

# WHEN THE KING DOES WRONG:

The Availability and Limits of Construction-Related Suits Against the Government

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The image features a character from the TV series Game of Thrones, specifically the High Sparrow, standing with his arms outstretched. He is wearing his characteristic white, textured robes. The character is centered within a highly ornate, golden frame that has intricate scrollwork and floral patterns. The background behind the character is a dark, moody landscape. At the bottom of the frame, the text "COME AT ME CROW" is written in a white, serif font. The entire composition is set against a dark red, textured background.

COME AT ME CROW

CROW

# What is sovereign immunity?

***Sovereign***  
***State & State Agencies***

VS.

***Governmental***  
***Political Subdivisions***



# Liability VS Suit

Immunity from paying money judgements

Affirmative defense

Can be waived by government

Immunity from being sued

Jurisdictional

Only Legislature can waive

## Con

- Comm
- Bound
- immu



## Court's role

- Common-law doctrine
- Boundaries—does immunity apply

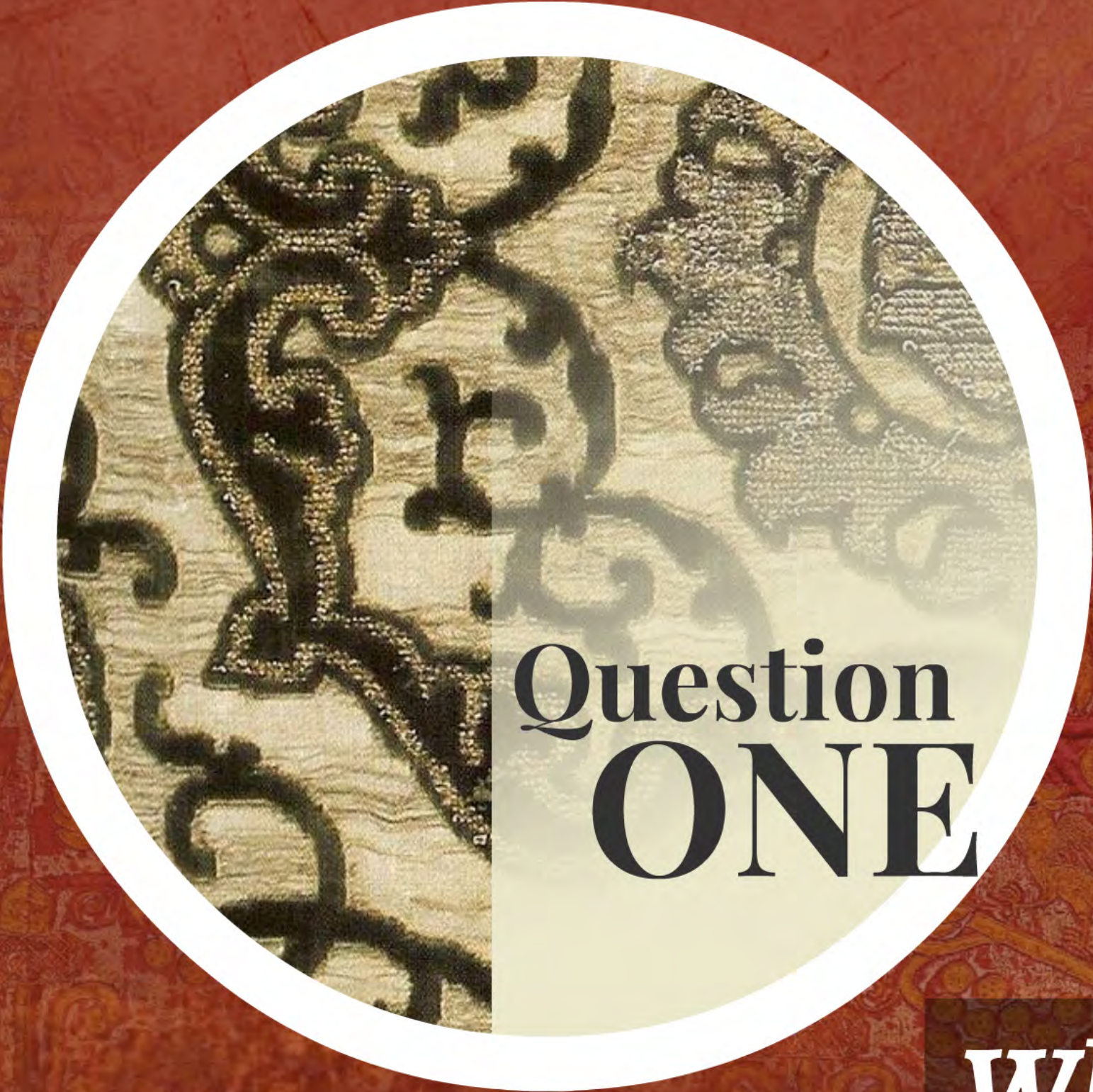
# VS

## Legislature's role

- Waiver
- "Legislature is better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear."



Can I make it past immunity?



Question  
**ONE**

*What i*

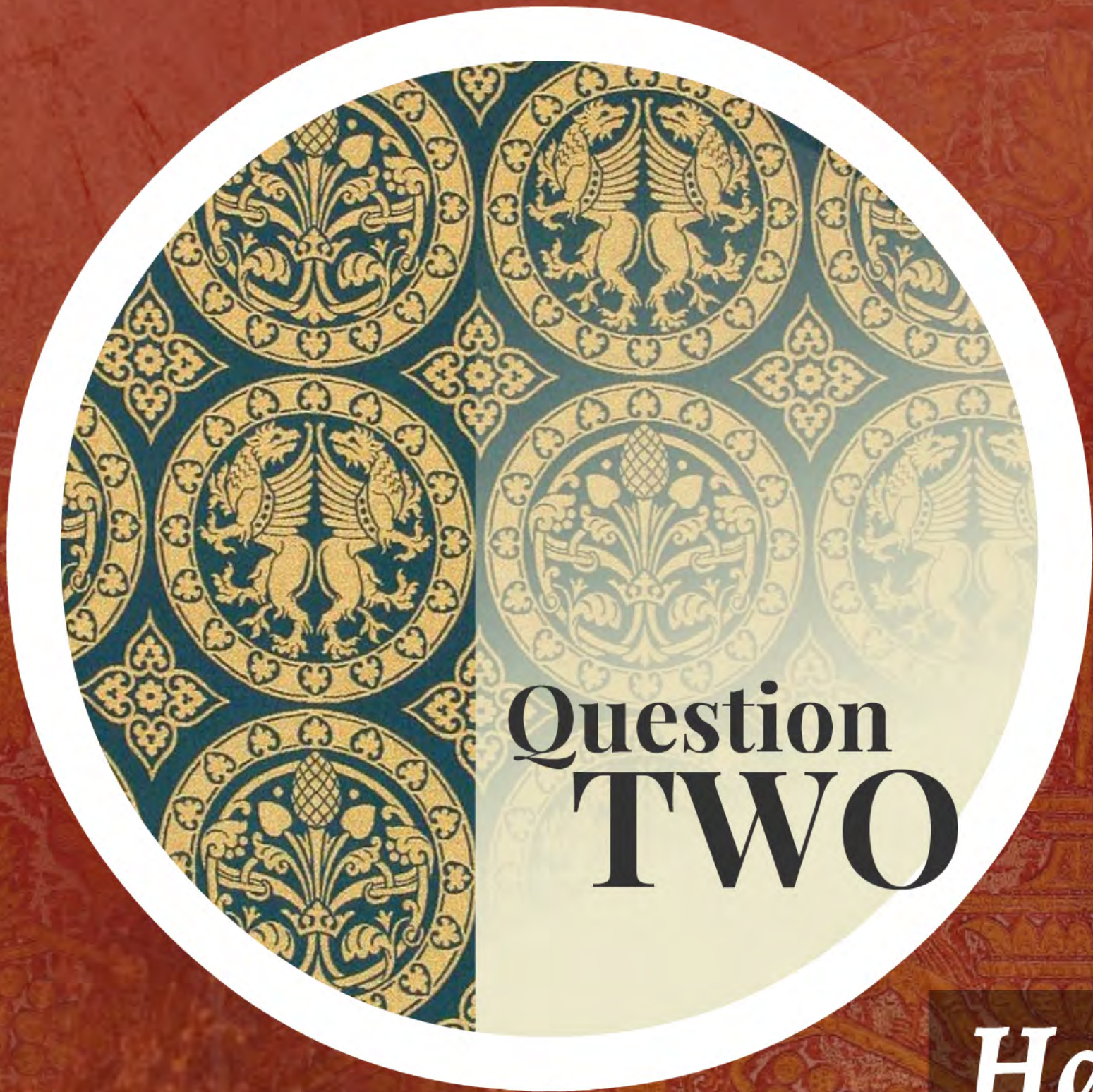
# QUESTION ONE

## *What is at stake?*

*(aka – How bad do you want to sue the government?)*

- Plea to the jurisdiction
- Interlocutory appeal
- Automatic stay
- Raise at any time





Question  
**TWO**

*Has im*

# *Has immunity been waived?*

- Clear & unambiguous statute

Sec. 271.152. WAIVER OF IMMUNITY TO SUIT FOR CERTAIN CLAIMS. A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter **waives sovereign immunity to suit** for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

- Claim-by-claim analysis

### Summary of Waivers of Immunity from Suit

Cause of Action	Gov't Entity	Amount in dispute	Waiver Statute	Description of waived claim
<b>Breach of Contract</b>	State	<\$250K	Tex. Gov't Code §§ 2260.001-.108	Permits administrative negotiation and contested case hearing at SOAH  Permits suit for amounts "due and owed" under a written contract for goods or services to the government
		>\$250K	Tex. Civ. Prac. & Rem. Code §§ 114.001-.013	
	County	Tex. Loc. Gov't Code § 262.007		
	LGE <sup>1</sup>	Tex. Loc. Gov't Code §§ 271.151-.159		
<b>Quantum Meruit</b>	None			
<b>Promissory Estoppel</b>	None			
<b>Negligence</b>	All		Texas Civ. Prac. & Rem. Code §§ 101.001-.109 (Texas Tort Claims Act)	Permits suit for property damages or personal injury caused by (i) government's operation of a motor-driven vehicle or equipment, (ii) or condition or use of government property.
<b>Negligent Misrepresentation</b>	None			
<b>Fraud</b>	None			
	Tex. Civ. Prac. & Rem. Code § 101.057 excludes intentional torts from waiver for tort claims			

# *Contract Waivers*

**BUT DIFFERENT**



# *Breach of Contract Waivers*

- **State/agency:**
  - Less than \$250,000: Chapter 2260 of Government Code
  - More than \$250,000: Chapter 114 of CPRC
- **Counties:** § 262.007 of Local Government Code
- **Local Governmental Entities:** Subchapter I of Local Government Code

# Waivers – THE SAME

## All three waivers:


1. Allow breach of contract suit against entity, if
2. Based on written contract
3. For goods or services to government
4. Damages sought are:
  - a. “Balance due and owed under the contract as amended”
    - i. Includes owner-caused delay or acceleration damages
  - b. Amount owed for change orders
  - c. Attorney’s fees (waiver only, not entitlement?)
  - d. Interest
  - e. No consequential, exemplary, or unabsorbed office overhead damages





# ***BUT DIFFERENT***

- 1.** Written contract
  - a. **State & LGE:** Essential terms & proper execution
- 2.** For goods or services
  - a. **State & County:** Only engineering, architect, or construction related contract
- 3.** **Balance due & owed**, including owner caused delay
  - a. **State:** only if contract expressly provides for that compensation
- 4.** **Change orders**
  - a. **State:** must be written
  - b. **County:** must be “required to carry out the contract”
  - c. **LGE:** must be for work contractor was directed to perform by LGE in connection with contract

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- a. **State:** only if contract expressly provides for that compensation

#### 4. Change orders

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#### 5. Attorney’s fees

- a. **State:** must be based on an hourly rate that is reasonable/just and contract must expressly provide attorney's fees are available to all parties under contract

#### 6. Interest

- a. **State:** As specified in K, or if not specified per Finance Code, not to exceed 10%
- b. **County:** As allowed by law (including per 1st Court, PPA)
- c. **LGE:** As allowed by law, including PPA



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## 7. No consequential damages

- a. **County & LGE:** Except for delay/acceleration damages allowed under statute



# *Key Issue*

*What is the “balance due and owed under the contract?”*

*Zachry Construction Corp.*  
v.  
*Port of Houston Authority of  
Harris County (Tex. 2014)*

Relationship between recoverable  
damages and Chapter 271 waiver



***holdings:***

allege recoverable damages under statute  
waiver to apply



# *Immunity holdings:*

- Must allege recoverable damages under statute for waiver to apply
- “[B]alance due and owed . . . under the contract”
  - a. Direct damages payable and unpaid
  - b. No need to be stated in or ascertainable from the contract

*Result: Immunity waived for claim for delay damages even though contract contained NDD clause.*

# Can "under the contract" really mean you don't consider the contract?

*The appellate courts seem unconvinced.*

*County of Galveston v. Triple B Servs., LLP*, 498 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2016)

- Suit for disruption damages
- Recognized Zachry interpretation, but examined recoverability of damages under contract at issue
- Waiver



*City of San Antonio v. Casey Industrial, Inc.*, 2016 WL 320504 (Tex. App.—San Antonio 2016)

- Contractor suit for damages under unique force majeure clause
- Recognized Zachry interpretation, but then analyzed numerous contract provisions
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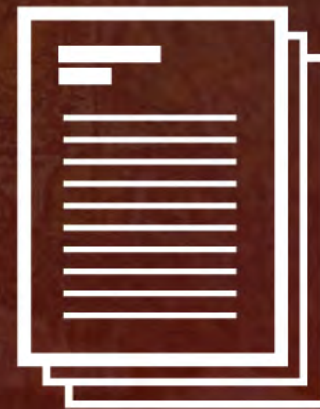


*City of Colleyville v. Newman*, 2016 WL 1314470 (Tex. App.—Fort Worth 2016)

- Independent contractor reclassified as employee seeks benefits (e.g. health insurance)
- Plaintiff benefits were direct damages "due and owed" under employment K
- Looked to contractual provision barring F from additional benefits and comp to decide not amounts due and owed
- Distinguished Zachry on basis that NDD was unenforceable
- No waiver

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# *The Court has been known to ~~walk back~~ clarify its immunity decisions*

- *Mo. Pac. RR Co. v. Brownsville Nav. Dist.* (1970) - sue or be sued
- *Federal Sign v. Texas Southern University* (1997) – waiver by conduct
- *Ben Bolt-Palito Blanco Consol. ISD v. Pol. Subdivisions Prop./Cas. Joint Self-Ins. Fund* (2006) – services to a governmental entity



# Practice Points

1. Have a **written** contract
2. Ensure contract is **properly executed**—proper execution varies but generally consists of approval by a council or board
3. Amendments including **change orders** in writing with proper execution
4. If government won't sign a CO, get direction in writing and document costs
5. Include in contract attorney's fees to prevailing party
6. Don't rely on *Zachry*—contract should spell out what is “due and

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3. Amendments including **change orders** in writing with proper execution
4. If government won't sign a CO, get direction in writing and document costs
5. Include in contract attorney's fees to prevailing party
6. Don't rely on *Zachry*—contract should spell out what is “due and owed” under various common situations. Imperative if contract is with state!
7. For long-term contract, address what is due and owed for early termination. Don't describe as lost profits
8. Don't rely on agreements that immunity is waived



Question  
**THREE**

*Immunity is*

# Question THREE

*Immunity is not waived for  
my claim. Is there any  
hope?*

Maybe, but don't get too excited.

*If Courts have determined  
immunity does not apply, no  
waiver required*

*apply:*



# *Immunity does not apply:*



1. **Counterclaims:** If government files suit (or counterclaim), immunity does not apply to counterclaims that are "germane to, connected with, or properly defensive" to the government's claims.
  - a. **BUT** no recovery of damages, private party's claims offset only
2. **Ultra Vires Suits:** If government acted beyond its legal authority, can file a declaratory judgment action against government *official*
  - a. **BUT** no recovery of damages, prospective relief only
3. **Settlement Agreements:** If government breaches a settlement agreement, no immunity **but only if** the agreement settled claims for which immunity was waived

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4. **City's acting in proprietary capacity:** When a city engages in a proprietary activity, no immunity at all.
  - a. **But** only proprietary activities are:
    - Operation of electric utility or amusement park
    - Unreasonably dangerous activities
    - Other activities that benefit only the city, that are not defined as governmental in Tort Claims Act.



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