

ORAL ARGUMENT – 01/31/01
00-0348
TNRCC V. WHITE

RHODES: This interlocutory appeal arises out of the denial of TNRCC's plea to the jurisdiction based on sovereign immunity for damages allegedly suffered by White in a fire occurring 6 days after TNRCC removed a pump from her property that was designed to dissipate gasoline vapors emanating from her neighbor's underground gasoline storage tanks.

This case presents 3 issues of statutory construction for this court to review. The first issue is the appropriate construction of the waiver provision of the Texas Tort Claims Act. Texas courts are in conflict with respect to this issue. The CA below adopted a broad, or liberal construction of the waiver provisions of the Texas Tort Claims Act in contravention of this court's holdings that the Texas Tort Claims Act should only be construed to waive sovereign immunity based on clear and unambiguous language, or the decisions of other CA's that sovereign immunity in the waiver provisions of the Texas Tort Claims Act are to be construed strictly.

ABBOTT: Do you seem to adopt the point of view that motor driven equipment must somehow be mobile and non-stationary?

RHODES: Yes, that's one of the arguments that TNRCC is asserting.

ABBOTT: Wouldn't that require us to engraft new language onto the statute...

RHODES: When you look at the plain meaning of the word 'motor' in the dictionary, the definitions of motor all encompass some type of movement.

ABBOTT: Is there a motor in a moving ceiling fan?

RHODES: I don't think you think of that as motor driven verses...

ABBOTT: What drives the fan?

RHODES: I think what the argument here is that the legislature has to waive sovereign immunity by clear and unambiguous language. And the term motor driven equipment clearly and unambiguously doesn't include for instance a fan that you plug into the wall.

HANKINSON: Give us an example of motor driven equipment.

RHODES: Motor driven equipment would be a crane or forklift.

HANKINSON: That's a vehicle...

RHODES: Not according to the...

HANKINSON: My problem is that vehicle must mean something too, which means equipment must mean something different. And a crane is something that you can get in and it can be moved, right?

RHODES: A crane can be moved but usually...

HANKINSON: And similarly other kinds of heavy equipment that's used on a construction site can also be moved. So why is that - what different meaning would we give to equipment other than the fact that it's not something that moves around?

RHODES: The case law that's interpreted the term 'motor driven vehicle' (if you look at for instance Brookshire v. Houston ISD case) has held that motor driven vehicle means those devices that are designed for highway travel. They reached that conclusion based on the other statutes the legislature has enacted to define what motor driven vehicle means. And, so, therefore, they held in the Brookshire case, for instance, that a forklift was not a motor driven vehicle, although it was motor driven equipment. There's a similar case with respect to a crane. Now TNRCC will admit...

HANKINSON: Again, we have motor-driven as a modifier to both vehicle and equipment. It doesn't say a vehicle with a motor that can be driven. Doesn't motor driven as a modifier mean that it's a motor that actually drives the operation of _____ vehicle or the equipment as opposed to a person driving a vehicle that has a motor?

RHODES: TNRCC will concede this is not it's best position on the merits of this case. What we are primarily asserting this argument with respect to is as a jurisdictional conflict. And once this court...

HANKINSON: When I read something that says motor driven, it tells me that it's a modifier and that means that the vehicle or the equipment is driven by a motor. That's what causes it to work. Which is different to me than if I were to read it had it been written that it is a vehicle with a motor that is driven. In other words, someone drives the vehicle and it happens to have a motor. So grammatically if we look at those words, we have two problems: 1) the use of the words vehicle and equipment; and 2) we have to interpret motor-driven as a modifier. How do you interpret motor-driven as a modifier?

RHODES: I interpret motor-driven as a modifier to require something that's driven by a motor that moves. Although, I will admit, I can see a reasonable argument to the contrary. And the TNRCC is not dependent upon this court...

BAKER: What about a _____, or a drill or an electric saw, that's a motor driven

equipment that could cause an injury but it doesn't move?

RHODES: In that situation there is some movement because when somebody's sawing or somebody is drilling - I mean whether or not it propels itself, there is some movement there. When you look at the definition of motor, that's usually what's involved and the motor is some type of movement.

BAKER: Well if we're getting that finite, there must be some part that moves in the pump, otherwise, it wouldn't have to have a motor to drive it. Isn't that correct?

RHODES: I guess there is a part that moves in your coffee maker as well, but I wouldn't think that that's motor driven equipment.

BAKER: Well it doesn't have a motor in a coffee maker. It does that by heat. All of this argument just has to do with whether we have jurisdiction or not?

RHODES: That is absolutely correct. That's why we are asserting this argument.

BAKER: Well let's assume that because we're hearing this case, we have some implication in our minds that we may have conflicts jurisdiction. So get to the point of why y'all should win.

ABBOTT: It concerns use verses non-use right?

RHODES: Yes, and the proper construction of the waiver provisions of the Texas Tort Claims Act.

ABBOTT: You obviously contend this is a non-use because they weren't using it at the time that this happened. What I would like you to do is to explain to us how we are to conclude that consistent with Robinson and Lowe.

RHODES: Robinson and Lowe have both been limited to the situation in which equipment was provided that lacked an integral component to that equipment, and, therefore, made the equipment unsafe. In Lowe, for instance, the football uniform was provided, the court held that it lacked an integral safety component in the fact the knee brace wasn't included and the knee brace had been removed. In Robinson, the individual was provided with swimming attire, but that did not include a life jacket. So those two cases have subsequently been limited by this court to those types of situations.

ABBOTT: And both including the life jacket you're saying that it involved a use, but it lacked an integral component?

RHODES: Exactly. Well in this case there was no use. And take a look at what this court has said with respect to this language: the use has got to be property damages approximately caused by and arising from the operation or use of motor vehicle driven equipment. And in the Lowe case, this court defined what this term means: arises from the operation or use of motor driven equipment. And arises from requires a nexus between the injury negligently caused by the governmental employee, and the operation or use of the motor driven vehicle or motor driven equipment. An operation refers to doing or performing a practical work. Use means to put into action or service to _____ 4052 a given purpose.

Now when the pump's been removed 6 days before the fire, it's not doing or performing any practical work.

HANKINSON: But the argument is that once the TNRCC jumped into this and put a pump in place, and then made the decision to discontinue the use of the pump, that in fact, that's a misuse of the pump. That if they had stayed away from it it would have been okay, but you can't put a pump in and - let's say you can't put a pump in, turn it off, and if the incident happens to happen while the pump is off, call it non-use because in fact that's a misuse because the pump should not have been shutoff. As I understand it, I think that's your opponent's argument.

RHODES: Right. But I think that misses the key point of the Lowe case, which is the nexus has got to be between the operation or use of the equipment.

HANKINSON: If the equipment is misused because it not turned on at the right time it is supposed to be, but it's actually in place, why isn't that a misuse?

RHODES: Because if you look at the definitions, when it's turned off and removed, how is it doing or performing a practical work. It's not. You can't say that coming back to your plain language questions with respect to motor driven equipment. You can't plainly say that it's doing or performing a practical work when it's not there. It's gone. It's been removed for 6 days. You can't say that it's being put into action or service when it's not there. It's been gone for 6 days.

OWEN: Are you saying there's a temporal requirement?

RHODES: I don't think necessarily. It think the temporal aspect of it goes more to proximate cause, which we have also argued as well, that the removal of the pump can't be the proximate cause of the damages here, because it's temporally, geographic and causally distance. And I think it makes the force of our argument stronger, the fact that there was 6 days here.

HANKINSON: If we look at that particular argument, you're question about the 6 day lag time, this is here on plea to the jurisdiction not on summary judgment. And they allege that the fact that you took the pump out - maybe it took 6 days for the gas to cool - I don't have any idea - the allegation is there, that in fact it's the removal that allowed the gas to cool and cause the fire. Now

on summary judgment you might be able to show that that was not the case. But what I'm concerned about is the standard that we use to review and a TC uses in initially considering a plea to the jurisdiction, because on the face of the pleadings they claim that the absence of that pump caused it. Now isn't it a matter of fact that would have to be decided on summary judgment whether in fact that 6 days was so temporally removed that it couldn't have caused it or, in fact, it was the fact that it was 6 days that caused it because it took that long for the gas to cool? So will you shift for a minute to the plea to the jurisdiction and tell me how we are supposed to review that _____ question.

RHODES: The plea to the jurisdiction in this situation, we're supposed to accept all of their factual allegations as true, not conclusory legal allegations, not their allegation that it was from the operation or use of motor driven equipment, but just the factual allegations to the extent that we have a _____ ISD v. Blue, there's other evidence that's been presented that's not disputed, obviously that could be considered by the court as well.

And in this case, we presented their responses this is White's responses to our interrogatories with respect to how this accident occurred.

HANKINSON: Why are we looking at interrogatories if we've got a plea to the jurisdiction which requires us to _____?

RHODES: We look at her factual allegations and the undisputed evidence that we presented under _____ ISD v. Blue. Especially in this type of case she made conclusory, legal allegations in her petition. We're on a notice petition system. We couldn't specially accept. We asked for more detail. What we're trying to get what her factual allegations are so that we can establish our plea to the jurisdiction. Because there is no reason to go to trial on this case if this is what she's going to prove at trial, which as a matter of law is insufficient to meet the standard under the Texas Tort Claims Act.

And so we asked her what is the basis for your injury? And she says, that the defendant's _____ engaged when I moved them over from the pump system thereby allowing a causing the vapors to migrate and _____ property. So she is very specific that it's the removal of the pump that she claims led to her damages.

HANKINSON: Okay. But that doesn't get you there on causation, right?

RHODES: Does that not help on causation.

HANKINSON: Would you agree that based on the pleadings in this case that as far as causation is concerned whatever the record was on the TC's consideration of plea to the jurisdiction, that given the standard of review that causation doesn't get you there?

RHODES: I don't believe that's correct.

HANKINSON: Then explain to me how in the face of that pleading and those interrogatory answers we apply the appropriate standard which I would like for you to tell us what it is _____ could determine that you can't get the nexus requirement?

RHODES: It's a question of law. You look at the same - I'm not sure that when you have - I mean a summary judgment is based on the undisputed facts. We're basing this on her undisputed facts. Her factual allegations, not her legal conclusions. And just as this court determined in Bossley, that based on that set of undisputed facts, this standard cannot meet the proximate causation requirement, the same result is appropriate here.

HANKINSON: Tell me what standard do we review the TC's decision on the plea to the jurisdiction?

RHODES: It's a de novo review.

HANKINSON: Alright. If we conducted a de novo review, are we to - what deference are we to give to the plaintiff's allegations into the record with respect to its effort to show by her pleadings that jurisdiction was waived by the legislature?

RHODES: Factual allegations have to be accepted as true, and undisputed evidence presented...

HANKINSON: If we look at those factual allegations that gasoline vapors migrated and pooled in her property, therefore, causing it to catch on fire, and we look at her interrogatory answers and she says that that's the case, tell me how we get there to decide that those allegations are not sufficient to meet the nexus requirement as a matter of law?

RHODES: Because the proximate cause has to be from the use or the operation of the equipment.

HANKINSON: That's the separate issue: did she actually allege use or operation of the equipment? Assuming that she alleged use or operation, how would you have us read this to show that she has not sufficiently pled the causation or nexus piece in order to establish waiver?

RHODES: Because the proximate cause - if you look at the term in the statute the proximate cause has got to be - it's part and parcel to the same thing. The proximate cause has got to be _____ proximate cause to _____ operation of the equipment.

HANKINSON: You've got two separate grounds up here. And you say on the first hand it's not the use or operation of the equipment; and second of all, even if it were the use or operation that

she hasn't met the nexus or causation, the _____ arises from _____. And my question to you is separate and apart, assuming that there is a use or operation, how would we decide that that pleading in the record on the plea to the jurisdiction fails to comply with the arises from language?

RHODES: Because we're interpreting my arguments a little bit differently. My argument with respect to proximate cause and it arises from, they are so much connected...

HANKINSON: So basically you are asking us to decide this use or non-use. You're not telling us to read an opinion that says this pleading is insufficient to show separate and apart arises from?

RHODES: What's I'm saying is that there is no showing in this petition that her damages were proximately caused from the operation or use of equipment. I'm not trying to argue that as a matter of law a decision to remove, like for instance the TNRCC - let's say somehow a bad decision to remove was sufficient, that that would preclude the proximate cause from that decision. But the decision is not sufficient. The proximate cause has got to be shown from the operation or use.

HANKINSON: I understand. But in every cause of action or with respect to waiver their elements and each must be independently established, and courts review them independently. And so again, I will ask you: Assuming that there is a misuse here as opposed to a non-use case in what way does that pleading fail separate and apart to satisfy the arises from requirement?

RHODES: I can't answer your question any different than I already have.

ENOCH: Let's assume that a pump is a motor driven piece of equipment, and a pump gets installed because gas is accumulating in this hole in the ground and it poses a danger, and the pump is dissipating the gas. And then the pump for some reason shorts circuits, fails. The gas accumulates and blows up. Is that a use of equipment that would satisfy the tort claims act?

RHODES: I think a malfunction could be distinguishable in that type of situation from a decision to remove.

ENOCH: If we don't have a decision that actually _____ it. But if some state employee goes by and flips off the _____ it's still there, they just turn it off, and the result is the same: the gas accumulates and blows up. How do we distinguish between equipment that is not in use because of a malfunction of the equipment and equipment that's not in use by the negligent activity of an employee who accidentally...

RHODES: I think it goes to the definitions of operation or use in the statute. Because if it malfunctions, you could still say even though it wasn't in service it was being used because you were trying to employ it for a given purpose. You were trying to employ it for the purpose of dissipating these gasoline vapors. If you look at the definition of use: employ for a given purpose

is one of the definitions. It's different when you made the decision not to use it. Because when you made a decision not to use it, it's not being employed for a given purpose. So I can see where you could make it a credible argument, and there's case law that supports this position that the plaintiff White has relied on that a malfunction could waive sovereign immunity. There is a couple of cases that have held that. And I think our situation is distinguishable from that situation...

ENOCH: You rely on a different provision that talks about the decision to employ it?

RHODES: Exactly.

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RESPONDENT

DOUGLASS: On the face of plaintiff's original petition, White has properly alleged facts that affirmatively demonstrate the TC's jurisdiction under Texas Tort Claims Act, §101.021, the Waiver of Immunity provision.

ABBOTT: On the face of _____ there's no allegation that the actual use of this piece of equipment caused the explosion or caused the fire or caused the problem?

DOUGLASS: I disagree.

ABBOTT: What your claim is is that the piece of equipment was removed 6 days before the event occurred. Correct?

DOUGLASS: That is correct.

ABBOTT: And that you don't claim that the actual use of the equipment caused the problem?

DOUGLASS: I disagree with that.

ABBOTT: What are those allegations?

DOUGLASS: This case is here on a motion to dismiss rather than on a summary judgment or _____ at trial. In the pleadings in para. 9, 10 and 11, and then 33 and 34 of the petition, we set forth as broadly as I could set forth when I was drafting the petition everything I could possibly think of that would come under this waiver provision - from digging the trench to pulling out the pump. Those specific allegations, and we enumerate each one a-e in paragraph 33 of the petition. But to be frank to the court, in responding to the summary judgment with one of the other defendants we have an expert report. And I think once we get to trial, the evidence is going to be that the misuse or the wrongful or negligent use of this pump is involved in the removal of the pump. So that your honor

is correct in that sense. But the way we have it pled, there is three ways we can go with this. One, we can simply say the negligent use was the removal of the pump, and stop there. Secondly, we can say from the pleadings that the methodology used by the TNRCC in removing the pump was negligent. And by that I mean maybe the week before the pump was suppose to be removed or was removed that you only use it 10-hours a day, and then the next day you only use it 9-hours a day, and that there is appropriate methodology used to remove the pump. Thirdly, using the pump at all may very well be the act.

What this pump did was essentially suck or vacuum all of these gas fumes that are under ground to this pipe system and then the pump extinguished them into the air. Well when you don't have a pump to do the extinguishing you've got all of these fumes that now have been literally pulled to the building.

ABBOTT: Well you hit the key right there. You said if you don't use the pump, then you have the problem. What happened in this case is that they didn't use the pump.

DOUGLASS: They didn't use the pump on the day of the fire. That is correct.

ABBOTT: So we're dealing with a non-use case.

DOUGLASS: Only if this court is to read into the requirements of the statute a direct causal link. Justice Owen brought up in her questioning that you would be rewriting the Texas law in requiring a direct relationship there, an active use or active operation of the pump. And I don't see that in any of this court's prior...

PHILLIPS: What about the Bossley case?

DOUGLASS: The Bossley case is a condition - you need more than a condition of the property to have your proximate cause. In that case it was whether the door that was left unlocked was sufficient to prevent the suicide. And this court said essentially it was too attenuated, that you couldn't foresee that leaving this door open you were going to have somebody commit suicide by jumping in front of a truck. Here, what's different and unique about this case as opposed to all of the other cases that I read cited by both parties, this pump was put out there with the specific purpose of protecting Ms. White and her property. The door wasn't put that in Bossley to prevent the plaintiff in that case from committing suicide by jumping in front of a truck...

HECHT: Well it was to prevent him from getting hurt.

DOUGLASS: Well it's preventing from exiting that door. And there may be unlimited uses of that door, only one of which possibly, conceivably would have been to prevent the suicide.

ENOCH: Based on your theory, assuming no pump had ever been put out there, would

you have a viable claim if you simply alleged that a pump should have been put out there? The decision to not use something that should have otherwise been used would satisfy the tort claims act?

DOUGLASS: Probably not. Probably that's where you could draw the line in the sand.

ENOCH: Well you used the example of maybe they should have done is use the pump for 12 hours a day instead of 10 hours a day. If you allege that the pump was there but they turned it off after 10 hours, and we believe they should have run it for 12 hours, and the fact that they chose not to use it for 2 hours, that would allege a use of the equipment. Yes?

DOUGLASS: I believe it would.

HANKINSON: I'm not sure if I understand your allegations. Directly to follow up to what Judge Enoch was just talking about. Is your allegation that had they never put the pump out there, the pooling would not have occurred, that it was something to do with having to use the pump for awhile and discontinued it, dug trenches like you say in your pleading or whatever, that in fact compounded the problem and caused the pooling that led to the fire? I don't understand enough about the underlying facts. Is that your allegation?

DOUGLASS: Either way.

HANKINSON: It seems to me it makes a difference.

DOUGLASS: It is a difference as far as to have jurisdiction in this case. That's correct. Actually though, I don't know whether this fire would have happened if TNRCC would never have been involved in it or not. And that's not something that's pled in the petition, However, I do know though it's not in the court's record, it's not in the petition - well it is in the record in the sense that it was evidence filed in response to the summary judgment, one of the other defendants, is that the TNRCC stuck its foot in the tar baby when it put the pump out there and took over the protection of Ms. White and her property. And when they did that and used a motor driven pump, then they waived their immunity from suit.

HANKINSON: Are you saying then that by having stepped in and used the pump they caused other people not to do other things - I mean I'm still having a hard time with your theory. Are you saying then that they caused other people not to take other preventative measures that would have otherwise been taken, or are you claiming that discontinuing the use of the pump in fact aggravated the circumstances so that it caused the fire? I'm trying to figure out what your connection is between having intervened and used a pump ties to this event for purposes of the waiver of immunity.

DOUGLASS: I think it's both and I think it has to be an either or situation. Factually, the TNRCC literally came in and took control of this building, this piece of property. And I would say as a factual matter that yes, we say once they've done that, they started down that road.

HANKINSON: Then they walked away after they did it...

DOUGLASS: Then they walked away. That's right.

HANKINSON: And so no one was doing anything about the gas at that point in time?

DOUGLASS: That's exactly right. Again this is beyond the scope of what is pled in the petition. Now whether we get to trial and we can prove all of these allegations that's a different story. What we're here today is, have we pled the elements under 101.021...

HANKINSON: They dug the trench next to her building?

DOUGLASS: That's correct. And you can find that cited to the record. In it's our summary judgment response which is part of the court's record.

ENOCH: You say that in answer to my question, the critical event here was the decision to use the pump. Once the decision to use the pump was made, then the failure to use it or not use it as a reasonable person would have done so creates the waiver of immunity under the tort claims act.

DOUGLASS: I don't want to use the term decision. I would rather use the active term, the action, or the operation of that pump. Yes.

ENOCH: As opposed to a malfunction where everybody intends for it to be operating and it doesn't, we have an intentional decision to not operate this piece of equipment, and as opposed to not being able to sue the state because they didn't use a piece of equipment and claim a waiver, you say _____ once the state decides to use a piece of equipment, then whatever decision they make about continuing to operate it or to not operate it or to operate some of the time or not some of the time is going to be subject to that type of decision is subject to a claim that can be made and sovereign immunity is waived as to that claim.

DOUGLASS: I would think so.

OWEN: Let's put this in terms of a hospital. Let's suppose there's a patient here who has violent tendencies. He is in a state hospital. The hospital administers through an IV a drug to calm him and then decides to remove the IV and release him, and six days later he murders someone. Is the decision to remove the IV - is that actionable?

DOUGLASS: That's a step farther out.

OWEN: How is that different from removing the pump?

DOUGLASS: Here the pump, the sole purpose of this pump was to protect Ms. White and her property.

OWEN: Well the sole purpose of the IV was to claim this man down, he had been threatening to kill his wife, so that he wouldn't carry out this threat.

DOUGLASS: And if that's the case, and the plaintiff in that case can plead and then subsequently establish the fact that there is a nexus there from having use of this medicine in preventing this murder, then sure I think it's the exact same thing.

OWEN: Haven't we decided that case?

DOUGLASS: I don't believe so.

ABBOTT: Kerrville State Hospital.

DOUGLASS: Quite frankly, I'm not familiar with that. I thought I had read before this morning all of the cases. I do think though we can use the analogy that Justice Abbott brought up earlier with the Robinson & Lowe cases. As in Lowe where there is a uniform and the football player was not provided a knee brace or wasn't provided an intractable portion of that knee brace, the same thing here. We have a motor driven pump system now without the most integral portion of it which is the pump. So I think we can get there, the back door that way as well.

ABBOTT: What about the distinction made by opposing counsel that in that case the equipment that was provided simply lacked an integral component, where as here you lacked a piece of equipment altogether?

DOUGLASS: I guess my analogy or response would be that the pump is the integral component of the pipe system, which was installed in this trench along the property line if I'm understanding the Justice's question.

I would like to address another issue that was raised by Justice Baker. I don't want to just concede that this court has jurisdiction to even hear this case. The petitioner has presented two grounds to attempt to argue the conflicts jurisdiction. One is the standard of review of the waiver provision, and the other is the definition of motor driven equipment. It is our contention that there is no such conflict. The standard of review of the waiver provision is the same even though the appellate courts are using different terminology. It's a semantic difference only. In Gian(?), a case cited by the respondent, is based on this court's decision in Satterfield and the Ft. Worth CA in Whitaker. And those cases say that statutes that create liability unknown to common law are to be constrictly construed. And to the ____ part they go on and say it's not to be extended or applied to cases not clearly within its purview. Well here, that's what the Ft. Worth CA has done. It says we will interpret the statute broadly, but within reason keeping in mind the

legislature did not intend a general waiver of governmental immunity, so as to not extend or apply this to cases where it doesn't belong. The same thing, different words, both conceding or acknowledging that the legislature wanted a limited waiver here.

As far as the motor driven equipment, again I don't believe that the case relied upon by the petitioner, the Schaefer case out of San Antonio, there is a question of law material to the decedent in that case that conflicts with the Ft. Worth CA's decision here. That was a use case, not a motor driven equipment case. It's factually and procedurally distinguishable from this case as found by the Ft. Worth CA, and by the Amarillo CA for the _____ case.

Schaefer focused on the principles and processes of direct controlling water, not on the specific elements of what motor driven equipment is.

But even if the court does find that there is sufficient conflict jurisdiction here, the Ft. Worth CA correctly utilized the standard of review, utilized the correct standard of review. They found that Ms. White, that we had properly pled motor driven equipment and pled causation.

The standard of review issue followed the historical construction to liberally construe the waiver provision to effectuate the purposes of the act going back to Lowe, Robinson and Salcedo. But they are going to balance this by acknowledging the limited waiver as Bossley required.

Using this standard of review, the Ft. Worth CA correctly held that White had properly pled causation and motor driven equipment. In the Texas Tort Claims Act, there is no specific description of what motor driven equipment is. And it's solely defined by excluding floodgates and medical equipment. But by that, it's my assertion that it recognizes the fact that you do not have to have a movable vehicle to have motor driven equipment.

There must be a separate meaning and separate use from using motor driven equipment and motor driven vehicle within §101.021. The 4DG's case said that we should interpret this motor driven equipment turned broadly, and in that case they found that sanitary sewer pumps were motor driven equipment. The Southwestern Gas case...

BAKER: Do you agree or disagree that there are cases out there that say motor driven equipment has to be something that moves itself from one place to the other as opposed to a stationary piece that's driven by a motor?

DOUGLASS: I will concede that.

BAKER: So there is a complex on which way that ought to go, and that's raised here in our court isn't it?

DOUGLASS: To some extent, I agree that it is.

BAKER: Doesn't that issue apply to the piece of equipment that's involved in this case, because this one that has the motor that drives it, but it doesn't move anywhere, so if we decide one way or the other that's critical to the citing...

DOUGLASS: That's exactly right. If this court were to determine that to have a motor driven piece of equipment, that that piece of equipment must have wheels and be able to be driven essentially as a crane, or as a dump truck, or something to that effect, then we are out. You're exactly right, we lose. But that would be...

BAKER: But there are cases that say that's what the law is.

DOUGLASS: I'm not sure what those cases, and I wasn't familiar with the case cited by counsel for the petitioner, this Brookshire case. I don't believe that there are cases under this specific waiver provision. I may be wrong with that. But I didn't come up with any. The cases that I came up with, and the most on point case is the 4DG's case out of Amarillo.

But to require movement, require the motor to move the equipment, I assert would be essentially rewriting the statute with something I would contend is best left for the legislature.

HECHT: The legislature won't do it. We asked them 25 years ago and they won't do it.

DOUGLASS: I understand that, and I agree, and the legislature probably can remove some of the ambiguity that's involved in this.

HECHT: Well they've not even tried in 25 years.

DOUGLASS: I would assert though that their failure to act supports the earlier historical cases from this court that plaintiffs are to be entitled to a wide berth here that they should have a liberal construction to allow people like _____, and certainly in this circumstance.

BAKER: But the liberal conservative idea of construing statutes it seems to me sovereign immunity is a doctrine that if strictly applied nobody would get to sue a state agency for anything. And so that when the legislature chooses to waive it that whatever the circumstances there are have to be narrowly construed to achieve that purpose. Otherwise they wouldn't have gone to all the links that did to write this statute the way they did and give us so many opportunities to construe it.

DOUGLASS: I agree, but the limitations on the waiver provision are the guts of the

provision, that you've got to have use, that you've got to have motor driven equipment or motor driven vehicle. And my assertion that in and of itself limits the application. I don't think any court that's ever considered this provision said that this is a blanket wide-open immunity provision or waiver provision. I think they all have used different terminology...

BAKER: But look at it from another one. You've got immunity from being sued without the legislature's consent, which is one part. And then you've got the immunity from liability. You could read this statute to say liberally it waives the requirement to get the legislature's consent to sue in any negligence case if it meets part of the statute that tells you how you can have liability, so that yes liberally it waives all necessity to get consent from the legislature, but it puts you into little pockets to decide whether you can maintain that suit and get liability after that. Would you agree with that interpretation?

DOUGLASS: I would agree with that, and I would also say that...

BAKER: And so then my next point is, having said that, we have to determine the nature of what motor driven equipment is based on the conflicts between the courts of appeal, _____ we have jurisdiction.

DOUGLASS: I would say the case relied upon by the petitioner to create this jurisdiction that the San Antonio CA didn't come out and say that non-movable equipment driven by a motor cannot be motor driven equipment. That is a use case and they concede in their statement saying well we consider it's still a possibility.

BAKER: Are you saying then in your case is not a use case, that's it's a non-use case?

DOUGLASS: Certainly this is a use case. What I'm saying is that for jurisdictional purposes, that there is no conflict between the Ft. Worth CA here and any other court in Texas on this issue, including the Schaefer decision because even in Schaefer it recognized the possibility that you could have motor driven equipment that you can't drive.

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REBUTTAL

RHODES: I would like to start off by reading what Schaefer actually held to disavow any misconceptions about the Schaefer holding. "Because the status of stationary electric motor driven pumps, as motor driven equipment is questionable at best, we conclude that the city water board's sovereign immunity has not been clearly and explicitly waived. Therefore, we conclude that the water pump in question is not motor driven equipment under the Texas Tort Claims Act.

I think there's a clear conflict there between what constitutes whether or not stationary electric motor driven pumps are, or not motor driven equipment. And that conflict gives this court jurisdiction. And Schaeffer in making that holding relied upon the Brookshire case I cited the court earlier along with some other 5th circuit cases that held for instance that a crane was not a motor driven vehicle but was motor driven equipment.

And also with respect to the conflict in the standard of review opposing counsel asserts that that's merely semantics. I did a search of every case cited in both petitioner's brief and respondent's briefs. Every case in which the court stated that it was going to use a broad or liberal construction of the waiver provisions of the Texas Tort Claims Act, every case said it was going to use a broad or liberal construction; held that sovereign immunity had been waived in that case.

On the contrary, every case that utilized either a clear and unambiguous standard or decided that they were going to construe waiver provisions of the Texas Tort Claims Act strictly or restrictively decided that immunity had not been waived.

PHILLIPS: What standard do you think we should use?

RHODES: I think the standard is what this court said in York and Bossley, a combination of the two tests. In York this court says that three principles guide the construction of the waiver provisions of the Texas Tort Claims Act. First that immunity is a matter to be addressed by the legislature; second that the legislature must waive immunity by clear and unambiguous language; and third, that the waiver provisions have to be construed to give effect to the purpose of the Texas Tort Claims Act as a whole. And then in Bossley, the court came back and specified exactly what the purpose of the Texas Tort Claims Act as a whole is, it's to provide a limited rather than an unlimited waiver of sovereign immunity. So I think the answer is that these allegations need to be reviewed to determine whether the factual allegations stated by the plaintiff clearly and unambiguously come within the limited waiver of sovereign immunity intended by the legislature in enacting the Texas Tort Claims Act.

ENOCH: Let's talk about the waiver of sovereign immunity _____.
My questions to Mr. Douglass and his answers it seems to me one of the issues may be here that sovereign immunity is waived when the governmental entity makes a decision to use motor driven equipment and that an injury arises out of that use. The argument is that the immunity has been waived. Now whether how the equipment was used simply goes to the question of negligence and not to the question of whether or not immunity now gets reestablished. So the argument then - the state can't be sued if they never decide to use the equipment, but once they decide to use the equipment and they implement use of the equipment as I think as you said employed the equipment to be used. Then if they negligently turn the equipment off, that simply goes to a question of whether or not negligence occurred. That doesn't go to the question of whether waiver occurred. How do you respond to that argument?

RHODES: I think the case law on this is clear, because when we make that decision we're no longer operating or using as I discussed before through the definitions. And there is also case law. For instance a perfect example of this is the Ranson case. It was a recent en banc decision from the San Antonio CA that this court denied the petition for review. In that case, a governmental employee was driving somebody who was mentally disabled home for the night. He stopped the car across the street from the home. So obviously we have used and operated motor driven equipment. He made a bad decision to drop this mentally disabled person across the street rather than taking him to the front door step. Our mentally disabled individual while walking the street got hit; sues under the Texas Tort Claims Act. The San Antonio CA en banc decision said that what they are complaining about is not the operation or use of the motor driven vehicle, but the bad decision to drop him off across the street. And there are several cases that have reached similar results, school bus cases...

HANKINSON: But let me ask you this. Would there be use if let's say in this particular instance that TNRCC put the pump in play, they were using it, they made the decision that they would run it for 12 hours, shut it off for 12 hours, or whatever. The fire occurs during the 12 hours that the pump is shut off. Is that a non-use case?

RHODES: That would be a much closer question.

HANKINSON: Well is it a non-use case or not? Yes or no.

RHODES: I would not say so, but there is authority that would say yes on that.

HANKINSON: So your position is is that that's a misuse because in fact they shouldn't have been turning the pump on and off and they are actually using it - in other words it doesn't actually require that the equipment be operating at the point in time that the injury occurs in order for there to be a use. You could have it nonoperable at the moment in time of the injury and still have a use?

RHODES: Because it could be nonoperable and yet being used because it was being employed for a given purpose. And I can see that. But that's a distinction in our case that we don't have that.

HANKINSON: I'm just trying to figure out where the line is.

RHODES: That's where at least I would draw the line.

HECHT: If after 25 years we still don't know the answer to that question and the San Antonio court still has to go en banc to decide these issues, should we rethink at some point the judicially created doctrine of the unity and let the legislature have another shot at this?

RHODES: And especially too considering that the legislature has now created a panel to review this court's decisions and try to come up with ideas on areas that they need to correct

legislation, and the Texas Tort Claims Act didn't get in there even though this court has only mentioned it for the last 25 years. So perhaps that may be the best thing to do.