945); *see also City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

31 *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 393 (Tex. 2011); *Heinrich*, 284 S.W.3d at 372.

32 *Tex. Dep't of Inc. v. Reconveyance Servs*., 306 S.W.3d 256, 259 (Tex. 2010).

33 *Heinrich*, 284 S.W.3d at 372.

34 *Town of Shady Shores v. Swanson*, -- S.W.3d --, No. 18-0413, 2019 WL 6794327 (Tex. Dec. 13, 2019) (permitting the assertion of governmental immunity in a no evidence motion for summary judgment); *Heinrich*, 284 S.W.3d at 377-78 (explaining that a plea to the jurisdiction can be used to assert entitlement to sovereign or governmental immunity); *Oakbend Med. Ctr. v. Martinez*, 515 S.W.3d 536, 542 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (explaining that governmental immunity can be asserted in a traditional motion for summary judgment); Tex. R. Civ. P. 85 (allowing for the assertion of a plea to the jurisdiction).

entity's assertion of immunity, it is immediately appealable under section 51.014(a)(8) of the Civil Practice and Remedies Code.[35]

Furthermore, distinct from the traditional error preservation rules, governmental immunity can be asserted for the first time on appeal.[36] Notably, however, governmental immunity cannot be used to collaterally attack a final judgment after all appeals have been exhausted.[37]

II. Summary of recent cases.

Cases involving immunity are perennial favorites for the Texas Supreme Court's exercise of its discretionary review. Consequently, a review of all of the Supreme Court's immunity jurisprudence over the past 15 years, would be better suited to a treatise, than a seminar paper. Consequently, this paper highlights only some of the most recent Texas Supreme Court cases whose holdings have a bearing on school law. Consequently, this paper largely omits cases that deal with the governmental/proprietary function dichotomy that applies to municipalities. This paper also omits discussion of individual immunities and recent tort claims act cases. Similarly, because section 51.014(a)(8) of the Texas Civil Practice and Remedies Code permits the interlocutory appeal of the denial of a governmental entity's plea to the jurisdiction, Texas' fourteen intermediate courts of

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35 Tex. Civ. Prac. & Rem. Code 51.014(a)(8).

36 *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 92 -97 (Tex. 2012) (holding that, because governmental immunity deprives a court of subject matter jurisdiction, it can be raised for the first time on appeal).

37 *Engelman Irrigation Dist. v. Sheilds Bros., Inc.*, 514 S.W.3d 746, 750 (Tex. 2017) (holding that the principles embodied in the doctrine of res judicata can defeat a claim of governmental immunity).

appeals issue a host of governmental immunity opinions annually. In fact, as illustrated by the chart below, the intermediate courts of appeal have issued 913 decisions implicating immunity in the last five years alone. Needless to say this paper does not attempt to summarize the output of the intermediate courts of appeals.

Court	Total number of cases
1st Houston	105
2nd Fort Worth	62
3rd Austin	141
4th San Antonio	90
5th Dallas	102
6th Texarkana	10
7th Amarillo	32
8th El Paso	51
9th Beaumont	54
10th Waco	20
11th Eastland	25
12th Tyler	24
13th Corpus Christi	111
14th Houston	86
TOTAL:	913

Breach of contract – specific performance:

***Hays Street Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697 (Tex. 2019) (Hecht, C.J.).**

The Texas Supreme Court held in *Hays Street* that claims that seek specific performance on breach of contract actions can be considered against governmental entities. In *Hays Street*, the Court found that a contract was formed by a memorandum of understanding (MOU) between the City of San Antonio (the City) and the Restoration Group concerning funding for restoration of the Hays Street Bridge and creation of a park.[38] When the City decided not to use the property for a park and sold it to Alamo Beer Company, the Restoration Group sued for specific performance of the MOU.[39] The City claimed immunity, but the trial court rejected that argument and entered judgment requiring the City to comply with the agreement.[40] The San Antonio Court of Appeals reversed and rendered judgment for the City.[41] In reversing the San Antonio Court of Appeals decision, the Texas Supreme Court held that its 2014 *Zachry Construction* opinion did not foreclose a suit for specific performance under Chapter 271 of the Local Government Code even though Chapter 271 does not expressly waive immunity for specific performance.[42] In enlarging the waiver of immunity provided by section 271.152, the Court reasoned that because section 271.153 says nothing about the equitable relief of specific performance,

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38 *Hays Street Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697, 700-03 (Tex. 2019).
39 *Id.* at 701.
40 *Id.*
41 *Id.* at 701-02.
42 *Id.* at 706-07.

section 271.152 waived the City's immunity for such claims.[43] ("To read former Section 271.153 as impliedly prohibiting every suit seeking an equitable remedy against a local governmental entity would too greatly restrict the general waiver of immunity in Section 271.152.").

In retreating from its previous jurisprudence, the Texas Supreme Court held that the provision of the statute limiting the total amount and type of damages that could be awarded against a local governmental entity does not foreclose an action seeking specific performance of an obligation under a contract. Notably, the court limited its holding to former section 271.153 (the 2005 version), because the 2005 version solely restricted *damages* available under a breach of contract claim.[44] The Court further acknowledged that the Legislature amended section 271.132 in 2013 to authorize specific performance in certain limited situations and reserved the issue whether the current version of the statute limits waiver of immunity for equitable relief solely to those the Legislature has now specified.[45] It is unclear what effect the *Hays Street Bridge* case will have on the judicial interpretation of the current version of Section 271.153, which has been in effect since 2013. And, there appears to be an open legal question as to whether specific performance is an available remedy under the current statute for contracts not involving the sale or delivery of reclaimed water.

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43 *Id.* at 708.
44 *See id.* at 707-08.
45 *Id.* at 708 n. 65.

Breach of Contract – disclaimer in policy manual:

***City of Denton v. Rushing*, 570 S.W.3d 708 (Tex. 2019) (Devine, J.).**

City of Denton and *Hays Street Bridge* were issued on the same day by the Texas Supreme Court, dealing with breach of contract lawsuits in which two different cities sought to have the suits dismissed because of sovereign, or governmental, immunity. The court found immunity had been waived in one case (*Hays Street Bridge*), but not the other. At issue in *City of Denton* was whether a contract existed under a personnel manual which contained a provision disclaiming that the manual created any type of contract.[46] For governmental immunity to be waived under section 271.152 of the Local Government Code, there must be an enforceable contract.[47] The Texas Supreme Court found that because the personnel manual effectively disclaimed any contractual intent, the personnel manual did not create an enforceable contract.[48]

Breach of contract claim – immunity not waived for consequential damages:

***Dallas/Forth Worth Int'l Airport Bd. v. Vizant Technologies*, LLC, 576 S.W. 362 (Tex. 2019) (Boyd, J.).**

The Texas Supreme Court found the Dallas/Fort Worth airport was immune from suit for alleged breach of good faith efforts agreement with a consultant for analyzing the airport board's credit-card processing costs.[49] At issue is whether the consultant could

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46 *City of Denton v. Rushing*, 570 S.W.3d 708, 709-10 (Tex. 2019).

47 *Id.* at 712-13.

48 *See id.*

49 *Dallas/Forth Worth Int'l Airport Bd. v. Vizant Technologies*, LLC, 576 S.W. 362, 364, 369 (Tex. 2019).

recover consequential damages under the waiver provided by chapter 271 of the Texas Local Government Code.[50] The Supreme Court held that even if the contract at issue stated the essential terms of a legally enforceable promise, chapter 271 does not allow for consequential damages other than delay damages.[51] The statue expressly provides that damages awardable on a contract claim for which chapter 271 waives governmental immunity cannot include "consequential damages, except as expressly allowed under Subsection (a)(1)."[52]

Contractual immunity:

***Owens v. City of Tyler*, 564 S.W.3d 850 (Tex. 2018) (per curiam).**

The City of Tyler built Lake Tyler in 1946 and leased lakefront lots to private residents. One resident decided to build a new pier and boathouse extending their lot onto the water.[53] Neighboring residents objected to this proposed use.[54] The neighboring residents sued the city after it issued a building permit.[55] After the court of appeals issued an opinion, the Texas Supreme Court issued the most recent *Wasson* decision, *Wasson Interest, Ltd. v. City of Jacksonville*, 559 S.W.3d 142 (Tex. 2018).[56] As a result, the Supreme Court remanded the case back to the court of appeals in order to analyze the case under the four-part *Wasson* test.[57]

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50 *Id.* at 372-73.
51 *Id.* at 374.
52 *Id.* at 374 (quoting Tex. Loc. Gov't Code § 271.153).
53 *Owens v. City of Tyler*, 564 S.W.3d 850, 851 (Tex. 2018).
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*

In *Wasson,* the Supreme Court held that there is no immunity for municipalities from tort claims arising out of the municipality's proprietary acts.[58] It is important to note that *Wasson's* holding is limited to municipalities and the Supreme Court made as much very clear.[59] Before issuing the 2018 opinion, the Supreme Court, in *Wasson*, took up an earlier appeal in 2016, unambiguously noting: "[l]ike counties, school districts 'perform [] no proprietary functions which are separate and independent of [their] governmental powers.'"[60]

Breach of contract – goods or services provided to the governmental entity:

***Lubbock Cnty. Water Control and Imp. Dist. v. Church & Akin, L.L.C.*,442 S.W.3d 297 (Tex. 2014) (Boyd, J.).**

For a contract to be "subject to" Chapter 271's limited waiver of governmental immunity, the contract at issue must require the contracting party to provide goods or services "to the governmental entity."[61] Prior to 2014, the Texas Supreme Court and lower courts had interpreted the requirement that the contract involve the provision of goods or services to the government fairly liberally.[62]

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58 *See Wasson Interests, Limited v. City of Jacksonville*, 559 S.W.3d 142 (Tex. 2018).

59 *Id.*

60 *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 430 n.3 (Tex. 2016) (citing Braun, 114 S.W.3d at 950) (alteration and omission in original).

61 *Lubbock Cnty. Water Control & Imp. Dist. v. Church & Akin, LLC*, 442 S.W.3d 297, 299 (Tex. 2014).

62 For example, in *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist*, 212 S.W.3d at 327, the Court held that a governmental entity could be sued for claims arising from a contract under which the governmental entity was providing insurance services to its members. In other words, the provision of services was ***by***, not ***to***, the governmental entity being sued.

The Court in *Church & Akin* reasoned that for a lease agreement to fall within Chapter 271's scope, the benefit provided to the local government entity must be more than "an indirect, attenuated one."[63] Specifically, "[w]hen a party has no right under a contract to receive services, the mere fact that it may receive services as a result of the contract is insufficient to invoke chapter 271's waiver of immunity."[64]

Breach of contract – Chapter 271's limits on recoverable damages and defining when immunity is waived:

***Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cnty*., S.W.3d 98 (Tex. 2014) (Hecht, C.J.); (Boyd, J, dissenting in part, with Johnson, Willett, and Lehrmann, JJ. joining).**

In *Zachry Construction* the Texas Supreme Court held that immunity was waived for a claim for delay damages even though such damages were disclaimed – and thus arguably not "due and owing" – under the contract at issue.[65] The case arose from the construction of a wharf for the Port of Houston Authority.[66] In the parties' contract, the contractor agreed that it would not be entitled to damages caused by delay, even if the delay was caused in whole or in party by "the negligence, breach of contract or other fault of the Port."[67] After the project was significantly delayed, the contractor sued for delay costs allegedly caused by the Port's intentional interference with construction.[68]

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63 *Church & Akin*, 442 S.W.3d at 303 (quoting *Kirby Lake Ltd. v. Clear Lake City Water Authority*, 320 S.W.3d 829, 839 (Tex. 2010)).

64 *Id.* at 303.

65 *Zachry Const. Corp. v. Port of Houston Auth. of Harris Cnty*., 449 S.W.3d 98, 106 (Tex. 2014).

66 *Id.* at 101-102.

67 *Id.* at 103.

68 *Id.*

In interpreting the restrictions on contractual damages in section 271.153, the Texas Supreme Court held that Chapter 271 of the Local Government Code "does not waive immunity from suit on a claim for damages not recoverable under Section 271.153."[69] In other words, the damage restrictions in section 271.153 are jurisdictional and incorporated into the limited waiver of immunity for breach of contract claims established in Section 271.152.[70] The Texas Supreme Court defined the "balance due and owed" as "the amount of damages for breach of contract payable and unpaid."[71]

Of particular importance in *Zachry* was Section 271.153 of the Local Government Code, which limited "the total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter."[72] The Court held that delay damages were a type of damages that could be "due and owed" under a contract.[73] Consequently, the Chapter 271 waived immunity against such claims.[74]

***Ultra vires* claims:**

***Chambers-Liberty Counties Navigation Dist. v. State of Texas*, 575 S.W.3d 339 (Tex. 2019) (Blacklock, J.).**

This case pits two governmental entities asserting influence over oyster production in Galveston and whether the Texas Department of Parks and Wildlife has the exclusive authority to allow oyster cultivation on certain submerged land in and around Galveston

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69 *Id.* at 110.

70 *Id.* at 108-110 (holding "subject to" clause in section 271.152 incorporates section 271.153 damage limitation as condition for waiver of immunity on breach of contract claim).

71 *Id.* at 111.

72 Tex. Loc. Gov't Code § 271.153(a).

73 *Zachry*, 449 S.W.3d at 112.

74 *Id.* at 114.

Bay.[75] The State of Texas sued a county navigation district and its commissioners, seeking to invalidate the lease the navigation district had with a conservation group under the theory that the State had the sole power to decide who may and may not cultivate oysters in the disputed area.[76] The State also sought monetary relief against the navigation district and the conservation group under the Parks and Wildlife Code.[77] On an interlocutory appeal, the Texas Supreme Court had to "once again navigate the turbulent waters of governmental immunity."[78] The Texas Supreme Court concluded that immunity bars the State's claim for monetary relief against the District but does not bar its *ultra vires* claim that the navigation district's officers exceeded their authority by entering into the oyster lease with the conservation group[79] The court found that the *ultra vires* claims against the commissioners to prospectively enjoin the lease are permitted to go forward.[80]

***Honors Academy, Inc. v. Texas Edu. Agency*, 555 S.W.3d 54 (Tex. 2018) (Devine, J., Justice Blacklock did not participate).**

Last term the Texas Supreme Court reaffirmed that a cognizable *ultra vires* claim must challenge the government official's authority to decide, not whether the official made an incorrect decision.[81] Justice Johnson issued a brief concurring opinion, again noting his

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75 *Chambers-Liberty Counties Navigation Dist. v. State of Texas*, 575 S.W.3d 339, 341 (Tex. 2019).

76 *Id.* at 341-43.

77 *Id.* at 343.

78 *Id.* at 341.

79 *Id.* at 354-55.

80 *Id.*

81 *Honors Acad., Inc. v. Texas Educ. Agency*, 555S.W.3d 54, 68 (Tex. 2018) ("'Ultra vires claims depend on the scope of the state official's authority,' not the quality of the official's decision." (quoting *McRaven*, 508 S.W.3d at 238)).

concern about whether the Legislature has the constitutional authority to grant governmental immunity:

> As this Court has explained numerous times, the doctrine of sovereign immunity, or governmental immunity as it is referred to in connection with political subdivisions of the state, developed through the common law. That being so, the judiciary has historically been, and is now, entrusted with 'defin[ing] the boundaries of the common-law doctrine and ... determin[ing] under what circumstances sovereign immunity exists in the first instance.[82]

Justice Johnson has commented on this in other cases,[83] and seems to be inviting a case to the Court that would allow full consideration of this issue.

***Hall v. McRaven*, 508 S.W.3d 232 (Tex. 2017) (Devine, J.); (Willet, Guzman, and Lehrmann, JJ., filed separate concurring opinions); (Brown, J. concurring, with Green, J. joining).**

In *Hall v. McRaven*, a regent for the University of Texas System alleged that the Chancellor had committed an *ultra vires* act by misinterpreting the Federal Educational Rights and Privacy Act (FERPA).[84] The Court disagreed, explaining that the regent wrongly assumed that *Houston Belt* meant that any legal mistake is an *ultra vires* act.[85] The Court began its jurisdictional analysis by examining the scope of the Chancellor's enabling authority, which the Court emphasized was supplied by a rule adopted by the University and not by FERPA – a federal law "collateral" to the Chancellor's authority.[86]

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82 *Id.* at 78 (Johnson, J., concurring) (citation omitted).

83 In 2006, Justice Johnson opposed Justice Hecht's blanket expansion of sovereign immunity in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), which re-interpreted statutory "may sue and be sued" language as not permitting suit and repudiated prior precedent.

84 *Hall v. McRaven*, 508 S.W.3d 232 (Tex. 2017).

85 *Id.* at 241.

86 *Id.* at 242.

This ruled stated that the "the Chancellor, in consultation with the U.T. System General Counsel, shall determine whether State or federal law restricts compliance with the request [and] shall determine whether a Regent may review information that is protected by [FERPA]."[87] Based on this broad and otherwise unconstrained authority, the Court concluded that the regent's complaint regarding the Chancellor's exercise of his discretion to interpret and apply FERPA failed to establish a valid *ultra vires* claim.[88] "When the ultimate and unrestrained objective of an official's duty is to interpret collateral law, a misinterpretation is not overstepping such authority; it is a compliant action even if ultimately erroneous."[89]

As the Court explained, "[a]n *ultra vires* claim based on actions taken 'without legal authority' has two fundamental components: (1) authority giving the official some (but not absolute) discretion to act and (2) conduct outside of that authority."[90] "In order to act without legal authority," government officials "must have exercised discretion 'without reference to or in conflict with the constraints of the law authorizing [them] to act.'"[91] The Court was unanimous in its analysis of the ultra vires issue. Four justices wrote separate concurring opinions, however, to address the merits of the dispute over the regent's ability to access records, even though his claims against the Chancellor were barred by immunity.

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87 *Id.* at 236.
88 *Id. at 243.*
89 *Id.* at 242.
90 *Hall v. McRaven*, 508 S.W.3d 232, 239 (Tex. 2017).
91 *Id.* at 242 (quoting *Houston Belt & Terminal Ry. Co. v. City of Houston,* 487 S.W.3d 154, 163 (Tex. 2016)).

One of the concurring onions confirmed that governmental immunity is a doctrine premised on separation of powers and sovereignty, and it serves to protect the public fisc from being diverted into private hands by payment of a judgment.[92]

***Houston Belt & Terminal Ry. v. City of Hous*., 487 S.W.3d 154, 164 (Tex. 2016) (Brown, J.); (Lehrmann, J., concurring).**

Reiterating its previous jurisprudence that an *ultra vires* plaintiff "must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act," the Court in *Houston Belt* emphasizes the use of the conjunctive "or."[93] *Ultra vires* suits are not so limited as to only apply to cases in which the act is "'purely ministerial.'"[94] Rather, a plaintiff may bring an ultra vires act against an officer's discretionary act that is without legal authority.[95] "[W]hen an officer acts beyond his granted discretion—in other words, when he acts without legal authority—his acts are not protected."[96] Accordingly, only when "absolute discretion—free decision-making without any constraints—is granted are ultra vires suits absolutely barred."[97]

It is clear, however, that merely alleging an official's discretion is limited will not be sufficient to avoid dismissal.[98] The Court noted in *Houston Belt*, "many legislative grants of authority, although not absolute, will be broad enough to bar most, if not all, allegedly *ultra vires* claims."[99]

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92 *Id.* at 253 (Brown & Green, J.J., concurring).
93 *Houston Belt & Terminal Ry. v. City of Hous*., 487 S.W.3d 154, 161-62 (Tex. 2016).
94 *Id.* at 161 (citation omitted).
95 *Id.* at 161-63.
96 *Id.* at 163.
97 *Id.*
98 *Id.* at 164.
99 *Id.*

Procedural:

***Town of Shady Shores v. Swanson*, -- S.W.3d --, No. 18-0413, 2019 WL 6794327 (Tex. Dec. 13, 2019) (J. Lehrmann).**

In *Town of Shady Shores v. Swanson*, the Texas Supreme Court held that governmental entities **can** assert governmental immunity through a no-evidence motion for summary judgment.[100] The Texas Supreme Court also held that the Texas Open Meetings Act (TOMA) waives governmental immunity only for claims seeking injunctive or mandamus relief to stop, prevent, or reverse a violation or threatened violation of TOMA, and not for suits seeking declaratory relief. [101] This holding is valuable to governmental entities throughout the state, as it demonstrates a continued dedication that waivers of governmental immunity must be made explicitly and that limited waivers of immunity should be read narrowly.

***Hughes v. Tom Green County*, 573 S.W.3d 212 (Tex. 2019) (Devine, J.); (Boyd, J., concurring, with Lehrmann and Brown, JJ., joining).**

Southern Methodist University (SMU) filed a probate proceeding seeking to remove a restriction on the use of a testator's specific bequest to it of proceeds generated by certain oil and gas properties.[102] Tom Green County, the residuary beneficiary under the testator's will, intervened in the proceeding, claiming the specific bequest to SMU had been fulfilled and accordingly, funds from the oil and gas properties should thereafter flow to the County

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100 *Town of Shady Shores v. Swanson*, -- S.W.3d --, 2019 WL 6794327 at *1 (Tex. Dec. 13, 2019).

101 *Id.* at *7-*8.

102 *Hughes v. Tom Green County*, 573 S.W.3d 212, 215 (Tex. 2019).

under the residuary clause.[103] The issue in this interlocutory appeal from a plea to the jurisdiction is whether the County has governmental immunity from an heir's claim that the County breached a Mutual Partial Assignment (MPA) executed by the County, the heir, and other will beneficiaries in a prior probate case.[104] The heir claimed that the County failed to perform one portion of the MPA, and the County asserted it was immune from the heirs' suit.[105]

Under *Tex. A&M Univ.–Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), when a governmental entity settles a suit in which it lacked immunity, it cannot claim immunity in a subsequent suit to enforce the settlement.[106] The court of appeals distinguished *Lawson* on the grounds that (1) the MPA was not a settlement agreement and (2) the County had not waived its immunity in the probate action.[107] The Supreme Court disagreed on both accounts.[108] First, the Court held that the MPA was a settlement agreement because it settled their dispute as to whether the County or the heirs were entitled to funds also claimed by other beneficiaries.[109] Second, the Court concluded that the County's voluntary intervention in the probate proceeding to assert an affirmative claim to the property's proceeds abrogated the County's governmental immunity *in relation to* those parties who opposed the County's claim under the residuary clause, specifically SMU and the testator's

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103 *Id.*
104 *Id.* at 216-17.
105 *Id.*
106 *Id.* at 214, 217, 221.
107 *Id.*
108 *Id.*
109 *Id.* at 221.

heirs.[110] The Court held that the County did not have immunity in the probate action, relying on *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006) ("when a governmental entity asserts claims for affirmative relief in court, the entity does not have immunity from suit for opposing claims that are germane, connected, and properly defensive to the entity's claims, to the extent that the claims of the private litigant offset those asserted by the governmental entity.").

The Court began with the fundamental premise that governmental immunity is a common law concept that generally protects political subdivisions "from the burdens of litigation."[111] The Court reasoned that the doctrine's protective features assume "that the government is an unwilling litigant, haled into court by a private plaintiff. The considerations that support the doctrine do not apply equally when the government invokes the jurisdiction of the courts to assert its own claims."[112]

Justice Boyd (joined by Justices Lehrmann and Brown), concurred in the judgment but not the Court's analysis.[113] The concurring justices agreed that *Lawson* governed but disagreed with the majority's reliance on *Reata*.[114] They reasoned that the claim the heir asserted in the probate action never implicated the County's immunity in the

110 *Id.* at 219.
111 *Id.* at 218.
112 *Id.*
113 *Id.* at 221.
114 *Id.*

first place because the heir asserted a competing claim to the funds, not a counterclaim against the County.[115] Thus, they concluded that *Reata* was not relevant in this case.[116]

***Nazari v. State*, 561 S.W.3d 495 (Tex. 2018) (Brown, J.) (Lehrmann, J, concurring in part, dissenting in part, and filed op. in which Johnson, J. joined).**

The immunity issue turned on whether the State, by filing suit, waived immunity only for claims seeking "money damages" or, more broadly, for claims seeking any type of "monetary relief."[117] The Court, based on its prior decision in *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 374 (Tex. 2006), adopting the narrow view, holding that the *Reata* abrogation-of-immunity rule "*never* applies when the state initiates litigation to enforce a substantive prohibition against unlawful conduct by imposing a monetary penalty."[118] Thus, "[s]overeign immunity protects the state from counterclaims that seek to offset a penalty."[119] Having concluded that civil penalties sought under the Texas Medicaid Fraud Prevention Act are penalties, not damages, the Court held that "sovereign immunity bars the Providers from asserting their counterclaims against the state."[120] Justice Lehrmann (joined by Justice Johnson) would have adopted the broader view and held that "the State's pursuit of monetary relief under the Medicaid Fraud Act subjected it to jurisdiction of the Court for offsetting, related counterclaims."[121]

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115 *Id.* at 221-22.
116 *Id.* at 221-23.
117 *Nazari v. State*, 561 S.W.3d 495, 505-06 (Tex. 2018).
118 *Id. at* 507.
119 *Id.*
120 *Id.* at 510.
121 *Id.* at 519.

Sovereign immunity from suit may not be used to collaterally attack a judgment that is otherwise final:

***Engelman Irrigation Dist. v. Shields Bros., Inc*., 514 S.W.3d 746, 750 (Tex. 2017) (Willet, J.).**

As discussed above, when a governmental entity has not waived immunity from suit, courts lack subject-matter jurisdiction over actions against such entities. In *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006), the Court ruled that statutory permission for political subdivisions to "sue and be sued" did not also waive sovereign immunity. *Tooke* overturned a prior decision which had been applied to the initial dispute between the litigants in *Engelman Irrigation District v. Shields Bros., Inc*. In that earlier case, Shields Brothers, Inc. recovered for breach of contract.[122] Under the governing law at the time, "sue and be sued" was deemed sufficient to waive the irrigation district's immunity.[123] Many years later, that rule was overruled in *Tooke*. After *Tooke* was handed down, the irrigation district collaterally attacked the earlier judgment seeking declaratory relief that it was void for want of jurisdiction.[124]

The initial issue in *Engelman* was whether the ruling in *Tooke* was retroactive and, if so, whether that retroactivity meant that otherwise final judgments were now void for want of jurisdiction.[125] *Engelman* involved a collateral attack on a final judgment where the parties had already exhausted all of their direct appellate options. In a unanimous

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122 *Engelman Irrigation Dist. v. Shields Bros., Inc*., 514 S.W.3d 746, 747-48 (Tex. 2017).
123 *Id.* at 747.
124 *Id.* at 748.
125 *Id.* at 750-52.

opinion by Justice Willett, the Court reiterated that its decisions were generally retroactive.[126] However, such retroactivity is limited to cases that were still in the "'judicial process.'"[127] The court rejected the irrigation district's contention that the decision in *Tooke* could affect judgments that became final long before *Tooke*.[128] As the Court has noted on earlier occasions, "[f]or any rational and workable judicial system, at some point litigation must come to an end . . ."[129]

Waiver of Immunity – *Sabine Pilot* Exception:

***Hillman v. Nueces Cty.*, 579 S.W.3d 354 (Tex. 2019) (J. Boyd); (Guzman J., concurring, with Lehrmann and Devine, JJ., joining).**

A former assistant district attorney brought this lawsuit against county and county's district attorney's office, alleging wrongful termination after the assistant district attorney provided exculpatory evidence required to be disclosed under the Michael Morton Act to a defendant contrary to the instructions of the assistant's supervisor.[130] The Supreme Court declined to extend the *Sabine Pilot v. Hauck,* 687 S.W.2d 733 (Tex. 1985) (recognizing a cause of action for wrongful termination of an at-will employee for refusal to perform an illegal act) exception to governmental entities, and refused to find that the Michael Morton Act impliedly waived immunity, specifically deferring to the Legislature to decide whether such waivers would be appropriate as a matter of public policy.[131]

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126 *Id.* at 748-49.
127 *Id.* at 749. (citation omitted).
128 *Id.* at 753.
129 *Id.* at 750-51.
130 *Hillman v. Nueces Cty.*, 579 S.W.3d 354, 356 (Tex. 2019).
131 *Id.* at 362, 364.

Justice Guzman issued a concurring opinion (joined by Justices Lehrmann and Devine) emphasizing that "[w]e defer to the Legislature to waive immunity, and I agree with the Court that the Morton Act contains no such waiver because no 'clear and unambiguous language' expresses that intent."[132]

Waiver of Immunity – Chapter 21 of the Texas Labor Code:

***Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755 (Tex. 2018) (Guzman, J); (Boyd, J., dissenting with Lehrmann, J., joining).**

After a teacher was terminated, she sued the school district for sexual harassment and retaliation under the Texas Commission on Human Rights Act (now Chapter 21 of the Texas Labor Code). As noted in Section I(c) above, the Texas Legislative has waived immunity for claims under Chapter 21 of the Texas Labor Code, subject to the right of the political subdivision to file a plea to the jurisdiction challenging whether there is a question of fact regarding the plaintiff's claims. In *Alamo Heights*, the Court clarified how the jurisdictional analysis must be resolved in a discrimination or retaliation case, including a Chapter 21 case.[133] The lower courts below held that a court addressing a plea to the jurisdiction in a discrimination case should examine only whether the plaintiff can present minimal facts for a *prima facie* case, and that the court should not resolve a question of pretext on a plea to the jurisdiction.[134] The Court reversed on this point.[135] Even if the plaintiff has presented evidence of facts sufficient for a *prima facie* case, a defendant's

132 *Id.* at 367 (Guzman, J., concurring).
133 *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 771 (Tex. 2018).
134 *Id.* at 785-86.
135 *Id.* at 769.

presentation of facts regarding a nondiscriminatory reason for the adverse action shifts a burden to the plaintiff to present evidence of facts showing pretext.[136] If the plaintiff cannot present sufficient evidence to create a fact issue regarding pretext, the court should grant the plea to the jurisdiction and dismiss the plaintiff's claim.[137] Viewed broadly, because the elements of a state law discrimination case are jurisdictional, if a plaintiff cannot establish each element, then a school district's governmental immunity remains intact.

Economic development corporations and governmental immunity:

***Rosenberg Development Corp. v. Imperial Performing Arts, Inc*., 571 S.W.3d 738 (Tex. 2019) (Guzman, J.) (Hecht, J., concurring).**

As a matter of first impression, the Texas Supreme Court reviewed whether an economic development corporation was immune from suit under the common law even though it was not a sovereign or a political subdivision of the state.[138] The Texas Supreme Court held that a municipally-created economic development corporation is a statutorily defined "governmental unit" which may appeal from an interlocutory order denying a plea to the jurisdiction, but such a corporation is not a "governmental entity" in its own right for governmental immunity purposes.[139]

The Court noted that the judiciary determines applicability of immunity in the first instance and then defers to the Legislature "to waive immunity when it exists."[140] The

136 *Id.* at 782-83.
137 *Id.* at 782-86.
138 *Id.* at 747.
139 *Id.* at 745, 750-51.
140 *Id.* at 741.

Court then analyzed the statute authorizing creation of economic development corporations and determined that the Legislature did not intend economic development corporations to have "discrete governmental-entity status separate and apart from its authorizing municipality."[141] The Court further expounded that even if the Legislature had designated economic development corporations as governmental entities, it would still be the judiciary's province to decide whether they are entitled to immunity.[142] "Governmental immunity," the court concluded, "does not extend like ripples from a pebble tossed into a pond but, instead, is limited to those entities acting as an arm of state government. Despite fulfilling public purposes, economic development corporations do not exist quite like an arm of the state government, imbued with aspects of sovereignty such as immunity from suit."[143]

Finally, the Court noted in dicta that it did not consider whether an economic development corporation might have "derivative immunity" by virtue of a corporation's relationship to another government entity.[144] The Court noted that derivative immunity is a distinct analytical inquiry, which is ill-defined under current jurisprudence.[145]Accordingly, whether an economic development corporation could possess "derivative immunity" remains an open legal question.

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141 *Id.* at 748.
142 *Id.* at 746, 750.
143 *Id.* at 751.
144 *Id.* at 751-52.
145 *Id.* at 751 (citing *Brown & Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117 (Tex. 2015)).

Attorneys' fees under the Texas Citizens Participation Act:

***State v. Harper*, 562 S.W.3d 1, 19-20 (Tex. 2018) (Brown, J.); (Boyd, J., dissenting, with Johnson and Lehrmann, JJ., joining).**

The Texas Supreme Court held last term in *State v. Harper* that immunity does not extend to counterclaims for attorneys' fees under the Texas Citizens Participation Act.[146] The attorneys' fee award recognized in *State v. Harper* was designed to police the State's behavior *as a litigant* – "the state should not be suing to prevent its own citizens from participating in government especially when it lacks even a prima facie case against them."[147] Acknowledging governmental immunity's paramount role in protecting the public fisc, the Texas Supreme Court authorized a limited financial recovery from the state in the form of an attorney fee award on a challenge to the State's pleadings.[148] The Court relied on its control over the common law as the source of its power to abrogate sovereign immunity in this case.[149]

146 *State v. Harper*, 562 S.W.3d 1, 19-20 (Tex. 2018).
147 *Id.* at 19.
148 *Id.* (noting that abrogating immunity in that context "risks paying only attorneys' fees (rather than damages or some other uncapped sum)" and thus "does not present any grave danger to the public fisc").
149 *Id.* at 19.

Appendix of select Texas Supreme Court Cases (excluding Tort Claims Act cases) since *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006):

Breach of Contract:

- *City of Denton v. Rushing*, 570 S.W.3d 708 (Tex. 2019) (Devine, J.).
- *Hays Street Bridge Restoration Grp. v. City of San Antonio*, 570 S.W.3d 697 (Tex. 2019) (Hecht, C.J.).
- *Dallas/Forth Worth Int'l Airport Bd. v. Vizant Technologies*, LLC, 576 S.W.3d 362 (Tex. 2019) (Boyd, J.).
- *Owens v. City of Tyler*, 564 S.W.3d 850 (Tex. 2018) (per curiam).
- *Lubbock Cnty. Water Control and Imp. Dist. v. Church & Akin, L.L.C.*,442 S.W.3d 297 (Tex. 2014) (Boyd, J.).
- *Zachry Constr. Corp. v. Port of Houston Auth. of Harris Cnty*., 449 S.W.3d 98 (Tex. 2014) (Hecht, C.J.); (Boyd, J, dissenting in part, with Johnson, Willett, and Lehrmann, JJ. joining).
- *City of Houston v. Williams*, 353 S.W.3d 128 (Tex. 2011) (Guzman, J.).
- *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth*., 320 S.W.3d 829 (Tex. 2010) (Jefferson, C.J.).
- *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivision Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320 (Tex. 2006) (O'Neill, J.); (Willet, J., concurring in part, and dissenting in part, joined by Hecht, J.).

Ultra vires:

- *Chambers-Liberty Counties Navigation Dist. v. State of Texas*, 575 S.W.3d 339 (Tex. 2019) (Blacklock, J.).
- *Honors Academy, Inc. v. Texas Edu. Agency*, 555 S.W.3d 54 (Tex. 2018) (Devine, J., Justice Blacklock did not participate).
- *Hall v. McRaven*, 508 S.W.3d 232 (Tex. 2017) (Devine, J.); (Willet, Guzman, and Lehrmann, JJ., filed separate concurring opinions); (Brown, J. concurring, with Green, J. joining).
- *Houston Belt & Terminal Ry. v. City of Hous*., 487 S.W.3d 154, 164 (Tex. 2016) (Brown, J.); (Lehrmann, J., concurring).
- *Morath v. Sterling City Indep. Sch. Dist*., 499 S.W.3d 407 (Tex. 2016) (Hecht, C.J.); (Brown, J, concurring); (Johnson, J., concurring in part, dissenting in part, and Willett, Guzman, and Boyd, JJ., joined).
- *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015) (Johnson, J.).
- *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 587 (Tex. 2015) (Johnson, J.).

- *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384 (Tex. 2011) (Johnson, J.); (Jefferson, C.J., concurring, with Medina, Willett, and Guzman, JJ., joining).
- *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368-69 (Tex. 2009) (Jefferson, C.J.).

UDJA:

- *City of Dallas v. Albert*, 354 S.W.3d 368, 378 (Tex. 2011) (Johnson, J.).
- *Texas Lottery Commission v. First State Bank of DeQueen*, 325 S.W.3d 628 (Tex. 2010) (Johnson, J.).
- *City of Houston v. Williams*, 216 S.W.3d 827, 828-29 (Tex. 2007) (per curiam).

Other/Procedural/finality of judgments:

- *Hughes v. Tom Green County*, 573 S.W.3d 212 (Tex. 2019) (Devine, J.)**; (**Boyd, J., concurring, with Lehrmann and Brown, JJ., joining).
- *Town of Shady Shores v. Swanson*, -- S.W.3d --, 2019 WL 6794327 (Tex. Dec. 13, 2019).
- *Rosenberg Development Corp. v. Imperial Performing Arts, Inc*., 571 S.W.3d 738 (Tex. 2019) (Guzman, J.) (Hecht, J., concurring).
- *Nazari v. State*, 561 S.W.3d 495 (Tex. 2018) (J. Brown).
- *Engelman Irrigation Dist. v. Shields Bros., Inc*., 514 S.W.3d 746, 750 (Tex. 2017) (Willett, J.).
- *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 413-14 (Tex. 2011) (Jefferson, C.J.).
- *City of Dallas v. Albert*, 354 S.W.3d 368 (Tex. 2011) (Johnson, J.); (Hecht, J., concurring in part, and dissenting in part, with Jefferson, C.J., joining).
- *Reata Construction Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006) (Johnson, J); (Brister, J., concurring, with Hecht and O'Neill, JJ., joining).

Clear and unambiguous waiver:

- *Hillman v. Nueces Cty.*, 579 S.W.3d 354 (Tex. 2019) (J. Boyd).
- *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 783-86 (Tex. 2018) (Guzman, J); (Boyd, J., dissenting with Lehrmann, J., joining).
- *Mission Consolidated Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 636-37 (Tex. 2012) (Willet, J); (Jefferson, C.J., dissenting, with Medina and Lehrmann, JJ., joining).
- *State v. Lueck*, 290 S.W.3d 876, 880-81 (Tex. 2009) (Green, J.).
- *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.,* 283 S.W.3d 838, 848 (Tex. 2009) (Johnson, J.).
- *City of Galveston v. State*, 217 S.W.3d 466, 471 (Tex. 2007) (Brister, J.); (Willet, J., dissenting, with Jefferson, C.J., and Hecht and Wainwright, JJ., joining)

Interlocutory Appeals:

- *Univ. of Incarnate Word v. Redus*, 518 S.W.3d 905 (Tex. 2017) (Devine, J.).
- *Texas A & M Univ. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007) (Green, J.).

Attorneys' fees:

- *State v. Harper*, 562 S.W.3d 1, 19-20 (Tex. 2018) (Brown, J.); (Boyd, J., dissenting, with Johnson and Lehrmann, JJ., joining).
- *Manbeck v. Austin Indep. Sch. Dist*., 381 S.W.3d 528 (Tex. 2012) (per curiam).