ORAL ARGUMENT – 09/28/04
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TEXAS A&M UNIV B. BISHOP

HUGHES: Texas A&M's sovereign immunity was not waived by the plaintiff's accidental stabbing by a fellow student, because his injury was not proximately caused by any state employees use of tangible property.

The CA's holding that two _____ sponsors used the knife by failing to prevent the drama club from using it conflicts with this court's longstanding definition of use, as well as its conclusion that negligent supervision claims do not leave immunity. Further, the university's immunity cannot be waived by the conduct of the Wonios, the play's directors, because they were independent contractors and not employees as a matter of law.

This court has never held that negligent supervision is a use of property under the act. To the contrary, its precedence dictate the opposite result. In the _____ case, the court held that a state mental hospital's failure to restrain a suicidal patient was not actionable. In Dallas Area Rapid Transit v. Whitley, the court held that the failure to supervise the public is insufficient to waive immunity under the act. And most recently in San Antonio State Hospital v. Cowan, the court rejected a negligence supervision theory that is very similar to the theory relied upon by the CA and the plaintiff in this case.

There are several aspects of the Cowan case that are particularly pertinent to this case before us.

O'NEILL: If we were to agree with your argument, are we going to have to disapprove some CA's opinions? Are we going to have to disprove Smith v. University of Texas, or Christilles v. Southwest Texas State University or are they distinguishable?

HUGHES: I think those cases should be overruled because those are negligent supervision cases. That was the basis of the CA's holding and the theory for the liability based on the conduct of Drs. Curley and Lesko, the faculty sponsors. And it's inconsistent with the court's definition of use. Drs. Curley and Lesko did not use the knife in this case. They did not put it into action, or service, or apply it to any given purpose. There is nothing in the record that indicated they even knew that the knife was being used in the play. And so the court's longstanding definition of use does not support that theory, which is inconsistent. In addition, the Smith case and the Christilles case were implicitly based on - those cases were decided more than 20 years ago. They were decided on the assumption that at that time that a nonemployee's use of property could waive immunity under what is now subsection 2 of 101.021 of the Tort Claims Act. And the court projected that premises that subsection in the Lowe case, subsequently explicitly rejected it in Cowan in subsection 2, and there was now no doubt that the employee must personally use the property that proximately caused injury for there to be a waiver of immunity under that provision. And that does

not exist in this case.

In Cowan, the court held that a governmental unit does not use property merely by allowing someone else to use it. And that's exactly what the CA's theory was in this case based on those outdated cases of Smith and Christilles. And this court has already rejected that theory but it should clarify that those cases are inconsistent on the negligent supervision theory and should be overruled.

HECHT: Suspenders are not a knife. Should that make any difference?

HUGHES: It does not make a difference. As the court clarified in Cowan, to be considered inherently unsafe an item has to be either defective or lacking an integral safety component. The knife in this case was neither one. It would be inconsistent with the court's precedence in Clark for example, to hold that that would make a difference. Mr. Bishop does not allege that the knife was defective. This is not an integral safety component case. And therefore it does not fall within that line of precedence. It doesn't make any difference.

The suspenders and the piece of walker that were at issue in Cowan can be said to be similar in that they were certainly dangerous in retrospect as used by the decedent in that case under the allegedly negligent supervision in this case. And so if the court were to hold that providing the knife was a use of property, that would be directly and consistent with Cowan where the court said that providing something is not a use of property.

O'NEILL: What if the stab pad had not been used. Let's say for some reason the faculty advisor or Wonios had not had the stab pad available. Would it then be a piece of equipment that lacked an integral safety component?

HUGHES: That would be an example of the failure to use property, which would be a non-use under the court's precedence, and, therefore, not a waiver of sovereign immunity.

O'NEILL: That's part of the system as I understand. You use a real live one because you've got the stab pad. And so if in this series you didn't have a stab pad, it would seems to me to fit this case perfectly.

HUGHES: First of all, they have not made that allegation. There's no allegation that the stab pad wasn't an integral safety component. And second, of course, the staff had what's provided in this case if what the allegation as they suggested in the brief that the stab pad should have been larger, that's exactly like the theory that was rejected in Clark, where the court said now you're suggesting that a slightly - in the Lowe case for example, that the knee brace that was provided should have been different, should have been bigger, should have fit better, and that's not a use of property. That's a non use of a different piece of property. The court rejected it also on the facts of the Clarke case where the anti-psychotic medication at issue was provided in oral form. The plaintiff alleged the injection form should have been used. And the court said, no, your complaining that what

was provided was inappropriate, that something different should have been provided. That's a non use of property and that doesn't waive immunity under the act.

JEFFERSON: If the university employees had specifically directed the students to use a knife without the stab pad, you would say that's still not being used because it's not the employee who is causing the injury?

HUGHES: That's correct. Under the court's precedence the use must be by the state employee. Second, there's a very important distinction here. To make clear there was no use of property by a state employee in this case. The provision of the knife as alleged here was by the Wonios, who were clearly the knife employees, but independent contractors as a matter of law as the CA correctly concluded in its initial opinion. The reason being, the issue is who had the right to control the details of their work? the details of directing the play? And the constitution of the drama club clearly assigns those duties to the directors who were the Wonios, of all aspects of collecting props, choosing the casting, rehearsals, set design, sound, and so forth. All of the essential elements of directing the details of directing the play.

HECHT: Respondent challenged the CA's finding the first time in this court. Is that true?

HUGHES: Yes it did.

HECHT: And we didn't reach it, so it's still in play I take it.

HUGHES: I think that's right. The CA on remand also did not address that issue - explicitly declined to address it. So I think it's in play.

WAINWRIGHT: Does the record in this case reflect whose knife it was?

HUGHES: I believe the record reflects that the knife was provided and owned by Diane Wonio.

WAINWRIGHT: It was also owned by one of the directors?

HUGHES: I believe the record is that she provided. I will provide that record cite to you.

Further, the elements that this court has tradition to look to in determining whether a worker is an employee or an independent contractor confirm further that the Wonios were independent contractor as a matter of law. They were not on the university's payroll. They did not go through the hiring process. They had no social security or taxes withheld. They sat their own hours. They had special skills. The skills of being directors and understanding how to put together a play. They were paid on piecemeal basis, not on an hourly or salary basis. And they received no benefits or vacation from Texas A&M. The CA's conclusion on this point was absolutely right.

They were independent contractors. They were not employees. The testimony cited by Mr. Bishop in response to that does not change the analysis. The fact that the Wonios were paid by the university of course does not distinguish an independent contract from an employee. Neither does the fact that the university retained the right to hire and fire the directors. As that right is always retained for independent contractors, the only testimony they refer to other than that is has to deal with the safety issues is the fact that the faculty members could have directed the Wonios to not use a real weapon in the play. And as the Thomas v. Harris County case cited in the brief, and this court's closely analogous opinion in Hearthstone v. Mendez state - the entities right to promulgate safety policies and to require its independent contractors to abide by safety policies is not evidence of a right to control the details of their work.

I would further direct the court's attention to Dow Chemical v. Bright, 89 S.W.3d 602 @ 607. The court in the analogous context of independent contractor on a premises liability theory rejects a very similar argument made to the one made by Mr. Bishop in this case on the right of control being determined by enforcing or having safety policies. And the court rejects that as being evidence of any right to control over the independent contractor.

Even if the court were to conclude that the Wonios were somehow employees of the university, they still did not use the knife to cause Mr. Bishop's injury. It was the student, Dennis Writtenhouse's use of the knife that proximately caused Mr. Bishop's injury. There's no dispute about what the facts were in this case. And it was not done in Wonios demonstrative use of the knife during rehearsals. It was his use of during the performance a week later that actually and proximately caused the injury. It was in Dennis Writtenhouse's hands, not Diane Wonios that the knife became the instrumentality of the harm as this court has described in Bosley. Instead, the Wonio's demonstrative use of the knife merely furnished the condition that allowed the injury to happen and this court has repeatedly rejected that that is sufficient to waive immunity. The court need not reach this issue if it agrees with the CA's that the Wonios were independent contractors as a matter of law, and not employees of the university.

We also ask the court to address the official immunity of the faculty advisors. If it need to reach this issue, to do so the court would have to agree that the faculty advisors actually used the knife. As discussed under the court's definition of use, Drs. Curley and Lesko did not use the knife, they did put it into action or service, or apply it for any purpose. But if the court were to agree with the CA that they did, we argue that they were entitled to official immunity, Drs. Curley and Lesko. As the CA recognized they satisfied the 3-part Chambers test for official immunity. The only question here is whether the governmental verses medical discretion test from Kassen v. Hartley, is meant to apply outside of the medical context. We argue that it's not for several reasons. First the plain text of the opinion discusses the dichotomy in terms of medical discretion verses governmental discretion. It's never phrased as governmental verses nongovernmental discretion. Secondly, in proximately a decade since the court issued Kassen, it's never considered Kassen outside of that context. The only other place that supplied it was correctly in the Gross v. Enos case, in the medical context of EMS paramedics and the court appropriately concluded that that was similar enough and not an extension of Kassen to not be a conflict of purposes of conflicts

jurisdiction.

In addition, the court in Kassen specifically rejected the uniquely governmental test that the CA relied on in this case. The court in Kassen said that official immunity does not turn on whether healthcare employees' discretion was uniquely governmental or medical. Here, the CA not only took that test and wrongly applied it outside of the medical context where the court's opinion firmly ensconced it, but it further applied exactly the uniquely governmental test that the court cautioned should not be applied. They based their decision on the fact that a student club's advisory's role could happen both in the private context and in the public sector and, therefore, reasoned that that discretion was not governmental and that is very similar to the uniquely governmental test the court cautioned against using in Kassen.

The faculty sponsors met all three elements of Chambers. They were governmental employees acting within the scope of their authority, performing discretionary duties, and acting in good faith. The CA did note that there wasn't any issue as to whether they were acting in good faith and similarly said it's clear that they were performing discretionary duties under the traditional test. So again, the plain issue that would be best for the court to address is, whether the CA wrongly extended Kassen v. Hartley outside of the medical context? And again, the court need not reach that issue unless you agree with the CA that he was denied.

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RESPONDENT

HOGAN: The court today has a question before it that just won't die again. And that's what's the relationship in this case between the government property and injury? The wrong answer we suggest to the court is none. That is that there is no relationship and no liability...

OWEN: When the Cowan case was argued before us, the AG asked a hypothetical. What would the answer be if a food service employee in prison handed the fork and knife to the inmate who turned around and stabbed and killed another inmate? What's your response to that? Is that a use factor?

HOGAN: If the government employee instructs the inmate on how to stab the co-inmate, then I would suggest to the court that there is liability under the Tort Claims Act. In the Cowan case, the court was very careful to point out that the issue in that case involved the provision of property which was not in and of itself inherently dangerous. Of course this is not like the cases that counsel pointed out to the court like in Cowan where somebody is providing suspenders and a walker. A knife and an inadequate stab pad are both a condition and a use of property, which we believe leads clearly down a lighted path to liability under the Tort Claims Act.

OWEN: The jury issue specifically referenced use of the knife did it not? It didn't talk about the stab pad.

HOGAN: No. They seemed to have missed that. That's correct. And the condition of the stab pad is central to the liability in this case. Paul Bishop, when he was told that they were going to stab him in the play said, Well, I would like to see what I am going to use. He looks for the stab pad and he says that's too small. I would like a bigger one.

OWEN: Again, the jury was specifically instructed about the knife. It didn't say stab pad. It said knife.

HOGAN: There is a parenthetical that says the knife. It's not specifically to be reviewed in that vane. We believe that the condition or use instruction necessarily involves the condition and the inadequacy of the stab pad. And the jury was instructed as to the condition and use element under the tort claims act. And the condition of the stab pad in this case was it was just too small. Just way too small. In fact the cause of the incident in stabbing of Paul Bishop was that the stab pad banked off or the knife banked off the top of the stab pad and into his chest.

O'NEILL: Are you claiming that these cases fit within those cases dealing with equipment that lacks an integral safety component?

HOGAN: Yes. It does. And I think that was the court's point in Cowan, specifically that the issue in Cowan was that there was nothing inherently dangerous about suspenders and a walker. It was the way that they were used in that case. This is something that is inherently dangerous. The condition that is involved in this case of the stab pad not being large enough, is a condition under the tort claims act, which would provide liability.

O'NEILL: The briefing seems to indicate that they don't think you've raised this and really carried it through, the lacking of an integral safety component. The briefing says you haven't claimed that. Therefore, we don't deal with it.

HOGAN: We have. In fact our brief in this case mentions specifically that the condition of the stab pad was something that was a result and cause of the injury. Not only was there use of property in this case by people who are in the paid service of the government, that is the Wonios telling people how to stab somebody properly so that it wouldn't violate the vampire _____. Mr. Wonio said that if they had used a plain knife or retractable knife, that's not going to be good enough because you can pretend to stab someone with a play knife, but you couldn't impale a vampire with it. Now that's something that's a little funny perhaps when you look at it on a cold record. But the use of the knife by the Wonios to demonstrate and direct and instruct the students on how to act in this play is enough we believe under the tort claims act to be use.

There is use by government employees. There is also control over the very instrumentality and the very activity that led to the injury.

The law teaches and the legislature has instructed this court that someone who is in the paid service of the government by competent authority is an employee as long as they are

not an independent contractor or someone over whom the government has no legal right to control.

Here's what the record says about that. Mr. Wonio's testimony was that we had an understanding with the club and Mr. Curley that we were in effect associate resident directors and we would be notified when it was time to start a new production. They were essentially the university's directors. The receipts for payment are signed by both Diane and Michael Wonio. And the organizational manual for student organization says, "responsibility to employ persons to aid or assist in the activities or to expend funds for any student organization rests with the faculty sponsors, approved by the associate campus dean for student services." Responsibility to employ is what the university's manual says and that's what happened.

Now that we believe makes employee status adequate for liability in this case. The Wonios in the paid service of the university actually used the knife and the stab pad to instruct the students on how to perform this impaling technique on a vampire. That ought to be enough, we suggest to the court, for liability under the tort claims act. But even if we didn't have use of that actual property, even if the Wonios had not been in the paid service of the university, we believe there is still another basis for liability independently. And that is that there was use in this case, or government control over the use of that very property which caused the injury.

And so unlike the cases cited by the state, there is in fact a more analogous situation. Look at Lee Lewis v. Harrison. Where the general contractor in that case had a specific retention of control over fall protection. And that was found to be enough of a right of control to establish liability. This court affirming a jury verdict for the plaintiff in that case.

We believe that just like Lee Lewis, in this case the university through its faculty advisors had retained control over the direction and selection of props, and more specifically through its campus policy to prohibit the use and possession of deadly weapons on campus. So this is not a fill in the blank, vague, general liability doctrine. This is something that is very specific and relates directly to the instrumentality that caused the injury. The university had control over the details of the Wonios' work as directors of the play. And the campus dean, Schmidly, said at page 261 of the record, that direct supervision of student functions is the responsibility of the faculty sponsors. And that he was obligated to see to it that the organizations comply specifically with those university regulations.

Now it's very detailed. Much more detailed than as suggested by the state, the retention...

HECHT: In your analysis of the case, the independent contractor issue sort of dropped out.

HOGAN: Well I hope so.

HECHT: Because you think that they are employees, but even if they are not employees

the control exercised by the university which would be use of property was the same issue whether you're looking at use or independent contractor? You seem to be saying that if the university exercised the requisite control that you think it did, that's enough both for use and for employee status or control over the independent contractor?

HOGAN: That's right. We believe that under the tort claims act liability is provided for and a waiver of immunity is given by the legislature whenever an employee uses property. That's their suggestion. Of course that's not required under any of this court's decisions. Actual use by the state employee isn't required we don't believe. What if this were a situation where the state provided a ventilator to use in home healthcare, provided instructions to an independent contractor nurse on how to use the ventilator, and following those instructions the nurse somehow disengages the alarm. The alarm doesn't go off, the ventilator stops and somebody dies. Would this court say that in that circumstance the state had no liability simply because the ventilator was being used by an independent contractor pursuant to instructions that the state had given? We think not. Suppose as the El Paso CA looked at in City of El Paso v. WAD Investments - let's say if there is a condemnation order to knock down to independent buildings in the City of El Paso and the county condemnation officer in misreading the documents about when the condemnation order had effect goes and tells them to knock down both buildings. The independent contractor driving the bulldozer knocks down both buildings. Would the state have no liability in that condemnation proceeding for misreading and instructing the bulldozer operator to knock down both buildings when only one of them was the subject of the condemnation order? We think not.

So there clearly under the case law should not be and we don't believe there is a specific requirement that the faculty advisors had to be holding the knife when it stabbed Paul Bishop for there to be liability. It is neither true in logic nor in the law that that ought to be the case. It is enough we believe that the university had control over the specific details of this activity. And the record is very clear about that through the student services dean, William Hearn, at pages 713 and 714 of the record. The record is replete with references to the specificity of control that the university had. So the faculty sponsors would have an obligation to see that student organizations comply with the campus policy. Yes they would. To ensure the students of the drama club comply with the regulations? Yes. They have the right to enforce it? That's true. Faculty sponsors have the right to veto any dangerous activities in the play? Yes. They have the right to dictate and control the actual performance of the play if it's not in compliance with rules and regulations of the university.

JEFFERSON: Accept for that last point, haven't we said on many occasions that a general right to impose safety obligations is not tantamount to control in a general contractor, independent contractor situation? How is this different?

HOGAN: Yes you have said that. And certainly this is different because of the level of specificity. Not like the Mendez case and not like the Thomas case cited by the state, which is just a generalized safety policy. This is a specific policy that prohibits deadly weapons on campus and would prohibit the use of those weapons in the student play. There is specific direction and control

down to the level of the props that is recognized by the people who testified in the record in this case.

This case, we suggest, is not like the Mendez case or the Thomas case, but is more like the Lee Lewis v. Harrison case in which the general contractor retained the right specifically over the use of fall protection, which was the implement in that case that led to the person's fall and then eventually to his death.

WAINWRIGHT: If you take the independent contractor step out between the government employee, faculty advisor, and the injured party, then wouldn't you have a Cowan type situation? In Cowan there was control over the decedent when he was admitted to the mental facility, there was control over the property even though it was his property, the decedent's property, the state had control over it for a period of time, inspected it and gave it back, the state had even more control over the decedent who was in a particular room in the facility. In this case it had less control over the students and what they were doing during the play. So how does this case come outside of Cowan, and isn't what you're asking for an extension beyond any prior application we've made of this statute?

HOGAN: No. What we ask for is a very narrow and limited rule. And that is, that when there is actual exercise and the right to control the specific instrumentality that causes the harm and there is direction as to the use of that instrumentality by the state employee, then there ought to be liability. And unlike Cowan...

WAINWRIGHT: The things you are talking about - control, and direction, those terms don't appear in the statute. And granted, the statute is not crystal clear and we asked the legislature to clear it up many times over the years to no avail. But the statute talks about personal injury caused by a condition or use of tangible personal property. It doesn't talk about control over others who use tangible personal property. It doesn't talk about the right to control the safety or the conditions of the conduct. It talks about control. It talks about use of tangible personal property, which we've held to mean it has to be a government employee using it, and it needs to be the government's property.

HOGAN: I just disagree with the reading of law and the case law that this court has handed down that requires the use to be by a government employee. And in fact, control is in the statute. Control is written into the statute, and the definition of employee in §101, which says that somebody who is the paid service and is an employee, but not somebody that the state has no legal right to control. And that's where the right of control language comes from. Because if there is a legal right to control, then that person - to make somebody a borrowed employee all you have to do is show that you have the legal right to direct and control the activities of the job.

OWEN: What if the contractor in Lee Lewis had said, you must wear a safety belt at all times when you're going outside the building. And the subcontractor allowed his workers not to. What would be the liability there?

HOGAN: If there were enough control and enough actual exercise, then we believe that there is liability in that case, and the court said so.

OWEN: What if the contractor had a policy in the Lee Lewis case in not allowing any guns or knives on the premises. And the subcontractor's employee brought a gun on the premises, got in an argument with a coworker, and shot him. Would the contractor be liable for that exercise and control?

HOGAN: I suppose that in the case if you have what we have here, and that is actual direction in the use of the instrumentality.

OWEN: I'm stepping away from the Wonios for a moment. The faculty advisors. What they had specifically told the Wonios, We've got a policy here: don't use deadly weapons. And the Wonios disregarded that policy. What would be the liability of the faculty advisors for telling them not to use deadly weapons when they did?

HOGAN: What the statute requires and the tort claims act you have to understand is a tiny bit different than the general contractor right of control cases, because the statute of course has language which instructs whether there's liability. And as J. Hecht mentioned in the Bosley opinion, some of the compromises that were necessary to secure the acts passage had obscured its meaning. It's not the best written statute in the world. But what it says is, that if there's a legal right to control, it doesn't even require actual exercise, then that person is not an independent contractor, and it is an employee if they are in the paid service of the state. And when those people in the paid service of the state have control over not just people, like in the Dallas Area Rapid Transit case, not just over supervising people, but actual control over the props, which is what happened in this case.

O'NEILL: And here's where I get confused. Because it sounds to me like you're talking about control in two different contexts. This rule that you want to apply to this case says that there is a use if you have inherently dangerous property and an employee directing its use. Now that seems different from right to control to me. So it seems to me that right to control was what we had in Cowan, the hospital had the right, and in fact was instructed by the court to take control of his possessions, including the walker and suspenders. So that right to control wouldn't really get you here on the specific direction piece that you are talking about.

HOGAN: The court pointed out the issue in that case was that there is nothing inherently dangerous about suspenders or walkers. But let's suppose that the right to control in that case was the state has a requirement and a policy: we're going to take away all sharp objects from patients that are admitted to this hospital. And the state not only failed to take away a knife from the mental patient, but _____ to him, and the said, Oh by the way, if you want to stab another patient here is the way that you impale that patient. I believe that there is a very good chance that the court would under those circumstances in Cowan have found liability. Just like in this case where there is actual provision by the Wonios who are in the paid service of the university as the resident associate directors, if they give the knife and provide an inadequate stab pad...

O'NEILL: I thought sort of underlying the Cowan decision was the theory that anything in the hands of a psychiatric patient like Cowan who was obviously suicidal could be inherently dangerous. The suspenders and the walker. When you are directed to take away property that he could use to injure himself, and that was a policy and directed by a court order, why wouldn't that be inherently dangerous property in the hands of a psychiatric patient intent on killing himself?

HOGAN: I understand the court may not want to make some sort of a broad sweeping general control policy to create liability under the tort claims act. And there is going to have to be some lines drawn between specific duties and generalized duties. And the way to draw that line in this case is that the specificity in this case is over weapons.

O'NEILL: You've got the Wonios' specific direction regarding the use of the knife. The faculty advisors direction is much more remote. You're trying to get specific direction on them based on general right to control.

HOGAN: No. We are not

O'NEILL: Specific right to control.

HOGAN: The specific authority and control in this case is provided by university policy, which says that the faculty advisors have the duty and the obligation, which they agreed to, to enforce campus policies. And the record says that the faculty sponsors had the legal right to make the Wonios comply with that organizational policy and the university's directives. And the record says at page 758, they could stop the play. They could fire the director. They could tell them not to use the knife in the play, and they can tell them not to use the gun that was used in the play. And specific right to control the record goes down to the level of the props. It goes all that way. And when there's that specificity, it's not a case like Cowan which this court said the issue here is whether merely providing someone with personal property that is not itself inherently unsafe is a use within the meaning of the act. I don't know why the court took pains to write that into the opinion. But J. Hecht did so for the court in writing that opinion. There is some reason for that language where it says that it's not itself inherently unsafe. If you provide a knife to somebody, instruct them how to use it, provide them an inadequate stab pad that's not big enough to catch the knife, it ought to be a surprise to nobody that there should be liability in that case.

WAINWRIGHT: Is there any indication that the legislature specifically wanted what you're talking about?

HOGAN: We believe that there is. The language in the statute says that itself. When you're defining an employee, the legislature says in §21 of the statute that it's vicarious liability or respondeat superior status which creates liability. The court then would want to know who's an employee and who isn't an employee. And the statute that somebody in the paid service is an employee as long as they are not somebody over whom the state doesn't have a legal right to control. So legal right to control, if you have that to direct and control the details of a specific activity

involved, is something we believe that creates employment status. An employment status in the use of instrumentalities that cause harm is the very tangible property that creates liability.

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REBUTTAL

HUGHES: On page 507 of the reporter's record, Diane Wonio testifies that she brought the knife onto campus. That particular page doesn't indicate whether it was her personal property. I believe elsewhere in the record it was, but I wasn't able to find it at this point.

WAINWRIGHT: And the stab pad?

HUGHES: The record is clear that she did, that she made the stab pad herself.

OWEN: How do you respond to his argument that the university had control over every detail of what the Wonios did as directors?

HUGHES: That's not what is supported by the record in this case. The record makes clear that the Wonios had the control over all of the details of directing the play. The details of directing the play are what are set forth in the constitution of the drama club: the right to choose props; the right to choose actors, casting, set designs, sounds, and so forth. And those things were clearly delegated to the directors of the play. And again, the only testimony that they raise deals with the university's right to enforce its own safety policies, which under the decisions that's been discussed earlier is always something that an entity has over its independent contractor.

O'NEILL: What's wrong with a rule that says if you have an inherently dangerous product or piece of property and someone specifically, affirmatively directs its use. Now I understand you don't think that happened here. The Wonios as you say are independent contractors and the faculty advisors as employees didn't specifically direct. Would you have a problem if there were such a rule, although it doesn't apply to this case?

HUGHES: I would have no problem if the legislature wanted to redraft the tort claims act.

O'NEILL: But it's no so clear from the tort claims act's language. When you say use, that it has to be employee use, it's a little bit hard to differentiate between someone who shoots someone and then gives the gun to someone else and directs them to shoot someone. I don't find that in the blatant plain language of the statute.

HUGHES: The example in that case though of shooting somebody - the example of an employee shooting somebody verses saying to somebody else you shoot that person. That's an intentional act and they are both hypotheticals and there's not going to be liability - I mean that individual can be personally liable for that rogue act. As actually the Wonios were held liable in this

case individually.

O'NEILL: But if the Wonios - let's say if this had been rehearsal and the director had taken the knife to simulate hitting the staff and had missed it. He would be liable. Immunity would be waived under the tort claims act. If he were an employee.

HUGHES: Only if he were an employee.

O'NEILL: Why should it be different if he's sitting there directing the student how to do it and the student misses?

HUGHES: I would go back to J. Hecht's opinion in Miller where he questions the policy decisions behind the tort claims act are sometimes hard to understand as applied to...

HECHT: Very _____.

HUGHES: Why should a state medical provider have its immunity waived when it affirmatively provides - uses property and provides negligent care but not have its immunity waived when it negligently fails to provide care? The policy rationale behind the tort claims act to the extent we can derive it at all doesn't explain that and it wouldn't explain, the example in your case. But that is clearly something for the legislature to address.

O'NEILL: So once again, we just say draw a bright line and let the legislature work it out?

HUGHES: I think this court has been very clear about the line in the employee use requirement. I wrote down that counsel stated, the actual use by a state employee is not required. I believe that that's directly contrary to this court's decisions. If it wasn't clear before Cowan as to subsection (2), it was clear by Cowan.

WAINWRIGHT: In Cowan if the hospital employee had given the decedent a gun, should that case have turned out differently?

HUGHES: It wouldn't have turned out any differently because again the property that was provided in that case was alleged to be dangerous, and indeed proved to be dangerous under the facts that happened. He's trying to carve out a narrow exception by claiming that the property was dangerous wouldn't be any kind of limitation at all because the plaintiff is always going to allege, and probably be able to prove in retrospect that the property was dangerous. If it wasn't dangerous as it was used there wouldn't be a suit.

WAINWRIGHT: So if the hospital employees had given the decedent a gun, put him in his locked room and walked away when he was admitted under a suicide watch, there would be no liability, no waiver of immunity?

HUGHES: I think there would be no waiver of immunity. What you would probably have would be individual liability for that indisputably irresponsible rogue act by those employees, and they should be held...

WAINWRIGHT: The state would be immuned?

HUGHES: The state would be immuned. And to consider it the state really should be immuned in that case, because clearly its policies would not - I mean that would be presumably an act outside of policy. And in such a circumstance it makes no sense to hold the state liable when the employee does something that's just completely outside of the bounds of their job and their discretion.

O'NEILL: Now they say they have brought up that it lacks an integral safety component. And I had always read the briefing from your side to be that they've never really pushed that theory.

HUGHES: That is correct. They have never alleged that the knife lacked an integral safety component. I would further point the court's attention to the clerk's record at page675, plaintiff's 6th amended petition. They don't mention the stab pad in their petition at all. So not only J. O'Neill, I think you pointed out, that it didn't go to the jury because they didn't even allege it. There was nothing alleged _____ the stab pad at all. And even if they had, that again would be what they would be complaining about. There would be a non-use of property, failure to use something else. And that's what the court rejected in Clark and said, you can't claim that something should have provided this as opposed to what was provided because that's complaining of the non-use of something that was provided rather than _____ what was provided. And that's what we had in this case.