

**ORAL ARGUMENT — 10/9/97**  
**96-1246**  
**KOLSTER V. CITY OF EL PASO**  
**&**  
**96-0123**  
**CITY OF AMARILLO V. MARTIN**

LAWYER: I represent the respondent, the *City of Amarillo v. Martin*. The central issue presented today by these two cases is: What is the meaning of due regard for the safety of others as it relates to the duty of care owed by authorized emergency vehicle operators when responding to emergency calls? Essentially these two cases share similar facts in that an emergency vehicle, in my case a fire truck, in Mr. Mann's case an ambulance, entered an intersection without checking to see if it was clear. Essentially entered the intersection blind.

The City of Amarillo equates due regard with reckless disregard and the City of El Paso says that: Due regard is an intermediate standard imposing a duty less than ordinary care, but greater than reckless disregard.

I would like to address what I believe to be the meaning of "due regard" and how it should be given its common meaning. Now while courts have understood due regard in its ordinary meaning, that being: reasonable care; due care, or requiring a negligence analysis, I believe none have analyzed it to the extent at why they reach this conclusion other than by and through its ordinary meaning.

Perhaps it is enough to say that "due regard" means ordinary care. But I would like to present to this court a short analysis of §24.6701(d) to explain why perhaps this court might want to offer an analysis in deciding this decision and the meaning of due regard.

The Texas Tort Claims Act provides that a governmental unit specifically retains its immunity in claims arising from the actions of an employee while responding to an emergency if the action is in compliance with the laws and ordinances applicable to an emergency action. The Texas Tort Claims Act by this clause sends us to the Texas Revised Civil Statutes Art. 6701(d), wherein, we find §24. The importance of understanding why §24 is there is that it provides that an authorized driver of an emergency vehicle may proceed through a red light without being held negligent per se or strictly liable for merely going through the red light. Due regard comes into play in that due regard is saying notwithstanding the fact that you would not be held negligent per se, you do have a duty, and that is to act with due regard or ordinary regard for the safety of others. Reckless disregard comes into play where despite the fact that you will be held to a negligent standard, you also will be held liable for exemplary damages in the case of an authorized emergency vehicle. I don't think this is problematic with the TTCA, because that specifically exempts government emergency vehicles.

Due regard for the safety of others is just a jury consideration for determining whether or not there is negligence in this type of situation. In Mr. Mann's jury charge, or that he presented to the court, which in turn presented to the jury, he specifically laid out negligence being not acting with due regard for the safety of others. Thus, I think that due regard for the safety of others as the legislature has put it into §24 is nothing more than providing the circumstances by which a jury is to consider what is negligence in this type of situation. Thus, it is more procedural than it is substantive.

I also believe it is in line with broad-form submissions. I also think that this court reached the same conclusion in the *City of Lancaster v. Chambers*. In the body of the text under the heading of *Negligence*, the court did speak to §24 and recognized that due regard falls under a negligence analysis.

I did not have the opportunity to file a brief to this court, because the trial attorney representing Ms. Martin died. However, neither my case, Mr. Mann's case or any of the CA mentions footnote 5 in the *City of Lancaster v. Chambers*. The court in *Chambers* needed to explain their new standard of good faith. And good faith can be recognized as an intermediate standard because the jury is to consider or the court in the summary judgment proceeding is to consider good faith is that being of an ordinary prudent officer. And it needed to compare this with some other example where there was an ordinary, or there was a gross negligence standard. In footnote 5, the court took the time to explain that good faith is different from ordinary or gross negligence as represented in 6701(d), §24. That's to ask this court to follow the *Chambers* decision when it used in that example, and all the lower court decisions, including the *City of Mesquite*, where the court has applied its ordinary meaning to due regard, and that being requiring a negligence analysis, or meaning ordinary care. Thus, I contend to this court today, that if we simply use the ordinary meaning and find that the legislature has provided this clause as a procedural issue for the TC to put in a jury question, I think we find the answer as simple as that.

GONZALEZ: It appears that the court was more persuaded by public policy considerations rather than statute in deciding these cases. Can you address that argument?

LAWYER: I think the public policy issue is addressed by saying that they must look towards the due regard for the safety of others. If you mean the public policy issue and not exempting the state from the acts of negligent driver, I think that's where we get into analysis of what good faith does, and that that is an official immunity example; whereas, the due regard for the safety of others only applies to the government, in this case the cities coming through the Texas Tort Claims Act. And I don't think that it interrupts any policy consideration in anyway your honor.

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MANN: Although this court granted my writ of application on 7 points, I can only speak on two, with the limited time I have. The first point, I will talk about due regards first, the

CCA in El Paso found that it was uncontroverted that Sloan, the ambulance driver, was driving without her corrective lenses at the time of the collision. That was uncontroverted. I produced in the courtroom large blowups of the driver's license showing that it had the "A Restriction" requiring her to wear glasses. She received a ticket for not having glasses. She didn't have them on. She didn't even have them with her.

The second thing that the court determined in the way of an affirmative finding, was that the ambulance driver's duty before proceeding through the intersection is to make sure that the intersection is clear before the ambulance proceeds when running through a red light. The court found that the ambulance driver never saw the plaintiff's vehicle prior to entering the intersection.

SPECTOR: The jury found that or the court?

LAWYER: The jury found that, and they answered it this way. As been pointed out, the jury was asked: That the driver of an emergency vehicle is never relieved of the duty to drive with due regard for the safety of all persons? In response to that, the jury found 55% negligence on behalf of the City, and 45% negligence on behalf of my client.

You would think that those findings by the jury, that they would be conclusionary on the CA. But it's my opinion, that because one of the panel being a former Alderman at the City, the CA decided who would win, and proceeded to draw their decision based on letting the city win.

The conclusion that was used by Justice Larsen was there was simply no showing that the ambulance driver did anything but proceed with due regard in compliance with applicable laws. Now, how do you determine what the applicable laws are? Well we know how the other cases held due regard. The *City of Amarillo* gave us a decision on that. But Justice Larsen concluded that due regard described as standard between ordinary care and recklessness to come up with a new standard in order to fit the situation of the particular case. She contended that the legislature had intended for emergency vehicles would have used "ordinary care" in drafting a statute, that was her contention. In their opinion, they said: We conclude that the evidence in this case raised no fact issues of the city's lack of due care, which anyway was a casual factor in this accident.

Now, let's talk about the definition of "due care," "due regard," as "due care." Due care is due regard. I served two terms in the legislature. I can tell you that in committee, we went to great lengths to try and take these words and determined what they were. We took the advice of professors, we took the advice of judges. And I think in my opinion, that in drafting this statute, the history shows they looked at other states. And I think that they used "due regard" synonymous with "due care." If you listen to it "due regard" and the terms of "due care," it sounds like something that a doctor might do. So, consequently, I think the legislature chose "due care" as synonymous

with “due regard.” There are cases that define “due care” as being ordinary standard of negligence.

Now, let’s talk about the no evidence standard that was applied by the court. The court found that the evidence was uncontradicted, that the restrictions on the ambulance driver’s driver’s license was in fact a mistake. She testified that in her opinion, she didn’t need glasses because she only needed them for reading and close work. I contradicted that with the testimony of the Texas Dept. of Public Safety, Sgt. Mormon, head of the driver’s license division of El Paso, who came in court and testified as to the restriction on the drivers license that we showed, and also testified that they always give the eye exam. I have laid that testimony out at great length in my brief, that they always give the eye exam, that you are required to take the eye exam.

Now the ambulance driver, Dawn Sloan, testified they did not require her to take the eye test. She said she merely said that she wore glasses, so they put the restriction on it, and that was a mistake. She did not believe that she should be required to wear her glasses. That was her justification, that the CCA accepted, and said it was uncontroverted in spite of the fact that the DPS officer testified that they always give the eye test.

ABBOTT:               Why was there no testimony from a doctor or optometrist about what her vision was?

DUNN:                 We didn’t have any of that.

ABBOTT:               I know, but why didn’t you go out and get it?

DUNN:                 I didn’t know what doctor she had gone to. Her husband is a police officer. He told her these things, and that’s where this came from. To rule that was uncontroverted means that they disregarded the expert witness’ testimony completely. There were certain evidence that was conflicting. There was conflicting evidence as to an obstruction existed which prevented Kolster, my client, from having a clear view of the intersection. Now the evidence was conflicting, that’s because in the brief filed by the City Attorney they gave the different witnesses as to what they testified to, the parties, and then in their brief, which you have before you, they said: That there were no other witnesses of any value other than those that spoke about personal injury or damages. The CCA disregarded the three expert witnesses that were called. The first expert witness, the City called was a civil engineer, Dr. Robertson, from Bryan, Texas, who had testified some 24 times on behalf of the government, had testified twice before in the City of El Paso. In cross-examining him, I asked him what time did he come into town? He came into town, he went out to the intersection. I asked him what time he went out there? He went out there around 1:30 in the afternoon. This accident happened at 5:00 p.m. At 5:00 p.m. the traffic is lined up so far down the side of this. There are 3 bridges that cross over into Mexico in this area. One of them is the Saragosa bridge. This accident happened at the intersection of Saragosa and Alameda. The cars on the right turned right to go across the bridge into Mexico. At 5:00 there are busses, vans, trucks, everything lined up in the right

hand lane to turn right.

The eyewitness, to show you how close the bridge is, the eyewitness Vasques who saw this was walking across the bridge and walking down the street on the right hand side of the intersection testified, an independent witness, he could not see the Kolster vehicle because of the cars both turning right and in a filling station there getting gasoline. He could not see the Kolster car until it entered the intersection.

The CCA shifted the burden and said it was conflicting. When I asked Dr. Robinson when he went out there at 1:30 what the cars were like? There were just a few cars. I asked did he know that the accident happened at 5:00? He said, No. Then I asked him if he would do I have, he read the depositions, and he found out that at the time of the impact, that the driver of the ambulance was talking or looking to the right. The attendant saw the Kolster vehicle when it entered the intersection. The reaction on her face caused Dawn Sloan, the ambulance driver, to turn to the left and see the car as it entered the intersection. I showed pictures, and asked her a series of pictures where the car was, and the Kolster vehicle was crossing the walkway stripes when they first saw it.

In Dr. Robinson's testimony, I asked him, "would he agree with me that had he been driving the ambulance, that he would have been hanging out over the steering wheel looking to the left instead of looking to the right?" And he said, "that's correct." Yet, the CCA said that evidence was conflicting. It was not conflicting. The jury got to see that.

By completely disregarding the testimony of 1) Sgt. Mormon from the DPS \_\_\_\_\_ driver's license requirements; 2) their own witness which they are bound by in Dr. Robinson testifying that they did not look in the direction in which they should have been looking, that is to the left as they went through the intersection; and 3) that the testimony of Kamil Vachette, the instructor that trained both the ambulance driver and the attendant testified that they have a manual, and we introduced it into evidence, says that when entering through a red light you must make eye contact with the oncoming vehicles before you proceed through the intersection. He said that's what he trained the driver to do, and that's what he said the standard was required by the department.

Although the CCA found this evidence was conflicting, I tell you by disregarding the three expert witnesses, because that's what it would take to find this conflicting, it is my opinion that the CCA did not apply the proper standard of care. They cited the fact that there was a no evidence situation, they proceed to completely disregard the findings of the jury, finding that the city was negligent by 55% and that my client, Ms. Kolster, was only negligent 45%. I think that they completely disregarded the standard of care; and, therefore, this court should be reversed and rendered on behalf of the TC's finding, the findings of the jury.

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## RESPONDENT

NUNN: I am the City Attorney for the City of Amarillo. Let me say at the outset that I certainly appreciate the court taking its time to hear us on this case. I know you don't have to, and it's a privilege to be here.

Mr. \_\_\_\_\_ has pretty accurately stated the issue before the court today in both of these appeals, and that is what is meant by the term "reckless disregard for the safety of others, vis-a-vis, drivers, and especially governmental drivers of emergency vehicles?" He has not correctly stated the result of that issue, though, because my contention is he told the court that I equated it with reckless disregard. But I have stated in my brief that I do not equate it with reckless disregard, but on the contrary, the absence of reckless disregard as did the CA in *Kolster v. City of El Paso*. That decision is difficult, because the court did not tell us what the standard of care is, but told us instead what it is not. The court said, "it is not ordinary negligence, and it is not reckless disregard." Well, the court is right on both of those counts, because it is definitely not ordinary negligence. My contention is that it cannot be reckless disregard for the safety of others for several reasons.

ENOCH: You say it's not ordinary negligence. But if negligence is defined doing that which a person of ordinary prudence would not have done, or failing to do which a person of ordinary prudence would not have done under the same or similar circumstances, why isn't this statute simply alerting the jury that the circumstances we're talking about are the emergency circumstances as opposed to the ordinary circumstances of people driving the street? So why isn't due regard simply an alert to the jury when you're involving an emergency vehicle on an emergency response, that we're talking about emergency circumstances and you gage their conduct whether a person under the same or similar circumstances would have done what they did, or would not have done what they did, why isn't that sufficient?

LAWYER: I think that you have put your finger precisely on the point, because *Bicaro v. Salas*, in which the San Antonio CA says the same thing. It talks about the public policy. It says that the emergency vehicle driver should not be judged by this same standard of care as an ordinary person driving down the street, because an ordinary person does not have statutory provision as is granted in §24 to drive above the speed limits, to run red lights, to drive on the wrong side of the street, to park on the wrong side of the street, to go through stop signs, and to do all the other things that emergency vehicle drivers are allowed by §24 to do.

ENOCH: But my point is, if negligence is measured against similar circumstances, why isn't that all you need in the emergency context? It's just you're alert. Now pay attention to the similar circumstances. This is an emergency response. So you gage their negligence based upon the circumstances they face.

LAWYER: I think we're talking about the same thing, but it is similar circumstances facing a driver of an emergency vehicle and not an ordinary driver, a reasonable prudent person as

the jury is often reminded to think about in the course of a trial, it is a reasonable prudent emergency vehicle driver. And that is a different standard of care. I get confused when I start talking about the higher standard of care and the lower standard of care. Looking at it from the plaintiff's point of view, it is a higher burden to overcome.

OWEN: How would you articulate that he said it's not ordinary negligence, it's not reckless disregard? What is it? And also you said you had some good reasons and you got interrupted, and I would like to hear what those are.

LAWYER: I would articulate it in this manner. The El Paso CA in telling us what it was not, said: Here's what you have to do. The defendant who always has the burden of proof on proving governmental immunity, which is what we're talking about here, has to prove that the driver was obeying the laws relating to emergency vehicles. Once the governmental entity or the driver, whoever is the defendant proves that, then the burden shifts back to the plaintiff to prove that the person in this case, in the *Kolster* case, entered the intersection without determining that the intersection was clear. And the El Paso CA said, that that occurred in this case, and it described somehow the first time the ambulance driver saw the plaintiff in this case. The US SC in *Bryan County Oklahoma v. Brown*, defined deliberate indifference as ignoring the obvious consequences of the action.

HECHT: You don't think a driver should be liable in these circumstances to ordinary negligence or not?

LAWYER: I do not.

HECHT: What should the standard be? How do you charge the jury?

LAWYER: The charge has to be something to the effect of an ordinary or a reasonable prudent emergency vehicle driver.

HECHT: How's that different from ordinary negligence?

LAWYER: Because as the court said in that San Antonio case, that driver of an emergency vehicle is held to a different degree of care than an ordinary prudent driver.

HECHT: What is the significance of the repeated reference to conscious disregard or reckless disregard?

LAWYER: "Conscious disregard," "deliberate indifferent," "reckless disregard," "utter indifference," "callous disregard," and \_\_\_\_\_ disregard shocks the conscience. Those are all terms that are used interchangeably by the court to mean what the SC said in that definition of "deliberate indifference."

HECHT: But you don't think the jury should be told this?

LAWYER: Yes, I think they should be told that this is the standard of care.

HECHT: Which is the standard of care: reckless disregard?

LAWYER: Yes, I think that they should. I'm not very good at drafting special issues because those things have already been done for us. But, I think that they should be told that something to the effect that if you find that the person was not acting in heedless or reckless disregard, as that term is defined in the special issue book, then you find that the person is not negligent.

HECHT: In your view can the government be held liable, immunity is gone for the conduct of an emergency vehicle driver, that is less than reckless disregard?

LAWYER: Well I think the standard has to be somewhere just less than reckless disregard. Because if you will look at *Burke Royalty v. Walls*, which is cited in my brief, it equates that reckless disregard with gross negligence. An example: The court in the *City of Lancaster v. Chambers*, said that, an emergency vehicle driver is entitled to qualified immunity if he can show that he was acting in the scope of his employment, and that he was exercising discretionary acts and was acting in good faith.

My feeling is, that a person who is grossly negligent or acting in its equivalent "reckless disregard" does not have the bona fides to prove this good faith in order to have qualified immunity. So, there's got to be a standard there that a person who is entitled to qualified immunity puts the emergency vehicle driver on the same plane if the court adopts this reckless disregard standard of care or the absence of reckless disregard as I have put it to the court.

HECHT: But we're really bound by the statute aren't we? It's not up to us to decide what the care should be. We've got the tort claims act and we've got the transportation code, and that's all there is isn't it?

LAWYER: Yes, sir. But "due regard" as it appears in the two places in the Transportation Code is not defined. It is qualified by the term "reckless disregard" for the safety of others as that term appears in the Tort Claims Act.

HECHT: And how is it qualified?

LAWYER: Well it says in 24(e) of 6701(d), which is now in the Transportation Code, that a person will exercise due regard for the safety of others. And then it qualifies it by saying, "but he shall not be excused for his reckless disregard for the safety of others." And then the provision of the Tort Claims Act, 101.055 says that same thing, that in absence of a statutory standard of care,



then he cannot be consciously indifferent or in reckless disregard for the safety of others.

So, it is this intentional ignorance standard of care that's ignoring the obvious consequences and obvious meaning "consequences that you know about and still ignore," that will create liability in my view for the driver of an emergency vehicle.

And that theme appears in the *City of Lancaster v. Chambers* when it talks about the qualified immunity. And what I'm suggesting to the court here is that there is no greater defense for the city in the qualified immunity standard and in this reckless disregard standard, because they appear to me to be the same. It doesn't make any difference whether the driver is entitled to qualified immunity or whether the court has to charge the jury with something other than this ordinary negligence standard of care. He is still on the same footing and his employer who is vicariously liable is still on the same footing as he would be in either case.

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GATES: In all the analysis, not only in these two cases, but the others cases, there is a party, an entity that we are forgetting, and that is the person that's lying at the end of this run by the emergency response vehicle, who is lying broken or bleeding or unconscious. And I think that anyone in this courtroom or anyone anywhere would be appalled if they were standing in the streets of Austin, or Amarillo, or El Paso and saw obviously an emergency situation: a burning building, a horrific car accident, and would be appalled if they sat and watched their fireman, their police officers, their EMS drivers poking through traffic, stopping at the red lights, letting traffic clear, signaling for proper lane changes, all of that, and...

SPECTOR: But no one is suggesting that. It seems to me that there also has to be a realization that if the emergency vehicle is in an accident, they are not going to get to the place where they need to be.

GATES: I understand. What I was leading up to is what's echoed by a lot of courts in this analysis, and that is, if there was an ordinary standard of care, the ordinary negligence standards that an emergency response driver was subjected to, there would be no reason for the statute.

ABBOTT: Do drivers typically get to places when they don't wear their contacts, when they need to have corrective lenses?

GATES: Yes.

ABBOTT: So, it's okay to drive on the road without corrective lenses when you need them?

GATES: Well addressing that issue, I think that it was clear at the trial of this case, that

the driver, Dawn Sloan, did not need corrective lenses for driving. They were only reading glasses. So there was no issue. I don't believe there is any issue that she was acting negligently in not wearing glasses. I think the testimony was clear that she did not need those glasses.

PHILLIPS: Help me understand this. I need to know what you believe the proper standard is and maybe even need to know what the El Paso court actually articulated, then I would like the effect of the glasses. In light of that under this standard when does evidence become controverted, and when does the El Paso court have the right to say there is no evidence ...I mean I want you to articulate that standard in light of a breach of a particular law or regulation and then particularize it to this case if there is no evidence to support what the jury did?

GATES: I agree with the others before me and what the *Kolster* court has said it is somewhere in-between. And I think the standard of care and the jury submission would be 1) this statute would be explained; it would be defined in the jury charge.

HECHT: Well how can it be defined? Do you find from a preponderance of the evidence that this is somewhere in-between negligence and reckless disregard?

GATES: No. First of all there would be definitions of what an emergency response vehicle is, perhaps what an emergency is, and all of those things. In other words, an intermediate step. We're not talking about ordinary negligence, we're not talking about gross negligence, but this intermediate step would be defined by way of the statute, that is emergency response vehicles. Then I believe that the jury would be asked to find: Do you find by a preponderance of the evidence that this driver, if they had found that indeed it was an emergency and this was a emergency response, violated that intermediate standard? And I believe that standard would be what the El Paso court suggested, and that is, are you complying with the law as it's set out? Were your lights on? Were your sirens wailing? Did you slow at the intersection? Did you do those things that are required of emergency response vehicles? If you did those things, then you are in compliance, then you have not breached that intermediate duty. And I believe that's what would be submitted to a jury, that they would be given definitions and they would be asked to analyze that conduct in context of the statutory requirements of an emergency response vehicle.

ABBOTT: In that regard, just assume with me for a second, that there is a fact issue on corrective lenses and a fact issue on whether or not the driver was looking where they were going. Just because they have their lights on, their sirens on, and slow down at an intersection, if they can't see and are not looking, those two parts if I recall are not in the statute?

GATES: No.

ABBOTT: So if they complied with the statute, but are looking down for a contact lense or for a spilled cup of coffee and run into a car technically they are still in compliance with the statute. But I'm sure you would agree that that was not the type of conduct that the law should allow

to go without liability?

GATES: I agree. There is that gray area or this undefined area that you spoke of but I believe just as in an ordinary negligence analysis by a jury there is going to be a weighing at that point.

ABBOTT: But going back to the question then, since we do have those gray areas, how can we structure an instruction so that we cover not only the black and white areas, but also the gray areas?

GATES: I think the instruction would incorporate the idea that this is not an ordinary negligence standard. And it would also talk about recklessness and what that is in this conscious disregard of the rights and safety of others on the road.

At this point, the only thing we have to go by is the fact that it's somewhere in-between. And the only thing we have to help us with is the statute that is a problem that you brought up, that there are some areas that aren't defined that I think we would have to. But I think for sure we would have to let the jury know that we're not dealing with an ordinary defendant.

ENOCH: Would it be sufficient to just make the negligence question be the conduct of an ordinarily prudent emergency vehicle driver? Would that be the intermediate standard or...

GATES: I believe so. If that was carefully defined and the jury knew that an ordinary prudent emergency response driver does not have to stop at a red light, does not have to pull over and stand maybe as other cars do, and can stand in the middle of the road and all those sorts of things, I think the general instruction that they are relieved from the ordinary rules of the road to the extent necessary to accomplish their task, maybe that's the fill-in there, that they are relieved from the ordinary rules of the road to the extent necessary to accomplish their task or their mission. Then, a jury would be able see how far away were they. What was the traffic like and that sort of thing.

OWEN: Doesn't a priority mean that when you go through an intersection and you hit someone, that you are going to be found liable? Something has happened and you are not carrying out your mission, the same way that you say, Well if you entered the intersection without due care, the accident itself is sort of res ipse isn't it under that kind of instruction?

GATES: No, I wouldn't agree. I think that again there is different rules, and I think we have to suspend the ordinary rules because we have to allow that emergency response driver to get to the injured person. And so I think that the jury should be told in some form that 1) you're not dealing with an ordinary defendant; and 2) that what is paramount or what they should consider is that their primary task was to get there, and that the laws of the State of Texas give them certain rights, give them certain privileges on the road that other people don't have, and I think that will all have to be drafted in there. But I think that the jury is going to have to look at if there is negligence

or at least the conduct in relation to the necessity of that conduct, and that is maybe going through a red light or maybe not slowing down. In this case the EMS vehicle actually stopped.

PHILLIPS: But in your particular case, whatever this standard is it lays out all the black and white, and then has a gray area. How come the mere fact that the driver was not complying with the restrictions that the State of Texas placed on that driver, how does that not raise a fact issue....she has an explanation, but what about that explanation forced the jury to believe her, so that the jury's failure to believe it must be discounted by the appellate court?

GATES: I think the reason that the El Paso CA decided this way is that they were looking at this not from an ordinary negligence standard. I think what's happening is everyone is trying to pound a square peg into a round hole. This is a different breed of negligence.

PHILLIPS: Some of these things can be disregarded. Some of the statutory recklessness for an emergency vehicle driver like having a siren, whatever they all are, those can be disregarded and then it's still no evidence of a violation?

GATES: No, I think that if there were finding that there was a lack of lights or sirens, then they are not acting properly as an emergency response team.

PHILLIPS: What's different about that and a finding that they are not complying with the state's requirement for what this person must do to be on the road?

GATES: Because I believe the emergency response driver is lifted out temporarily while they are on that run from those ordinary negligence standards. And the eyeglass issue, I believe that the court analyzed this in light of the idea that we have another standard of negligence, that they can't...just assuming that that's true, it's absolutely true that she needed the glasses, I think this is a good example where a court or a jury could analyze and say, "But this is a different breed. We're not talking about..."

PHILLIPS: Yes, the jury could do that. But the jury had already done that. I am interested in how the court can say, "There are certain requirements of the law which the jury cannot find that a violation of breaches this duty."

GATES: I believe what you're saying then is that the emergency response driver in addition to those statutes that govern that conduct also must subscribe to all of the statutes that govern ordinary users of the road. And I don't believe that's the intent of the legislature.

PHILLIPS: I thought you agreed in answer to Justice Abbott's question, that certain requirements peculiar to a driver getting into the car were different from a stop sign. Maybe I misunderstood your answer. If you equate eye glasses with a driver having to stop at the stop sign, then I understand your position.

GATES: I believe that question, I think you are talking about something in particular related to the emergency situation: were the lights on? that set of requirements there.

PHILLIPS: That wasn't how I heard it, but I guess I understand your position. Eye glasses are like stop signs?

GATES: Yes. Again, in light of the situation though in a sense they may fail and give way to the greater need in an emergency response situation.

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#### REBUTTAL

LAWYER: I am going to attempt to respond to both attorneys. I will search the first point out. The city attorney of Amarillo takes a position that we have in his case no ordinary negligence situation. He mentioned to you that he was not familiar with jury issues. I am familiar with jury issues. And I feel that the negligence issue would be given to the jury as an ordinary standard of negligence care, and then in instructions, and that's the way in which it would be done, the instructions would qualify the different standards. But I don't think that any place the courts or anything else can change what the legislature intended by using the term "due regard." I don't think that we can say, "negligence as applied to an ambulance is a different standard from negligence." I don't think we could draw on issues that would encompass that without using \_\_\_\_\_, the 277 requirement and so on.

OWEN: What about the words "conscious indifference" and "reckless disregard," the legislature also used those? What do we do with those words?

LAWYER: There was a case in which there were not ordinances or standards and the reckless disregard was put in there because of a fire truck that backed into a car, which was not in violation of any ordinance or any standard. It was put in there to show that it was a standard. I don't think that that standard even reaches far enough to reach gross negligence. I don't think that does to the full extent, because the state does not pay in the event that it's determined there is gross negligence. The statute prevents the state from paying on a gross negligence. So I think that that does not reach the standard of gross negligence.

Getting back to what the city attorney of Amarillo mentioned, the *Chambers* case, and the affirmative defenses. The affirmative defenses, the *Chambers* case says that the immunity is a \_\_\_\_\_ defense and then the cases have held, the *Kennedy* case, that the city, in this case, must prove all elements of their affirmative defense. Both the attorneys in speaking for the cities have tried to shift the burden to the state. Once they say: once the lights and the sirens are on, then the burden shifts to the plaintiff to show that they were driving in bad faith. There are cases holding that the burden doesn't shift that far. But in both cases, that's what the arguments are.

The *Chambers* case gave us an excellent definition of good faith. And in any of these cases did the city attempt to apply the good faith standard. Let me give you what I have worked up here, as would be the issue in a good faith case, and ask you to see what you think of this. If they were applying for a summary judgment, this would be the standard: No reasonable prudent officer under the same or similar circumstances while not wearing her corrective lenses could have believed that entering the intersection against a red light when she could not see the traffic in the inside lane outweighed the clear risk to the public in entering the lane when she did. In neither case was there a good faith thing applied for the summary judgment.

They relied on taking it to the jury on the basis that the ambulance driver had their siren on, the lights going and, therefore, that gives them a complete immunity. In *State v. Terrell*, Justice Greenhill says: We don't believe the legislature intended such a broad exclusion; and, therefore, the Transportation Code that's recently been enacted uses the term "due care." They used them again and again just like they had done in the previous statute. So the legislature's intent was contingency there, that due care is a standard they require.

The purpose of the Tort's Claim act is to \_\_\_\_\_ the damages that \_\_\_\_\_ government that this \_\_\_\_\_. In other words, to level the playing field and make the government on the same category and the same level as private industry, or private person. The statute so relates. 101.21, gives us that standard.