

Plaintiff will refer to each of the statements set forth in the Affidavits submitted by Defendants

II. EVIDENTIARY SUPPORT

Plaintiff is in agreement with said Defendants' statement of the nature of the case in question.

I. NATURE OF THE CASE

Plaintiff, Plaintiff, DAVID P. GRIFFIN, and in response to City of Austin and Rondella Hawkins, in both her official and individual capacities, to their Plea to the Jurisdiction and Motion for Summary Judgment and alternatively, Defendants offer of Special Exception to Plaintiff's original petition seeking the Court to order plaintiff to replaced prior to the Court's exercising jurisdiction over plaintiff's claims, states as follows:

Comes now, Plaintiff, DAVID P. GRIFFIN, and in response to City of Austin and Rondella Hawkins, in both her official and individual capacities, to their Plea to the Jurisdiction and Motion for Summary Judgment and alternatively, Defendants offer of Special Exception to Plaintiff's original petition seeking the Court to order plaintiff to replaced prior to the Court's exercising jurisdiction over plaintiff's claims, states as follows:

This matter having come on for hearing on December 15, 2009 and the Court granting Plaintiff's Motion to Continue as to the response to Defendant City of Austin ("COA") and Rondella Hawkins ("Hawkins") giving Plaintiff until Thursday, December 17, 2009 to respond,

TO THE HONORABLE JUDGE OF SAID COURT:

PLAINTIFF'S RESPONSE TO DEFENDANTS CITY OF AUSTIN AND RONDELLA HAWKINS' PLEAS TO THE JURISDICTION, MOTION FOR SUMMARY JUDGMENT AND ALTERNATIVELY, SPECIAL EXCEPTIONS

	§	
	§	Defendants.
	§	
	§	Television
	§	Members of Public Access Community
TRAVIS COUNTY, TEXAS	§	HELENE CAUDILL, individually and as Board
	§	DEBORAH L. HILL, TRINA DENLEY,
	§	LIMEI PALOMU, DANIEL SCARDINO,
	§	GOODMAN, CELIA HUGHES, EMANUEL,
	§	Television, CATHY BEAUDOIN, JACKIE
	§	Executives of Public Access Community
	§	and LINDA LITOWSKY, individually, and as
	§	CHANNEL AUSTIN, GARRY WILKISON
	§	ACCESS COMMUNITY TELEVISION aka
	§	employee of the City of Austin, PUBLIC
126 th JUDICIAL DISTRICT	§	HAWKINS, individually and as an
	§	CITY OF AUSTIN, RONDELLA
	§	
	§	vs.
	§	
	§	Plaintiff,
IN THE DISTRICT COURT	§	David P. Griffin

As previously set forth herein, Plaintiff concedes that he does not meet the prerequisites necessary to file a claim under the Texas Whistleblower Statute as he acknowledges that his employment was with a Contractor for the City and not the City itself. However, as previously set forth herein due to the contractual relationship between PACT and the City, the City of Austin breached its fiduciary duty. Ms. Hawkins states that she oversees "employees in the areas of cable TV and utility franchise management, utility ratemaking, oversight of the public access TV management contract, management of City's community technology initiative and collections/claims services" (cited Rondella Hawkins, Affidavit,

A. Whistleblower Act Replaced by Breach of Fiduciary Duty

If Defendants motion to dismiss Defendants COA and Hawkins pursuant to Texas Rules of Civil Procedure § 101.106 is granted, such action would in effect deny Plaintiff's constitutional rights to seek restitution from someone who has harmed him. With no investigation, no discovery only the claims of the defendants of being innocent with no proof no discovery no trial at this time, summary judgment should not replace a trial, or the wisdom of a jury delivering the facts after discovery is permitted in the normal course.

IV. MOTION FOR SUMMARY JUDGMENT

In summary, as has been pled above, there are no jurisdictional defects with regards to Plaintiff's claims herein.

Plaintiff Negates there are Jurisdictional Defects

litigation. action in an effort to exhaust all efforts in doing his due diligence to resolve this matter before resorting to remedies. However, as set forth above under IV Motion for Summary Judgment herein, and as evidenced by Plaintiff's affidavit attached hereto, Plaintiff, as a normally prudent person, did in fact take all necessary herein also indicate that Plaintiff as an employee of PACT did not exhaust all of his administrative point is moot but contends that jurisdiction is relevant as to breach of fiduciary duty. The Defendants claim under the Whistleblower Act, Plaintiff is withdrawing his claim of whistleblower and therefore the Whistleblower Act and Breach of Fiduciary Duty - Jurisdiction Questions Regarding the

come within the definition of governmental immunity. the current circumstances in that the actions complained of herein against COA and HAWKINS does not

A. Immunity: Plaintiff claims herein that immunity for the Defendants herein is not valid in

III PLEA TO THE JURISDICTION

Affidavit of David P. Griffin

herein in support of their Plea to the Jurisdiction and Motion for Summary Judgment, and in addition thereto, will submit the following affidavits in support of Plaintiff's claims and response herein:

Exhibit B, to Defendant City of Austin, Defendants City Of Austin and Rondella Hawkins' Plea To The

Jurisdiction, Motion For Summary Judgment And, Alternatively, Special Exceptions). Ms. Hawkins and

the City of Austin breached their fiduciary duty to the public and Plaintiff herein by doing the following:

1. Failing to report or investigate a crime, specifically theft of City property, although the

PACT-CITY contract (Sec. 35) specifically states that "The Contractor shall comply with all applicable laws, rules, regulations, procedures and policies, of the Federal, State and local governments" which includes criminal theft of property in violation of

Texas Rules of Civil Procedure, § 6.01. REQUIREMENT OF VOLUNTARY ACT OR

OMISSION. c) A person who omits to perform an act does not commit an offense unless a law as defined by Section 1.07 provides that the omission is an offense or otherwise provides that he has a duty to perform the act.

2. By permitting City property to be illegally sold by PACT (their Contractor) to third Parties, in violation of

Texas Rules of Civil Procedure, § 6.01. REQUIREMENT OF VOLUNTARY ACT OR

OMISSION b) Possession is a voluntary act if the possessor knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.

3. By negligently permitting the facilities of PACT to fall below industry standards;

4. By failing to pursue remedies available after it was disclosed in a City audit that Time Warner for years had been under-reporting revenues due the City;

5. By condoning forgery of documentation for personal gain, in violation of

Texas Penal Code §32.32 FALSE STATEMENT TO OBTAIN PROPERTY OR

CREDIT - (a) For purposes of this section, "credit" includes: (2) furnishing property or service on credit; (4) co-making, endorsing, or guaranteeing a note or other instrument for obtaining credit; (b) A person commits an offense if he intentionally or knowingly makes a materially false or misleading written statement to obtain property or credit for himself or another. (c) An offense under this section is: (4) a state jail felony if the value of the property or the amount of credit is \$1,500 or more but less than \$20,000; AND

Texas Penal Code §32.21 **FORGERY** - (a) For purposes of this section:

(1) "Forge" means:

(A) to alter, make, complete, execute, or authenticate any writing so that it purports:

(i) to be the act of another who did not authorize that act;

(ii) to have been executed at a time or place or in a numbered sequence other than was in fact the case; or

(iii) to be a copy of an original when no such original existed;

(B) to issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged within the meaning of Paragraph (A); or

(C) to possess a writing that is forged within the meaning of Paragraph (A) with intent to utter it in a manner specified in Paragraph (B).

(2) (A) printing or any other method of recording information;

b) A person commits an offense if he forges a writing with

intent to defraud or harm another; AND

In order to prove breach of a fiduciary relationship, the plaintiff must show that the defendant breached the duty created by the relationship and that the defendant was the plaintiff's fiduciary. The fiduciary duty in issue cannot extend to matters "beyond the underlying relationship of the parties." The plaintiff must also show that the defendant's breach of the duty resulted in an injury to the plaintiff or in a benefit to the defendant even if the plaintiff suffered no loss. There is an equitable presumption of unfairness when parties under a fiduciary relationship enter into a transaction and one of the parties does not benefit or profit from the relationship and the other does. When the presumption of unfairness is made, the burden to prove the transaction was fair and to produce evidence of the fairness shifts to the party seeking to enforce the agreement (the fiduciary).

Formal as well as informal relationships give rise to a fiduciary relationship.

In describing the elementary nature of a fiduciary relationship, the Texas Supreme Court wrote in *Texas Bank & Trust, v. A. E. Moore*: "When persons enter into fiduciary relations each consents, as a matter of law, to have his conduct towards the other measured by the standards of the fieri loyalties exacted by courts of equity. That is a sound rule and should not be whittled down by exceptions. If the existence of strained relations should be suffered to work an exception, then a designing fiduciary could easily bring about such relations to set the stage for a sharp bargain... mischief would result more often from engraving exceptions upon the general rule than from a strict adherence thereto." The Court also stated in an earlier case: "the term 'fiduciary' is derived from the civil law and contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. Further, the term [fiduciary] includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations."

A fiduciary duty is a special type of duty owed where there has been a special relationship created between individuals or between an individual and an entity. This special duty is not created by an agreement between the parties, but simply by the nature of the relationship. When that special duty has been breached, a cause of action may ensue to recoup damages resulting from the breach. To prosecute a case of breach of fiduciary duty, one is not necessarily obligated to prove there existed an agreement between the parties that formed the fiduciary relationship, but show the existence of a special duty and the breach of it. The fiduciary relationship can be formed by agreement, but can also be formed by the existence of a special relationship between the parties. Texas case law has defined a fiduciary relationship to be "when a person is under a duty, created by law or contract, to act on or give advice for the benefit of another within the scope of the relationship," that person has a fiduciary relationship with the other person. Whether a person has a fiduciary duty is a factual question.

Associates, P.C.:

Quoting from the Business Law: Breach of Fiduciary Duty by Business Law Attorneys at Garg &

documentation, all resulting in loss of City property. investigate the theft or City property and condoning criminal acts of Defendant Wilkison in forging The City of Austin breached its fiduciary duty to the public by failure to act in a timely manner to

Code of Criminal Procedure Chapter 12. 01. Felonies
(B) theft by a public servant of government property over which he exercises control in his official capacity.

B. Defendant Hawkins' Official Immunity.

A fiduciary relationship was established in normal course between the City of Austin ("COA") and its citizens to uphold the law. As a citizen and a producer at PACT, the fiduciary responsibility was breached when the citizen (the Plaintiff herein) complained of criminal activity first to the Board of Directors of PACT, then to Rondella Hawkins, the Contract Manager and thereafter the Austin Police Chief and Austin City Mayor. However no action was taken by said authorities despite repeated attempts by Plaintiff to bring it to their attention. When the COA failed to acknowledge the thefts reported, it broke its fiduciary responsibility to protect the assets of the City from being squandered by third parties. COA failed its fiduciary responsibility to the citizens of Austin when it failed to maintain public facilities by permitting the facility to fall behind on Texas Building Code Violations via no fire alarms or sprinkler systems in the public building, and no working security system. COA broke its fiduciary responsibility to its citizens by failing to properly monitor the financial activities of Time Warner resulting in financial loss to the City. Despite the fact that Rondella Hawkins as Contract Manager of PACT was made aware that certain documents were being forged for personal gain by PACT management (Gary Wilkison), the COA did indeed breach its fiduciary responsibility by failing to take appropriate action. By failing to take action, the COA and Rondella Hawkins became conspirators with PACT management in the commission of a crime similar to that set forth in the criminal case of Showery v. State noted above, by permitting personal financial gain to be had by third parties by illegally disposing of City assets. Pursuant to Texas law, Rondella Hawkins despite the fact that she did not profit personally from actions of PACT management did breach her fiduciary duty to the City by concealing this illegal activity from her superiors.

Missapplication of fiduciary property can be considered a crime under Texas Penal Code §32.45. In pertinent part, the statute reads: "A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held." The severity of penalties for such actions is commensurate to the value of the misappropriated funds. Additionally, if the crime was committed against an elderly person, the penalty is increased to the next higher category.

In the criminal case of Showery v. State, 678 S.W.2d 103 (Tex.App. – El Paso 1984, pet. ref'd.), Showery, a doctor, provided services to the complainant and promised her help with getting a refund of her payment by filing the necessary insurance paperwork. Dr. Showery informed the complainant that her payments to him were payments in full. However, Dr. Showery made claims to the insurer that far exceeded the amounts paid by the complainant. The insurer denied most of the claim, but paid the doctor at least the sums collected from the complainant. Dr. Showery deposited the claim checks into his account, but did not refund any money to the complainant. Dr. Showery was found to be the complainant's fiduciary and she was found to be the beneficiary. The court stated "[w]hen [Dr. Showery] received the funds from Prudential, he held them in trust for the benefit of the complainant. This trust arose from the original contract for services, the fees paid and the claim for insurance reimbursement. By depositing these proceeds in his business bank account and refusing to tender them to his patient, he breached a fiduciary obligation and imposed continuing loss upon the beneficiary." Dr. Showery was convicted under the statute and given four years in prison. His grounds on appeal were overturned and the 4-year sentence was upheld.

Defendant Hawkins is claiming official immunity citing case law that pertains to a governmental

employee's entitlement to official immunity "for the good faith performance of discretionary duties taken in the course and scope of her authority" which holds true as to her governmental duties as a City employee providing vital services to the public. However, the Texas tort claims act clearly states that Miss Hawkins activities were not covered. Providing cable access communications isn't an essential service that the City has to perform, but implies that it is necessary for the betterment of the community. This makes Miss Hawkins and the City liable. The City has taken part in a joint venture that they have complete and utter control over, according to the contract signed by the City and the contractor Public Access Community Television. This contract clearly binds the two together. The contract states hours of operations, salaries to be paid reports have to be made inspections are allowed at any time, all their assets in the bank accounts can frozen, all copyrighted material, all royalties are paid to the City for anything PACT creates. This clearly states how the City has utter control of PACT which is in a city own building on city property with city own assets and promoted with the cities blessing of operation as a city entity. In communications on the City's website indicates that Public Access Community Television is a part of the City and how proud the City is of its long history. No where on the City website does the City indicate that Public Access is really a third party and not part of the City.

The City contends that public access is a vital part of their City and everyone is welcome and everyone has free speech, except for anyone who complains about the illegal activity, management or how inadequate the City has proven to be over the years. These complainants are not wanted and if one does take legal action, you will be barred from using public facilities that receive public funding and its primary function is for freedom of speech unless it is against PACT or the City. Management claims that they are a privately owned corporation and can therefore refuse to do business with anyone that it chooses.

Public Access is a one of a kind and a monopoly run by the city. There is no other facility in the City where you can receive these services. There are private industries that provide similar services but the cost for the individual would go up over 3000%, whereas the services intended to be provided by public access, it only costs a few hundred dollars to produce a show that would be tens of thousands of dollars to produce in the private sector. This is why Public Access is a monopoly and one of a kind as the city alleges. When Linda Litowsky turns people away, she is denying them access to public property and public resources, and when that conduct is condoned by the City and Hawkins. both the City and Hawkins violated a fiduciary duty between herself and the City of Austin and its citizens. It appears to Plaintiff that it is a hypocrisy to use public funds to generate free speech but snatch that right of free speech away, with the same funds and public interests that are spent defending lawsuits of wrong doing by city officials and private contractors that they have contracted with.

Plaintiff intends to show Hawkins has and is grossly incompetent in performing her duties. The

A governmental employee engaged in the performance of a public duty can be held civilly liable if he acts in a wrongful, oppressive, or illegal manner. Whether public servants enjoy immunity from liability for their torts is a question distinct from that of the immunity of the sovereign itself. Section 101.026 of the Tort Claims Act provides that to the extent an employee has individual immunity from a tort claim for damages, the employee is entitled to his immunity defense, i.e., the Tort Claims Act does not abrogate the official immunity which Texas Courts have long bestowed upon public officers

THE TEXAS TORT CLAIMS ACT - INDIVIDUAL IMMUNITY FROM LIABILITY

The allegations of violation of freedom of speech is a Constitutional right and if this Court feels with regard to this allegation jurisdiction would be Federal in nature, Plaintiff will request to have this action remanded to the federal court.

open records request.

In all my years as a journalist I've seen many requests for open records have never seen a City or a government body so inadequate to respond to these requests to the point it surely violates federal law under attempt to justify the expenditures.

An open records request was not performed properly and information deliberately doctored and/or omitted, and the documentation received by Plaintiff had hand written explanations on the documents in an of her duties, she failed to report criminal activities and participated in a cover-up.

In the newspaper article on September 22, 2006, Rondella Hawkins states that the condition is deplorable and it needs to be quickly repaired. When she requested \$1.9 million due, Time Warner flatly refused to pay. It took years for the City to finally recover the money contractually owed to it from Time Warner. Via a newspaper article dated March 15, 2008, it was noted that Time Warner had still not paid the money and that management stated that the place and equipment were in desperate need of repair. To Plaintiff's knowledge, Ms. Hawkins spent over 3 years demanding the money owned and it was finally paid in the spring of 2008. Ms. Hawkins is in direct control of PACT and all of these things happened under her watch. Hawkins is responsible for the activities that she had domain over. However, in direct dereliction of her duties, she failed to report criminal activities and participated in a cover-up.

Former management stole hundreds of thousands of dollars. Grande record speaks for itself. Current management is involved in

Communication failed to pay over \$2.1 million owed to the city. Current management is involved in litigation, with numerous complaints having been filed against them by private citizens. Audit reports show Time Warner has been cheating the city on revenue for years. Reports will show the City has neglected the public access building for years and just now has dedicated funds to repair.

Under the English common law, a person could not sue the state for a wrong committed

I. BACKGROUND AND HISTORY

UNDER THE TEXAS TORT CLAIMS ACT POLITICAL SUBDIVISION LIABILITY

Before the enactment of the Tort Claims Act, Texas courts held that a municipality could not be held liable for property damages, personal injury, or death arising from a "governmental function" performed by the municipality. However, municipalities were liable for damages, injuries, or death arising from a "proprietary function," where the courts treated municipalities in the same manner that a private entity would be treated and subjected them to the same risks as private entities.⁴ Trying to distinguish between governmental and proprietary functions based on a reading of court cases was difficult, if not impossible. Generally, governmental functions were those, which the municipality was required by state law to perform in the interest of the public. Proprietary functions were those, which the municipality chose to perform when it believed it would be in the best interest of its inhabitants. Among the operations held to be governmental functions were: garbage disposal, sanitary sewage disposal, police, fire suppression, and traffic regulation. Activities held to be proprietary functions included: construction of sanitary sewer lines; construction, repair, and maintenance of streets; and construction and operation of storm sewer lines.

GOVERNMENTAL FUNCTIONS V. PROPRIETARY FUNCTIONS

THE TEXAS TORT CLAIMS ACT

Texas law is sensitive to the notion that summary judgment should not allow a trial judge to infringe on the jury's role as fact-finder. *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 422 (Tex. 2000). Summary judgment does not allow for a litigant to be deprived of its right to trial by jury. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n.5 (Tex. 1979). Thus, during a summary judgment proceeding, the trial judge should not be asked to weigh evidence. *Huckabee*, 19 S.W.3d at 422. If it's governmental action, they are covered under immunity. The action is not consider government but proprietary function. Public access would not be considered government activity but proprietary activity. I have attached a copy of the tort claim act.

The Texas Supreme Court has held that a governmental entity can waive sovereign immunity under the theory of joint enterprise. *Texas Dept. of Transp. v. Able*, 35 S.W.3d 608 (Tex. 2000).³³ In *Able*, the Court held that if a governmental entity that would otherwise be immune engaged in a joint enterprise whereby the other party was an agent for the governmental entity, the governmental entity would be liable for the agent's negligence as if it were a private person. *Id.* at 613. Therefore, the governmental entity has waived its immunity and is liable if a plaintiff pleads a cause of action under the Tort Claims Act. *Id.* by the governmental entity and serves as a limitation upon the general liability created under Section 101.021.

subdivisions of the State, they also could not perform proprietary functions and had no tort liability until consequently had no tort liability until the Tort Claims Act was enacted. As counties were regarded as legal

4 It should be noted that Texas courts have held that the State performed no proprietary functions and

voters for approval. That amendment, which was approved by voters in November 1987, states:

action, an amendment to Article 1, Section 13 of the Texas Constitution was presented to the

changed to governmental functions by the Legislature. To insure the validity of the legislative

municipalities. Some functions previously held to be proprietary in court decisions were

the Legislature sought to define governmental functions and thereby limit the liability of

sewer lines. As part of the "tort reform" laws passed by the 70th Texas Legislative Session in 1987,

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Before the enactment of the Tort Claims Act, Texas courts held that a municipality could

II. GOVERNMENTAL FUNCTIONS V. PROPRIETARY FUNCTIONS

The Texas Legislature originally enacted it as Tex. Rev. Stat. Art. 6252-19.

Civil Rights Act. 1 Tex. Civ. Prac. & Rem. Code Ann. § 101.001, *et. seq.* (Vernon 2005 & Supp. 2006).

Rights Act. The Tort Claims Act and the liability limits under the Act have no application to the Federal

Rights Act. The United States Constitution and federal laws govern immunity under the Federal Civil

It is not an exhaustive analysis of the Act. The paper does not address liability under the Federal Civil

overview of political subdivision liability under the Tort Claims Act and its waiver of sovereign immunity.

sovereign immunity of governmental units of the state. This paper will provide the reader with an

immunity when it passed the Texas Tort Claims Act. The Act is a partial waiver of the

statutory waiver of immunity. In 1969, the Texas Legislature enacted such a waiver of sovereign

were not liable for the torts of their agents or officers unless there was a constitutional or

courts held that, under the doctrine of sovereign immunity, the state and its political subdivisions

much of the law initially adopted in the United States, this country followed that doctrine. Texas

against that person. The King could do no wrong. Because English common law is the source of

the passage of the Tort Claims Act.

(a) Notwithstanding any other provision of this constitution, the legislature may by law define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law.

(b) This section applies to laws enacted by the 70th Legislature, Regular Session, 1987, and to all subsequent regular or special sessions of the legislature. TEX. CONST. art. 11, § 13.

By the adoption of Texas Civil Practices and Remedies Code Section 101.0215, the Texas

Legislature defined which functions were governmental and which were proprietary. Subsection (a)

provides that a municipality is liable for damages arising from its governmental functions, which are those functions that are enjoined on a municipality by law and are given to it by the state as part of the state's sovereignty, to be exercised by the municipality in the public interest, including, but not limited to:

(1) police and fire protection and control;

(2) health and sanitation services;

(3) street construction and design;

(4) bridge construction and maintenance and street maintenance;

(5) cemeteries and cemetery care;

(6) garbage and solid waste removal, collection, and disposal;

(7) establishment and maintenance of jails;

(8) hospitals;

(9) sanitary and storm sewers;

(10) airports;

(11) waterworks;

(12) repair garages;

(13) parks and zoos;

(14) museums;

(15) libraries and library maintenance;

(16) civic, convention centers, or coliseums;

(17) community, neighborhood, or senior citizen centers;

(18) operation of emergency ambulance service;

(19) dams and reservoirs;

(20) warning signals;

(21) regulation of traffic;

(22) transportation systems;

(23) recreational facilities, including but not limited to swimming pools,

beaches, and marinas;

(24) vehicle and motor driven equipment maintenance;

(25) parking facilities;

(26) tax collections;

(27) firework displays;

(28) building codes and inspection;

(29) zoning, planning, and plat approval;

(30) engineering functions;

(31) maintenance of traffic signals, signs, and hazards;

(32) water and sewer service;

(33) animal control;

(34) community development or urban renewal activities undertaken by

municipalities and authorized under Chapters 373 and 374, Local

Government Code;

(35) latchkey programs conducted exclusively on a school campus under an

interlocal agreement with the school district in which the school campus is

located; and

(36) enforcement of land use restrictions under Subchapter A, Chapter 230,

Local Government Code.

Section 101.0215 provides that the Tort Claims Act does not apply to the liability of a

municipality for damages arising from its proprietary functions, which are those functions that a

municipality may, in its discretion, perform in the interest of the inhabitants of the municipality,

including, but not limited to:

(1) the operation and maintenance of a public utility;

(2) amusements owned and operated by the municipality; and

(3) any activity that is abnormally dangerous or ultrahazardous.⁷

However, Subsection (a) is not an independent waiver of governmental immunity, and

therefore a plaintiff must establish the applicability of the Tort Claims Act under another section,

such as Section 101.021, before relying on Section 101.0215. *Bellnoa v. City of Austin*, 894

S.W.2d 821, 826 (Tex. App.—Austin 1995, no writ); *City of San Antonio v. Winkenhower*, 875

S.W.2d 388, 391 (Tex. App.—San Antonio 1994, writ denied). Further, Section 101.0215(c)

provides that the proprietary functions of a municipality do not include the thirty-six functions

6 Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a) (Vernon 2005 & Supp. 2006).

7 § 101.0215(b).

listed in Section 101.0215(a). For proprietary functions, a political subdivision has the same

liability as a private person.

Section 101.0215 determines only whether the particular act involved is a governmental

or proprietary function. Section 101.0215 does not itself waive sovereign immunity. If an act is