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Supreme Court of Texas.
STEPHEN F. AUSTIN STATE UNIVERSITY, Petitioner,
v.
Diane FLYNN, Respondent.
No. 04-0515.

October 19, 2006

Appearances:
Rance L. Craft, (argued), State of Texas Office of the Attorney General, Austin, TX, for Petitioner.
Thomas Stefan Allen, (argued), Attorney at Law, Nacogdoches, TX, for Respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice N athan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

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SPEAKER: The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas are admonished to draw near and give their attention for the Court is now seated. God save the State of Texas and this Honorable Court.
CHIEF JUSTICE JEFFERSON: Thank you. Please be seated. Good morning. The Court has three matters on its oral submission docket. In the order of their appearance they are: Document 04-0515, Stephen F. Austin State University v. Diane Flynn from Nacogdoches County in the Twelfth Court of Appeals District, 05-0311 In re Autonation Inc. and Auto Inc. Imports North Limited d/b/a Mercedes Benz of Houston North, original proceeding, and 06-0322 Owens & Minor Inc., Owens & Minor Medical Inc. v. Ansell Healthcare Products, Inc., Becton, Dickinson, and Company which is here on a certified question from the United States Court of Appeals for the Fifth District.
The Court has allotted 20 minutes per side in each argument and we expect to complete all arguments before noon. We will take a brief recess between the arguments. These proceedings are being recorded and a link to the arguments will be posted on the Court's Web site at the end of the day today. The Court is now ready to hear argument in 04-0515 Stephen F. Austin State University v. Diane Flynn.
SPEAKER: May it please the Court. Mr. Craft will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF RANCE L. CRAFT ON BEHALF OF THE PETITIONER

MR. CRAFT: May it please the Court. The Court should reverse the court of appeals and render judgment for the university for two independent reasons. First, the Austin University dedicated a public easement so that people like the Flynns could cycle across its campus for recreation. It is entitled to the protections of the Recreational Use Statute, and Flynn cannot invoke the gross negligence accepting to that statute because the evidence attached for the university's plea establishes that the university was not grossly negligent.

JUSTICE: How's this different from the Shumake case?

MR. CRAFT: This is different from the Shumake case with respect to whether the university can establish gross negligence. In Shumake, the court held that based on the allegations and the evidence, that there was a fact question as to gross negligence. And it had to be remanded without reason because the -- the culvert at issue in that case was a hidden barrel. In contrast, in this case, we're dealing with a sprinkler that is -- that is open, that is in the middle of the field that is spraying water 15 to 20 feet in the air, and it is an obvious condition. And as the court described in Shumake, that is a circumstance under which the -- the defendant cannot be grossly negligent. That is the distinction.

JUSTICE O'NEILL: If it were a hidden condition, would she make a claim?

MR. CRAFT: If it were a hidden condition, then it would be closer to Shumake.

JUSTICE O'NEILL: Do we have in the record what type of sprinkler system this is? In other words, did it pump up on a timer or would they open it up and sort of presume that it was operating at the time she came through. And my understanding is the allegation it sort of shot up and activated unexpectedly.

MR. CRAFT: This is what the evidence shows and I wanna go through this in detail with the Court so that you'll understand how this happened. Now I'll start with Mr. Flynn's deposition because he went through the shot put field first.

JUSTICE: He went through what? I'm sorry. He went through what?

MR. CRAFT: Mr. Flynn rode through the shot put field where the sprinkler was located first. And his narrative is located in pages 63 to 69 of the record. He's riding in front. As soon as he reached the southern boundary of the shot put field, he saw the sprinkler all the way on the other side of the field operating on the northeastern corner according to his testimony. What he saw was the water shooting all the way across the field in an arch that he described as being 15 to 20 feet high. As he continued to ride toward it, he saw that it was oscillating. And as he got to the sprinkler, he ducked under the arch and continued riding. He was passed out of view by the time Mrs. Flynn arrives at the shot put field.

And her narrative is located pages 50 to 55 in the record. Like her husband, she saw the sprinkler as soon as she reached the southern boundary of the -- of the shot put field. When she got there, she saw it operating in the northeastern corner and she says it was shooting a big stream of water all the way across the creek to the other side. After that, she put her head down and she was looking down at the ground as she was riding. And she testified that the next time she became aware of the sprinkler, she was four to six feet away from it,

and that's when it oscillated and hit her. So this is a condition that they observed as soon as they got to the open area where the sprinkler is located.

JUSTICE: What if -- what if they didn't? And -- and if they didn't observe it, does it matter? Whereas in Shumake, you had an underground culvert that couldn't be seen by anybody, you have a rushing water. And we had a reporting of some near drownings.

MR. CRAFT: It matters because their testimony is the evidence of whether this is open and obvious. And I wanna be clear, your Honor --

JUSTICE: It appears a different fact pattern where someone is riding, sprinkler comes up and for whatever reason, this gets them off balance, they fall down, and break their neck.

MR. CRAFT: If it -- if it had popped up out of nowhere then -- then that would be perhaps a different case --

JUSTICE: Well does that mean that the state or the university system has to go now and remove all of the sprinkler systems that are throughout the -- these campuses?

MR. CRAFT: No, it doesn't. I mean in this case, the -- the sprinkler attachment is above ground. They saw it as they approached it.

JUSTICE: What if they didn't? What if it's below ground? They ride -- they ride by there. It comes up, get knocked off the bike, you break your neck.

MR. CRAFT: Then I think that's a hidden condition and we're -- we're -- we're getting into closer to Shumake where there can't -- where that could be evidence [inaudible] --

JUSTICE: So -- so under Shumake, the first person you squirt can't sue but everybody after that can. That's what Shumake seems to say.

MR. CRAFT: Well, it --

JUSTICE: One person complains of drowning, that's tough. But everybody after that can sue.

MR. CRAFT: Well, I think, even in Shumake, it depends on whether the condition was -- was hidden or obvious at the time even the first person who arrived. I wanna be clear. We're not relying on the Flynns' testimony to establish their subjective state of mind as to what they knew or didn't know. But their testimony is evidence of what the conditions were in the field at that time. And that does go to whether it is objectively an obvious condition. So that -- that -- at least under Shumake, the university is not grossly negligent under the circumstances.

And in Shumake, the -- the court relied on a case from the Utah Supreme Court, Golding v. Ashley Central Irrigation Company. And the quote that the court used from Golding is this, "That the landowner has knowledge of an uncommon hidden peril or danger on the land that is not inherent in the use which the land is put and that would not be reasonably discovered or avoided by a trespasser. The landowner's failure to warn or guard against such a danger could amount to willful wanton or gross negligence." If you apply that standard to this case, it's very different. The sprinkler was not hidden. They saw it when they entered the field. It's shooting 15 to 20 feet in the air. The sprinkler was inherent in the use of this property. This was a university shot put field. To maintain the athletic field, it has to be watered. In fact, Mrs. Flynn testified that she had seen sprinklers on other university athletic fields during her bike rides and that's [inaudible] in the record.

JUSTICE: I can appreciate the record -- the facts in the case here. I'm concerned with having -- if this is a hidden defect and then

requiring the state systems or any -- any public system to go out and have to now put up signs warning bicyclists or pedestrians that, "Hey there's a sprinkler system here. If it comes up, you know, don't be surprised." Or having them have to modify them at a great expense if you have a different fact situation and a different type of sprinkler situation.

MR. CRAFT: Well again, I think it would depend on the facts of each case whether -- whether the sprinkler actually poses a danger, whether it is concealed. Those are all things that go to this gross negligence exception to the Recreational Use Statute. I would also add that the -- the Recreational Use Statute has been amended since this case was decided. And now, at least as to government entities, their protection under the statute is governed by subsection (f) and it is no longer modified by subsection (d) that is the grossly negligent exception that the court relied on in Shumake. Now it just says -- a government unit doesn't owe any greater duty than it does to a trespasser. So if it's a premises defect, there's not gonna be a duty to warn or guard against condition on the [inaudible].

JUSTICE: What was the -- what is the second point on your introductory statement going to be?

MR. CRAFT: The second point had to do with Section 101056 under the [inaudible] from the university's decisions about the design of its sprinkler system and the most effective way to maintain its athletic fields and those are discretionary acts which the university maintains as proven in Section 101056. But I wanna go back to this -- this question of the application of the statute in the first instance. The court of appeals ignored the black letter law when it said that the existence of this easement meant that the university was not an owner of the property where Mrs. Flynn was injured. As this Court said in Marcus Cable Associates v. Krohn used it as a nonpossessory interest. It authorizes the use of the property for particular purposes but it doesn't convey the property itself.

JUSTICE: I mean -- I'll make sure I understand that facts. Flynn was riding her bike along the Stephen F. Austin campus. The sprinkler was on an easement which she thought was owned by the city. Correct?

MR. CRAFT: The allegation is that she was cycling on an easement owned by the city but dedicated to public use by the university. A sprinkler was on the shot put field in an area that was not within the easement. That's the allegation. But notwithstanding the existence of the easement because it's simply nonpossessory interest, the university still owns that property where the trail is located. And that brings it within the plain language of Recreational Use Statute. It is the university --.

JUSTICE: I wanna be sure of a couple of things. I understand your argument that there's not -- that there can't be both premises and a negligent activity claim arising out of the [inaudible]. But here it seemed like the circumstances are a little different because you have on the one hand, an argument that weighing just a bit set up is a premises defect because it allows this kind of thing to happen. But the operation of it might be a negligent activity. Why? Why aren't there -- I'm slicing it pretty finely, but why aren't there two causes of actions?

MR. CRAFT: There are not two causes of action because, although she has pled to the cause of action, they are predicated on the same facts. And what she has said is that there was past conduct by university employees in setting up the sprinkler and turning it on. And that once the Flynns entered the shot put field, the operating

sprinkler was part of the conditions that they encountered and there was no contemporaneous conduct by any university employee while that's going on.

JUSTICE: And you -- and you think if it were a negligent activity claim, it would not be covered by the Recreational Use Statute.

MR. CRAFT: Well, it would still have the gross negligence exception in it. And in that sense, the issue of whether this is a negligent activity or a premises defect has kind of dropped out of the case after Shumake because it was determined that before -- because our position was that the Recreational Use Statute completely closed the immunity waiver for premises defects. But now, after Shumake, the court has said that's not correct. That whether it's a negligent activity or a premises defect, someone can still evade the restrictions of the statute by showing either past gross negligence in the case of the premises defect or contemporaneous gross negligence in the case of negligent activity claims. So either way it got showed gross negligence. So that distinction really doesn't matter to the case so much after Shumake. And now what is determinative, once we decided that the Recreational Use Statute applies, is whether there has been gross negligence.

JUSTICE: And regardless of that -- if it's discretionary, that's another independent ground. You'll prevail

MR. CRAFT: That is an independent ground. If the Court does not agree that this evidence established that the university was not grossly negligent, then it would then have to turn to the 101056 issue.

JUSTICE: Can you speak to the -- the distinction between a discretionary act and implementation of it. I mean, you know, it depends on how broad we approach the question -- the summons and everything, if it's policy-based. How things are -- where the -- where the sprinkler is placed, etc., but -- but, you know, if you can conceive the situation where the implementation of that policy decision might create liability. What if the, you know, the stream is so forceful that it, you know, it's -- it's completely unreasonable to knock people off and the force is caused by a negligent implementation of that policy.

MR. CRAFT: That means -- that could be if -- if it was an implementation. But -- but in this case, and what the court has done with the 101056 is that it started by looking at what the allegations are attacking and -- and going through those to establish whether it falls within 101056. And the forcefulness of the sprinkler is a design decision. And while we may not think of design decisions as being a formulation of policy, the court has said in numerous cases that the engineering design decisions are discretionary acts within 101056. So I think that's a category that's been established. And when you're talking about where we're gonna place the sprinkler in relation to the shot put field and how much water is it gonna spray out which will determine how much of the shot put field is covered, I mean, that's a design-type decision that's just inherent in the sprinkler.

The other thing she challenges are whether to post warning signs. And that the court has also held to be a discretionary act in State v. Miguel, whether there's no legal requirement to post a warning. So it -- it necessarily is a discretionary act.

JUSTICE: If the decision was discretionary, then it looks to me as if the state is entitled to rendition [inaudible].

MR. CRAFT: If it is discretionary, then it is entitled to [inaudible].

JUSTICE: If it's just covered by the Recreational Use Statute,

would it mean to be remanded for further opportunity for the plaintiff to plead gross negligence?

MR. CRAFT: It would not. She has pled gross negligence but -- but our position is that the evidence attached to our plea, because it establishes that this is an open and obvious condition, means that there cannot be gross negligence. And there's not gonna be any better evidence than what the conditions were when the Flynns entered the shot put field. We're not relying on something we pulled out from the file. This is their testimony.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Allen will present argument for the respondent.

ORAL ARGUMENT OF THOMAS STEFAN ALLEN ON BEHALF OF THE RESPONDENT

MR. ALLEN: May it please the Court. Ladies and gentlemen, it is our position that this case is not a case in which this Court showed [inaudible] opinion or the decision of the court of appeals. In fact, the Court of Appeals' decision was right on -- was correct. And -- and we start with the issue of whether or not the Recreational Use Statute applies to this case at all. And there's been a lot of discussion about the significance of whether it's an easement, whether it's not an easement, where the condition took -- was actually, geographically located versus where the injury occurred. And the reason this is significant is because when you look at the Recreational Use Statute, it has been written to combine with traditional Premises Liability Law. It discusses the status of the individual who is on the premises. And it says that they are relegated, that they are no greater of use today for individuals than that of a trespasser. Traditional Premises Liability Law does not even apply in this case. The reason is, unlike the easements that are traditionally granted or that are -- that are granted to individuals for access to a place, this involved an easement in which the -- a geographical location, an area of land set aside with parameters, with widths, was actually transferred over to the City of Nacogdoches. It wasn't transferred over to the public as opposing Counsel stated. It was transferred over to the city and the city dedicated it for public use.

JUSTICE O'NEILL: Well how -- how would you transfer it to the public but for transferring it to the city? I mean --

MR. ALLEN: Well, there -- there had been other situations where you could simply dedicate it to public use. You wouldn't have to -- you wouldn't have to transfer it to a governmental entity to open it up for public use.

JUSTICE O'NEILL: But the purpose was clearly to open it up for public use.

MR. ALLEN: I agree. I agree. But the station is that when they transferred it to the city, they no longer had any control whatsoever over that piece of land upon which that trail was located.

JUSTICE: It's still a holding.

MR. ALLEN: It is. But the distinction is, that in the other cases from the other jurisdictions cited that the easement was granted to the individual using it. And -- and presumably, and, I think we can all presume that the owner of the land maintained the right to control even

that area. They could place what they wanted to on there. They maintained it. They mowed it. That didn't occur in this case.

JUSTICE O'NEILL: What difference --

MR. ALLEN: I'm sorry.

JUSTICE O'NEILL: What difference does that make if the purpose behind the Recreational Use Statute is to encourage owners to dedicate land for public use, for recreational purposes, why would control make any difference in the analysis?

MR. ALLEN: Because that is by definition what -- that is what defines a premises liability case. It is the right to control over the premises upon which the individual is located. There is no other test. Owner, occupier, lessee, all those things are different terminologies in the Court --

JUSTICE: But the owner remains liable for some things.

MR. ALLEN: The owner would only, I believe, remain liable for latent defects on that trail, okay. And the distinction is that condition --

JUSTICE: So -- so it's like if they're still liable for something. Then the Recreational Use Statute would still apply, wouldn't it?

MR. ALLEN: It would if the defect was a latent defect on the trail itself over a portion which they did retain control, okay. And I think the Court interprets that as these latent defects that an owner may have, or may have knowledge of. When they transfer the property to someone else, for instance, leasing a house to someone and they know that the floor is rotten but the person they lease it to doesn't know. Well, they retain that the law still leaves that duty on them to do something about it.

But this is not a situation that -- this is not the situation here. We're talking about a condition that existed on a premises adjacent to an area over which they had no control. Now, the city could certainly enjoy a right -- or would certainly be covered by the recreation -- Recreational Use Statute with respect to other conditions that might be on this trail. We're talking about roots that may be growing across it, limbs -- things such as that. But the -- but the university has given up all control over this and therefore they should enjoy, since it's not a premises liability case, the Recreational Use Statute doesn't apply.

JUSTICE: So you -- so you don't have the premises liability apply.

MR. ALLEN: I don't believe it is -- I don't believe it is a [inaudible] premises liability case in that terminology. I don't think it is one where, for instance, it doesn't matter what the status of the individual on the property is. And an example -- I'm sorry.

JUSTICE: I'm just wondering if you have a premises liability claim or not. I thought you told the trial judge that this was a premises liability case.

MR. ALLEN: It's a premises liability case in that it deals with the defect on a premises. It is a condition of real property, okay. They may also -- I'm sorry.

JUSTICE: This is not the time to partial hang which to apply. We just need to know do you have a premises claim or not.

MR. ALLEN: I think it may also be a negligent activity case, your Honor.

JUSTICE: Also or not? Do you have a premises claim or not? That is just an easy question.

MR. ALLEN: Your Honor, under Lee Lewis, I'm not sure, I'm actually -- I'm actually not sure. And when you look at Lee Lewis the distinction between a negligent activity in a condition on a piece of

property. And I think you've pointed this out during arguments earlier, it gets very fine in the distinction of what that is. This is actually an oscillating sprinkler so there's an activity going on. But someone put it there earlier, so. I, you know, is it a condition? Is it a negligent activity? Could it be both?

JUSTICE O'NEILL: All right. Would you answer the question then. I know I'm switching course here. But the force of this -- of the water coming out of the sprinkler system being a design decision and not implementation.

MR. ALLEN: I don't think we know the answer to that. I don't think the factual record --

JUSTICE O'NEILL: [inaudible], I mean, don't we just sort of intuitively know that whatever force comes out of a sprinkler is part of the design?

MR. ALLEN: It was part of the design of the sprinkler not necessarily that the -- I guess that they didn't design the sprinkler. I'm sure they just chose the sprinkler head. And we don't know that because it wasn't factually developed at trial --

JUSTICE O'NEILL: But -- but even if they chose the system, knowing what the pressure was, that would still be a policy decision.

MR. ALLEN: If there was some policy decision made by SFA where the individuals formulating the policy got together and discussed what power pressure the sprinkler should have and I have --.

JUSTICE O'NEILL: Even if they didn't. Even if they did.

MR. ALLEN: Then, no. I don't think it would.

JUSTICE O'NEILL: Well even if -- well let's say they -- they've got a brochure that said, this is the pound pressure in this particular sprinkler system and they say, "Yeah, we're gonna buy it." That's a policy decision as well.

MR. ALLEN: It -- it possibly could be. I -- I don't think we could tell that though from the factual record. We don't have any evidence of whether they even knew what the power of it was when they got it. I think all those things would have to be factually developed at the trial court level in order to attack jurisdiction for that reason, and that wasn't done. We don't know who decided to put the sprinkler there other than it was an employee of SFA. We don't know whether some authority was delegated and -- and some individual landscaper was told, "Here, go make sure that the -- the -- it gets watered." Clearly, that wouldn't be the type of individual who could make this --

JUSTICE: Do you have any idea about how Mr. Craft characterized the deposition testimony?

MR. ALLEN: Yes, I do, especially the way it characterized the deposition testimony of Ms. Flynn with regards to whether or not she appreciated the oscillating sprinkler coming across the trail. The evidence was not such. It was not that. The evidence was that she didn't appreciate that the sprinkler was oscillating across the path of it until she was about four feet from it. And, in fact, that is the portion of the testimony that he quotes in his brief. It is that she recognized it was coming across and that she was about four feet from it. At that point there was nothing she could do.

JUSTICE: Is there any evidence that anyone who set up the sprinkler knew that the force of the sprinkler could knock somebody off a bicycle and yet went ahead and set up the sprinkler across the path anyway?

MR. ALLEN: Your Honor, to be honest with you, I don't recall that. And -- and the reason I -- they certainly knew how far it would project the water. And then it was --

JUSTICE: [inaudible] cross the path where people would go back and forth. Is there any evidence that they knew that it was gonna do that?

MR. ALLEN: Yes.

JUSTICE: Through this?

MR. ALLEN: Yes.

JUSTICE: And then it was --

MR. ALLEN: No. That's not in the record.

JUSTICE: Well, we need to know what -- what's in the record.

MR. ALLEN: Well, your Honor. That is the first prong I wanna -- I wanted to address this anyway with respect to the issue of whether or not there is gross negligence in this case which would exempt it even if the Recreational Use Statute applied. Judge, the reason that wasn't briefed by me is because that is a factual dispute. This should really be handled, in my opinion, more properly at the trial court level. What he has raised are issues that may preclude judgment or may be right for summary judgment, with affidavits and the like. But not in my opinion, Judge, under the existing case law a factual dispute that ought to be developed in the -- from the standpoint of filing a motion -- our plea to the jurisdiction.

JUSTICE: But if it is a premises case and if the Recreational Use Statute does apply, you do have to allege gross negligence and send the decision back to raise that issue before the court again, don't you?

MR. ALLEN: Yes, your Honor. And we pled it. The question is whether we have to raise sufficient facts in a plea to the jurisdiction. And, your Honor, I don't think that's the law. If they filed a motion for summary judgment on the basis of not having evidence of gross negligence, that would be different.

JUSTICE: Well but if you -- if you say that there is gross negligence but the only facts that you allege are ordinary negligence, do you think that's enough?

MR. ALLEN: No, your Honor. If we alleged in our pleadings facts that we're only sufficient if proven to show simple negligence and the Recreational Use Statute applies, no, your Honor. We should look -- I don't think that's the case. I think the pleadings clearly set forth that they knew it. The pleadings state, "They knew it was a dangerous condition. They knew it was gonna go across the trail." My client didn't know it was gonna go off across the trail. "They knew it was gonna be dangerous and they did willfully and wantonly disregarded that risk." That's what the pleadings are in this case.

JUSTICE: If you plead gross negligence and sufficient facts for that pleading and the Recreational Use Statute applies then the state comes in, Stephen F. Austin with facts that it says, "To [inaudible] gross negligence, even at a plea to the jurisdiction stage." Don't you have to raise facts at least sufficient to raise a fact question?

MR. ALLEN: Your Honor, that is not how I interpret the status of the law. When it talks about -- generally, you look no further than the pleadings, in determining a plea to the jurisdiction. Do the pleadings as the plaintiff has set forth, plead sufficient facts to overcome sovereign immunity. Now, there are cases in which the Court may hear evidence as to a jurisdictional fact. But, your Honor, I think, jurisdictional facts go the heart of the case of whether or not there's gross negligence or not. It may go to whether or not they had control of it. It may go to whether or not it was a special defect versus a regular defect.

JUSTICE: Well did you -- did you plead facts or did you just plead it -- it's a danger? Did you just conclude it -- it's a danger? Did you actually plead the facts?

MR. ALLEN: I pled facts, your Honor.

JUSTICE: And what facts did you plead? How much force there is or what facts did you plead as opposed to merely saying, "This is a danger they knew about, and they were grossly negligent." What facts did you plead that would make -- that would make us go on pleadings instead of the pleadings and the evidence?

MR. ALLEN: What was pled, your Honor, was that the university placed this oscillating sprinkler that posed the danger to those traveling up and down the trail --

JUSTICE: And why -- why -- why was it a danger. I mean, they -- they placed it there. The fact it's a danger is a conclusion, isn't it?

MR. ALLEN: Because it could knock individuals off their bikes who were traveling up and down the trail.

JUSTICE: Okay.

MR. ALLEN: And they knew that individuals were traveling up and down the trail by bicycle, and then if they were knocked off their bike, that they could become seriously injured. And if they disregarded that risk even knowing it, then that that constitutes gross negligence.

JUSTICE: Well, if that -- if that plea is not to get you there, what if you pled that we were riding down their sidewalk and -- and this oscillating sprinkler in a neighbor's house of ours got me in the eyes and blinded me and I fell off and that's the danger and -- and if we just plead that and don't have to look behind then every pleading is going to be gross negligence. Is it not? Unless -- unless we know something more other than that they knew that it was a danger at all. You can always say that.

MR. ALLEN: Your Honor I agree. I agree you certainly can. But that is the reason we have summary judgment. That is the vehicle by which to resolve those types of issues, not in a plea to jurisdiction. If there aren't sufficient facts then file a motion for summary judgment, file contraverting affidavits, and let the trial judge decide whether there are. I mean that's where that's -- that issue is better left.

JUSTICE: It's just hard to imagine the circumstances in which setting up of an ordinary sprinkler would be gross negligence?

MR. ALLEN: I agree. Setting up an ordinary sprinkler.

JUSTICE: Was there anything extraordinary about this sprinkler?

MR. ALLEN: It shot over 100 feet. It was -- it was a powerful sprinkler. Plus, your Honor, getting into the facts again which I have really tried to avoid simply because I don't think they're relevant to this inquiry about how it traverses the property, but there was nothing but water on the other side of this trail.

JUSTICE: What [inaudible]?

MR. ALLEN: Because no one would expect a sprinkler to come across this trail and -- and fly off into the woods. That's my point. If you're traveling down this trail, they're watering nothing. They're watering the woods in the trail. If it had oscillated correctly or -- or what I think would have been correctly. It never would have touched Ms. Flynn.

JUSTICE: It is hard -- it's still hard for me to imagine the circumstances where watering nothing is grossly negligent.

MR. ALLEN: Well, your Honor, I think --

JUSTICE: Maybe it's a waste of water. But it's just kind of hard to see how that's grossly negligent.

MR. ALLEN: It's the stream that was powerful enough to knock her off her bike. I mean that's the -- that's the allegation. Those are the facts and -- and like I said if this were -- the facts might be different. But once again we're getting into what exactly the facts are

with respect to gross negligence and I plead asking the Court let the trial court do that. You know, let us present evidence of what that is and a plea to the jurisdiction is not the appropriate vehicle to do this.

JUSTICE: Counsel, doesn't Miranda and Bland -- don't they both say that under appropriate circumstances facts may have to be considered at the jurisdictional stage?

MR. ALLEN: Yes. Yes, your Honor. And I -- I addressed that earlier what I think those types of facts are. I don't think they go to the issue of whether the defendant was negligent or not or whether the defendant was grossly negligent or not.

JUSTICE: You said -- it sounded like you were saying earlier that control is an issue under the Recreational Use Statute?

MR. ALLEN: Yes, your Honor. I -- I -- yes, your Honor. I believe.

JUSTICE: Why?

MR. ALLEN: And I believe the reason that is -- is because once again, I think that as a use of the term trespasser, I think it is contemplating clearly traditional Premises Liability Law. And what oh -- that the case I was gonna point out, this is -- this is most closely like a case where an individual is walking down the sidewalk, a public sidewalk and something from the building next to it falls off.

JUSTICE: What if -- what if that this university has, instead of having a sprinkler system, planted some trees in a beautification project and somebody is jogging along, the tree falls on that person and injures him? You know, facts are important.

MR. ALLEN: Those facts are, I agree, your Honor. And that may be as a matter of law. If that would -- what was pled and there wasn't anything else pled as -- such as knowledge that the tree was gonna fall and disregarding of that knowledge certainly just -- just a tree fall. It is not their fault. It's no one's fault. That happens.

JUSTICE: I suggest that maybe in that situation you can envision where an entity may be grossly negligent but grossly negligent for the -- even the wrongful implantation of a sprinkler system, it seems to me to be insignificant reach.

MR. ALLEN: Your Honor, and I can understand that without having the facts developed in the trial court level. But I think going back to that is -- that is a factual determination that would ultimately be made by a jury or per summary judgment would be made by a judge at a trial court to add -- to add knowledge of all the facts that came in by affidavit. I just don't believe it's a vehicle that ought to be handled in a plea to the jurisdiction.

JUSTICE: And so the case should be sent down for those facts to be developed?

MR. ALLEN: Sure. Yes, your Honor.

JUSTICE O'NEILL: What facts would need to be developed in order to make the discretionary decision determination?

MR. ALLEN: As to whether or not there was sufficient evidence of gross negligence.

JUSTICE O'NEILL: No. Whether -- whether the sprinkler -- the operation of the sprinkler was a discretionary function? I mean, it seems to me that -- that -- that the policymaking and the implementation distinction is we want to protect government employees for discretionary decisions at whatever level they make them. And if, for example, the sprinkler system was bought with no directive, you know, do it this way on this day, at this time, at this pressure, whoever is making it day to day, that decision is gonna be entitled to the protection of making that discretionary decision. So either --

either way, it seems like the discretionary piece doesn't work here.

MR. ALLEN: I -- I'm not sure I'm following you. Are you -- are you saying that if the individual was told to do it this way, water on these days, water at this time, water this location --

JUSTICE O'NEILL: Then it seems to me that would be the implementation part, that it's no longer discretionary if you've been told how to do it. But I -- I think in response to our last question to you was, if the pressure is determined by the people who bought the sprinkler system -- if that's just built into the system and clearly that's a policy decision for which the government is entitled to immunity.

MR. ALLEN: I'm not sure I would agree. I'm not sure that watering your -- the shot put field is the type of governmental discretionary action that was -- that was anticipated to be covered by. And I -- I go back to the language of State v. Terrell that -- that this Court rendered back in 1979 and states, "Only those acts or omissions which constitute the execution or the actual making of those policy decisions were intended to be excluded." And -- and it seems to me that it's these types of policy decisions that a -- that a police forced us, whether to send three officers out versus five, whether to put a stop sign up versus not put a stop sign up. Not the type of decision of whether or not you should water at five o'lock or ten o'clock or one o'clock in the morning.

JUSTICE O'NEILL: Why not? I mean it seems to me like that's as discretionary as you can get when something needs watering and how you're gonna go about watering. Isn't that core discretionary activity?

MR. ALLEN: I can envision a circumstance where it may be, but I think it would depend on who make those decisions, and under the circumstances in which they were made. I don't think if an individual -- a landscaper is given the -- the obligation of just watering the yard, water the shot put field, an hourly employee. And he goes out and he decides that he's gonna water at five o'clock in the afternoon when everyone's running. I'm not sure if that is a policy decision that's anticipated or -- or that's subject to the discretionary act -- with exception to sovereign immunity. But I think those facts would have to be developed.

CHIEF JUSTICE JEFFERSON: Any further questions. Thank you, Counsel.

MR. ALLEN: Thank you.

JUSTICE: But what about the idea that here the condition existed not on the right path but on property adjacent to the right path. Does that make a difference in your mind?

REBUTTAL ARGUMENT OF RANCE L. CRAFT ON BEHALF OF THE PETITIONER

MR. CRAFT: It doesn't make a difference because the area of the easement is still university property. So it doesn't matter. It's still university property. And I wanna address a couple of record issues first. Mr. Allen said in his argument that the easement was transferred to the city and the city dedicated this to the public use. That's not what he pled. Page 85 of the record, paragraph 12 on information and belief, "That portion of the trail running through Steven F. Austin State University property was an easement owned by the City of Nacogdoches and dedicated to public use by Steven F. Austin State

University." So it's that dedication that directs the use of this easement for a walking, jogging, cycling trail.

JUSTICE: Counsel, is there any -- is there any evidence in the record about what type of transfer happened between the state -- between the college and the city. We've heard the term transfer several times.

MR. CRAFT: There's not any record evidence of that --

JUSTICE: So the only thing we have -- the only thing we have to go on is his pleadings there?

MR. CRAFT: All we have to go on his pleadings and his pleading is that it was a dedication to public use by the university and as a matter of law, you have to have some public entity owning that dedicated public easement to accept it for the public and complete the dedication. But it's the dedication by the university that dictates what this is going to be for. The city doesn't have the control that Mr. Allen says it does. They could not set up the barricade right where the trail starts on Steven F. Austin State University.

JUSTICE: Is that in the record?

MR. CRAFT: I'm --

JUSTICE: Is that in the record?

MR. CRAFT: That's a matter of law --

JUSTICE: But what's in the record about what the city clerk could not do? That's what I'm asking. What kind of transfer do we have? Or do we know anything other than his pleadings?

MR. CRAFT: We only know what he said which is dedicated to public use by Steven F. Austin State University --

JUSTICE: So, I guess this -- the university could actually have deeded that to the city, for all we know.

MR. CRAFT: But the allegation is that it was dedicated for public use. So that's all we had to deal with.

JUSTICE: You said the allegation is a transfer to the city. So if -- if they transferred it to the city by deed, then we have a conflict somewhere in there just --

MR. CRAFT: Well --

JUSTICE: I'm trying to figure out what we do know and all we know is what's in his pleadings. And those seem to be somewhat conflicting.

MR. CRAFT: I don't think that there's a conflict because his -- his pleadings do not say there was a transfer. It said the city owned it. It was dedicated to public use by the university. That's -- there's nothing conflicting about that. You can dedicate an easement for public use that will be owned by the public entity but that dedication directs what it's for. The university could not set up -- I mean the city could not set up a barricade where the trail starts at -- on university campus and say nobody can jog here anymore, because that's inconsistent with the dedication and that's just a matter of law.

The other record issue I want to address is what Mrs. Flynn testified to you when she entered the shot put field. She said when she entered the shot put field, as soon as she was at the southern boundary, she sees the sprinkler spraying a big stream of water in the northeastern corner of the field. She puts her head down, continues riding. The first time she becomes aware that it is oscillating, is when she was four to six feet away from it. But just because she put her head down doesn't mean this isn't open and obvious. And we know that from her husband's testimony. Her husband said, "I rode towards the sprinkler and I was watching it. And while I was watching it, it was oscillating." So that establishes that this is an open and obvious condition. As to the -- the issue of, because it's oscillating, is this

an activity. Just because it's moving, doesn't mean it can't be a condition of the premises. There are no requirements that a premises condition be static. Running water can be a condition. Smoke can be a condition. So just because this is moving doesn't mean it's activity.

Mr. Allen questioned whether gross negligence is a jurisdictional fact. It is a jurisdictional fact. Otherwise, this Court would not have gone to the trouble in Miranda and in Shumake of going through the evidence to see whether there was -- whether gross negligence could be established by that evidence. It's -- it is a jurisdictional fact by virtue of the Recreational Use Statute because it limits the waiver of immunity that Mrs. Flynn has invoked in the Tort Claims Act.

JUSTICE: Let's step back a few steps. When you're talking about the pleadings as to who dedicated the easement for public use. Under the Recreational Use Statute that's relevant to giving permission in the recreational purpose for the property?

MR. CRAFT: Yes.

JUSTICE: Okay. What, if any, role does control have under the Recreational Use Statute?

MR. CRAFT: It doesn't have any role because there's nothing in the statute that said you have to maintain control. And the court that would read that into statute would be contrary to the statute's purpose.

JUSTICE: The court of appeals talked about the control in the context of the Recreational Use Statute.

MR. CRAFT: Yes.

JUSTICE: Just -- just a misread of the statute, do you think?

MR. CRAFT: That is -- that is incorrect. I -- I think that has no basis in the law. Otherwise, Miranda would say, "I need to restrict access to my property because I have to maintain the reckless and level of control in order to have the protection of the Recreational Use Statute and that's inconsistent with the statute's purpose.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Mr. Craft. The cause is submitted. And the Court will now take a brief recess.

2006 WL 5878145 (Tex.)