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October 14, 2022

Hon. Blake A. Hawthorne, Clerk of the Court
Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

Re: No. 21-0307; *City of League City, Texas v. Jimmy Changas, Inc*; In the Supreme Court of Texas

To the Honorable Clerk of the Court:

Respondent Jimmy Changas, Inc. files this post-submission letter brief to further respond to questions raised by the Court at oral argument, which took place on October 4, 2022. Please forward this letter brief to the Chief Justice and Justices of this Honorable Court.

I. *City of North Richland Hills v. Friend*, 370 S.W.3d 369 (Tex. 2012)

Justice Lehrmann asked Jimmy Changas's counsel: "In NRH2O, which has to do with the City's—it was a waterpark—if that is clearly not a governmental service, then why did we in fact hold that there was non-use in that case under the Tort Claims Act?" 32:12.

In that case, Sarah Friend's estate sued the City of North Richland Hills, which owns a water park called NRH20. *Friend*, 370 S.W.3d at 370-71. The estate alleged Sarah died because, after she collapsed at the water park, the City's employees failed to use an Automatic External Defibrillator ("AED") device that was on the premises. *Id*.

The City filed a plea to the jurisdiction, arguing, among other things, that the estate's negligence claim does not fit within the Tort Claims Act's waiver of immunity provisions because the estate did not allege Sarah's death arose from a condition or use of tangible property. *Id*. at 371 (citing TEX. CIV. PRAC. & REM. CODE § 101.021(2)). The trial court denied the City's plea, but the court of appeals

reversed in part, finding the estate's allegation was sufficient to allege a condition or use of property—referring to the AED. *Id*. This Court reversed the court of appeals and held: "The Legislature intended governmental units to be liable for negligently using harmful property, but not for failing to use it." *Id*. at 373.

Friend did not address the governmental versus proprietary dichotomy. The case, instead, turned on whether the Legislature waived immunity—an analysis that presupposed the City's operation of the water park was a governmental function. *See* TEX. CIV. PRAC. & REM. CODE § 101.0215(a)(13) (parks), (23) (swimming pools); *see also Sanders v. City of Grapevine*, 218 S.W.3d 772, 778 (Tex. App.—Fort Worth 2007, pet. denied) ("[W]e must first determine whether the alleged conduct falls within a governmental function under section 101.0215; if it does, we must then look to see whether the conduct falls within one of the other provisions of chapter 101 that waives immunity."). Thus, Jimmy Changas respectfully submits that *Friend* is inapposite.

II. *Wasson II* Factors

Justice Blacklock asked questions concerning some of the *Wasson II* factors. *See* 15:49 ("I would think that you're elected by the people of the city, everything you do is intended to benefit the people of the city and benefits outside the city are perhaps welcome but incidental. I just don't see where that gets us in the analysis."); *see also* 19:35 ("I'm struggling with the *Wasson* test frankly, and it seems, in that regard, to be asking questions that don't really have much to do with what's governmental and what's proprietary because everything a city does is for its citizens. So, where does answering that question get us if our goal is to distinguish between governmental and proprietary?").

Justice Blacklock's implicit observation that the *Wasson II* factors will frequently lean toward proprietary has to do with the derivative nature of governmental immunity. As this Court explained in *Wasson II*, "[t]he governmental/proprietary dichotomy is based on the reality that sovereign immunity is inherent in the State's sovereignty, and municipalities share that protection when they act 'as a branch' of the State but not when they act 'in a proprietary, non-governmental capacity.'" *Wasson Interests, Ltd v. City of Jacksonville*, 559 S.W.3d 142, 147 (Tex. 2018) (quoting *Wasson Interests, Ltd v. City of Jacksonville*, 489 S.W.3d. 427, 433 (Tex. 2016)). Put differently, "a city has no immunity of its own but is afforded the State's immunity when acting as the State's agent and performing governmental

functions for public benefit." *City of Galveston v. State*, 217 S.W.3d 466, 478 (Tex. 2007) (Willett, J., dissenting). This principle has deep roots. As this Court explained over a century ago:

> In so far as a *quasi* corporation exercises powers exclusively public in their character, forced upon it without its consent, simply because the state can thus, through such local agencies, more easily and effectively discharge duties essentially its own, it is proper that no action should be maintained against it for the negligence, or even misfeasance, of its officers, unless the action be given by an expression of the same sovereign will which arbitrarily imposed the duty

City of Galveston v. Posainsky, 62 Tex. 118, 125 (1884).

City of Fort Worth v. George, 108 S.W.2d 929 (Tex. App.—Fort Worth 1937, writ ref'd), illustrates the circumstances under which a city is protected by the State's immunity. Through its passage of the Sanitary Code, the Texas Legislature mandated cities provide sanitation services. The purpose of the legislation was to "improve the sanitary conditions of all parts of the State and to improve public health and to suppress the spread of diseases." *Id*. at 932. The court determined that the City was immune from a lawsuit that arose from its State-mandated sanitation services because the function was enjoined on it by the State. "[T]he City of Fort Worth, acting through its agents in the collection of garbage," the court explained, "was in pursuit of a governmental function imposed by law upon it; a duty from which it could not escape nor ignore." *Id*. at 936.

So, at common law, the State's immunity protects a city when the city performs a governmental function enjoined on it by the State for the primary benefit of the general public. It does not apply when the city performs a discretionary act primarily for the benefit of the local community, as the City did in this case. The *Wasson II* factors root out these important distinctions. That they favor a proprietary finding is consistent with the notion that cities perform discretionary acts for the benefit of their citizens more often than functions enjoined on them by the State. When a city performs a discretionary act, as the City did here, the State's immunity does not trickle down.

III. Inconsistent Definitions

Justice Blacklock also asked: "What do we do with the fact that this list in the Tort Claims Act [] has this preface that's sort of a general definition of governmental functions and says those functions [] are enjoined on a municipality by law and given it by the state as part of the state's sovereignty. . . . But then the statute says [] that includes this list of 35 different things, the vast majority of which don't bear any resemblance to that definition." 3:19.

Because cities primarily perform in their proprietary capacity, they do not benefit from the State's immunity under the common law test. Thus, they were subject to liability for most of the functions they perform. In 1987—the same year § 101.0215(a) came into existence—the Texas Constitution was amended to include article XI, section 13(a), which provides: "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 under prior statute or common law." TEX. CONST. art. XI, § 13.

As this Court explained, this provision "empowers the Legislature to abrogate common law rights of action against municipalities." *City of Tyler v. Likes*, 962 S.W.2d 489 (Tex. 1998). Although many functions included in § 101.0215(a) are proprietary under the common law analysis, the Legislature conveyed governmental immunity to municipalities by reclassifying proprietary functions as governmental, thereby offering municipalities greater protection from certain tort claims. But the Legislature did so only for the functions specifically listed in § 101.0215(a). The Legislature purposefully omitted Chapter 380 projects and continued to do so after the decision in *City of Westworth Village v. City of White Settlement*, 558 S.W.3d 232 (Tex. App.—Fort Worth 2018, pet. denied).

IV. Immunity's Purpose and Derivative Nature of a City's Access to Protection

Justice Young asked about the statement in *Wasson II* that "courts should consider immunity's nature and purpose and the derivative nature of a city's access to that protection" when the factors do not all point in the same direction. *See* 33:51. In *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621 (Tex. 2011), this Court stated "the doctrine of sovereign immunity originated to protect the public fisc from *unforeseen* expenditures that could hamper governmental functions." (emphasis

added). This case does not involve unforeseen expenditures. It involves money the City agreed to pay to incentivize Jimmy Changas to construct the restaurant and generate revenue. The payment of the incentives the City promised to pay could not have been unforeseen by the City. As for the phrase "derivative nature," this is a clear reference to the common law concepts discussed above. Because the State never enjoined on the City the obligation to contract with Jimmy Changas, the City does not have access to the State's immunity protection.

Sincerely,

/s/ Steven J. Knight

Steven J. Knight

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on counsel for Petitioner by using the Court's CM/ECF system on October 14, 2022.

/s/ Steven J. Knight
STEVEN J. KNIGHT