

lem was solved. The significant point was, that when the employees were informed and recognized the merits of the program they cooperated. We believe in the case of approved respiratory equipment they will also cooperate if we use the correct approach.

It is undisputed that the “chemical product” referenced in Alcoa’s 1948 memorandum was not asbestos. It is also undisputed asbestos is a mineral, not a chemical. Nevertheless, appellees argue that this memorandum evidences Alcoa’s general knowledge that “contaminants could be taken home.” Knowledge of the general danger of contact-poisoning from “chemical products,” however, does not amount to knowledge of the hazards of non-occupational exposure to asbestos. Appellees also cite to the Walsh–Healey Public Contracts Act in effect in the 1950s as further proof of foreseeability. The Walsh–Healey Act was enacted to protect “the health and safety of employees” who worked in industries that furnished “materials, supplies, articles, and equipment in any amount exceeding \$10,000.” The Walsh–Healey Act, however, addressed only workplace safety and mandated that “workers shall not be exposed to concentrations of atmospheric contaminants hazardous to health.” It did not put employers on notice of the hazards of non-occupational exposure to asbestos.

Appellees also cite to a regulation effective in Texas as of July 1958 entitled “Maximum Permissible Concentrations of Atmospheric Contaminants in Places of Employment.” As the name implies, however, this regulation was also limited to protecting *workers* from excessive *occupational* exposure in the workplace. It did not constitute notice to employers of the hazards of non-occupational exposure to asbestos.

Based on the record in this case, the danger of non-occupational exposure to asbestos dust on workers’ clothes was nei-

ther known nor reasonably foreseeable to Alcoa in the 1950s. Accordingly, under the facts of this case, the analysis fails the test set out by the Texas Supreme Court in *Mellon Mortgage Co.*, 5 S.W.3d at 655.

[13] Foreseeability is the “central question” and the “foremost and dominant consideration” in a legal duty analysis. *Greater Houston Transp.*, 801 S.W.2d at 525. Consequently, we conclude that the other factors relevant to establishing a duty—the risk, the likelihood of injury, the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant—cannot, as a matter of law, outweigh a complete lack of foreseeability of any danger to one in Mrs. Behringer’s situation.

CONCLUSION

For all of these reasons, we reverse the judgment of the trial court and render judgment that appellees take nothing on their claims against Alcoa.



**CITY OF FARMERS BRANCH, Texas;
Bob Phelps, in his official capacity;
Tim O'Hare, in his official capacity;
Bill Moses, in his official capacity;
Charlie Bird, in his official capacity;
James Smith, in his official capacity;
and Ben Robinson, in his Official Capacity, Appellants**

v.

Guillermo RAMOS, Appellee.

No. 05–07–00137–CV.

Court of Appeals of Texas,
Dallas.

Oct. 12, 2007.

Background: Resident brought action against city and city officials alleging viola-

tion of Texas Open Meetings Act (TOMA). City and officials filed a plea to the jurisdiction, seeking dismissal on the grounds of sovereign immunity. The 116th Judicial District Court, Dallas County, Bruce Priddy, J., denied the plea. City and officials appealed.

Holdings: The Court of Appeals, Molly Francis, J., held that:

- (1) resident's allegations were sufficient to state a claim that city violated TOMA, and
- (2) resident's TOMA claims were not mooted by city ordinance that repealed the two ordinances forming the basis of the claims.

Affirmed.

1. Appeal and Error ◊70(3)

City council members sued in their individual capacities were entitled to appeal an interlocutory order denying a plea to the jurisdiction that was based on sovereign immunity.

2. Pleading ◊104(1)

A plea to the jurisdiction based on sovereign immunity challenges a trial court's jurisdiction.

3. Appeal and Error ◊893(1)

A plea questioning the trial court's jurisdiction raises a question of law that the Court of Appeals reviews de novo.

4. Appeal and Error ◊863

In reviewing a trial court's ruling on a plea to the jurisdiction, the appellate court focuses first on the plaintiff's petition to determine whether the facts pled affirmatively demonstrate that jurisdiction exists.

5. Appeal and Error ◊916(1)

In reviewing a trial court's ruling on a plea to the jurisdiction, the Court of Appeals construes the pleadings liberally, looking to the pleader's intent.

6. Pleading ◊111.48

In the context of ruling on a plea to the jurisdiction, if the pleadings are insufficient to establish jurisdiction but do not affirmatively demonstrate an incurable defect, the plaintiff should be afforded the opportunity to replead.

7. Pleading ◊111.36

In some instances, a plea to the jurisdiction may require the court to consider evidence pertaining to jurisdictional facts.

8. Pleading ◊104(1), 111.43

A plea to the jurisdiction should not be granted if a fact issue is presented as to the court's jurisdiction, but if the relevant undisputed evidence negates jurisdiction, then the plea to the jurisdiction must be granted.

9. Administrative Law and Procedure
◊124

Texas Open Meetings Act (TOMA) is intended to provide public access to and increase public knowledge of government decision making. V.T.C.A., Government Code § 551.002 et seq.

10. Administrative Law and Procedure
◊124

Texas Open Meetings Act (TOMA) is not a legislative scheme for service of process and has no due process implications; rather, its purpose is to provide openness at every stage of a governmental body's deliberations. V.T.C.A., Government Code § 551.002 et seq.

11. Administrative Law and Procedure
◊124

The legal counsel exception to the Texas Open Meetings Act (TOMA) is an affirmative defense on which the governmental entity bears the burden of proof. V.T.C.A., Government Code § 551.071.

12. Administrative Law and Procedure
⌘124

The notice required to be provided by the governmental body under the Texas Open Meetings Act (TOMA) must be sufficiently specific to alert the general public to the topics to be considered at the upcoming meeting. V.T.C.A., Government Code § 551.041.

13. Administrative Law and Procedure
⌘124

Provisions of the Texas Open Meetings Act (TOMA) are mandatory and are to be liberally construed in favor of open government. V.T.C.A., Government Code § 551.002 et seq.

14. Evidence ⌘48

Court of Appeals would not take judicial notice of the agenda for a city council meeting so as to enable city to defeat resident's claim of lack of notice violation of the Texas Open Meetings Act (TOMA); agenda was subject to reasonable dispute. V.T.C.A., Government Code § 551.041; Rules of Evid., Rule 201.

15. Municipal Corporations ⌘92

Resident's allegations that city met in closed door meetings to negotiate, draft, agree upon, and revise an ordinance were sufficient to state a claim that city violated the Texas Open Meetings Act (TOMA). V.T.C.A., Government Code § 551.002 et seq.

16. Evidence ⌘32

Court of Appeals would take judicial notice of city ordinance, which ordinance was verified by city secretary, in determining whether the ordinance mooted resident's Texas Open Meetings Act (TOMA) claims against city. V.T.C.A., Government Code § 551.002 et seq.; Rules of Evid., Rule 204.

17. Action ⌘6

The "mootness" doctrine dictates that courts avoid rendering advisory opinions by only deciding issues that present a live controversy at the time of the decision.

See publication Words and Phrases for other judicial constructions and definitions.

18. Action ⌘6

An issue becomes "moot" when it appears that one seeks to obtain a judgment on some controversy, which in reality does not exist, or when one seeks a judgment on some matter which, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy.

19. Municipal Corporations ⌘92

Resident's Texas Open Meetings Act (TOMA) claims against city were not mooted by city ordinance that repealed the two ordinances forming the basis of the claims; city could be compelled, as a remedy still available, to disclose records relating to the meetings at which repealed ordinances were discussed and agreed upon. V.T.C.A., Government Code § 551.002 et seq.

20. Appeal and Error ⌘173(1)

City failed to preserve for appellate review its argument that resident lacked a valid cause of action under the Texas Open Meetings Act (TOMA) due to city's subsequent ratification of challenged ordinances, where the city did not present the argument in its plea to the jurisdiction before the trial court. V.T.C.A., Government Code § 551.002 et seq.; Rules App.Proc., Rule 33.1(a).

Trey Dowdy, P. Michael Jung, Scott Allen Shanes, Strasburger & Price, L.L.P., Dallas, for Appellant.

William A. Brewer, III, James S. Renard, C. Durham Biles, Bickel & Brewer, Dallas, TX, for Appellee.

Before Justices RICHTER, FRANCIS, and LANG-MIERS.

OPINION

Opinion by Justice FRANCIS.

Guillermo Ramos sued the City of Farmers Branch and Bob Phelps, Tim O'Hare, Bill Moses, Charlie Bird, James Smith, and Ben Robinson, each in his official capacity, after the City Council adopted two controversial ordinances Ramos alleged violated the Texas Open Meetings Act (TOMA). Appellants filed a plea to the jurisdiction seeking dismissal of the lawsuit on sovereign immunity grounds, and the trial court denied the plea. Appellants brought this interlocutory appeal under section 51.014(a)(8) of the Texas Civil Practice and Remedies Code.

In three issues, appellants contend the trial court erred in denying their plea because (1) Ramos's suit fails to plead sufficient facts to assert a valid cause of action under TOMA and overcome their sovereign immunity; (2) Ramos's claims are moot; and (3) no valid cause of action exists based upon subsequent ratification. For reasons set out below, we reject all arguments and affirm the trial court's order.

On November 13, 2006, the Farmers Branch City Council adopted two ordinances, numbered 2892 and 2893. Ordinance 2892 mandated that owners and/or property managers of apartment complexes require proof of citizenship or eligible immigration status for prospective tenants. Ordinance 2893 was directed at property maintenance and required, among other things, that flower pots and other landscape receptacles contain living plants. Opponents denounced the ordinances as

illegally targeting the city's Hispanic population.

Three weeks later, Ramos filed this lawsuit asserting that appellants enacted the ordinances in violation of the Texas Open Meetings Act. Ramos alleged that appellants deliberated on and agreed upon both ordinances in closed meetings in violation of TOMA. Ramos also alleged that the notice for the vote on Ordinance 2892 was insufficient. Ramos sought injunctive and declaratory judgment relief as well as attorney's fees. Appellants denied the allegations and filed a plea to the jurisdiction, asserting that Ramos failed to plead sufficient facts to establish a valid TOMA violation.

While the plea to the jurisdiction was pending, Ramos and other residents presented the City with a petition, signed by more than ten percent of the registered voters, seeking either repeal of Ordinance 2892 or a public vote. On January 8, 2007, appellants adopted Ordinance 2900, which submitted the rental ordinance for a public vote. Nine days later, appellants adopted ordinance 2903, which repealed both Ordinances 2892 and 2900, restated the substance of the rental ordinance, and called a public vote for May 2007. During the time in which appellants took these actions, the trial court conducted several hearings on matters related to this lawsuit, including the plea to the jurisdiction. Although appellants did not amend their plea, they notified the trial court of repeal of Ordinance 2892 in a status conference in late January. One week later, the trial court denied appellants' plea to the jurisdiction.

[1] We begin by addressing Ramos's contention that we do not have jurisdiction over the individual council members sued in their official capacity. Relying on this Court's opinion in *Dallas County Community College District v. Bolton*, 990 S.W.2d

465, 467 (Tex.App.-Dallas 1999, no pet.), Ramos argues that because the individual defendants are not “governmental units,” they are not entitled to an interlocutory appeal. Three days after this appeal was argued and submitted, the Texas Supreme Court addressed the precise issue presented and concluded that a person sued in an official capacity, as here, may appeal an interlocutory order denying the jurisdictional plea. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843 (2007, no pet. h.). Accordingly, we have jurisdiction over the mayor and council members.

[2-8] Turning to the appeal, in their first issue, appellants argue the trial court improperly denied their jurisdictional plea because Ramos’s pleadings fail to allege facts constituting a TOMA violation. A plea to the jurisdiction based on sovereign immunity challenges a trial court’s jurisdiction. *State v. Holland*, 221 S.W.3d 639, 642 (Tex.2007). A plea questioning the trial court’s jurisdiction raises a question of law that we review de novo. *Id.* We focus first on the plaintiff’s petition to determine whether the facts pled affirmatively demonstrate that jurisdiction exists. *Id.* We construe pleadings liberally, looking to the pleader’s intent. *Id.* If the pleadings are insufficient to establish jurisdiction but do not affirmatively demonstrate an incurable defect, the plaintiff should be afforded the opportunity to replead. *Id.* In some instances, a plea to the jurisdiction may require the court to consider evidence pertaining to jurisdictional facts. *Id.* A plea should not be granted if a fact issue is presented as to the court’s jurisdiction, but if the relevant undisputed evidence negates jurisdiction, then the plea to the jurisdiction must be granted. *Id.*

[9,10] TOMA is intended to provide public access to and increase public knowledge of government decision making. *City of San Antonio v. Fourth Court of Ap-*

peals, 820 S.W.2d 762, 765 (Tex.1991) (orig.proceeding); *City of Laredo v. Escamilla*, 219 S.W.3d 14, 18 (Tex.App.-San Antonio 2006, pet. denied). It “is not a legislative scheme for service of process; it has no due process implications. Rather, its purpose is to provide ‘openness at every stage of [a governmental body’s] deliberations.’” *City of San Antonio*, 820 S.W.2d at 765 (quoting *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 300 (Tex.1990)); *City of Laredo*, 219 S.W.3d at 18. TOMA therefore mandates that “every regular, special, or called meeting of a governmental body shall be open to the public,” with certain narrowly drawn exceptions. TEX. GOV’T CODE ANN. §§ 551.002, 551.071-.088 (Vernon 2004 & Supp.2006); *City of Laredo*, 219 S.W.3d at 18. A “meeting” includes any deliberation involving a “quorum” or majority of the members of a governing body at which they act on or discuss any public business or policy over which they have control. *Id.* at § 551.001(4)(A) (Vernon 2004).

[11] One exception to open meetings allows a governmental body to privately consult with its attorney when it is seeking advice about pending or contemplated litigation or a settlement offer or on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with TOMA. TEX. GOV’T CODE ANN. § 551.071 (Vernon 2004). This exception is an affirmative defense on which the governmental entity bears the burden of proof. *Olympic Waste Servs. v. City of Grand Saline*, 204 S.W.3d 496, 504 (Tex. App.-Tyler 2000, no pet.).

[12,13] TOMA requires a governmental body to give notice of the date, hour, place, and subject of each meeting. TEX. GOV’T CODE ANN. § 551.041. The notice pro-

vided by the governmental body must be sufficiently specific to alert the general public to the topics to be considered at the upcoming meeting. *Cox Enterps., Inc. v. Bd. of Trus.*, 706 S.W.2d 956, 959 (Tex. 1986). The provisions of TOMA are mandatory and are to be liberally construed in favor of open government. *Willmann v. City of San Antonio*, 123 S.W.3d 469, 473 (Tex.App.-San Antonio 2003, pet. denied).

With respect to Ordinance 2892, Ramos alleged appellants violated TOMA by (1) failing to properly notice the City Council meeting of November 13, 2006 and (2) drafting, deliberating, debating, and agreeing upon the ordinance behind closed doors. We begin with notice.

[14] In his amended petition, Ramos alleged that “the agenda for the November 13, 2006 City Council meeting, which was purportedly posted on the bulletin board at Farmers Branch City Hall on Friday, November 10, 2006 at 1:30 p.m., did not mention or otherwise describe the Ordinance—although numerous other proposed ordinances and resolutions are specifically identified therein.”

Appellants assert proper notice was given and, as evidence, rely not on the agenda, but the City Council minutes of the meeting. The minutes of the meeting, however, cannot negate allegations that the *agenda* failed to provide sufficient notice. Although appellants have attached a copy of the agenda as an exhibit to their brief, attachments to a brief are not evidence before the court. *Elk River, Inc. v. Garrison Tool & Die, Ltd.*, 222 S.W.3d 772, 788 (Tex.App.-Dallas 2007, pet. filed).

To the extent appellants request this Court to take judicial notice of the November 13 agenda, we decline to do so. Texas Rule of Evidence 201 provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial ju-

risdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. TEX.R. EVID. 201; *Dallas Co. Constable Pct. 5 Michael Dupree v. KingVision Pay-Per-View, Ltd.*, 219 S.W.3d 602, 613 (Tex.App.-Dallas 2007, no pet.). The agenda for the November 13 meeting does not fall within either category. Ramos’s petition sufficiently states a claim for a notice violation under TOMA, and we reject appellants’ assertion otherwise.

[15] With respect to closed door deliberations, Ramos alleged the following:

Notably, Defendants, with a quorum present and/or in an effort to circumvent the requirements of TOMA, engaged in closed sessions and otherwise secret deliberations during which the provisions of Ordinance 2892 were drafted, deliberated, negotiated, debated, and agreed upon. Among other things, during these secret deliberations, Defendants discussed the need and importance of there being a unanimous vote by the City Council in support of Ordinance 2892. In order to obtain this unanimity and to evade TOMA, it is now evident that, behind closed doors, Ordinance 2892 was negotiated, modified, and revised to secure the votes of all Defendants. Indeed, the unanimous vote in favor of Ordinance 2892 was secured in these secret meetings through, among other things, an agreement to exclude public libraries and recreation centers from the English-as-an-official-language resolution. In fact, Mayor Phelps admits that in closed session and through serial secret conversations, Defendants deliberated on Ordinance 2892 and discussed how they would vote on the Ordinance. Thus, when the City Council voted publicly on Ordinance 2892, the

vote was merely a rubber-stamp of Defendant's agreement reached in secret. Tellingly, it was only *after* the vote on Ordinance 2892 that the floor was opened for public discussion.

Defendants have thwarted the residents of Farmers Branch's right to know how and why their government passed Ordinance 2892 by: (1) failing to provide adequate notice that the Ordinance would be considered at the meeting on November 13, 2006; and (2) drafting, negotiating, deliberating, and in fact, agreeing upon Ordinance 2892 behind closed doors, in violation of TOMA. No debate occurred at the open meeting because Ordinance 2892 had already been agreed to during Defendants' improperly-closed and otherwise secret deliberations. The subsequent public vote on Ordinance 2892 was merely a confirmation of the deliberations and decisions already reached behind closed doors.

In their brief, appellants rely on the attorney consultation exception to open meetings, apparently because there was some threat of litigation at an earlier council meeting. Appellants argue that TOMA does not prohibit the expression of opinions in a closed executive session as long as the vote or final decision is made in open session. Specifically, they urge that the "only affirmative claim of an allegedly improper discussion is the allegation that '[appellants] discussed the need and importance of there being a unanimous vote by the City Council.'" They contend that even if true, such activity "does not constitute more than an expression of opinion at most."

While we agree with the general proposition that TOMA does not prohibit expression of opinions in proper, closed meetings, we first question whether appellants even made a showing that a closed

executive session was proper. Our record does not contain evidence of the threat of litigation, when it was made, or its scope. (In fact, at the hearing, Ramos's counsel asserted that Ordinance 2892 had not been conceived or drafted at the time of the alleged threat, therefore suggesting it could not have been the subject of the threat.) Given that the exception is an affirmative defense, it was appellants' burden to conclusively show its application.

Regardless, even assuming the exception applied and having read Ramos's allegations, we cannot agree that Ramos's allegations constitute nothing more than "expression of opinion." Ramos alleged that the City, in closed meetings, "drafted, deliberated, negotiated, debated, and agreed upon" the provisions of the ordinance and then "negotiated, modified and revised" the ordinance to "secure the votes" of appellants. Further, Ramos alleged that the public vote was no more than a rubberstamp of the "agreement reached in secret." These allegations, if true, suggest appellants acted outside the lawful bounds of an executive session and would constitute more than an expression of opinion. We conclude these allegations are sufficient to state a claim for violation of TOMA with respect to Ordinance 2892.

As for Ordinance 2893, appellants argue Ramos's TOMA claim is based on the allegation that appellants met together in "unnoticed and unscheduled meetings to discuss the proposed ordinance." Appellants assert that because Ramos did not allege such discussions included a quorum of council members, he has not pleaded sufficient facts to support a TOMA violation. A review of Ramos's pleading, however, belies appellants' claim. Specifically, Ramos alleged that appellants "failed to comply with TOMA in connection with the enactment of [the ordinance] by, with a quorum present and/or in an effort to cir-

cumvent TOMA, drafting, deliberating, and [sic] in fact agreeing upon Ordinance 2893 in closed meetings.” Consequently, appellants’ issue is without merit.

Finally, Ramos also alleged appellants violated TOMA when they adopted Ordinance 2900. In their brief, appellants have not challenged the trial court’s ruling with respect to this ordinance. Consequently, we will not address it. For the reasons stated above, we conclude the trial court did not err in denying appellants’ plea to the jurisdiction for reasons related to the sufficiency of pleadings.

[16] In their second issue, appellants argue the trial court erred in denying their plea because Ramos’s claims with respect to Ordinance 2892 are moot because they repealed the ordinance. As with the previous issue, appellants rely on evidence that they failed to admit below despite the fact it was available, i.e., Ordinance 2903. Appellants again ask that we take judicial notice of the ordinance.

A court, upon the motion of a party, shall take judicial notice of a municipal ordinance, provided the party requesting the notice furnishes the court with sufficient information to comply with the request and the court gives the opposing party an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. TEX. R. EVID. 204; *Flores v. State*, 33 S.W.3d 907, 914 (Tex.App.-Houston [14th Dist.] 2000, pet. ref’d). Here, appellants provided the Court with a copy of the ordinance, verified by the city secretary. Thus, given rule 204, we take judicial notice of Ordinance 2903.

[17, 18] The mootness doctrine dictates that courts avoid rendering advisory opinions by only deciding issues that present a “live” controversy at the time of the decision. *Camarena v. Tex. Employment*

Comm’n, 754 S.W.2d 149, 151 (Tex.1988); *Young v. Young*, 168 S.W.3d 276, 287 (Tex. App.-Dallas 2005, no pet.). An issue becomes moot when (1) it appears that one seeks to obtain a judgment on some controversy, which in reality does not exist or (2) when one seeks a judgment on some matter which, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy. *Young*, 168 S.W.3d at 287.

[19] Ramos contends that repeal of Ordinance 2892 does not moot the issue because the question remains as to whether appellants violated TOMA and, if so, what remedial relief should be entered. In particular, Ramos argues that while repeal of the ordinance “may obviate the need to void the ordinance, it does not remedy [a]ppellants’ breach of their duties owed to residents of Farmers Branch under TOMA—namely, the public’s right ‘not only to know what government decides but to observe how and why every decision is reached.’” Ramos argues that the trial court could declare that appellants violated TOMA and compel them to disclose to the public all transcripts, minutes, recordings, and other evidence of closed meetings as well as require appellants to comply with TOMA in the future. At the hearing on the plea, appellants’ counsel, who is also the assistant city attorney, represented that there were no recordings of the executive session but that a certified agenda, under seal, did exist. See TEX. GOV’T CODE ANN. § 551.103.

While making no comment on whether a violation has in fact occurred or any particular remedy that should be enforced should the trial court find a violation, we agree with Ramos. If a governmental body illegally deliberates and decides an issue in closed session, repealing the action so that it can be retaken in a later setting does not vindicate the very right

protected by TOMA. As stated by our supreme court: "Our citizens are entitled to more than a result. They are entitled not only to know what government decides but to observe how and why every decision is reached." *Acker*, 790 S.W.2d at 300. Accordingly, we conclude that Ramos's request for a declaration that appellants violated the statute, coupled with the potential remedy involving the certified agenda, establishes that this issue is not moot. We overrule the second issue.

[20] In their third issue, appellants argue the trial court erred in denying their plea to the jurisdiction because no valid cause of action exists based upon subsequent ratification. Specifically, appellants argue that any TOMA violation can be ratified by and through subsequent action by a governmental entity. This issue was not raised in appellants' plea to the jurisdiction and, therefore, is not properly before this Court. See TEX.R.APP. P. 33.1(a). Regardless, appellants' contention seems to be an extension of their mootness argument that we have previously rejected. Accordingly, we overrule the third issue.

We affirm the trial court's order.



Robert Walter FISCHER, Appellant

v.

The STATE of Texas, Appellee.

No. 04-05-00834-CR.

Court of Appeals of Texas,
San Antonio.

Oct. 24, 2007.

Background: Defendant was convicted in a jury trial in the 226th Judicial District

Court, Bexar County, Sid L. Harle, J., of murder. Defendant appealed.

Holdings: The Court of Appeals, Rebecca Simmons, J., held that:

- (1) evidence was insufficient to admit extraneous offense of theft of alleged murder weapon, and
- (2) error in admission of extraneous offense evidence was reversible error.

Reversed and remanded; motion for rehearing denied.

Phylis J. Speedlin, J., dissented and filed opinion.

1. Criminal Law ⇨1153(1)

A trial court's actions as to the admissibility of extraneous offense evidence is reviewed under an abuse of discretion standard; as long as the trial court's ruling is within the zone of reasonable disagreement and is not arbitrary or unreasonable, there is no abuse of discretion and the trial court's ruling will be upheld.

2. Criminal Law ⇨369.2(1)

Extraneous offense evidence is admissible if the trial court determines: (1) the evidence is relevant to a material issue in the case; (2) the evidence is relevant apart from character conformity; and (3) the probative value of the evidence substantially outweighs the danger of unfair prejudice.

3. Criminal Law ⇨374

In deciding whether to admit extraneous offense evidence, the trial court must make an initial determination, at the proffer of the evidence, that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense. Rules of Evid., Rule 104(b).