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Supreme Court of Texas.
City of Grapevine, Texas Petitioner,
v.
Amy Sipes and Tana (Trevino) Waddell Respondents.
No. 04-0933.

February 15, 2006

Appearances:

P. Michael Jung, Strasburger & Price, L.L.P., Dallas, for petitioner.

Constance M. Maher, The Maher Law Firm, Arlington, David F. Farris, Lively, Padfield & Stout, Fort Worth, for respondents.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice Harriet O'Neill, Justice David M. Medina, Justice Paul W. Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson and Justice Scott A. Brister

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PROCEEDINGS

COURT ATTENDANT #1: Please be seated. Court is ready to hear argument in 04-0933 The City of Grapevine versus Amy Sipes and Tana Waddell.

JUSTICE #2: May it please the Court. Mr. Michael Jung will present argument for the petitioner and Mr. Wright for the plaintiffs will present argument for Grapevine the State of Texas. Petitioner has reserved five minutes for rebuttal. Mr. Jung will be the first eminence, Mr. Jung will present the rebuttal.

ORAL ARGUMENT OF P. MICHAEL JUNG ON BEHALF OF THE PETITIONER

MR. JUNG: May it please the Court. The Texas Tort Claims Act contains of a variety interrelated provisions that only make sense when construed together, because each sheds light on the meaning of the others. For example, Section 101.056 entitled, "Discretionary powers," has two parts. Part two preserves governmental immunity for a discretionary failure to act. What does discretionary mean? We have

some guidance purport one, which preserve immunity for the failure to perform an act not required by law. So we know, whatever else discretionary means, it includes a situation where accent is not required by law. In the specific context of a traffic control devices, Section 101.060 A(2) likewise consist of a number of interrelated provisions that shed light on one another. It is divided into three sections: A(1), dealing with the initial placement of a traffic control device; A(2), deal with the failure to correct the absence or condition or malfunction of a traffic control device; and A(3), dealing with the failure to correct the removal or destruction by a third party of a traffic control device. And like the rest of the statute, this three provisions must be construed together. The State versus Gonzales this Court held that A(2) is limited by A(3), that is, that A(2) does not apply in situations where A(3) does apply. Likewise, this support of rule in the present case that A(2) is limited by A(1), and does not apply when A(1) applies that is that absence under the statute refers to something different than a failure to initially place a traffic control device who goes back to his specific subject of section A(1). A(1) preserves immunity for the failure to initially place; if that failure is the result of discretionary action. Now, recall if you will that discretionary action includes at a minimum, a decision not to place when placement is not required by law.

JUSTICE #3: When is a replacement? What is placement not required by law?

MR. JUNG: Most of the time, your Honor.

JUSTICE #3: So if you have a, a road where I just straight away then it makes it sharp left turn, seeking decides at stake someone decided not to place a warning to the motors, sharp turn ahead and you entered that turn it's on peril.

MR. JUNG: That is correct, your Honor. That's the holding of this Court in State versus Rodriguez. That the designed of a highway is inherently discretionary function, and to design would include the placement of warning signs. The only exception to that might be if the warning sign where a warning sign relating to a special defect in the highway. Warning wire installation and something like that. But it is not a special defect in the part of the design and is immunized to such.

JUSTICE #3: But it seems to me it's like three things why argued; that is first, just to know the termination made at all to place asylum. Secondly, there is a determination that may not to place asylum and the determination made in two places asylum. Now, was the determination have been made to place asylum. It's seems to me why, why should there be any difference for fact that you made that determination, you put the asylum there, something happens in his absent, you have could back, or made the determination and still have to put asylum there which made that determination to place it why is it the same thing is in absence? Well, what would be a policy reason for difference on that.

MR. JUNG: Let me give you a couple of a-- a couple of reasons. First of all, Texas really based on the statute, A(2) says, "If it an A(3)-- if it removed or malfunctions then there is potential liability if you don't replace it within a reasonable time, that's the legislature simply said that. Whereas, it is said that initial for failure to initially place not failure to decide to initially place but failure to initially place is immunized to offense of discretionary decision, so that's the text you once. The, the logical answer is that the decision to initially place or takes of a greater degree of

discretion than the decision to fix that, that was just broken which has been lost. Impart because of that reliance that motorist comes-- come to have on a situation, if, if a let's say stop sign on across street is knock down that is a situation where motorist maybe ex-- maybe relying on the existence of that stop sign, and there's a, a heightened level of danger to public, if it is not correct to be in unreasonable time. In the case of initial placement, there is a policy decision to initially place but the decision on the timing of placement also partakes of policy considerations. If the City Counsel has direct that need to City manager to place a traffic light, then the decision to place or not place is out of my hand, but still within my hand is, all right, there are 12 other traffic lights that need to be place in this City. What are my priorities? How does that compare with the priority of this other crises that we're dealing with and some other part of the City. That is still partaking of discretionary decision make. Just as the decision of the lower level traffic engineers about what kind of bank-- embankment to have in the State versus Rodriguez case was a discretionary decision.

JUSTICE #3: Can you say it was the decision has been made to place asylum. It that matter how long it take to put asylum there, it's all discretionary.

MR. JUNG: Unless the timing is required by law. Let me give you an example of that. If, if the City of Grapevine had entered into a contract to text dot on this case that said, "No later than day acts, we will have a spotlight at an intersection." And then it failed to abide by that contract but that might be a situation where about the reason of the contract installation of the sign by that day was required by law and therefore, not discretionary under all bisects. But, but absence the situation like that, it would not be.

JUSTICE #4: So under Usury Act, they could never place to stop sign and still be immune.

MR. JUNG: That is correct and, and if ...

JUSTICE #4: We know that made the decision to do that.

MR. JUNG: Well, but they have made the decisions to do it-- the same people in this case, made the decision to do it as delay the implementation of that decision. So the, the decision to do it was an internal decision within the staff that for whatever reasons were sufficient to the staff, did not get informative within the prescribed amount of time. This is not a situation where the City Council said, "Go forth and install this abstinence." City Council ratify the installation of the light after the fact the decision to place the light and the responsibility for implementation of that decision rest of for the same thing. But to answer your question, yes, unless the time when it require by law, there is no liability and that's propose 0561. The Court of Appeals drew this, one must implement a decision to place within a reasonable time doctrine from a series of cases dated back to the Dallas Court's decision in the Sam Bore case. And with respect to Justice Baker who was in the audience earlier as well as on the panel in Sam Bore that decision is by lo--- bad logic and bad policy. I've discussed why it's bad law it is not compord with 0561 or the 060 A(1). It is bad logic, because the timing of implementation can in many cases we just this discretionary as the decision to ample to lives and it is bad policy because we do not want to place government under a burden as a, as a prize of making a decision to install, that a clock begins to run in taking on potential liability. Just say, "no, I'm not going to replaced it and there's no liability", but if you say, "yes, then you've better get done within a reasonable time or somebody

is going to sue." Particularly is that so in this case where the City of Grapevine was acting as a volunteer to place the traffic signal at a state control highway intersection because the state did not have sufficient funds to pay for a temporary seg-- Appocoli saying that, "No good deed goes unpunished if the holding of the Court is that having decided to place the signal." Grapevine had a duty to place it within a reasonable time and if liable if it failed to do that. Then, we have a deed punished Grapevine for proponing of that deed. Unless the Court has any further questions, I'll give the podium to the State of Texas. Thank you.

JUSTICE #3: Thank you, Mr. Jung.

MR. JUNG: May it please the Court. The state's interest in this case is that the Tort Claim-- that it in Tort Claim Act lawsuit's, the order of the Court's analysis is a critical to the correctness of its judgment. In this case, the Court of Appeals failure to fall the progress sequence of analysis in the act, resulted in its holding that the plaintiff could bring a negligent implementation of policy claim against the City without first invoking the acts, general labor provision. But there is no negligent implementation of policy claim in the air, any claim against the governmental unit under the Tort Claims Act, must first arise within the acts of a waiver provision. Section 101.021 falling the acts structure, the Court of Appeals should have, should have engaged in a simple two-step inquiry. First, the Court should have asked whether plaintiff's allegation is constituted a common law cause of action for which sovereign immunity had been waived under Section 101.021. If the answer of that question is "No", as it is in this case, the court's inquiry must end. Second, and only if the answer to the first question is "yes", should the Court then what you think exemptions to the waiver or immunity in the general waiver provision? The Court of Appeals erred in this case by answering a second question first, it's inquiry should have begun and ended with each determination that plaintiff's claims fail to constitute either a use of property or premises defect. Indeed, the Court of Appeals held in this case even if out of sequence that plaintiff's claims failed to constitute either a use of property or premises defects. At that moment, the Court of Appeals should have and must have under the law render judgment for the City, because no claim had invoked the general waiver of immunity. With respect to specifically to the use of property claim, the City claimed inn his motion for summary judgment and looks at clerk record at pages 14 through 15. The plaintiffs failed to alleged any allegation under the use of property provision that caused a injury to the plaintiff. The Court of Appeal or the, the Trial Court granted that motion for summary judgment on that ground and the Trial-- and the Court of Appeals affirmed on that ground at page 282. With respect to premises defect, the City again in clerks record at 22 through 24, asserted that any defect at that intersection was a premises defect for which appelliant had been formed. The Court of Appeals analyze the jurisdictional evidence that it been presented and concluded that the plaintiff admitted that, that there were sufficient signs at the intersection to warn her of unexpected danger. Therefore, the Court of Appeals held at page 282 of its opinion that, qoute, "The Trial Court did not err by granting the City summary judgment on the premises liability issue." As a matter of law then, there is no use of property in this case, there is no premises defect on this and as such, The Tort Claims Act has simply not been emboss.

JUSTICE #5: This is not an argument that the City makes. So how do the Court treats it?

MR.: Well, the Court has-- had in, in many occasions, there's, there's an appeal your Honor is well aware indicated that substance of requirements of the Tort Claims Act are jurisdictional and as the Court recently determined who the nearest to Texas self-question medical standard, had in fine, at Dallas versus Luz Heizer that the Court has to-- and indeed, has a duty to ascertain its own jurisdiction before it can reach an issue presented. I've specifically referred the Court to the City of Taylor versus Lives case in which almost this exact facts does exact situation occur in which the parties presented in issue that could not be reach because the claim did not fall within the general waiver of the Tort Claim Act. Unless the Court has any further questions [inaudible]?

JUSTICE #4: I'm, I'm tough-- I'm a little bit confused about the structure-- if the Court has found, no used of property, attention first of all, I don't see how, I mean, 101.060 A(1) contemplates a nine years. It's hard for me to see how he reconciled this case.

MR.: I think that when we're talking about asylum, we're talking about premises defect. I don't think wherever going to talking about, it used property claim. But in this case the plaintiffs did bring and used the property claim in addition to their premises defect claim and the Court held as a matter of law, that there wasn't used of property. I'll refer the Court specifically choose Section 101.021 and as the Court said in Texas First in Recreation versus Miranda you either have to have a used of motor vehicle confinement state more than difficult a use of property or premises defect. You must have one of the three, if you don't have one of the three, you've never endowed to avoid.

JUSTICE #1: Thank you, counsel. The Court is ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court. Mr. David Farris will present argument for the respondent.

ORAL ARGUMENT OF MR. DAVID FARRIS ON BEHALF OF THE RESPONDENT

MR. FARRIS: May it please the Court. The facts of this case or such that-- being such a decision on his horrible likely have a very, very late application. And I say that because noble on with the City of Grapevine could explain why that signal was never erected. So we don't know what, what happened other than nothing happened and there is no justification offered or no excuse, offered or no explanation offered at all. The only decision-- the only discretionary decision that we know about it is the decision that was first made to a rectus-- a signal at an occasion. And well, that may have been a good deed as Mr. Jung suggested rather than saying it's a good deed that, that it did not go unpunished, I think it may be that good deeds could all-- off though neither-- rather than leads to the Court house. I would like to address the state's argument because I think they are impartially right, I think if the-- there is a conflict in the Court's opinion, I think these are the created in, in, internal inherit conflict and I wish would the state that they had flip it, and had argued or had address first the, the question of the use or condition of property because if they had writtenly Court-- that the Court of Appeals had written the opinion that way, I think they would have realized they created a non-sector and that they would have been corrected that non-sector and I think that the opinion as a whole suggest that it would

have corrected this by finding still the same result and, and still, I want to mix the, they respond if they have held in the Court of Appeals. There, there is some Court's issue that is not been argued, I want to address to its brief when that is a question public policy raised in states brief, and I think that the failure of the City to, to suggest that they didn't have the money or that they didn't have the time whether there was some other reason for not erecting at the signal could have been a ground for summary judgment that was not raised, and still I think that's another reason why perhaps, this is not in purpose case this Court to take. Unless the Court has some questions on-- or remembers to balance of my time.

JUSTICE #6: Well, if it, if it had been flipped, what is your argument on used of property and on premises defect?

MR. FARRIS: Well, I think, I think if you're going to-- I think the absence of, of several names that that has to be understood as the use of property, it's a, it's a-- perhaps, a broad used but it's, is-- if that is not this offensive, I think as the conflicting narrow definition that the, that the other side asked you to put on the absence when what is meant by the absence of the signal in this case. So I think the Court would have-- the Court Appeals would have properly found that it involve in using condition and that the unexplained absence, once the Court and the other if once the City had exercise its discretion. Was it, was it-- am I-- it did realize that factual issue, summary judgment was improperly granted it, that should be set back to the Trial Court.

JUSTICE #7: Why is it the decision went to install it for the first time, a discretionary--?

MR. FARRIS: Maybe, it could very well been, your Honor.

JUSTICE #7: And I'll have to.

MR. FARRIS: And, and I think that the Cit-- the City could have offered this with some explanation, their response tha-- in this case and that's on of the reason I think, this is such a-- this case is such a narrow application. The City responses we don't know, why we didn't correct that statement. If they had said some, we did on around's hood because we have different of cases -

JUSTICE #7: So, so governmental discretion-- governmental decisions are discretionary only they have a good reason for?

MR. FARRIS: Well, they have, they have-- I think they have some reason, so could say we have no reason -

JUSTICE #7: So it's not a good reason for the-- for a law that we may just assume the legislature didn't exercise a discretion of action.

MR. FARRIS: I think, I think that when the facts -

JUSTICE #7: With the facts of the matter is, we sometimes is not a good explanation other than politics perhaps, or other than disagreements that they don't put on the record, I mean that's what discretion means, doesn't it?

MR. FARRIS: I think that's exactly what it means.

JUSTICE #7: So I mean, the decision to delay put it then, I mean it-- trouble with the difference between a decision not to put it in, which is of course always really a decision not to put it in now. Never decides for the future, we're not going to put it in, what's the difference between a decision not to put it in and not to put it in in out, but put it in later seems like their just this discretionary aren't they?

MR. FARRIS: If a decision was in fact made, the City was incapable of citing they ever made a decision not to put it in.

JUSTICE #8: Seems like, that discretionary argument though, could

cut off twice and if you have to stop sign that used to be there and somehow it got knock down. You could still said the timing of when to put it back up with the discretionary. So I guess, it's hard for me to draw the distinction between if the decisions made initially place, and we say when to initially place it's discretionary. What's the difference if is a traffic control device has been removed while it just the discretionary decide when to be placed.

MR. FARRIS: Well, we know that if someone-- if, if I handle still sign, the City doesn't do something over that reasonable period of time this can't cause you to arise to a cause of action.

JUSTICE #8: I understand, I guess that's my point is, is, why isn't a reasonable period of time discretionary in that scenario when it's not a common?

MR. FARRIS: I, I think that's very good question, your Honor, and I think the, the answer is that in depth. The exit that sized of discretion cannot be allow to, to be an umbrella that encompasses just doing nothing.

JUSTICE #1: No further questions.

MR. FARRIS: Thank you.

JUSTICE #1: Thank you.

REBUTTAL ARGUMENT OF P. MICHAEL JUNG ON BEHALF OF PETITIONER

MR. JUNG: May it please the Court. Let me address first the use question. I think if this a ban exceeding on the intersection and regardless of the other provisions of the Tort Claims Act. The City would be using that real property and if on the other provisionsn in the Tort Claims Act their reliability not having the stop sign or stop light there, that will rise from the used of that real property. What makes that different from this case is that this was not the City's intersection. This was a City at intersection in which the City wasn't inter-loafer, in fact the City had actually done some unauthorized things at the intersection, it was called on to curved it by text dot and for having done so and required to removed. So this was the State's property and the City was not using the real property, so I think that's where to used issue comes in with regard with signal light.

JUSTICE #9: So the City had own the property, you think this case would be like failing to include a piece of athletic equipment that's important to the safety of its use.

MR. JUNG: Well, not necessarily, but I think the used question would, would be beyond that and into the discretionary function question and the traffic controlled question under 0601, would not be introduced of one used question. Secondly, the prescribe procedure would be summary judgment burden of establishing that the delay was a-- an exercise of discretion. It is our position that by reason of 0561, unless the summary judgment record show that the timing of the implementation were required by law, the fact that it was not required by law which was established the summary judgment of record is all that is necessary to trigger 0561 and by extension of 0601 such that the immunity applies.

JUSTICE #3: I take it you don't disagree to the state.

MR. JUNG: We do not disagree to the state; we felt that the provisions of 022-2 which relate to special defects and the failure to warn of the absence of a traffic controlled device. Whatever, they get

to warn in the absence of the device names. Made it necessary or, or made it advisable for us to brief the absence versus initial implementation question, that's why that issue is not present in our brief, but we agree it is jurisdictional and we agree to the state on the merit of it. Any further questions?

JUSTICE #1: Thank you counsel. The case is submitted and the Court will take a recess. All rise.

2006 WL 5891610 (Tex.)