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Supreme Court of Texas.
City of North Richland Hills, Texas, Petitioner
v.
Laura Friend, Individually and as Personal Representative of the Estate of Sarah Friend, Deceased, and Luther Friend, Individually, Respondents; State of Texas, Amicus Curiae.
No. 11-0367.

February 28, 2012.

Appearances:

Fredrick Wayne Quast, Taylor, Olson, Adkins, Sralla & Elam, LLP, Fort Worth, TX, for the petitioner.

Rance L. Craft, Office of the Attorney General, Austin, TX, for the Amicus Curiae.

Darrell L. Keith, Keith Law Firm, P.C., Fort Worth, TX, for the Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 11- 0367, City of North Richland Hills v. Laura Friend and others.

MARSHAL: May it please the Court, Mr. Quast will present argument for the Petitioner and Mr. Craft will present argument for Amicus Curiae, the State of Texas. Petitioner has reserved five minutes for rebuttal. Mr. Quast will open with the first 10 minutes.

ORAL ARGUMENT OF FREDRICK WAYNE QUAST ON BEHALF OF THE PETITIONER

ATTORNEY FREDRICK WAYNE QUAST: Good morning. This, of course, is a Texas Tort Claims Act case arising out of a very tragic incident that occurred at the city's water park in the City of North Richland Hills where a Sarah Friend collapsed from a heart condition and the allegations are that she passed due to a failure to provide her with automatic external defibrillation. As this Court is well aware, this case has already produced an opinion from this Court, Yamada v. Friend. That was a Texas Medical Liability Act case. In that opinion, the Court characterizes the facts for Friend in this manner. Friend's allegations focused on the failure of water park personnel to use an automatic external defibrillator in attending Sarah. Courts under the Texas Tort Claims Act,

you can be held liable if you're a government for a use of property, but the Court has long held you cannot be held liable and there's no waiver of immunity for a nonuse.

JUSTICE DEBRA H. LEHRMANN: Let me ask you. Let's say if we buy that argument, then, I mean, is it going to be, are we going to need to find that the AED was an integral safety component or is it just enough to say that it was alleged.

ATTORNEY FREDRICK WAYNE QUAST: Your Honor, I think the facts need to back up. You can't just, the cases say and they've held this forever and ever. You can't just use magic words under the Texas Tort Claims Act to invoke jurisdiction. Specific facts that are alleged have to back up what you're actually saying and in this case, I don't think they do that. The court of appeals also recognized in this case that this was a nonuse of property, but again it upheld this case and this case is still alive and before the Court based on lack of an integral safety component theory and that is, the city provided other necessary resuscitative equipment, but did not provide an automatic external defibrillator even though there were two that were located at this water park. What I would want the Court to consider for a second what if the opposite had been true and what if this government provides an automatic external defibrillator, but does not provide other necessary resuscitative equipment? I cannot see how that is not also a waiver under the court of appeals' opinion. In other words, the reciprocal is also true. If the integral whole is necessary resuscitative equipment and then provide an AED, but nothing else, that's also a waiver of immunity. Since the message that the court of appeals' opinion sends is, government, if you want to avoid a waiver of immunity when it comes to necessary resuscitative equipment, you have to provide everything or you can provide nothing. That is very bad on public policy grounds especially in the context of automatic external defibrillators. Even though this is not truly in the record, if these devices are going to have any impact or efficacy on public health, they have to be placed and put in as many places as possible. Any time that I see an automatic external defibrillator in a public building or some other institutional building, it's there by itself. There's no other necessary resuscitative equipment there. That is a waiver of immunity if it's in a public building under the court of appeals' opinion. The decision discourages the government from putting these things in as many places as possible. Not only is the court of appeals' opinion bad for public policy reasons, it flies in the face of this Court's precedent. In Kerrville State Hospital v. Clark, essentially allegations were there that the state hospital used a form of medication, but it should have used something different. Essentially, I don't see the difference between that case and this case. The only difference is in Kerrville State Hospital or excuse me in Clark, the failure to use different tangible personal property that was alleged to cause the injury. In this it's just, well, you used some stuff or you've provided some stuff, but you didn't make an AED available additional property. I don't think there's a distinction under the Act or there should be a distinction under the Act between those two set of facts. Also in Clark, the lack of integral safety component theory, that line of cases previously that had come up with this theory, the first one was McGuire where the city hospital provided a bed without rails, Lowe, Texas Tech University provided a football uniform without a knee brace and, finally, the Robinson case where a child was provided a swimsuit without a life preserver. In Clark, this Court limited that precedent to its facts and essentially said when that theory, the lack of integral safety component theory is limited to facts when a state actor provides property that lacks an integral safety component and the lack of that component led to the plaintiff's injuries. In this case, we don't have the state providing any property for Sarah Friend to use. The actual injured party was not provided the property. That alone makes it distinguishable from the facts of this case. In addition, there are cases out there-

CHIEF JUSTICE WALLACE B. JEFFERSON: So if a person has a heart attack and the city is aware of it in a medical center and they intentionally refuse to send an ambulance to meet that person's needs, the city in that event is immune because there's no, because nonuse of the ambulance is not actionable against the city.

ATTORNEY FREDRICK WAYNE QUAST: Absolutely, Your Honor, absolutely. Now those facts sound a little harsh, but the problem, the reason why we have that kind of a limited waiver of immunity or limitations of waiver of immunity is sometimes the government doesn't have enough ambulances and also sometimes the doctrine of governmental immunity it's not a fair doctrine. It's in place to shield taxpayers' money from and this is when the government does things that are bad. There was a case called Texas A&M v. Bishop to where this

Court further limited the lack of integral safety component theory by saying that a safety component has to be entirely lacking. It can't be just inadequate. In that case, it was a stab pad. They were in a play and somebody was using a knife and they got hurt. The allegations were that the stab pad wasn't big enough. This Court held well that doesn't work under lack of integral safety component because the component's not entirely missing. There's something that is there. Your Honor, if you apply that to this case, there were AEDs at the park. The general allegations are that they just weren't close enough. They weren't in the right place. They weren't brought over to where Ms. Friend collapsed.

JUSTICE EVA M. GUZMAN: What was brought over?

ATTORNEY FREDRICK WAYNE QUAST: Your Honor-

JUSTICE EVA M. GUZMAN: An oxygen mask, and other airway equipment, was that brought over?

ATTORNEY FREDRICK WAYNE QUAST: Your Honor, again, we're limited here to the pleadings and I think that is what the pleadings suggest.

JUSTICE EVA M. GUZMAN: Well if you have a system for providing these types of efforts to resuscitate, why wouldn't the automatic external defibrillator device be an integral safety component of those types of devices, particularly with what is known now about their ability to save lives.

ATTORNEY FREDRICK WAYNE QUAST: Well, Your Honor, again, I, you can't just under a lack of integral safety component theory categorize a big any group of tangible personal property and say, look, that place has no limitations on the waivers of immunity in the act, potentially any three pieces of personal property I could stick there on the table and say one of them makes the other two safer. Then I could categorize them.

JUSTICE EVA M. GUZMAN: As pled though, these aren't any three pieces of personal property. These are specific type of equipment to resuscitate, correct?

ATTORNEY FREDRICK WAYNE QUAST: Well, Your Honor, that is true.

JUSTICE EVA M. GUZMAN: But that's what they're designed for?

ATTORNEY FREDRICK WAYNE QUAST: Exactly.

JUSTICE EVA M. GUZMAN: Okay.

ATTORNEY FREDRICK WAYNE QUAST: But, again, if all you have to do if you're going to say the integral whole is the component that we should have provided, well there's no limitations on the theory.

JUSTICE EVA M. GUZMAN: But you had-I'm sorry, go ahead.

ATTORNEY FREDRICK WAYNE QUAST: No, I'm sorry.

JUSTICE EVA M. GUZMAN: You had AED devices there as well sort of suggesting that it was part of one safety regimen or scheme if you will.

ATTORNEY FREDRICK WAYNE QUAST: Well, again, Your Honor, I don't believe that's the case. They weren't stored in the same place and, again, you can use airway equipment and other stuff without the AED. I see that my time has expired. Unless the Court has any questions, I'll sit down.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The

Court will hear argument from Amicus Curiae, the State of Texas.

ORAL ARGUMENT OF RANCE L. CRAFT ON BEHALF OF THE AMICUS CURIAE

ATTORNEY RANCE L. CRAFT: May it please the Court, the State generally agrees with the City this case should be decided on its first issue about integral safety components, but we diverge from the City and the court of appeals in how you get there. Once the City dismissed its employees from this suit under Section 101.106(e) of the Tort Claims Act, then this case should have proceeded as an ordinary Tort Claims Act case against the City and that's when this issue of integral safety component should have been addressed. The City should not have been able to at that point invoke Section 101.106(b) to try to dismiss itself from the case on the theory that its employees though now dismissed were named in the original suit and the court of appeals should not have held that the exception to subsection (b) pursuits to which the governmental unit can sense could be satisfied by the immunity waiver in the Tort Claims Act itself. Now, on those points, the single most important thing that I can tell you today is this. Read Justice Bland's opinion on rehearing for the First Court of Appeals in the City of Houston v. Esparza case from last October. That opinion gets Section 101.106 exactly right in all respects and under that opinion, the outcome in this case would have been as I first described. When the City dismissed its employees under (e), then this case would have proceeded as a regular Tort Claims Act suit.

JUSTICE NATHAN L. HECHT: If (b) consent can be found in the Employment Discrimination Act, why can't it be found in the Tort Claims Act?

ATTORNEY RANCE L. CRAFT: This is why, Justice Hecht, because the language of subsection (b) refers to consent and the Election-of-Remedies provision in Section 101.106 is itself a condition on the government's consent to suit. If the plaintiff voluntarily proceeds against an employee, which is the circumstance in which subsection (b) applies, then that confers immunity on the governmental unit so by definition, in that circumstance, the government has not consented to suit. Moreover, that interpretation would render subsection (b) meaningless. If all subsection (b) says is if you sue an employee, then you cannot sue governmental unit in any, for any claim for which immunity is waived in the Tort Claims Act or any other immunity waiver. That adds nothing to the existing rule because that's already true. It's already the case that you can't sue a governmental unit unless there's an immunity waiver and, in particular, that condition if you sue an employee would make no sense because it's also true if you don't sue an employee then you can't sue the government unless immunity is waived so that would need to be with no work to do and that's not help-

JUSTICE NATHAN L. HECHT: But in any event, you can't use it in seriatim.

ATTORNEY RANCE L. CRAFT: Yes and you can't use it in seriatim really for the same reason that that would leave (e) with no work to do because if (a) and (b) apply without reference to (e), then we would never have occasion to use subsection (e). In a circumstance like this, would the plaintiff sue both the governmental unit and the employees, then all the government has to do is use (a) to get the employees out because the government has been sued and then turn around and use (b) to get itself out because the employees have been sued and there would never be a reason to use subsection (e).

JUSTICE NATHAN L. HECHT: The courts of appeals are in some conflict over this and are you aware of that conflict?

ATTORNEY RANCE L. CRAFT: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: And does this resolve, does your position resolve that conflict?

ATTORNEY RANCE L. CRAFT: It would, Your Honor. The position that we urge the Court to adopt is that adopted by the First Court of Appeals in the Esparza case that I mentioned. Also, at least as to the consent issue, the 13th, 4th, 8th and 10th Courts of Appeals have all said that subsection (b) doesn't bar a claim simply be-

cause it falls within the immunity waiver in the Tort Claims Act. It's the 2nd and 14th Courts of Appeals that have accepted a governmental unit's invocation of subsection (b), but then said it goes away because it involves a motor vehicle or it involves use of tangible personal property. No appellate court has embraced the outcomes that the City urged in its briefs, which is you can use in seriatim to get rid of the whole suit and essentially once a plaintiff files a pleading that names both the governmental unit and an employee, they lose their cause of action altogether. No court has embraced that.

JUSTICE DALE WAINWRIGHT: The City argues that we should overrule Lowe and Robinson. Does the State take a position on that?

ATTORNEY RANCE L. CRAFT: The State doesn't take a position on those issues, Justice Wainwright. Again, our primary focus here is Section 101.106.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Craft. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Keith will present argument for the Respondent.

ORAL ARGUMENT OF DARRELL KEITH ON BEHALF OF THE RESPONDENTS

ATTORNEY DARRELL KEITH: May it please the Court, my name is Darrell Keith. It's my great privilege and honor to represent the family in Estate of Sarah Friend, who died tragically. Excuse me, Your Honor, I've been battling an upper respiratory infection for sometime now. May I have my water at the podium, please?

CHIEF JUSTICE WALLACE B. JEFFERSON: You sure may.

ATTORNEY DARRELL KEITH: I apologize.

JUSTICE DEBRA H. LEHRMANN: Mr. Keith, may I ask you what was the property that was used here? What exactly was used by the people that work there at the park?

ATTORNEY DARRELL KEITH: The what we claim are the components of the emergency equipment necessary to have successfully resuscitated Sarah Friend, those being airways, oxygen, Ambu bag and mask it's another part and perhaps some emergency drugs. I don't think the emergency drugs were used. I think the fire department arrived on the scene with emergency drugs, but I think there were some emergency drugs in the kit and then, of course, the AED was the component that the integral safety component we believe that was lacking.

JUSTICE EVA M. GUZMAN: What makes it a component of those other items that you've mentioned part of that?

ATTORNEY DARRELL KEITH: Because in emergency situations and in this particular case with hypertrophic cardiomyopathy, which was an unfortunate and rare heart disease that little Sarah had, brings about an abnormal thickening of the cardiomyopathy of the heart, the heart muscle, if you will, and that can cause abnormal heart rhythms when the heart gets into an abnormal rhythm, that can trigger an event that leads to a cardiac arrest, which it did in her case. The automatic external defibrillator device is designed to restore the cardiac rhythm. Without the AED device as a component of the emergency equipment, the emergency equipment is absolutely useless and ineffective. That is why it is so integral and essential to the emergency situation.

JUSTICE DALE WAINWRIGHT: How far does your argument extend? Would the water park have to have an operating room onsite? Do they have to have ER doctors on site? Do they have to have any conceivable equipment that could be necessary in an emergency like the one you're talking about?

ATTORNEY DARRELL KEITH: Well, no, we're certainly not contending that as well. Our case, we think, is consistent with the line of cases which have been narrowly construed by this Court over the years beginning with the *Lowe v. Texas Tech* case decided by the imminent Justice Greenhill shortly after I began practicing law and those cases have largely turned on the factual circumstances.

JUSTICE DEBRA H. LEHRMANN: That's what I was going to ask. Are you saying that the connection between the automatic external defibrillator and the equipment that was actually used in this particular situation is dependent on the facts of this case and the fact that this tragic accident occurred because of this particular person's needs because of the heart condition?

ATTORNEY DARRELL KEITH: Well, yes, in the context of the lack of integral safety component concept that has that emanated from the *Lowe* case and other cases cited in the briefs and mentioned and in the context of Sarah Friend belonging to a class of individuals that would have been susceptible or any individual that would be susceptible to cardiac arrest that to which the AED and the other emergency equipment could have been effective, keeping in mind that in answer to I think Justice Wainwright's question or perhaps Chief Justice's question, I apologize about how far does it extend.

JUSTICE DEBRA H. LEHRMANN: That's my question. How far would they go?

ATTORNEY DARRELL KEITH: The evidence of case in a pleadings demonstrate that we get a little bit beyond the negligent misuse of tangible personal property feature under the exception, the immunity waiver under the Tort Claims Act, but the pleadings showed, the evidence of the case will show that the park had paramedics on scene. They had radio equipment. We alleged negligent misuse of the radio equipment. The court of appeals felt that was a stretch because it wasn't the radio wasn't actually involved in the use, but they had radio equipment. They had paramedics and they called 911. They called for the higher level of professional care from the fire department with the paramedics and the advanced medical equipment including the AED device.

JUSTICE PAUL W. GREEN: Would you make the same case if the City had chosen not to supply any AEDs at the park at all?

ATTORNEY DARRELL KEITH: If the City had provided nothing--

JUSTICE PAUL W. GREEN: The other component, the airways and so forth, they just decided that they were not going to supply the park, even though they were available out there to purchase, but they said well, we're just going to make the decision not to supply those and now that component is not available at the park. Do you have the same argument?

ATTORNEY DARRELL KEITH: Do I understand, Your Honor, you're asking if no emergency equipment was provided or just the AED was-

JUSTICE PAUL W. GREEN: Just the AED was not there.

ATTORNEY DARRELL KEITH: Was not there. I believe we would make the same argument because then that would have been a defective, the equipment would have been inherently defective because it would have lacked the component necessary to resuscitate Sarah Friend. We've alleged the evidence is going to show when the fire department arrived with more advanced paramedics and they began the resuscitation and added the emergency drugs and the AED, they had an AED, her heart responded. Sarah Friend died because of the prolonged lack of hypoxia anoxia, the prolonged lack of oxygen to her brain that was caused by her heart not being restarted.

CHIEF JUSTICE WALLACE B. JEFFERSON: Just to carry Justice Green's question further, would your ar-

gument be the same if no emergency equipment were provided at the park?

ATTORNEY DARRELL KEITH: I think not because then there would not have been any, the Texas Tort Claims Act can be very harsh as the Court knows. There would be no equipment that would have been used, Your Honor, so I don't know what what, Sarah.

CHIEF JUSTICE WALLACE B. JEFFERSON: But why wouldn't city attorneys across the state if your argument is right say let's remove any type of emergency equipment at our state parks and facilities because if we happened to have a battery that's inoperable in the AED or an oxygen mask that doesn't work, then we're potentially liable for a lot of, the liability is extended. So why would the response not be to remove all equipment?

ATTORNEY DARRELL KEITH: Well, given the narrow parameters that the Legislature has allowed liability for the State of Texas in these various situations, I think that comes down to a basic call of rightness versus wrongness. There are many injustices under the Tort Claims Act, cases particularly in medical malpractice that are in the books and that I have seen in my 41 years of where you have cases where there is a nonuse of a product that is not actionable so I think that falls upon the morality and the values of the leaders of our governmental units, hopefully if this Court is trying to balance between incentives and disincentives, I think that's very difficult for this Court to do because of the limits that the Legislature, the very narrow limits of liability that the Legislature has created for this state.

JUSTICE PHIL JOHNSON: Counsel, let me go a little, the other ways of removing it. What if the people who attended Sarah had the AED but simply chose not to use it. They chose to use the other devices and said let's try these other devices. We're still trying to get her to breathe and bagging her and using the medications. Is that then a lack of integral device or is that nonuse of the AED if they had brought it with them and just chose not to use it. What does that do to your situation?

ATTORNEY DARRELL KEITH: Well, I think that if the emergency responders had the AED and the evidence was that they made a deliberate decision not to use the device?

JUSTICE PHIL JOHNSON: Because they were using the other equipment.

ATTORNEY DARRELL KEITH: I think that the argument could go both ways that it was still a negligent misuse of the equipment because the AED was not used in that fashion and it's also arguable that that would follow under the negligence nonuse of that component, which would perhaps be a new nuance or feature of the lack of integral safety unit or component doctrine in this state. I would obviously argue the former, but I could see that one could argue the other. I think that's an excellent question and would put me on the harms of a dilemma. Obviously, I would argue it would still be, but one could argue the other way.

JUSTICE PHIL JOHNSON: That's a little more difficult. Then you clearly have a nonuse of equipment.

ATTORNEY DARRELL KEITH: Of a component. The argument would not then, like in the Lowe case, there was the absence of the brace.

JUSTICE PHIL JOHNSON: They told them to take it off.

ATTORNEY DARRELL KEITH: Yes.

JUSTICE PHIL JOHNSON: And so, but so he didn't use it, but-

ATTORNEY DARRELL KEITH: Right.

JUSTICE PHIL JOHNSON: And the same, your answer would be the same, I presume, if they had a choice of

three or four drugs and the AED and they said let's not use the drugs. Let's use the AED and it turned out that the drugs may have made a difference and the AED did not. So a choice not to use would always, under your theory it sounds like, be a defect in the system or the equipment.

ATTORNEY DARRELL KEITH: Well, in an emergency cardiorespiratory arrest situation, Your Honor, the use of drugs alone is unlikely if not impossible to bring about the restoration of a heart rate. When you have a situation like this, the rhythm has either there is either cardiac standstill or arrhythmia and drugs alone are not going to bring that back without the AED. That's why the AED is so integral part of this matter. They had an AED at the Green Extreme Amusement ride and it became disabled for various reasons and it was in another location. It wasn't just removed as the court of appeals indicated. It was not functioning and the city, in my view, was neglecting to get it fixed so there had been they had the safety equipment there, but then they moved it to another location, so they only had one left and so everything, all the emergency safety equipment was in one location in a shed some distance from the amusement ride when Sarah collapsed so they had to go retrieve it and when they retrieve it, they didn't bring the automatic external defibrillator with the rest of the equipment.

JUSTICE EVA M. GUZMAN: Is that more like Robinson where they furnished the swimsuit but not the life vest.

ATTORNEY DARRELL KEITH: Yes.

JUSTICE EVA M. GUZMAN: And so here they're furnishing some equipment, but not what you are asserting is an integral part of that, the AED.

ATTORNEY DARRELL KEITH: Yes.

JUSTICE EVA M. GUZMAN: So it's closer to Robinson.

ATTORNEY DARRELL KEITH: Right and in Robinson, the swimmer had a disability that made the lack of the life preserver critical to the incident.

JUSTICE EVA M. GUZMAN: So this Court held that the life preserver was just as much a part of the swimwear attire as the knee brace was in [inaudible].

ATTORNEY DARRELL KEITH: I believe very strongly that the pleadings in this case and the evidence in this case will show that to effectively treat most cardiac situations, cardiac distress or arrest situations and particularly hypertrophic cardiomyopathy that Sarah Friend had, the AED was just an essential component. She could not have been revived and we pled and we the evidence we think will show that she was revived. Her heart was revived when the AED was used some minutes later, but as I indicated, her heart hadn't beat for so long, her brain had been deprived of life-sustaining oxygen.

JUSTICE EVA M. GUZMAN: That's exactly where the question gets a little more difficult because it's not tough to say that when you're disabled and someone gives you a swimsuit, they should give you a vest or that when you have a uniform, you probably shouldn't take off the knee brace, but as was alluded to earlier, you had an oxygen mask and some other equipment and some drugs and what else are we going to put in. I mean as technology advances, what other type of equipment are we going to start saying is a component. It's a tougher argument.

ATTORNEY DARRELL KEITH: As one who's been involved in medical malpractice litigation for four decades, it's been my privilege to see modern medicine evolve over time and I think I can say it's a matter of common knowledge by everyone in the Court that emergency medical equipment, particularly in the field, has evolved and developed as units of equipment-airways, airway management devices, drugs, oxygen, applicators of oxygen and devices such as AED devices that I think that it's safe to say that in all likelihood that trend will

continue where it will be a component. It will be a composite of integral components that will be a part of the emergency medical teams' system in a-

JUSTICE EVA M. GUZMAN: Is there anything else right now that's a part of that emergency medical team system that's not brought up here for the next case that comes up. Is there some other piece of equipment out there other than the AED or is that it? Would that make the system whole?

ATTORNEY DARRELL KEITH: Well, in a more sophisticated environment, there might be devices that and this would be more in the advanced [inaudible] when I referred to the fire fighters and paramedics, advanced paramedics on the team. There's what called a cricoidotomy kit where there are devices where if you have any airway obstruction, you swell in your injury can go below the level of the vocal chords, which can obstruct trying to get into the, get an airway established and enter just above the sternum and create an airway.

JUSTICE EVA M. GUZMAN: So how does a governmental entity then balance its interest in protecting its citizens by providing some equipment with what might be the rule or the outcome here that an AED was an integral component and now you've mentioned another one and the next case will say well you should have had that and so how does the City balance that and how his this rule written to address that?

ATTORNEY DARRELL KEITH: I was just trying to respond to your question as are there more advanced techniques and certainly, but then those advanced techniques arrived at the scene in the form of the fire fighters and since-

JUSTICE EVA M. GUZMAN: But my question was asked because it pertains to how this rule will operate in the future, the rule that you ask us to adopt that an AED is a component of the regimen for resuscitating.

ATTORNEY DARRELL KEITH: It work in this case, the Plaintiffs, we are not complaining that the emergency equipment was not adequate in its design and presentation. We are saying that when they brought the equipment to the scene of her, of Sarah's arrest that it was lacking an integral safety component to effectively resuscitate her.

JUSTICE PAUL W. GREEN: Okay, let me ask about this. A stroke victim on the city property and people know now that you get some aspirin in the mouth of a stroke victim quickly then it could alleviate a lot of the damage caused by a stroke. So the kit doesn't have any aspirin and it comes in and it comes in late, same case?

ATTORNEY DARRELL KEITH: Potentially. Potentially, yes, although with a stroke victim, you're dealing with a physiologically a different scenario where medication intervention alone could well be adequate and without the necessity of other components.

JUSTICE PAUL W. GREEN: So the lack of aspirin could trigger a waiver of immunity in a case like that?

ATTORNEY DARRELL KEITH: Yes.

JUSTICE DALE WAINWRIGHT: I have a similar question.

ATTORNEY DARRELL KEITH: Yes, if I understand your question correctly and I apologize if I didn't.

JUSTICE DALE WAINWRIGHT: Justices Guzman and Green, let me frame it more generally. How many illnesses or genetic defects does the governmental entity have to anticipate? What if it's a severe diabetes case or an aneurysm case or a kidney failure case? I know you're focused on your facts.

ATTORNEY DARRELL KEITH: Yes.

JUSTICE DALE WAINWRIGHT: When we write an opinion, we provide guidance for the area of the law hopefully and we've got to anticipate these other areas so how many areas of illnesses or genetic problems does a governmental entity have to anticipate and then have the necessary medical equipment onsite conveniently to address?

ATTORNEY DARRELL KEITH: Well, given this water park situation in similar wide range of incidents, with the systems of the medical director's input and the planning this particular entity and the water park, I think they did it to be able to deal with any reasonably foreseeable emergency. That's a wide range of emergencies and one of the most common is cardiorespiratory arrest and the AED and emergency equipment is relatively and was relatively developed, easy to use. These people had been trained by outside consultants and sometimes just having and they had paramedics on the scene. They can make an assessment and then call 911 or other emergency responders is adequate. Obviously, we're not arguing that every governmental entity ought to have an emergency room, an operating room or sophisticated medical equipment on the scene. We just feel that in this case that what they did, they anticipated that they would have various cardiorespiratory arrests. They anticipated the need for AED and basic fundamental. They had swimming. You could have a drowning or a near-drowning incident where you'd have to resuscitate and so forth. So they had basic emergency equipment and components available and we think that was reasonable. They just didn't use it. They didn't bring all of the equipment to the scene that would have saved this little girl's life.

JUSTICE DALE WAINWRIGHT: You make a good point because Lowe and Robinson involves equipment that was being used specifically. Football equipment for football. Swimming equipment for swimming. At a water park, you want to have something to address swimming accidents, but you're talking about cardiac at a water park.

ATTORNEY DARRELL KEITH: Well, yes, swimming and it was also an amusement park too. Swimming and cardiac events that can occur separate and apart from swimming as it did with Sarah. I see my, I guess my time is up, I'm passed and I haven't address the other issues on Section 101.106 (a) and (b) and so I do just commend the Court to my briefs?

CHIEF JUSTICE WALLACE B. JEFFERSON: Your briefs are thorough on that, but if you want to submit anything post submission, you can also do that.

ATTORNEY DARRELL KEITH: I only received Counsel's Amicus brief late last week and, as I said, I'm not making excuses, but I have been battling a really bad sinus infection, antibiotics and maybe surgery so if I could respond to that, I would appreciate it.

CHIEF JUSTICE WALLACE B. JEFFERSON: You are invited to submit post submission and with respect to the briefs or to this argument.

ATTORNEY DARRELL KEITH: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF FREDRICK WAYNE QUAST ON BEHALF OF PETITIONER

JUSTICE DEBRA H. LEHRMANN: What is your response to his argument that, in fact, the AED and the other equipment that was used that they're all related and that the AED didn't provide that safety component?

ATTORNEY FREDRICK WAYNE QUAST: Justice Lehrmann, that question is when you're talking about lack of an integral safety component, in other words, there is a whole from which something is lacking that makes it safer, how big can you make the whole?

JUSTICE DEBRA H. LEHRMANN: Well he's saying this was a whole in light of particularly the facts in this situation and this particular person's heart condition.

ATTORNEY FREDRICK WAYNE QUAST: Exactly. Who determines how big the whole gets? How can a government foresee how big the whole gets? Your Honor, I can lay any three pieces of personal property and given enough time and imagination, I can come up with a category and say, ah, that's the whole. For example, that's a water refreshment kit.

JUSTICE DEBRA H. LEHRMANN: Do you agree that whatever property that the government is providing does need to be whole in the sense that it does need to have the safety components that are necessary to make sure that it can be used properly in order to save peoples' lives so there is a legitimate argument there and so on balance, obviously there has to be a line between what is whole that would be covered and what's not and how do you respond to that?

ATTORNEY FREDRICK WAYNE QUAST: Well first of all, on public policy grounds, I think the Court has asked some very legitimate questions about well, if the government provides something, do we have to provide everything. I think that answers the question, Your Honor. I think these cases, the lack of integral safety component cases are actually condition cases. In other words, if you look at the hospital bed in McGuire, that was a hospital bed and it lacked rails. There was some sort of an attachment or closeness. In Lowe, there was a football uniform that lacked a knee brace, but there were also allegations that the State had provided equipment that was faulty so that was a condition, not a lack of integral safety components. I'm sorry. So, Your Honor, I think the question here is when we talk about what is integral, how big can that get? And, Your Honor, I think there is a body of law out there that tells us when a pre-chattel lacks something to make it safe, well products liability.

JUSTICE DAVID M. MEDINA: But once a city or state is undertaking a duty to provide safety equipment, don't they have more to do than just stick it out there?

ATTORNEY FREDRICK WAYNE QUAST: No, I don't believe so. Well, if we're talking about duty, I'm not prepared to answer that question as far as general negligence law, but, again, no, I don't think so, Your Honor.

JUSTICE NATHAN L. HECHT: What's your response to the State's argument?

ATTORNEY FREDRICK WAYNE QUAST: What's my response to the State's argument? Well I agree with them somewhat. In other words, subsection (b) consent can't include the Tort Claims Act. Don't be too hard on the court of appeals. That's what I told them what I thought the law was at the time. As for-

JUSTICE DALE WAINWRIGHT: Take it out on you instead the court of appeals?

ATTORNEY FREDRICK WAYNE QUAST: Absolutely, please do. If you're looking at 101.106, yes, (b) can apply when both the government and the employee are sued. Let's look at when you sue the employee. If you sue the employee and they're outside the course and scope of the employment, congratulations, you've sued the right person. If you sue the employee for acts within the course and scope of the employment, subsection (f) says that that's not a suit against the employee at all. Automatically by operation of statute, it says that is a suit in their official capacity only. That's a suit against the government. You don't sue the employee when under the circumstances of subsection (f). When the government is substituted in, it's a name change. It's not a party change. So in that situation, those two situations are what happened when you just sued the employee and, again, subsection (b) doesn't have a job to do unless it applies in situations where you sue both the government and the employee and, again, the purpose of this statute is to make you choose at the beginning of the lawsuit, which to sue. Essentially I think the statute makes the consequences if you don't elect very harsh. My time is almost expired.

JUSTICE PHIL JOHNSON: It's not your position that subsection (b) was designed to deprive someone of a

cause of action. That was not the intent of the Legislature simply to try them on the cause of action.

ATTORNEY FREDRICK WAYNE QUAST: Yes, Your Honor.

JUSTICE PHIL JOHNSON: That was their intent?

ATTORNEY FREDRICK WAYNE QUAST: I believe so. This is a very harsh, harsh statute with a Tort Reform Bill and the Michael Hall article, the Texas Tech Law Review article that talks about why this was imposed, why this law was enacted. You're required to sue the government and you can't sue the employee and even the Plaintiffs' counsel, asked you at the beginning of suit determine this tortfeasor, they're a government employee. Are they acting within the course and scope of their employment? I got to sue the government. I got to take the damage caps. I got to take the limited waivers. If they're outside the course and scope of their employment, you sue the employee. If you don't make an election, then, yeah, the consequences can be really bad. I don't know if there are any other questions.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The cause is submitted and the Court will take another brief recess.

MARSHAL: All rise.

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