ORAL ARGUMENT – 09/11/02
01-1012
CITY OF DALLAS V. JENNINGS

ESSENBURG: This case is about whether a municipality should be held strictly liable for a one-time accidental back up under theories of nuisance and unconstitutional taking simply because back ups may routinely happen or be inherent in the operation of a sewer system.

The answer to that question is no. The legislature has never intended for the nuisance and unconstitutional takings exceptions to the doctrine of sovereign immunity to be construed so broadly.

The nuisance exception should be limited to the categories of actionable nuisance that were established by this court in its decision in City of Tyler v. Likes. In that case this court recognized that there are three actionable nuisance claims which may be brought against a municipality that are an exception to sovereign immunity. The first is by showing that a municipality negligently caused a nuisance or negligently invaded another's property interest. Immunity, however, is retained for property damage. Only personal injury is recoverable under a negligent invasion.

The second type of actionable nuisance is by showing that the municipality intentionally caused a nuisance or intentionally invaded the property of another.

And the third category is by showing that the operation of the sewer system itself was a nuisance somehow by being abnormal or out of place in its surroundings.

ENOCH: I'm assuming that the City could not go build a swell or a ditch that ended at somebody's property, and all the runoff after every rain would just end up _____ somebody's property. I'm assuming the City could not do that without facing some sort of claim that this periodic runoff and _____ out here was a taking of _____ runoff. Don't you agree that could happen that the City would have some responsibility if they developed a runoff pattern that put all the water on somebody's property?

ESSSENBURG: In that circumstance, because if they are constructing a ditch it's probably for a public purpose and a pubic purpose will be achieved by doing so, by building a ditch or widening a road.

ENOCH: Well let's suppose instead of doing a ditch they run a runoff pipeline under the ground. And so they take all this runoff and they put it into a pipe and they run it underneath the property. And periodically it clogs up and floods the property. If my argument was that inherent in a sewage line is that it will periodically back up and flood couldn't I make the same argument that for a public purpose they built this place for a runoff, that by the very nature of it existing it subjects the property adjacent to which it runs to periodic flooding? Wouldn't that be essentially the same

sort of argument that the City would be responsible for having built something for a public purpose that subjects a particular cost to this adjacent property?

ESSENBURG: Well if you built something for a public purpose, then in this instance we're talking about an unintentional back up from the routine maintenance of the sewer system itself.

PHILLIPS: There is affidavit proof from the Jennings that this will always happen sooner or later in a sewer, that it will back up. I'm not saying whether that's true or not. I'm just saying there's this kind of proof. Is there not?

ESSENBURG: I think the proof was that routinely back ups occur because of the use of the system by putting grease in it, which was the cause of this clogging of the sewer in this case. And simply because use of the system by citizens that has nothing to do with any action on the part of the city or a municipality, to hold the city liable for any and all actions would be tantamount to strict liability for operating a governmental function.

PHILLIPS: Show me the distinction between this and cases that say if the city builds a condition where your land is going to flood two or three times a year, or once every two years or something - I mean there's been cases with only occasional flooding caused by the city doing something, and that's been held to be a taking. And the city says, you know, we hope it never floods. We hope there was no more rain for twenty years and there was no flooding, but indeed there was rain and it went over the spillway and it flooded their property two or three times a year. And that's been held to be a taking. Now if the proof is that grease is going to get in these drains and it's going to back up and there is going to be this occasional sewage back up into a house, why isn't that the same as a spillway that overflows a few times?

ESSENBURG: Unclogging grease from a sewer main there is no intention to flood someone's property. When you're talking about constructing a public improvement, such as like a dam for flood control, you do intend to release water from that dam to benefit the public for flood control. There's no benefit to the public from flooding someone's home with sewage, which is not done intentionally in unclogging the sewer lines. There is no intent that it's going to flood someone's home with sewage if you unclog one line.

PHILLIPS: Isn't that _____ to the court can make as a matter of law, or do we have a fact finder look at that distinction?

ESSENBURG: I think a court as a matter of law in a circumstance - if you've got a situation where there's a repeated flooding situation, then there may be a question of fact as to whether something might be inherent or there might be some intent involved. But when you're talking about a circumstance where there is a one-time back up that neither recurs nor is consistently recurring, then that would not amount to a nuisance or a taking in either circumstance.

PHILLIPS: If the sewage was backing up once every six weeks, then it might become a

taking on the third time. I mean can we make a legal principle?

ESSENBURG: I wouldn't say it would become a taking. I think it could become a nuisance, but I do not believe it would rise to the level of a taking. Because there is no public benefit to be gained from the flooding of another's property with sewage. And it's not put to a public use.

PHILLIPS: If it was happening frequently it could become a taking?

ESSENBURG: I would say a nuisance, but maybe not a taking if it was based on sewage.

PHILLIPS: We can say as a matter of law you get one free shot.

ESSENBURG: When you're looking at a circumstance from a one-time event, and there's cases that have been decided since Likes; the Wickham case cited in our brief. There are no Texas cases that specifically hold that a single, temporary event can support a claim for a nuisance. And in looking at other states that have addressed this issue, there was a case on point in the State of Georgia where there was a back up from a clogged sewer, and the court held that a single, isolated event that's not continuous or recurring is not sufficient to support a claim for a nuisance. In that instance you've got to prove the invasion is somehow intentional. And the requisite element of intent is the same for a nuisance case as it is for a constitutional taking. You have to prove that when the state acts for the purpose of actually causing the invasion or knows that the harm is substantially certain to result from the conduct, then you've got the requisite intent that's necessary to establish nuisance, and a takings claim.

ENOCH: Well wouldn't there be the argument here that if you're running a sewer line you know that it will back up - I mean don't you face yourself coming and going? The argument here is, the city knows that wherever they run this sewer line they are going to subject the adjacent property to overflow. Isn't that substantially what you just said? If they have substantial knowledge that it's going to produce an effect on adjacent property wherever they put a sewer line, haven't they satisfied your nuisance and intent element for a takings claim?

ESSENBURG: But that's not what this case is about. This is not installing a line that causes repeated flooding. This is about sewage back ups occur because of the use of the line separate and apart from any action on the part of the city. Citizens who use the line throw grease in it and it gets clogged up. From time to time back ups will occur, but that doesn't mean that the city has created a nuisance simply by operating a sewer system. If that were the case then the city would...

ENOCH: But a ditch doesn't cause a problem on the adjacent property. It's somebody puts water in the ditch that caused the problem on the adjacent property. I thought we agreed that the city might have some liability if it ran the runoff ditch up to someone's property that resulted in all the water just pooling on their property. Didn't we agree that the city could be liable for a taking there or not?

ESSENBURG: If it was a ditch that was constructed for road improvement purposes, then it would possibly be a taking because it would be for a public use. But there's no public use if it's achieved by flooding someone's home with sewage, or the accidental result of flooding someone's home from sewage by routine maintenance of unclogging a sewer line. If that were the case, then the city could be held responsible for any incidental property damage that results in the performance of a routine maintenance and governmental function. And it would be prohibitive to be able to provide the service of sewer systems and citizens would have to go to outhouses and septic tanks.

RODRIGUEZ: Cities know that in time of droughts sometimes water mains break all over the cities. Is that the same kind of situation that we've got here? Under the plaintiff's theory there be a cause of action for a nuisance or for a taking because a water main breaks resulted in flooding?

ESSENBURG: No. What we have here is not - there was no defective condition of the pipe. It was not broken. It was simply clogged with grease, which caused sewage to back up. And in that circumstance there's nothing abnormal or out of place about a system that's operating as it's intended.

Now the respondents would have you believe that evidence that there should have been an 8 inch main instead of a 6 inch main would somehow show that this particular main was abnormal or out of place in its surroundings. But the summary judgment evidence produced by both parties show that at the time this main was installed it met current design criteria and there was no summary judgment evidence that brought forth to establish that there was a requirement to replace or retrofit preexisting lines that were on good structural condition. And this main was determined to be in good structural condition. So based on that if there had been some sort of law that required the city to retrofit or replace six inch mains with eight inch mains, then perhaps that main might have been abnormal or out of place in its surroundings. But not in this case because there was no requirement to do so.

And allegations that the city be required to replace this main goes really to the issue of a negligent failure to perform a discretionary function from which the city retains immunity from.

With respect to the intentional takings, intent is the same. You have to intend the harm. Likes said, you have to intend the harm. This court's decision in The City of Houston v. Renault, 1968 said you've got to carry out an act that you know has the purpose of causing the harm. And that was not what was done here. The City simply responded to a back up call: unclog it. It happened to flow down the line and cause a second blockage which resulted in the flooding of the Jennings home in this case. And that simply does not amount to a creation of a nuisance or a taking in this case.

Because Jennings did not establish either of the categories that there was either an intentional invasion or because they did not establish that this line was somehow abnormal or out of place in its surroundings, then summary judgment was proper for the city and the CA

should not have reversed summary judgment in favor of the city on that basis.

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RESPONDENT

SHAVIN: Likes did not overrule merely a century of Texas cases holding governmental entities liable for the destruction caused by their nonnegligent maintenance and operation of the sewer system. In fact, Likes approvingly cites or relies upon this very line of cases. Yet the City of Dallas citing only one unpublished footnote in a federal DC case argues that intent to harm the plaintiff is a prerequisite to bringing a constitutional taking or nuisance claim against a governmental entity in Texas. The city is incorrect. It is the conduct, not the harm that must be intended. The line of cases that has so held includes State v. Hale, Kerr, Green, a case from the 5th circuit in 1989 that the City cites, Palacios Seafood specifically holds that intent to harm is not required.

HECHT: The problem with that is, you don't build a sanitary sewer accidentally. You always act intentionally. So under your argument every municipality would be liable for every sewage back up?

SHAVIN: No. A municipality would only be liable for those nonnegligently caused nuisances. Not for every nuisance.

PHILLIPS: If the city does something wrong they escape. If they've done everything right they pay.

SHAVIN: Correct. And the irony of that or the seeming irony of that rule that is established by these cases, I think can be explained in this way.

ENOCH: On that point, I don't mean to interrupt you, but you're focusing on something. In your pleadings you argue that this is the normal course of events for a sewer line. It will back up. It's inherent that it will back up. But your pleadings are predicated on the fact that sewer lines will clog and in the unclogging of sewer lines it will back up. So don't you meet yourself coming and going here? The event that's caused the injury was the unclogging of a sewer line without determining that once they do that it won't get clogged up further down there. And so your damages are the result ultimately in the negligently act in the maintenance of the line as opposed to the mere existence of a line that will nonnegligently have a back up.

SHAVIN: No. It is not based upon any allegation or evidence that the maintenance of the sewer line by the city in this case was negligent. The evidence in the pleadings support the claim that the actions of the city in maintaining the sewer line in this case was intentional. And as you pointed out in your questioning of petitioner's counsel, when the city knows, not just in this one instance, but by virtue of the operation of the sewer system, that it will back up due to grease in the lines, then the intent is established. At least a fact issue is established as to the city's intent to cause the nuisance.

PHILLIPS: What's the good public policy behind saying if the city fills a bad sewer line or they repair negligently they are free, but if they do everything perfect they should pay up?

SHAVIN: It makes imminent sense and it has for over 100 years that in Texas a person's private property cannot be damages, not just taken or destroyed, but damaged, which only requires a one-time event that causes damage to that homeowner by virtue of the construction, operation or maintenance of a public work. The public work in this case clearly be a public sewer system. There's no argument in this case that the city intended to cause sewage to back up into my client's house. Of course not. The argument is by virtue of their operation of a public sewer system for the benefit of all of the members of the public they should bear the cost. The public as a whole should bear the cost for the damage that's caused by the operation, maintenance or construction of that system.

HECHT: Well I thought I asked you that earlier, and you said no. It was going to be limited. I thought my question to you was, if you build a sanitary sewer your summary judgment proof says it's going to back up. And so knowing that whoever builds it will always be liable for the back up.

SHAVIN: Except when the back up occurs by virtue of a negligent act of the city. Because then it's not an authorized act under State v. Hale and Webber.

HECHT: If the city is negligent it won't be liable?

SHAVIN: That's what the long line of Texas cases clearly holds, including every case that's cited by the city. They hold that a nonnegligent taking or nuisance is actionable. Just as if it were against a private individual. It's only when the city's actions were negligent. And to answer CJ Phillip's question, the policy reason behind that, I believe, although I don't think it's been well explained by all of these cases is, that when the state operates a system, such as a public sewer system for the benefit of the public, and that system causes damages to the residence of the city it should bear the loss. It should stand the loss of that damage only if it was not due to some negligence with its employees, as in the Weber case.

HANKINSON: So it's the opposite of what we would usually find. And the reason behind it is because the public benefits from the operation and as long as they are doing everything okay, the public should pay, but if they do something wrong that's not the public's fault, and so the public shouldn't pay. Is that in a nutshell what you are saying?

SHAVIN: That's it in a nutshell.

HANKINSON: It's the opposite of what we're used to dealing with?

SHAVIN: It's the opposite of default principle. But it is the clear, I think, intent of the cases, especially the takings cases, that by virtue of the operation of the public works damages

caused to the residence if it is not by virtue of the negligence of the employees of the state, then the sovereign should be liable. That's what the constitutional provision of 1876 says, and that's the way it's been interpreted, I think, consistently since that time.

PHILLIPS: Why is the element of knowing that damage will occur important? I mean why is that essential to your recovery?

SHAVIN: The way these cases have developed is that nuisance cases and takings cases have kind of conjoined. And in the nuisance area, as Ms. Essenburg did say, there are three bases for a nuisance action and the first is the intentional act. The courts have said where there is an intentional act causing a nuisance the city can be liable. They also say that that can be the basis for a takings claim. It is not clear in the case law whether they are saying they are one in the same or not. But I believe that the standards that the court has used in the takings area is absolutely clear as to the intent element. And it does not require an intent to harm, and there is not a single case other than the footnote that Ms. Essenburg cited, the City of Dallas v. _____, that says otherwise, including respectively your honor in the Likes case. You did not rule that intent to harm is a requirement. Especially not intent to harm the plaintiff.

OWEN: What about in Houston where they build those really wide concrete waterways for drainage, and they know that every 100 years we may get a flood or a gulf storm that's going to rise way above those borders and flood the surrounding neighborhoods. Are they liable for those floods?

SHAVIN: No. The law of water damage is a different issue. There are different standards that do apply. They are similar but they are not the same. If the operation of that waterway, there were spillages that were inherent in the operation, and if they were routine and normal as the testimony was in this case, in the case of the operation of the sewer system, I believe they could be held liable. However, if it's a once in a 100 year flood my opinion would be that would not be likely to be considered routine, normal, customary in the operation of the waterway and, therefore, there would be no liable.

ENOCH: What is the customary operation of the sewer line that causes the flooding?

SHAVIN: The customary operation of the sewer system in Dallas and elsewhere is that there are various elements that get into the sewer system, including grease and rags and roots, I believe, that clog it up. And that those clogs can result in back ups into the residents homes. Often do, usually do, I would suspect, to no fault of the homeowner. The homeowner whose home is inundated with raw sewage did not cause that blockage to occur. It's by virtue of the operation of the system.

ENOCH: If I have an affidavit from a maintenance person who says that this type of blockage of that does not result in back up or flooding, but only if there is some mistake that's done. As I understand the affidavit here is, they are attacking directly your point that inherent in the

operation is that grease will trap up and it will back up. And the expert says, that ain't necessarily so. It isn't a routine event that the grease clogs it up and it causes a back up.

SHAVIN: The evidence is not exactly as you said it was. The evidence is, in this case, that sewer blockages due to grease are inherent in the operation of a sewer system. Those are the words of the City of Dallas employee in the Shade case who testified, that we used also in our case. We also had an expert witness who said that, that sewage back ups due to grease are inherent in the operation of a sewer system. The city's controverting proof in an attempt to raise a fact issue on this point is that not every time that they come out to unblock a sewer line does it result in a second blockage down the street. That's not the issue. The issue is not as the city frames it: whether every time the city comes out and does an act of maintenance, there has to be a damage caused to someone down the street in order for there to be a nuisance. The Jennings did not have to experience...

ENOCH: But doesn't the nuisance that occurred have to be the result of the maintenance that happened? Nonnegligent, but is has to be the result of the maintenance that happened?

SHAVIN: Maintenance or operation,. In this case we had both: we have the operation of a sewer system that has sewage blockages due to grease. Inherently, routinely, commonly, that's what the evidence shows.

OWEN: But to me the routinely and customary, or routinely and commonly are not necessarily the same as inherent.

SHAVIN: The word inherent may not have been defined by any of the witnesses who testified, but they meant by inherent that it is in our case routine that it happens as a normal course of operation.

OWEN: Where does the routine and customary occurs? I mean how often does this occur? In how many homes in Dallas? One home a year, ten homes...

SHAVIN: We don't have the evidence in the record to establish how many times in the City of Dallas sewer system there are blockages due to grease; however, the city crew chief testified, that's what he does everyday. He testified that he might come out and unblock four or five a day.

OWEN: But unblocking is different from flooding of homes. Is it routine and customary that these blockages flood Dallas homes?

SHAVIN: It is routine and customary that they occur in the operation of the sewer system that homes are flooded by sewage. Now how routine, how common, how often...

OWEN: Who said that? What was the evidence on that point?

SHAVIN: Gary Morgan testified in his deposition that sewage back ups due to grease,

such as the one that occurred at the Shade home, were inherent in the operation of a sewer system. You can't have a sewer system without having blockages due to grease like that. The testimony in our case from our expert was that sewer line blockages due to grease are inherent in the operation of the system. I understand your question is, how often or how routine is the blockage that goes into someone's home? And I don't think that there is evidence on that point, because it was never raised by the city as a basis for their summary judgment motion. That blockages that due to grease that go into a person's home are not routine. They are just saying that the blockage that occurred in this case was a one time event, and, therefore, there is no liability for it.

OWEN: They say it's a one time event. You say it's routine and customary. There seems to be a gap between there.

SHAVIN: The one time event was that this never happened to the Jennings before. That's true. The fact is though that this happens in the operation of a sewer system that the city of Dallas operates routinely. And, therefore, the operation of the sewer system is a nuisance for which the city could be held liable unless they operated it negligently. That's the basis for the taking.

ENOCH: But my point is, doesn't the flooding that the result have to be the routineness and not the grease? If I have a ditch that ends at that property so that when it rains it will end up on that property, it seems to me says the city is going to be liable because in the operations that water will end up on that property. The city is liable. It seems to me it's a different question to say sewer lines will routinely get clogged, but they don't routinely flood someone's home. And then argue that because they routinely clog necessarily the city anticipates that they won't be responsible for a home that gets flooded from that clog.

SHAVIN: The distinction I understand that both you and Justice Owen have made is a valid distinction, however, it was not one that was made the basis of the summary judgment motion. And if I understand it, the only evidence in the record was that sewer line blockages due to grease such as the one that occurred at the Jennings home, which did invade their home, blew out of their toilets, blew out of their bathtubs, caused 4 inches of sewage in their home are routine, are inherent in the operation of a sewer system. That's the evidence. No distinction was made between those sewer line blockages that never resulted in a back up into someone's home and those that did. The only evidence is that these kinds of blockages, like the one that occurred at the Jennings house are routine, are inherent in the operation of a sewer system.

There are several reasons to distinguish Likes and Weber, which are the two primary SC cases that the city relies upon. First is, that the plaintiff's claims in both were based on negligence. Negligent culvert construction and design in Likes and negligent conduct of the State highway employees in Weber.

In Likes, moreover, there was nothing whatsoever that the city did to cause the damage to Ms. Likes, to increase the amount of water in the watershed in which her home was located.

In Weber, the out of control brush fire was caused, according to the court, solely by the negligence of the highway crew. The city has attempted from the very beginning to recast our claim as a negligence claim. Our nuisance claim and our taking claim. There was no evidence and there was no pleading to support it. Either from the Jennings or the city. The Jennings' pleadings evidence in summary judgment response point to two things: the city's intentional acts of maintenance of the sewer system; and the city's operation of a sewer system in which blockages due to grease are inherent.

I would simply say that this court should affirm the CA's opinion and let the Jennings have a trial on the merits of their nuisance and takings claims.

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REBUTTAL

ESSENBURG: Mr. Shavin is correct in saying that the Texas Highway Department v. Weber is very closely analogous to this case before you now. As with the highway employees in Weber who were starting a brush fire to burn grass from the roadway, it got out of control, and it caused the neighboring property to be damaged. Now in that case there was no authorization or necessity for the employees to cause the damage. Just like there was no authorization, the city employees in this case were not authorized nor required to flood the Jennings' home to unstop this blockage.

It doesn't stand that the damage occasioned by the second blockage was not a necessary result of or incident to unstopping the first blockage. So based on this court's holding in Weber, this was not a taking as it was not a taking in Weber.

Now with respect to the Likes' case, under the holding in Likes evidence that sewage back ups may routinely happen or may be inherent does not establish the element of intent that's necessary to support claims for nuisance or taking from a one-time event in this case. And that's what we are looking at - a one time accidental discharge.

The CA was incorrect in reversing the partial judgment that was denied for the Jennings and rendering partial judgment that their claims constitute a nuisance, because they relied on a statute which does not establish a private right of action, and that is the Health and Safety Code provision that was 341.011.

The code construction act, 311.034 of the Texas Gov't Code, that was essentially a codification of this court's holding in Dewhart v. State and recently reaffirmed in Travis County v. Pelzel(?), provides that statutes shall not be construed as a waiver of sovereign immunity unless that waiver is affected by clear and unambiguous language. So the CA was incorrect in establishing that because the sewage may have met the definition of public health nuisance under the Health and Safety Code, that they had established a claim for nuisance that was within the nuisance exception to the waiver of immunity.

Jennings cannot cite to any authority that allows them to take and borrow language from a statute defining a public health nuisance to create a claim that's not recognized within the laws of this state. The CA was also incorrect in reversing the summary judgment in favor of the city because as was established by the city, plaintiff's essential elements on their claims of nuisance and taking were established conclusively against them by the city's evidence. And because that was the case, in this case the TC's decision should be affirmed.

Now with respect to the testimony that Mr. Shavin discussed of Gary Morgan. That was taken in a separate case, not admissible in this case as _____ summary judgment evidence because it was not proven to be-the witness is not proven to be unavailable to testify in this case.

HECHT: But you're not complaining of that here are you?

ESSENBURG: Yes we are. And we objected to that consideration of that evidence, that even if that evidence were admissible, that testimony does nothing to establish that there was an intentional taking in this case. Simply there is no discussion by this court in Likes that the fact that something may be inherent establishes intent. And for that reason we would ask that this court not find strict liability on the part of the city for sewage back ups that are unintentional and accidental.