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Torts - Municipal Liability - Exemplary Damages Available against Municipality Performing Proprietary Function if Willful or Malicious Conduct Directly Attributable to City Official(s) Symposium - Business Tort Litigation - Case Note.

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TORTS—Municipal Liability—Exemplary Damages Available Against Municipality Performing Proprietary Function If Willful Or Malicious Conduct Directly Attributable To City Official(s)

City of Gladewater v. Pike
727 S.W.2d 514 (Tex. 1987)

Upon the death of their son in 1952, Mr. and Mrs. Pike purchased three adjoining cemetery lots from the City of Gladewater.[1] The lots were located in "Gladewater Memorial Park," a cemetery owned and operated by the city.[2] Johnny Mack Pike, the deceased son, was supposedly interred in the middle lot, and, upon their demise, Johnny's mother and father were to be buried on either side of him.[3] Upon Mrs. Pike's death in 1976, the Pikes were notified by the city that her designated plot was no longer vacant.[4] She was consequently buried in another part of the cemetery.[5] In 1982, the surviving Pikes desired to remove the bodies of Mrs. Pike and Johnny to a common area so that mother and son could lie together.[6] However, the attempt to exhume Johnny's corpse proved futile—the body was not found in its designated burial plot, and no indication existed of it ever having been buried there.[7] The only records maintained were those indicating which lots

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1. *See* City of Gladewater v. Pike, 727 S.W.2d 514, 517 (Tex. 1987). Johnny Mack Pike was 2 years old when he died. *See id.* at 517. He was survived by his parents and nine brothers and sisters. *See id.* at 516.

2. *See id.* at 516-17. The City of Gladewater purchased the land in 1944 for use as a cemetery and thereafter adopted rules and regulations regarding maintenance of the cemetery. *See id.* The cemetery was designated as a perpetual care cemetery under TEX. REV. CIV. STAT. ANN. art. 969(c) (Vernon 1963). *Id.* at 516.

3. *See Pike*, 727 S.W.2d at 517.

4. *See id.* Under the city's ordinance, it was impermissible to place someone in a plot owner's lot without that owner's consent. *See* City of Gladewater v. Pike, 708 S.W.2d 524, 525 (Tex. App.—Texarkana 1986), *aff'd in part, rev'd in part*, 727 S.W.2d 514 (Tex. 1987).

5. *See Pike*, 727 S.W.2d at 517. The Pikes apparently took no action on the city's violation of the ordinance, but instead exchanged the deed to the lot bought for Mrs. Pike in 1952, which had become occupied, for a vacant plot in another part of the cemetery. *See id.*

6. *See id.*

7. *See id.* 517. The only tangible remains discovered in Johnny's plot was a casket containing the corpse of an adult. *See id.* The city's expert witness, a forensic pathologist, testified that it would be very likely that if Johnny had been buried in that lot, some of his remains could be found there—at least metal parts of Johnny's coffin or pieces of the clothing he was buried in—but nothing except a different casket containing the corpse of an adult was found. *See id.* at 525.

had been bought and the names of the deed owners.[8] The surviving Pikes sued the City of Gladewater for negligent infliction of mental distress seeking actual and exemplary damages.[9] The Pikes alleged that the failure of the city to keep a record of Johnny's location and its misplacement of Johnny's corpse constituted gross negligence.[10]

The trial court awarded actual and punitive damages holding that the city's failure to maintain any record of Johnny's burial was grossly negligent conduct and that such negligence was the proximate cause of the corpse's misplacement.[11] The Texas Court of Appeals in Texarkana affirmed.[12] The Texas Supreme Court granted writ of error to address the issue of whether a municipality may be liable for punitive damages upon a finding of gross negligence.[13] Held—*Reversed*. Exemplary damages are available against a municipality performing proprietary functions only if the injury results from willful or malicious conduct directly attributable to city official(s).[14] The Pikes, however, failed to show that the city's omission in keeping accurate

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8. *See id.* at 525. The City of Gladewater, in acting as trustee of a perpetual care cemetery, was required, pursuant to TEX. REV. CIV. STAT. ANN. art. 969(c) § 3 (Vernon 1963), to keep a "permanent and well bound" record of the lots' situs and the identity of persons interred in those lots. *See Pike*, 727 S.W.2d at 517. However, no records were kept of who was buried in the Pike lot, nor where Johnny's body was currently located. *See id.*

9. *See id.* at 525 (Wallace, J., dissenting).

10. *See id.* The Pikes specifically alleged that the negligence of the city included: "(1) violating and desecrating the grave of Johnny Mack Pike; (2) wrongfully disinterring the body of Johnny Mack Pike; (3) placing another body in the grave of Johnny Mack Pike; and, (4) losing the body of Johnny Mack Pike." *Id.* The Pikes claimed that the City's failure to maintain complete and accurate records of the graves where people were buried, the selling of one grave to two or more persons, and permitting two persons to be buried in the same plot constituted gross negligence and that the Pikes' mental injury was a direct result of their inability to find the body of Johnny Mack Pike. *Id.* Both the City of Gladewater and Gladewater Memorial Park were named as defendants in the suit. *See Pike*, 727 S.W.2d at 524-25.

11. *See Pike*, 727 S.W.2d at 516. The father and one sister, Mildred Powell, were each awarded $1,000.00 in actual damages and $10,000.00 in exemplary damages. *See id.* at 525. There is no mention of recovery by the other siblings. *See id.* at 516.

12. *See id.* at 525. The Texarkana Court of Appeals followed the gross negligence standard set out by the Texas Supreme Court in *Burk Royalty Co. v. Walls*. *See Pike*, 708 S.W.2d at 527; *see also* Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981)("a series of negligent acts or omissions and many circumstances and elements may make up indifference amounting to gross negligence"). The court of appeals in *Pike* held that the city's negligent omission in keeping a record of Johnny's burial site was "sufficient to amount to conscious indifference and to present a proper circumstance for exemplary damages." *Pike*, 708 S.W.2d at 527

13. *See* City of Gladewater v. Pike, 727 S.W.2d 514, 516 (Tex. 1987).

14. *See id.* at 514. This culpability standard was first enunciated by the United States Court of Appeals for the Fifth Circuit in *Peace v. City of Center*, 372 F.2d 649 (5th Cir. 1967) and adopted by the Supreme Court of Texas as the appropriate standard for determining municipal liability for exemplary damages, instead of the *Burk Royalty* standard used by the Texarkana Court of Appeals. *See Pike*, 727 S.W.2d at 523. The Texas Supreme Court actually created a two prong test where the act must have been committed or omitted with the

records of Johnny's burial was done with the requisite maliciousness or evil intent; accordingly, the Texas Supreme Court denied the exemplary damages awarded by the lower courts.[15]

Traditionally, a municipality was completely immune from liability because of the sovereign immunity doctrine inherited from England.[16] That doctrine barred any action against the government based on the medieval concept that "the King can do no wrong."[17] A municipality's role in society as a political and corporate body entails the performance of both governmental and proprietary functions.[18] The rigidity of the sovereign immunity doctrine induced American courts to establish an exception to the doctrine recognizing that when a municipality acts in a proprietary function, the municipality could be liable for the torts of its representatives.[19] This exception to the strict sovereign immunity doctrine became apparent in the 1800's,[20]

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appropriate level of culpability, evil intent or malice, as the first prong, and that act must be directly attributable to policy making officials, as the second prong. *See id.* at 522-23.

15. *See Pike*, 727 S.W.2d at 524. That part of the judgment awarding actual damages to the father and Mildred Powell was affirmed by the Texas Supreme Court. *See id.* at 518.

16. *See* Muskoff v. Corning Hosp. Dist., 359 P.2d 457, 458-59 n.1 (Cal. 1961).

17. *Id.*

18. *See, e.g.*, Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132 (Fla. 1957)(historical recognition of two categories, governmental and proprietary); Smith v. State, 473 P.2d 937, 944 (Idaho 1970)(villages act governmentally and proprietarily); Oklahoma City v. Moore, 491 P.2d 273, 275 (Okla. 1971)(distinction of governmental and proprietary function incorporated within provisions of The Governmental Tort Liability Act); Dilley v. City of Houston, 148 Tex. 191, 222 S.W.2d 992, 993 (Tex. 1949)(at times municipality acts as private corporation, at other times as arm of government); City of Tyler v. Ingram, 139 Tex. 600, 164 S.W.2d 516, 519 (Tex. 1942)(municipality functions in dual capacity of governmental and proprietary); Taylor v. Newport News, 197 S.E.2d 209, 210 (Va. 1973)(municipality acts either governmentally or proprietarily). In addition, it has been noted that as a political body, a city must perform as the government but when functioning as a corporation it performs as a normal corporate entity. *See generally* 18 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.01a, at 128 (3d ed. 1984).

19. *See, e.g.*, Lane v. City of Tulsa, 402 P.2d 908, 908 (Okla. 1965)(defense of governmental immunity not available where act is proprietary); Caroway v. City of Atlanta, 70 S.E.2d 126, 128 (Ga. Ct. App. 1952)(municipalities not liable for discharge of governmental function but same does not follow for proprietary function); Rowley v. City of Cedar Rapids, 212 N.W. 158-59 (Iowa 1927)(while municipality not liable for governmental functions, under doctrine of respondeat superior, is liable for proprietary functions).

20. *See* Bailey v. Mayor of New York, 3 Hill 531, 539 (N.Y. Sup. Ct. 1842)(first court to distinguish between governmental and proprietary function of municipality); *see also* W. PROSSER, PROSSER ON THE LAW OF TORTS § 131, at 979 (4th ed. 1971); Greenhill & Murto, *Governmental Immunity*, 49 TEX. L. REV. 462, 463 (1971)(total immunity became so intolerant that the courts created governmental-proprietary distinction). Courts across the United States created the proprietary distinction as an exception to the strict rule of governmental immunity. *See* Greenhill & Murto, *Governmental Immunity*, 49 TEX. L. REV. 462, 463 (1971). Exceptions were created to curtail the harsh effect of common law sovereign immunity, which completely refused to allow an injured party redress when his injury was caused by

and a majority of American courts have since recognized the distinction between a city's total immunity to all liability when acting in a governmental capacity, and its liability for actual damages when acting in a proprietary capacity.[21]

In those jurisdictions where the distinction is still found, courts generally state that if the municipality is acting in an involuntary manner beneficial to the general public "as the arm of the government," it is a governmental function.[22] However, if the municipality is undertaking activity that is beneficial only to the constituents of that municipality's boundaries, and such activity could be done by a private entity as well, it is a proprietary function.[23] Dissatisfaction with the difficulty in distinguishing between govern-

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the municipality or its representatives. *See* Davies v. City of Gath, 364 A.2d 1269, 1271 (Me. 1976)(when societal conditions change, past judicial doctrines cannot always fulfill needs).

21. *See, e.g.,* Jackson v. Florence, 320 So. 2d 68, 69 (Ala. 1975)(cities immune for torts committed when acting in governmental capacity but liable when city acting in corporate or proprietary capacity); Brinkman v. City of Indianapolis, 231 N.E.2d 169, 171 (Ind. App. 1967)(major exception to rule of absolute immunity is if city acting in proprietary function); Haney v. Lexington, 386 S.W.2d 738, 739 (Ky. Ct. App. 1964)(courts deny liability for governmental function but impose when functioning proprietarily); Austin v. City of Baltimore, 405 A.2d 255, 259 (Md. 1979)(city liable if proprietary function; protected if governmental); Taylor v. Newport News, 197 S.E.2d 209, 210 (Va. 1973)(city not liable when acting in governmental capacity).

22. *See, e.g.*, Austin v. City of Baltimore, 405 A.2d 255, 259 (Md. Ct. App. 1979)(Legislatively sanctioned act is governmental and act not sanctioned is private); Oklahoma City v. Moore, 491 P.2d 273, 275 (Okla. 1971)(functions of municipalities imposed by law are governmental, if not governmental then proprietary); Gates v. City of Dallas, 704 S.W.2d 737, 738-39 (Tex. 1986)(governmental functions performed as agent of state, and proprietary performed voluntarily by municipality to benefit those within corporate boundaries). The Texas Legislature recently passed legislation defining governmental functions as those acts performed for the general public which are mandatorily given to the municipality by the state. It further defined proprietary functions as those which are performed at the discretion of the city for the benefit of its inhabitants. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 1988). The code lists the following as governmental functions:

> . . . police and fire protection and control; health and sanitation services; street construction and design; bridge construction and maintenance and street maintenance; cemeteries and cemetery care; garbage and solid waste removal, collection, and disposal; establishment and maintenance of jails; hospitals; sanitary and storm sewers; airports; waterworks; repair garages; parks and zoos; museums; libraries and library maintenance; civic, convention centers, or coliseums; community, neighborhood, or senior citizen centers; operation of emergency ambulance service; dams and reservoirs; warning signals; regulation of traffic; transportation systems; recreational facilities, including but not limited to swimming pools, beaches, and marinas; vehicle and motor driven equipment maintenance; parking facilities; tax collection; firework displays; building codes and inspection; zoning, planning, and plat approval; engineering functions; maintenance of traffic signals, signs and hazards; water and sewer service; and animal control.

Id. § 101.0215(a).

23. *Id.*; *see also* Pichette v. Manistique Public Schools, 269 N.W.2d 143, 145-46 (Mich. 1978)(any activity conducted for profit excluding those supported by taxes are generally pro-

mental and proprietary functions convinced a majority of states to abolish or modify that remnant of the sovereign immunity doctrine dictating that a city is immune from liability when acting in a governmental capacity.[24]

Abolition or alteration by individual states of this remaining governmental-function immunity has given rise to a variety of theories upon which to base present-day municipal liability.[25] In assessing this liability, some states have abolished all immunity for governmental functions and treat the mu-

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prietary). Under the TEX. CIV. PRAC. & REM. CODE ANN., municipal proprietary functions include but are not limited to the maintenance and operation of public utilities, operation and ownership of amusements, and ultrahazardous or abnormally dangerous activities. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 1988)(effective September 2, 1987).

24. *See, e.g.*, Stone v. Arizona Highway Comm'n, 381 P.2d 107, 112 (Ariz. 1963)(doctrine so inequitable should be abolished); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957)(cannot predicate twentieth century law upon eighteenth century anachronism); Haney v. City of Lexington, 386 S.W.2d 738, 740 (Ky. Ct. App. 1964)(distinctions between governmental and proprietary contrived with no sensible basis). Some functions termed governmental in one state are proprietary in another. *See* W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 131, at 1054 (5th ed. 1984)(anything but uniformity exists between states and their classifications of governmental versus proprietary functions). For states that have abolished the doctrine, see, e.g., Stone v. Arizona Highway Comm'n, 381 P.2d 107, 113 (Ariz. 1963)(judicially created doctrine of sovereign immunity, outmoded and unjust should be abrogated); Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 461 (Cal. 1961)(judiciary may remove governmental immunity); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133-34 (Fla. 1957)(archaic and outmoded concept should be abolished in order to more appropriately deal with demands of justice); Davies v. Bath, 364 A.2d 1269, 1273 (Me. 1976)(observing majority of jurisdictions abolished governmental immunity by judicial decision or statute); Pruett v. Rosedale, 421 So. 2d 1046, 1047 (Miss. 1982)(noting practically all states have abolished governmental immunity doctrine); Becker v. Beaudoin, 261 A.2d 896, 898 (R.I. 1970)(governmental immunity and proprietary liability distinction has long been United States majority rule but no longer serves needs when governmental immunity is abolished). The historical distinction between governmental and proprietary functions, although highly criticized as "confusing" and "irrational," remains a preliminary step in determining municipal liability in many states. *See, e.g.*, Perry v. Wichita, 255 P.2d 667, 670 (Kan. 1953)(rule that city is liable in damages for negligence of employees while exercising proprietary function is fundamental); Young v. Chicago, Rock Island & Pac. R.R., 541 P.2d 191, 193 (Okla. 1975)(city liable in proprietary function for negligence of employees); City of Houston v. Quinones, 142 Tex. 282, 285, 177 S.W.2d 259, 261 (1944)(municipal corporation acting privately liable for torts); City of Tyler v. Ingram, 139 Tex. 600, 605, 164 S.W.2d 516, 519 (1942)(municipality not liable when acting in governmental function); Pontarelli Trust v. McAllen, 465 S.W.2d 804, 807 (Tex. Civ. App.—Corpus Christi 1971, no writ)(city is not liable for governmental functions unless provided for in Texas Tort Claims Act); Treadaway v. Whitney Indep. School Dist., 205 S.W.2d 97, 99 (Tex. Civ. App.—Waco 1947, no writ)(absent statutory authority, school acting governmentally not liable for torts).

25. *See* W. PROSSER & W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 131, at 1044-1045 (5th ed. 1984). The authors address the diversity among jurisdictions noting one or two states retain something similar to sovereign immunity, seven or eight have established administrative agencies for the purpose of handling such cases, nine states have waived governmental immunity in specific circumstances, one or two retain absolute immunity for govern-

nicipality the same as a nonmunicipal corporation.[26] Other jurisdictions, recognizing the traditional approach of liability for proprietary functions, have expanded municipal liability by creating specific exceptions to the rule of nonliability in a governmental capacity.[27] Only a minority of jurisdictions still adhere to the traditional rule that no liability exists as a matter of law if the function is governmental.[28]

Currently, most jurisdictions, whether they have abrogating, altering, or adhering to strict governmental immunity, will, upon a finding of municipal

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mental functions, some provide for insurance and waive immunity, and about thirty states have substantially abrogated immunity. *See id.*

26. *See, e.g.*, Young v. Des Moines, 262 N.W.2d 612, 622 (Iowa 1978)(determine municipal liability by applying same legal principles used in determining liability of private corporation); Haynes v. State, 363 N.Y.S.2d 986, 994 (N.Y. Ct. Cl. 1975)(municipality liable if nonmunicpal corporation would be liable under same circumstances). *But see* George v. Chicago Transit Auth., 374 N.E.2d 679, 680-81 (Ill. App. Ct. 1978). The court in *George* observed that management and employees of a corporation who subject the corporation to liability for exemplary damages can be replaced by its shareholders. However, replacement of public officials who subject a municipality to liability for exemplary damages cannot be done by citizens in the same manner as shareholders; therefore, a city should not be treated the same as a nonmunicipal corporation. *See id.*

27. *See, e.g.*, Schenkolewski v. Cleveland Metroparks Sys., 426 N.E.2d 784, 787 (Ohio 1981)(court partially abolished governmental immunity concept stating proprietary functions are not immune); Oklahoma City v. Moore, 491 P.2d 273, 276 (Okla. 1971)(legislative intent behind Tort Claims Act was to expand responsibility of government for governmental functions even though proprietary functions still remain vulnerable to liability); Turvey v. City of Houston, 602 S.W.2d 517, 519 (Tex. 1980). The Texas Tort Claims Act generally waives governmental immunity if injury was caused by a governmental employee and involved a motor vehicle, or if the injury was caused by a defect in governmental property. *See generally* Greenhill & Murto, *Governmental Immunity*, 49 TEX. L. REV. 462, 463 (1971)(discussion of the general provisions of the Texas Tort Claims Act). The Act does not apply to a proprietary function; therefore, in order to determine if the waiver is effective, it must first be determined whether the function that caused injury was governmental or proprietary. *See id.*

28. *See* Burns v. Mayor and City Council of Rockville, 525 A.2d 255, 257 (Md. Ct. Spec. App. 1987). The Court in *Burns* refused to abrogate the common law doctrine of tort immunity and stated that the defense of acting in a governmental capacity is still available; hence, the distinction between governmental and proprietary capacity is the fundamental basis of liability. *See id.* at 264-65. *See, e.g.*, Reasor v. City of Norfolk, 606 F. Supp. 788, 797 (E.D. Va. 1984)(municipality deserves sovereign immunity for governmental functions); Nestle v. Santa Monica, 496 P.2d 480, 488 (Cal. 1972)(statute reinstituted remnant of common law sovereign immunity where governmental function is immune); Rustin v. District of Columbia, 491 A.2d 496, 500 (D.C. 1985)(governmental immunity does not cover ministerial functions); Robinson v. City of Decatur, 325 S.E.2d 752, 753 (Ga. 1985)(evidence shows governmental function shielding city from liability); Cancel v. Watson, 329 A.2d 596, 597 (N.J. Super. Ct. Law Div. 1974)(legislative act reestablished common law governmental immunity); Taylor v. City of Newport News, 197 S.E.2d 209, 210 (Va. 1973)(city acting in governmental capacity immune from liability). *See generally*, W. PROSSER AND W. KEETON, PROSSER & KEETON ON THE LAW OF TORTS § 131, at 1044-45 (5th ed. 1984)(small minority of jurisdictions hold governmental functions immune).

liability, allow actual damages to be awarded against a municipality.[29] However, a majority of jurisdictions will not award exemplary damages as part of a judgment against a municipality because the policies behind such an award, namely deterrence and punishment, are not furthered when the wrongdoer is a city.[30] There exist three discernible views of assessing exemplary damages against a municipality.[31] The initial approach is that, as a matter of law, exemplary damages are not available against a municipality.[32] The second approach is to treat municipal corporate entities analogously to nonmunicipal corporations and assess liability accordingly.[33] A final ap-

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29. *See, e.g.*, Lusk v. Roberts 611 F. Supp. 564, 572 (M.D. La. 1985)(plaintiff was entitled to recover $15,000 from city for physical and mental injuries from police officer's battery); Grason Elec. V. Sacramento Mun. Util. Dist., 526 F. Supp. 276, 281 (E.D. Cal. 1981)(day has long past where status as public entity shielded from actual damages); Muskopf v. Corning Hosp. Dist., 359 P.2d 457, 459 (Cal. 1961)(individual's compensation outweighs public convenience). Many jurisdictions have established limits on actual damages. *See, e.g.*, Cauley v. Jacksonville, 403 So. 2d 379, 387 (Fla. 1981)(statute limits damage recovery against government in tort to $100,000); City of Houston v. LeBlanc, 562 S.W.2d 20, 22 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.)(Texas Tort Claims Act limits recovery to $100,000); Sambs v. City of Brookfield 293 N.W.2d 504, 510 (Wis.), *cert. denied*, 449 U.S. 1035 (1980)(statutory limit of $25,000 constitutional). The Texas Legislature recently changed the limits available so that liability arising in governmental capacity now has a limit of $250,000.00 per person, $500,000.00 for bodily injury or death, and $100,000.00 for damage to property. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 1988). Previous limits for local units of government were $100,000 for each person injured, $300,000 for death or bodily injury, and $100,000 for property damage. *See id.* § 101.023 (Vernon 1986).

30. *See, e.g.*, Smith v. District of Columbia, 336 A.2d 831, 832 (D.C. 1975)(clear majority of states refuse punitive damages absent statutory authority); Long v. City of Charlotte, 293 S.E.2d 101, 114 (N.C. 1982)(overwhelming weight of modern authority supports common law concept that punitive damages not available against municipality); Rascoe v. Town of Farmington, 304 P.2d 575, 577 (N.M. 1956)(exemplary damages not available absent statutory authority). The Restatement (Second) of Torts states that deterrence of future similar conduct and punishment of the defendant are the rationale for allowing punitive damages. *See* RESTATEMENT (SECOND) OF TORTS § 908 (1979). Some court's have held that the Restatement is inconsistent with an award of punitive damages against a city because only the taxpayers are punished and a city's conduct is therefore not deterred. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981)(policy of deterrence and punishment not furthered by exemplary damages against municipality).

31. *See* City of Gladewater v. Pike, 727 S.W.2d 514, 519 (Tex. 1987). The court states that case law reveals three distinct approaches to the issue of exemplary damages against a municipality. *See id.*

32. *See id.* at 519. The court noted that the last census indicated nineteen states followed the approach of denying exemplary damages against a municipality as a matter of law. *See id.*; *see also* Gary v. Falcone, 348 N.E.2d 41, 42 (Ind. Ct. App. 1976)(common law rule that exemplary damages are not available against municipality); Rascoe v. Town of Farmington, 304 P.2d 575, 577 (N.M. 1956)(in absence of statute, exemplary damages not available against municipality); Johnstone v. Smith, 621 S.W.2d 570, 572 (Tenn. Ct. App. 1981)(punitive damages are not recoverable against governmental entity).

33. *Pike*, 727 S.W.2d at 520. Under the second approach, a governmental corporation

proach is a case-by-case allowing the facts of the case to dictate whether an award of punitive damages is appropriate.[34]

Historically, Texas has followed the majority of jurisdictions in recognizing that municipalities are immune to all liability when acting in a governmental capacity and liable only for actual damages when acting proprietarily.[35] However, Texas legislatively altered the immunity provided to governmental functions in 1970 when the Texas Tort Claims Act became effective.[36] Under the Act, certain exceptions to immunity for governmental functions were enacted, and a city may now be held liable for actual damages

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would be liable if a nongovernmental corporation undertaking the same conduct would be liable. *See id.* This equal corporate analogy is sometimes rationalized by the idea that exemplary damages would create the desired deterrent effect on a municipality the same as they would on a nongovernmental corporation. *See id.*; *see also* Hayes v. State, 363 N.Y.S.2d 986, 994 (N.Y. Ct. Cl. 1975)(exemplary damages do have same deterrent effect on municipality as on noncorporation). This approach is criticized by the Texas Supreme Court as rendering municipalities vulnerable to possibly crippling punitive awards. *See Pike*, 727 S.W.2d at 525.

34. *Pike*, 727 S.W.2d at 521. Some states consider the culpability of the municipality, the mental state of the actor, the award of actual damages or the need for governmental responsibility in deciding whether to impose exemplary damages against the municipality. *See, e.g.*, Jackson v. Davis, 530 F. Supp. 2, 5 (E.D. Tenn. 1981)(exemplary damages not awarded absent showing of malice); Holda v. County of Kane, 410 N.E.2d 552, 563 (Ill. App. Ct. 1980)(must show officials ratified or condoned employees conduct to recover exemplary damages from government); Adams v. City of Salina, 48 P. 918, 919 (Kan. 1897)(punitive damages possibly could be awarded but must first be showing of actual damages).

35. *See, e.g.*, Moody v. City of Galveston, 524 S.W.2d 583, 588 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.)(city acting proprietarily not immune from tort liability); Hodge v. Lower Colo. River Auth., 163 S.W.2d 855, 856 (Tex. Civ. App.—Austin 1942, writ dism'd by agreement)(municipality not liable in proprietary function); City of Wichita Falls v. Lipscomb, 50 S.W.2d 867, 871 (Tex. Civ. App.—Fort Worth 1932, writ ref'd)(city can be liable for proprietary functions but not governmental functions).

36. *See, e.g.*, Turvey v. City of Houston, 602 S.W.2d 517, 519 (Tex. 1980)(before Texas Tort Claims Act, city not liable in performance of some governmental functions); Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978)(after Tort Claims Act waiver of governmental immunity exists); Gates v. City of Fort Worth, 567 S.W.2d 871, 873 (Tex. Civ. App.— Fort Worth, 1978 writ ref'd n.r.e.)(if act complained of not waived by Texas Tort Claims Act, defense of governmental immunity viable in Texas jurisprudence). Generally, the Texas Tort Claims Act is a waiver of governmental immunity to liability when property damage, personal injury, or death are proximately caused by a city employee's negligence, wrongful act or omission while acting within the scope of employment, and his negligence involved the operation of motor-driven vehicle or equipment. *See* TEX. CIV. STAT. ANN. art. 6252 (1971)(repealed by Act of June 19, 1983, ch. 529, §§ 1-4, 1982 Tex. Gen. Laws 3084, 3084-85). Waiver of governmental immunity also exists if the injury, damage, or death results from the use or condition of governmental property. *See generally* Greenhill & Murto, *Governmental Immunity*, 49 TEX. L. REV. 462, 468-469 (1971)(discussion of the general provisions of the Texas Tort Claims act). If a private person would be liable for injury, death or property damage in one of these circumstances, then the government is also liable. *See id.* Also, the government is entitled to receive notice of suit within six months of the accrual of a cause of action. *See id.*

when performing specified governmental functions.[37] Section 101.058 of the Tort Claims Act, reaffirming the fact that tort liability may arise if the municipality is acting in a proprietary manner, specifically excludes municipal proprietary functions.[38] The legislative intent was to "preserve the claimant's common law remedy to seek unlimited damages for the negligent acts of a municipality when engaged in a proprietary function."[39] Until *City of Gladewater v. Pike*, no punitive damage award had been assessed by a Texas court against a municipality acting in a proprietary manner.[40] Texas prece-

37. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon 1986). Specific exceptions to the common law immunity for governmental functions along with exclusions and limits on liability are found in the Texas Tort Claims Act. Exceptions to governmental liability are found when the injury complained of was caused by premises defects on city owned property. Another exception is an injury caused by a city employee's negligence involving a motor vehicle while in the course of employment. *Id.* at § 101.021. Limits on the amount of liability are found in section 101.023, and proscription of exemplary damages against a municipality for liability arising under the Tort Claims Act is under section 101.024. Some activities remain immune from liability including schools (partial exclusion), legislative action, activity by courts, action by state military forces when on active duty is excluded, certain governmental functions such as collection of taxes, discretionary acts or failure to act by government, and civil disobedience and intentional torts. *See id.* at §§ 101.051-.057. Municipal liability is limited to governmental functions. *Id.* at § 101.058. Also, traffic regulation devices and failure to place correctly or malfunction is not actionable under the Act. *Id.* at § 101.060.

38. *Id.* at § 101.058. The Texas Tort Claims Act is therefore not controlling once it is determined that a municipality is acting in a proprietary manner. *See* City of Houston v. Turvey, 593 S.W.2d 766, 768 (Tex. Civ. App.—Houston [1st Dist.] 1979)(action against city for tort committed functioning proprietarily cannot be barred by provisions of Tort Claims Act), *aff'd*, 602 S.W.2d 517 (Tex. 1980).

39. *Turvey*, 602 S.W.2d at 519. Unlimited damages are damages outside and potentially beyond the limits imposed on actions brought under the Texas Tort Claims Act. *See id.*

40. *See* City of Gladewater v. Pike, 708 S.W.2d 524, 527, *rev'd in part and aff'd in part*, 727 S.W.2d 514, 525 (Tex. 1987). The Texarkana Court of Appeals states, "no Texas case has been found which allowed exemplary damages against a municipality." *Pike*, 708 S.W.2d at 527. Previous Texas courts addressing the possibility of exemplary damages against a municipality have stated that the facts of their respective cases did not call for exemplary damages because the conduct of the municipality was not of a severe enough nature. *See, e.g.*, City of Katy v. Waterbury, 581 S.W.2d 757, 761 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ)(only willful, malicious type conduct or gross negligence justifies punitive damages); Ostrom v. City of San Antonio, 77 S.W. 829, 829-30 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.)(trespass action would not justify exemplary damages without willful injury); San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 280 (Tex.Civ.App.—San Antonio 1975, writ ref'd n.r.e.)(Texas law does not warrant exemplary damages against municipality unless acts ratified by governing body). *But cf.* Cole v. City of Houston, 442 S.W.2d 445, 451 (Tex. Civ. App.—Houston, [14th Dist.] 1969, no writ)(court followed precedent stating exemplary damages not available against municipality as matter of law). Between the time that the Texarkana Court of Appeals affirmed *City of Gladewater v. Pike* and the time that case was heard by the Texas Supreme Court, the San Antonio Court of Appeals awarded punitive damages against the City of San Antonio for a death claim against the city while acting in a proprietary manner. *See* City of San Antonio v. Hamilton, 714 S.W.2d 372, 375 (Tex.App.—San

dent, however, had not precluded an award of exemplary damages against a municipality acting in such a capacity.[41]

In an opinion written by Justice Robertson, a majority of the Supreme Court of Texas, in *City of Gladewater v. Pike*, held that exemplary damages are available against a municipality.[42] The supreme court first decided that a city's ownership and operation of a cemetery was a proprietary function because it was a service that benefited only the residents of Gladewater and not the general public.[43] The court next addressed the issue of exemplary damages against a municipality acting in a proprietary capacity, an issue of first impression for the Texas Supreme Court.[44] After discussing the three approaches to exemplary damages against a municipality,[45] the supreme court elected to create an individualized approach in the form of a two prong test.[46] While reiterating the general rule proscribing exemplary damages against a municipality, the *Pike* court created a two prong test as an exception to that rule allowing recovery for exemplary damages if the plaintiff can 1) establish gross negligence the equivalent of malicious or willful conduct; and 2) link that conduct directly to the city's policy making official(s).[47]

Antonio 1986, writ ref'd n.r.e.). The San Antonio Court of Appeals awarded the exemplary damages finding gross negligence on the part of the city in rejecting a drainage engineer's recommendation to build a bridge over a low water crossing where the plaintiff's deceased drowned. The exemplary damages against the City of San Antonio were reduced by the percentage of comparative negligence of the plaintiff, but were nevertheless awarded. *See id.*

41. *See* Ostrum v. City of San Antonio, 77 S.W. 829, 829-30 (Tex. Civ. App.—San Antonio 1903, ref'd n.r.e.). The court stated that exemplary damages are available for willful injury to land, but that it would be an exceptional circumstance before exemplary damages could be awarded against a municipality. *See id.* The Texas Supreme Court held that the court's intention in the *Ostrom* case was to leave open the possibility of exemplary damages against a municipality. *See* City of Gladewater v. Pike, 727 S.W.2d 514, 522 (Tex. 1987).

42. *See Pike*, 727 S.W.2d at 522. Exemplary damages are available against a municipality performing proprietary function when the conduct is malicious or grossly negligent and if the conduct is directly attributable to public officials. *See id.*

43. *See id.* at 519. Although no Texas court had ruled on this matter, eight other states have recognized that it is a proprietary function to operate a cemetery, and the Supreme Court of Texas felt that such operation fell "squarely within the general rule." *See id.* The operation and ownership of a cemetery by a municipality has been subsequently redefined by the Texas Legislature as a governmental function. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 1988).

44. *Pike*, 727 S.W.2d at 518-19.

45. *See id.* at 519-21. The three approaches to the issue of punitive damages against a municipality are: (1) to deny the imposition of punitive damages against a municipality as a matter of law; (2) to treat the municipal corporation as a "non-corporate entity"; or, (3) to decide whether the facts of the case warrant an award of punitive damages. *See id.*

46. *Id.* at 522. The first prong concerns the culpability of the actor, and the second prong concerns the imputation of such conduct to municipal officials. *See id.*

47. *See id.* A standard where gross negligence must be the equivalent of evil intent or maliciousness was defined by the United States Court of Appeals for the Fifth Circuit in *Peace v. City of Center*, and adopted by the Texas Supreme Court as the first prong of its test instead

The accepted standard of gross negligence in Texas was formulated by the Texas Supreme Court in *Burk Royalty Co. v. Walls*.[48] The *Burk Royalty* decision permitted recovery of exemplary damages upon a showing that the defendant's conduct was done with "such an entire want of care as shows the act or omission was the result of conscious indifference."[49] The *Pike* court refined this standard by requiring the plaintiff to show that the defendant acted with evil intent, malicious design, or gross negligence.[50] The *Pike* court held that although successive city managers were directly responsible for the inaccurate records at the cemetery, such managers did not act with evil intent, malice, or equivalent gross negligence, and therefore, recovery of exemplary damages by the Pikes was barred.[51] Noting the policy considerations of deterrence and punishment in the context of exemplary damages against a municipality,[52] the supreme court concluded that its "exceedingly" difficult burden of proof would not undermine those important considerations.[53]

In his concurrence, Justice Kilgarlin criticized the majority's departure

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of the *Burk Royalty* standard used by the Court of Appeals in Texarkana. *See* Peace v. City of Center, 372 F.2d 649 (5th Cir. 1967); *see also Pike*, 727 S.W.2d at 523. The second prong states that the official is imputed with culpable acts only when he has been given authority by the governing body to make policy or to act. *See id.*

48. Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981). The *Burk Royalty* standard is the usual test for determination of gross negligence redressable by punitive damages. *See, e.g.*, Clements v. Steele, 792 F.2d 515, 516 (5th Cir. 1986)(*Burk Royalty* enunciates current Texas law regarding punitive damages and gross negligence); Olin Corp. v. Dyson, 709 S.W.2d 251, 252 (Tex. App.—Houston [14th Dist.] 1986, no writ)(*Burk Royalty* must be followed in determining gross negligence, positive finding will allow punitive damages); Poole v. Missouri Pac. R.R., 638 S.W.2d 10, 12-13 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.)(plaintiffs recovered exemplary damages for defendant's gross negligence based on *Burk Royalty* standard).

49. *Burk Royalty*, 616 S.W.2d at 922.

50. *Pike*, 727 S.W.2d at 523. The court felt that a stricter standard was appropriate in the context of municipal liability for exemplary damages because of the unique nature of punitive damages against a municipality. *See id.* Not only was the required culpability level more strict, but the plaintiff was also required to show that the conduct was directly attributable to a city official's conduct. The plaintiff's burden of proof, therefore, was much more difficult than the *Burk Royalty* standard, where a showing of conscious indifference was sufficient. *See id.*

51. *Pike*, 727 S.W.2d at 524. The court found that several successive city managers were retainable for the omission in keeping proper cemetery records. However, since their culpability level was only simple negligence at most, the court did not allow a punitive damage award. *See id.* at 523.

52. *See id.* at 524.

53. *See id.* A creation of precedent whereby exemplary damages could be allowed has been attempted in at least one other jurisdiction, but that attempt failed because it undermined the policy considerations. *See* City of Lawton v. Johnston, 252 P. 393 (Okla. 1927)(city that ratifies malicious, fraudulent, or oppressive acts of officials can be liable for punitive damages), *overruled by*, Nixon v. Oklahoma City, 555 P.2d 1283, 1286 (Okla. 1976)(exemplary damages against municipalities serve no purpose of punishment or deterrence).

from the widely accepted test for gross negligence promulgated by the Texas Supreme Court in *Burk Royalty Co. v. Walls*.[54] Justice Kilgarlin noted that the creation of a new standard of culpability applicable solely to municipalities created an "arbitrary classification of tortfeasors."[55] A more appropriate alternative, in his view, would have been a reexamination of the *Burk Royalty* standard rather than the creation of a new one.[56]

In its decision to permit recovery of punitive damages against a municipality acting proprietarily, the Texas Supreme Court properly adhered to Texas' traditional reluctance to award punitive damages against a city by creating a difficult burden of proof which must be met by a defendant before exemplary damages are recoverable.[57] The court seemed to infer that the widely accepted test for gross negligence found in *Burk Royalty* does not serve an adequate purpose when addressing punitive damages in the context of municipal liability.[58] The effect of using the *Burk Royalty* standard for gross negligence, which requires only a showing of conscious disregard for the rights of others, could potentially allow an exorbinate amount of exemplary damages to be awarded against a municipality.[59] The stricter standard created by the Texas Supreme Court's two pronged test in *Pike* is appropriate for assessing exemplary damages against a municipality.[60] The test's

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54. *See Pike*, 727 S.W.2d at 525 (Kilgarlin, J., concurring)(citing *Burk Royalty* as support for contention that different standard of gross negligence should not be used for different types of cases).

55. *Id.*

56. *Id.*

57. *Pike*, 727 S.W.2d at 522 (synthesis of Texas law creates two prong test where plaintiff may recover exemplary damages against municipality acting proprietarily).

58. *Id.* at 523. The *Burk Royalty* test for determining gross negligence is not appropriate in the context of exemplary damage awards against municipalities. *See id.*

59. *Id.* at 525 (Kilgarlin, J., concurring)(concern that exemplary damages too easily obtainable requires protection of municipality); *see also* City of San Antonio v. Hamilton, 714 S.W.2d 372, 374 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). Texas courts were beginning to allow punitive damages against a municipality based on gross negligence. *See* Hamilton 714 S.W.2d at 376; City of Gladewater v. Pike 708 S.W.2d 524, 527 (Tex. App.—Texarkana 1986), *rev'd*, 727 S.W.2d 514 (Tex. 1987). In *Hamilton*, the San Antonio Court of Appeals awarded exemplary damages against the City in a wrongful death action where the City was grossly negligent in failing to follow advice of an engineer and build a bridge across a low water crossing where, subsequently, plaintiff's deceased drowned. *See Hamilton*, 714 S.W.2d at 376. Less than four months before that decision, the Pikes were awarded exemplary damages against the City of Gladewater by the Texarkana Court of Appeals on a finding of gross negligence. *See* City of Gladewater v. Pike, 708 S.W.2d 524, 527 (Tex. App.—Texarkana 1986), *rev'd*, 727 S.W.2d 514 (Tex. 1987). The *Burk Royalty* standard allows an inference that the defendant's state of mind was that of conscious indifference to the result of his conduct. *See* Williams v. Steves Indus., 699 S.W.2d 570, 572 (Tex. 1985). The *Pike* test, requiring proof of a malicious or evil state of mind, does not allow proof of the defendant's state of mind by inference. *See Pike*, 727 S.W.2d at 523 (court rejects *Burk Royalty* standard).

60. *See Pike*, 727 S.W.2d at 524.

stringent requirements, if met, demonstrate inexcusable quasi-intentional conduct that should be both punished and deterred by the awarding of damages in excess of the actual damages caused.[61] Policy considerations of deterring future unlawful conduct by the defendant and others as well as punishing the defendant are the primary bases for the imposition of punitive damages.[62] These policy considerations are not undermined but are furthered by the restrictive burden of proof created in *Pike* because policy making officials must be directly linked to the wrongdoing. Fear of such association to malfeasance, and hence no reelection, should act as a deterrent.[63]

Ironically, the two policy considerations of deterrence and punishment provide the major thrust of a majority of jurisdictions' argument in favor of disallowing punitive damages against a municipality.[64] Those jurisdictions argue that, while individual taxpayers are the beneficiaries of the punishment effect of an exemplary judgment, they concomitantly bear the burden of providing funds to pay the judgment and are thereby, in effect, punishing themselves.[65]

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61. *Id.* (any exception carved out of nonliability rule must limit recovery to situations that show utter disdain for rights of citizens). A small minority of states allow punitive damages when the conduct is malicious. *See* REDDEN, PUNITIVE DAMAGES § 4.6, at 118 (1980).

62. *See, e.g.*, Fisher v. City of Miami, 172 So. 2d 455, 457 (Fla. 1965)(justification for punitive award is punish offender and deter similar wrongs by others); Hofer v. Lavender, 679 S.W.2d 470, 474 (Tex. 1984)(deterrence and punishment of wrongdoer two major policies behind punitive damages); Kolb v. Bankhead, 18 Tex. 228, 233 (1856)(prevention of similar wrongful events in the future is purpose of punitive damages).

63. *See Pike*, 727 S.W.2d at 523. Since the conduct must be directly attributable to the city officials, they will appear responsible to the public. *See, e.g.*, Thomas v. Sams, 734 F.2d 185, 192 (5th Cir. 1984)(culpable acts attributable to government only when done by official who had power to act or make policy); Bennet v. City of Slidell, 728 F.2d 762, 769 (5th Cir. 1984)(city policymakers decide goals of city functions and devise means to achieve goals); Christopher v. City of El Paso, 98 S.W.2d 394, 400 (Tex. Civ. App.—El Paso 1936, writ dism'd)(for master to be liable for servant, master must have power and duty to control servant while employed). If the city is held accountable for damages, more care will be taken in the training and selection of its employees and agents, thus providing a deterrent effect. *See* Young v. City of Des Moines, 262 N.W.2d 612, 622 (Iowa 1978).

64. *See* City of Gladewater v. Pike, 727 S.W.2d 514, 524 (Tex. 1987)(arguable that no deterrent or punishment effect in awarding punitive damages against municipalities). *See, e.g.*, Fisher v. Miami, 160 So. 2d 57, 59 (Fla. App. 1954), *aff'd*, 172 So. 2d 455 (Fla. 1965)(recognizing argument that awarding punitive damages against municipal corporations only punishes taxpayers); Chappell v. City of Springfield, 423 S.W.2d 810, 814 (Mo. 1968)(exemplary damages against municipality contravene public policy); Rannells v. City of Cleveland, 321 N.E.2d 885, 889 (Ohio 1975)(public policy justifying punitive damages vanishes when applied to municipal corporations). *See generally* Comment, *Recovery of Punitive Damages Against Municipalities:* Young v. City of Des Moines, 40 OHIO ST. L.J. 967, 976-86 (1979)(supporting limitation of punitive damages against municipalities).

65. Nixon v. Oklahoma City, 555 P.2d 1283, 1285-86 (Okla. 1976). The Oklahoma Supreme Court states that exemplary damages should not be allowed against a municipality

In recognizing the unique status of a municipal defendant, the Texas Supreme Court in *Pike* created an exceedingly difficult burden for the plaintiff to meet in order to recover exemplary damages.[66] The effect of such a burden is to ensure that when the defendant is a municipality, only the most egregious wrongdoings are redressed by an award of exemplary damages.[67] With juries as arbiters, presumably composed of taxpayers themselves, punitive damages can be effectively and discretionally invoked when deterrence is necessary.[68] Before *City of Gladewater v. Pike*, it was questionable whether a city could be liable for punitive damages under Texas law;[69] now, all doubt is erased and a stringent, yet viable standard exists.[70] The court expressly refused to follow other jurisdictions which treat municipalities acting within proprietary capacities analogously to private corporations.[71] Under a private corporate analogy, the municipality would be vulnerable to more frequent and potentially ruinous punitive damage awards because *Burk Royalty* sets the standard for awarding exemplary damages against a corporation[72]—a far less restrictive burden of proof than the burden imposed by the two

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because public policy of deterrence and punishment is not served by requiring the taxpayers to bear the burden of the punishment. *See id.*; *see also* 5 DAMAGES IN TORT ACTIONS § 40.54[2][a](1) at 40-145-48 (1987).

66. *Pike*, 727 S.W.2d at 524.

67. *Id.*

68. *Id.* The court refused to "foreclose" the possibility of exemplary damages on the premise that a case may arise someday where a municipality's conduct may warrant exemplary damages. *See id.* Deterrent effect is created by awarding punitive damages against a municipality because potential liability induces officials to better train employees and avoid wrongful behavior themselves. *See* Young v. City of Des Moines, 262 N.W.2d 612, 622 (Iowa 1978).

69. *See, e.g.*, City of Katy v. Waterbury, 581 S.W.2d 757, 761 (Tex.Civ.App.—Houston [14th Dist.] 1979, no writ)(city could be liable if conduct willful, wanton, malicious, or consciously indifferent); Moody v. City of Galveston, 524 S.W.2d 583, 590 (Tex.Civ.App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.)(court refused exemplary damages against city because no evidence of gross negligence); Ostrom v. City of San Antonio, 77 S.W. 829-30 (Tex.Civ.App.—San Antonio 1903, writ ref'd)(vindictive circumstances could render exemplary damages recoverable against municipality); *see also* City of Gladewater v. Pike, 708 S.W.2d 524, 527 (Tex.App.—Texarakana 1986), *aff'd*, 727 S.W.2d 514 (city liable for punitive damages due to gross negligence); City of San Antonio v. Hamilton, 714 S.W.2d 372, 375 (Tex.App.—San Antonio 1986, writ ref'd n.r.e.)(evidence supported jury finding of municipality's gross negligence; exemplary damages proper).

70. *See Pike*, 727 S.W.2d at 522 (court's two prong test allows exemplary damages only upon satisfaction of both prongs).

71. *See id.* at 525.

72. *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981). Many cases have applied the gross negligence standard found in *Burk Royalty*. *See, e.g.*, Schwartz v. Sears, Roebuck & Co., 669 F.2d 1091, 1095 (5th Cir. 1982)(exemplary damages affirmed against Sears Corporation based on *Burk Royalty* standard of gross negligence); Delta Drilling Co. v. Cruz, 707 S.W.2d 660, 664 (Tex. App.—Corpus Christi 1986, writ ref. n.r.e.)(exemplary damages recoverable against corporation when employee grossly negligent according to *Burk Royalty* test); Missouri Valley, Inc. v. Putman, 627 S.W.2d 829, 832 (Tex. App.—Amarillo 1982, no

prong test in *Pike*.[73] The creation of a separate and more onerous standard to discern municipal liability for exemplary damages is appropriate and does not create an unwarranted and arbitrary distinction of tortfeasors.[74] While the *Pike* test does not place municipalities on the same level as other tortfeasors in the recovery of punitive damages for grossly negligent acts,[75] it does solidify the position that punitive damages are recoverable from a municipality acting in a proprietary function—a recognition that lower courts in Texas have refused to explicitly adopt.[76]

In the wake of *Pike*, the Texas Legislature recently added Section 101.0215 to the Texas Tort Claims Act.[77] When coupled with the *Pike* test,[78] that section further narrows the possibility of a plaintiff's recovery of exemplary damages against a municipality.[79] The governmental functions specifically listed in subsection (a) of the new section, which according to the Act can never be included as proprietary functions,[80] actually supersede almost all functions previously observed by Texas courts as proprietary functions.[81] Although the list is not exhaustive of all municipal functions, it

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writ)(exemplary damages against corporation appropriate when corporation grossly negligent under *Burk Royalty* test).

73. *See Pike*, 727 S.W.2d at 524 (indifference of city official insufficient to impose liability under two prong test).

74. *Id.* at 525 (Kilgarlin, J., concurring)(arbitrary class of tortfeasors created). Municipality defendants are unique and allowance of exemplary damages against them is only appropriate for the most egregious acts. *See Pike*, 727 S.W.2d at 524.

75. *See, e.g.*, International Armament Corp. v. King, 686 S.W.2d 595, 597 (Tex. 1985)(to allow exemplary damages, gross negligence must be conscious indifference standard established in *Burk Royalty*); Houston Lighting & Power v. Reynolds, 712 S.W.2d 761, 772-73 (Tex. App.—Houston [1st Dist] 1986, no writ)(*Burk Royalty* standard test for gross negligence; redressable by punitive damages in product liability case); Estate of Clifton v. Southern Pac. Transp., 709 S.W.2d 636, 640 (Tex. 1986)(mental attitude of defendant essential ingredient authorizing exemplary damages based on *Burk Royalty*'s conscious indifference standard; mental state may be inferred).

76. *See Pike*, 727 S.W.2d at 522. One Texas case held that exemplary damages are not permissible against a municipality as a matter of law, while others have held that the facts of their case did not warrant such an award; the Supreme Court of Texas ruled that a synthesis of Texas case law establishes the two prong test in *Pike*, thereby, allowing exemplary damages. *See id.*

77. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 1988).

78. *See Pike*, 727 S.W.2d at 522 (two prong test of culpability and attribution to officials).

79. *See id.* at 525. The *Pike* test is restrictive in the sense that if plaintiff cannot establish that the municipality's function was proprietary, show gross negligence equal to evil intent, and link that conduct directly to officials in policy making positions, he cannot recover exemplary damages against a municipality. *See id.* The ability to prove plaintiff's case is narrowed due to the fact that the proprietary category has been so narrowed by § 101.0215 of the Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 1988).

80. *Id.* § 3.02 (a).

81. *Compare* City of Gladewater v. Pike, 727 S.W.2d 514, 519 (Tex.1987)(operation of cemetery is proprietary function) *and* City of Katy v. Waterbury, 581 S.W.2d 757, 761

leaves very few activities performed by municipalities unaddressed.[82] The range of activities not listed as governmental, which may be classified as proprietary, is extremely limited.[83] The new section specifies public utilities, amusements, and ultrahazardous activities as proprietary functions,[84] but many of the particularized functions that come under these headings are contained in the list of governmental functions.[85] For example, maintenance and operation of a public utility are proprietary functions, but waterworks, a function incorporated within public utilities, is a governmental function under the Act.[86] Despite amusements being listed as proprietary activities, parks and zoos, museums, convention or civic centers, libraries, or recreational facilities are not subject to exemplary damages as they are listed as governmental functions.[87] Ultrahazardous activities that are proprietary functions but are excluded from under this heading are the establishment and maintenance of jails, warning signals, and fireworks displays.[88] If a plaintiff can classify the city's activity into the limited category of proprietary functions that remain, and if he can meet the two prong test established in *Pike*, then and only then can he recover punitive damages against a

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(Tex.Civ.App.—Houston [14th Dist] 1979, no writ)(construction and grading of street proprietary function)*and* Moody v. City of Galveston, 524 S.W.2d 583, 588 (Tex. Civ. App.—Houston [1st Dist.] 1975, ref'd n.r.e.)(furnishing water to residents or nonresidents of city is proprietary function) *with* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a) (Vernon Supp. 1988)(specifically lists cemeteries and cemetery care, construction and design of streets and waterworks as governmental functions). The court of appeals in *Christopher v. City of El Paso* lists the following functions as those which are traditionally held in Texas and other jurisdictions as proprietary in nature:

> [S]urfacing and grading of streets; the clearing of streets of weeds, brush, and small trees, and burning the brush; construction and maintenance of sidewalks; cleaning streets; collecting disposing of garbage; construction and maintenance of storm sewers; maintenance and operation of a street railway; operation of an electric light plant; maintenance and operation of parks; maintenance and operation of zoo; operation of swimming pool and water slide; operation of an airport; and maintenance and operation of wharves.

Christopher v. City of El Paso, 98 S.W.2d 394, 397 (Tex. Civ. App.—El Paso 1936, writ dism'd). *But see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a) (Vernon Supp. 1988)(listing such functions as governmental).

82. *Compare* 2 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10.01, at 735 (3d ed. 1977)(discussing general functions of municipality) *with* TEX. CIV. PRAC. & REM CODE ANN. § 101.0215 (Vernon Supp. 1988)(listing of governmental functions for Texas).

83. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 1988). Public utilities are probably the most common functions not redefined by the legislature as governmental. *See* Christopher v. City of El Paso, 98 S.W.2d 394, 397 (Tex. Civ. App.—El Paso 1936, writ dism'd)(operation of electric light plant is proprietary function).

84. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215 (Vernon Supp. 1988).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

municipality.[89]

After *Pike*, the plaintiff with a claim against a municipality will have to meet a difficult burden of proof to recover punitive damages. Not only will the plaintiff have to establish acts bordering on being intentional, but such acts must be attributable to policy making official(s). To make recovery of exemplary damages even more difficult, the plaintiff will have to establish that the city was acting in a proprietary function, a categorization recently narrowed by the Texas legislature. Such proof is more difficult than the *Burk Royalty* standard which allows an inference of the defendant's conscious indifference. However, the *Pike* standard properly balances the compelling interest of the plaintiff with that of the municipality by addressing egregious, malicious conduct committed by an official which proximately causes plaintiff's injury, while at the same time recognizing the uniqueness of a municipal defendant and the effect that potentially devastating judgments could have on the taxpaying public if gross negligence could be proven. Under *Pike*, a precedent now exists for that "exceptional case" where the conduct of city officials is so terribly offensive to the public's natural sense of justice that exemplary damages should be awarded.

Jeffery V. Strahan

89. *See* City of Gladewater v. Pike, 727 S.W.2d 514, 525 (Tex. 1987).