

ORAL ARGUMENT – 11/14/02
02-0177
DALLAS AREA RAPID TRANSIT V. WHITLEY

SIMMONS: The theme of the case before the court could be summarized as a selection between two options: whether the Dallas CA should be allowed to expand the limited waiver of governmental immunity to a point of nonexistence; or whether this court should stop this unwarranted, unauthorized expansion to _____ prior decisions and the clear intent of the legislature.

The holding we seek is a simple one and straight forward. DART is a Texas governmental entity. Texas governmental entities immuned from tort law suits unless they are waived by clear and(?) ambiguous language of the Texas legislature. Cause of actions are based on the non-use or the failure to use more vehicles. Misuse of information, failure to provide police protection, or a failure to be supervised do not state a cause of action within the limited waiver of immunity authorized by the Texas legislature. And, therefore, the TC did not have subject matter jurisdiction and the Dallas CA decision should be reversed.

With regard to the failure to use of a motor vehicle, the use of a bus cannot be grounds for the finding of a waiver of immunity. As interpreted by this court, the tort claims act requires that injury must have been caused by the actual use of the governmental property and not its failure to use it.

HANKINSON: Is this viewed as a failure to use case? I thought the allegation turns over whether the bus was an instrument that was used that caused the injury? I didn't realize we were dealing with failure to use as one of your arguments.

SIMMONS: I _____ the failure to use because the Dallas CA talks about the failure of the bus driver to go back and pickup Mr. Whitley.

Neither does this cause of action arise out of the operation of the vehicle as well.

HANKINSON: Would you then deal with the question raised by the plaintiff in this case that when the bus driver put the passenger off the bus he was using the bus as that term is used in the tort claims act.

SIMMONS: Simply put, the injury did not occur at that moment. There was no injury of Mr. Whitley at that juncture. He didn't injure his self on the bus. No instrumentality of the bus caused an injury. The injury occurred sometime later after the bus was well away from the location.

OWEN: But what about when he put the passenger off the bus, and she immediately went and attacked the plaintiff?

SIMMONS: Again, the tort claims act specifies that if you look at the incident, if you find at that moment, then the question is what injury occurred at that moment? There was no injury to Mr. Whitley at the moment where he was put off the bus. He was fine. He was standing there waiting for a bus. There would be another bus along in approximately 30 minutes.

O'NEILL: But the statute specifically says it has to arise from, which is a little bit less direct than caused by immediately as you seem to be arguing. What does that arises from mean?

SIMMONS: Arises from, I would think it would have to be that there would have to be something related to the actual operation of that vehicle. Put simply, I would think that there would need to be a direct nexus between the injury and that operation. If not, then all you have is simply the bus becoming the location or something that creates a situation where injury may possibly happen.

O'NEILL: What if the bus driver had dropped someone off in a very dangerous neighborhood, just randomly for no reason and forced them off the bus, would an injury that resulted from injury being in that part of town for example be something that arises from the use of the bus if the driver uses the bus to put a passenger off forcibly in a dangerous area?

SIMMONS: We would say no. Because again criminal activity is a risk that applies to all citizens. It is a general risk that can happen to anyone at anytime. If that was true, then anytime we open our doors and put somebody off, even in downtown Dallas where people have been kidnaped going to their cars to go home, and having found deceased, we would be liable anytime we put a person off at any location. Because any location in Dallas or in our service area has potential of becoming dangerous.

O'NEILL: So you would read the arises from language to really mean caused by. They have to be hit by the bus.

SIMMONS: Hit by the bus, or something that - if for example, they had slipped and fell on the bus. If there was something on the bus that caused them to injure themselves. But there would need to be some direct nexus between that vehicle and the injury. In this case there was none.

PHILLIPS: How do you distinguish this case from Contreras, from the Beaumont CA where the school child was let off at the wrong stop?

SIMMONS: I believe that Contreras was improperly decided. I believe that the San Antonio CA, their en banc decision, is a correct interpretation of that principal. Because what you have here is basically a negligent supervision, that is, that we should have stayed there to make sure that the person got to the destination correctly. I don't think that's a correct interpretation of the limited waiver of immunity under the Texas tort claims act.

SCHNEIDER: If I understand what you're saying, regardless of what the known danger is, for instance if there was a shootout, whatever, a bus driver lets a passenger off or forces them off in that situation, that wouldn't arise in connection with or arise from the operation of the use of the bus?

SIMMONS: Again, I will say no. We never force individuals off the bus. We ask them to leave. If they choose to leave and comply with the direction of the bus driver, then he may do so, or he may refuse to do so at which time we will call a supervisor and ask to talk to them. But in Texas in the past 5 years has averaged over 100,000 aggravated assaults per year. That would mean that there are opportunities out there for the criminal element to sit upon the people at any given time. No one knows when a situation will become dangerous.

PHILLIPS: This driver had a hint didn't he? According to the facts taken most favorably to Mr. Whitley, this driver had some inkling that there was more than just general danger.

SIMMONS: I believe the driver believed that by separating the individuals that would put the end to it. There was no way to know that these individuals would go back and attack the plaintiff.

PHILLIPS: How about her loud statement at the time she left the bus?

SIMMONS: If that's going to be the item that turns this case, then that would put the governmental entities of this state on a very high burden. For example at football games, or little league events, or where any kind of a business meeting, if then someone says something _____, then that would imply that you need to go out and arrest them because they might go out and do something. The fact is, the majority of people after they've had a argument of this nature, they cool down and the matter goes away. It's only that small element of individuals that go off and take matters into their own hand. All I'm saying is, there's no way the driver could have known that this was going to be one of those individuals, one of those one out of a hundred that was going to go out and attack this individual.

SMITH: What is the policy reason for the legislature's confining the waiver to operation or use of a motor vehicle instead of the situation as J. Schneider hypothesized where you let somebody off in the midst of a shooting? What's the policy reason for limiting the waiver to operation or use of a motor vehicle?

SIMMONS: The policy reason is that the funds of the government are very finite. They are very limited. And the legislature has to weigh the benefits of allowing a wider waiver of immunity against the harm that it would do to the state of Texas.

HECHT: But they could do that by saying we're only going to pay on Mondays. And so what is the policy reason for saying we're only going to pay when there's an involvement of

personal property?

SIMMONS: The policy reason would be the operation of a motor vehicle equipment is quite different in that it has to be limited to the precise operation of that vehicle, otherwise anything that vehicle did would always be a waiver of immunity. If you broaden the scope of it to such that you include the mere dropping off of a passenger who then walks down the street, who then is assaulted, then any vehicle operated by the state of Texas or any governmental unit will always have the problem of okay you can be sued for this cause of action.

O'NEILL: I believe you said there would be some situations where the bus would be involved in an accident sufficient to waive immunity such as slip and fall, I believe you said, a condition on the bus that made it dangerous. What if the driver had pushed this plaintiff off the bus physically?

SIMMONS: If he pushed him, then it would be an intentional tort. And that would not be an action that could be imputed to DART. If he physically pushed him off the bus...

O'NEILL: So if he was physically pushed, you would say there would be a waiver of immunity here?

SIMMONS: No, because that would be covered by the intentional tort provision that bars actions by governmental employees as being a waiver that can apply to the governmental entity. Actual physical contact with the individual would be an actual intentional tort by the governmental employee.

O'NEILL: But would that involve a use of the motor vehicle?

SIMMONS: No, it would not.

O'NEILL: Why would that be different from a condition that was on the floor that the passenger slipped and fell on, something on the bus that caused the condition for the injury?

SIMMONS: Because it's not a part of the _____. The case I'm thinking of is a case involving a motorist who was stopped by a police officer, taken to a parking lot and then forcibly raped. In that case, the individual's claim that there was a use of the motor driven equipment, and the CA said no, because the car was just the location for where this attack occurred. The actual damage was caused by the employee, not the actual motor driven vehicle. And in your case, that would be the same situation. The actual injury would be caused by the employee, not the motor driven vehicle. It would simply be the location where the injury took place.

JEFFERSON: Let's say we were to hold your way and say that DART was immuned from liability. Does the plaintiff have any other recourse against the driver, for example?

SIMMONS: He did have that recourse. At one point in time he could have sued the employee directly and tried to collect from them. He at one time could have sued the individuals who attacked him and tried to collect from them. There were other avenues. At this juncture all the statute of limitations have expired. But those were the elections that the plaintiff's counsel made.

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RESPONDENT

KNOUSE: The questions that you've asked, I think that the key issue and the proper focus here in determining whether or not there has been a waiver of immunity is not whether or not the driver struck the person with the bus, or whether or not he was negligent in the operation of the bus. But the true and the proper focus is whether or not the negligent actions or affirmative conduct in this case proximately caused the occurrence and arose from the operation of the bus.

In this particular instance there's not any question from the facts at least as we pled, and I would remind the court that this is a case of a plea to jurisdiction that was purely on the pleadings, there was no evidentiary findings here. It didn't go anything further than the pleadings. And the question is, whether or not we properly pled the facts here enough to waive immunity.

SMITH: Is your standard then a but for type standard?

KNOUSE: No sir. I understand that that is not the standard. I understand that that's true. My only issue here is whether or not it arose from the operation of the vehicle. Here obviously the DART bus driver used and operated the motor vehicle to drive Harold Whitley to an isolated portion of Dallas, not his stop, ordered him and forced him off of the bus. Then knowing that he had been threatened with death threats and knowing that he had actually been attacked twice by the woman on the bus, then let her off two blocks later at her stop with her getting off the bus making a threat that she was going to go back and kill Harold Whitley.

HANKINSON: What are the outer limits of the arising from language used in this statute?

KNOUSE: I believe that the limits here has to do with proximate cause. I think that what the court has to focus on and has focused on in other cases is dealing with cause and fact and foreseeability. Both of which we had here. There are cases that this court has dealt with, for example, like the Bosley case that was cited by the court dealing with an unusual situation where the doors were left open and the guy runs out and then gets run over. And what basically I think the court was saying is kind of like in the Union Pump case, it was too attenuated. It was not a foreseeable type of situation.

HANKINSON: Had this attack occurred two hours after he was left off the bus would it still be arising from the use of the bus?

KNOUSE: I would say that it would become more attenuated with time obviously.

HANKINSON: And so then that's my question. What are the outer limits if using the bus includes letting someone off a bus, at what point in time does that act of letting someone off the bus become too attenuated to arise from the use of the bus?

KNOUSE: I think here you have to look specifically to the factual pleadings and the factual situation involved. The cases that I have read, the Contreras case where they let the person off at the wrong stop and they are killed. The case out of Austin where the bus driver honked the horn for the child to walk out and then she was ran over. The case out of Dallas, the Hickson case, where they failed to use the flashers on the vehicle. All of these things happened fairly soon in time, I think. And so I think it would be a reasonable inference, I guess in answer to your question, that the closer in time the less attenuated it would be.

HECHT: If I were just giving a ride to two friends, and they got in a fuss and I said, Look I'm just trying to do you a favor. Get out. I don't want to take you any further. And they get out and the fight continues and they assault each other. Would you say that that arose out of the use of the car?

KNOUSE: The way I would answer that, and I would draw your attention back to one other thing that has not been highly emphasized in the briefs here. We did raise it before the CA in the 5th district. Traditionally when you're talking about a common carrier, and I will distinguish it from your situation, the courts including the Texas SC has held common carriers to a very high duty of care, to discharge their passengers in a safe place, to determine whether or not the place they are putting them off would be a safe place or not. And those were distinguished I might add from the cases involving school buses, which is the majority of the cases that the court has before it involving injuries involving buses.

HECHT: But you're arguing now that the existence of some duty kind of implicates whether it's arising under?

KNOUSE: Yes.

OWEN: That's my question. Let's assume that DART is a common carrier. And let's assume that the woman had attacked the plaintiff on the bus and the bus driver just drive on down the road while the fight ensued. Would that be an injury arising out of the use or operation of the bus?

KNOUSE: I wouldn't think it would. Under the one case where a student was stabbed on the bus, that was clearly not something that arose from the operation of the bus, and that is a case where the bus just formed a locale for the assault.

OWEN: How can you allege in this case, under my facts, the driver should have stopped and put both of them or one of them off the bus? The driver could see the fight on the bus in their rearview mirror, and you would allege well he should have put the woman off the bus. He should have stopped the bus and made her get off. Would that be a use or operation of the bus? That's the allegation. The bus driver could see the fight as he was driving down the street, and should have, but did not stop and put one of them off.

KNOUSE: I think it is more of an issue of whether or not - I guess what I'm really saying, and I understand where you're coming from, the issue and if we deal with the focus as being the negligent act of the bus driver arising when he is in the operation of the bus as opposed to hitting somebody with the bus, and in your circumstance, I suppose it would depend on whether or not the driver's action and his training in that situation would have been to take that particular action. I don't think it is quite analogous to this situation where he deliberately chose to put the individual off the bus knowing that he had been threatened and then put the attacker off less than two blocks later.

OWEN: I'm just trying to see the difference. He knows there's a fight going on. He sees that she's injuring him and he doesn't stop. He just keeps going. What's the difference?

KNOUSE: In that particular instance, I don't know that there would be a gross difference except from the standpoint, and I think your talking about did he have a duty to breakup the fight or to call the police, or to take some type of affirmative action to deal with the unruly passenger, and I would say yes that does arise in the operation of the bus.

SCHNEIDER: Assuming this case either we're not on appeal, or you were in the TC and you got to the TC and you submitted an issue. What type of proximate cause would you ask? What would be the factual question you would ask the jury in this matter?

KNOUSE: In this particular matter, the specific question that I think is most applicability is found in our petition, in our pleading under para. 4F. And that was whether or not DART was negligent by and through the negligent conduct of its bus driver in wrongfully ejecting the plaintiff, Harold Whitley, from the bus, who the driver knew to be physically disabled in a remote and dangerous area of Dallas, and putting him in immediate danger. That's an awkwardly worded thing, and obviously it would be much more global than that. But that would be the jest of it.

O'NEILL: The San Antonio CA said that negligence supervision is not use of property. How do you draw the line between something like dropping a passenger off and not following up to make sure they are safe, and negligent supervision?

KNOUSE: In Ransom, where they let the mentally retarded individual off directly across from his house, the bus leaves and then he's hit by an intoxicated driver, they did interpret that as being supervision or a failure to supervise and see that the passenger was safe. I would distinguish

it from this fact situation completely because here he was not, as the CA for the 5th district said, this is not simply even a case of dropping an individual off at the wrong stop. What happened here was that the driver made a decision to force Whitley off the bus when he knew that he was disabled in a dangerous area...

O'NEILL: But key to it is, is that he didn't go back and pick him up. So he didn't go back to check on the situation or see if it was escalating or see what was happening. And it's hard for me to distinguish that from negligent supervision.

KNOUSE: Well it's more than that. Because what the driver did here as an affirmative act, is he forced him off the bus telling him and falsely representing to him wait here a few minutes and I will come back and pick you up. As the 5th district noted, the woman attacker knew exactly where he had put Whitley off. She had threatened the man twice with a knife and threatened him orally in the presence of the bus driver, and as she got off the bus two blocks later stating I'm going to go back and kill Whitley.

O'NEILL: When does that not go over into the intentional activity in the hypothetical I posited that in effect he pushed him off the bus? And your opposing counsel says that would be a different cause of action.

KNOUSE: I don't think it is a different cause of action. I thought you were right on point in the question. During our oral argument at the 5th district, J. Kincaid asked Mr. Simmons, what if DART elected to take a busload of passengers to a pond known to contain alligators and sharks and proceeded to throw them off one by one in the pond. Would you have liability? And the answer was no. Because we didn't hit them with the bus. Now that's where I see the problem is that I think that the carriers like DART have interpreted this court's decisions in the past to mean solely that arising from operation of the bus means hitting them with the bus. And that's not, I don't think, what the law is saying here.

SMITH: What is the policy reason for this? Why would the legislature say that there is a potential liability when the injury arises from operation or use of a bus, and not say it could also arise from negligent supervision for example to take the Ransom facts into account. What is the legislative rationale if you know?

KNOUSE: I don't know. I tend to agree with J. Hecht in his concurring opinion of TDC v. Miller, that I think that this is a common, really arised out of a common law immunity, which was created by the courts, and the courts can choose to change that. This court has called upon the legislature to explain itself on numerous occasions and to make changes, and nothing has occurred at this point. I agree with J. Hecht in what he said, that while I think that the court has deferred to the legislature, it isn't necessarily to advocate what you have to do here. I agree with J. Hecht in saying that I think the ultimate outcome will be completely abolishing waiver. That's precisely what happened with charitable immunity. That's what's happened with other immunities that have been

court created or common law created. But here as far as the rationale of the legislature, I can't give you one, because I don't think they have given you one at all, or given us one. I think as has been stated in your opinions, they have given this court and the citizens of Texas very little instruction of what it means to arise from, or why they did what they did.

OWEN: Let's suppose that the passenger in this case, the plaintiff, had been dropped off at a regular bus stop, but it was in a dangerous area. And he told the driver I'm scared to get off here. This is a rough area of town, and he had been attacked by someone in the area, not by another passenger. Would there be liability under that scenario?

KNOUSE: Of course that takes it one step removed. And I think it kind of gets into the situation of *Nixon v. Mr. Property* as far as whether or not you can expect someone to be criminally attacked. In that particular case they said it was a dangerous neighborhood and...

OWEN: Specifically is that use or operation of a bus, to let a passenger off at an existing bus stop in a dangerous part of town?

KNOUSE: And you're saying this is the passenger saying I want to get off here but I'm a little afraid because it's dangerous?

OWEN: No. I'm saying I don't want to get off here, and the bus driver says look you've been disruptive and I'm putting you off at the next stop. And the next stop is in a rough part of town.

KNOUSE: I think it would arise from use of the operation.

OWEN: So DART should be liable anytime it has a bus stop in a neighborhood that has a high crime rate?

KNOUSE: No. I'm not saying that either. I'm saying that I think DART has a duty here to deliver its paying passengers from the point that they come from to the point that they want to go, which is not what occurred in this case. This was not even a bus stop. What he did is he just put him off the bus in the middle of an area.

OWEN: Establishing a bus stop in a part of town that has a criminal history of high crime are they going to be liable for passengers who even say okay I want to get off here. Are they going to be liable for establishing that bus stop because that's use or operation of a bus?

KNOUSE: If it's a bus stop that is controlled by DART, I would say yes. I would say that if they control the bus stop, then they have a duty to the safety of their passengers to put them off at a safe place according to case law.

HECHT: We have some factual information attached to the petition in the brief, but you say this was not considered in the ruling on the plea?

KNOUSE: I don't believe it was. What occurred here, it is similar to one of the cases, Mr. Simmons filed a plea to the jurisdiction on the pleadings on loan, and in the alternative filed a motion for summary judgment. It was a no evidence motion for summary judgment, and so the attachments came from that. The actual hearing that we had before Justice Marshall took less than 5 minutes. There was no evidentiary hearing. There was nothing other than "I grant the motion based on the pleadings alone."

HECHT: So then it's a legal question whether the facts taken into account, whatever we would determine them to be amount to a rising under?

KNOUSE: Yes. I think that's true.

SCHNEIDER: So your jury question would be, did the operation and use or his operation and use of the vehicle cause the injuries? Is that what it would be? And that's what I was trying to get you to awhile ago. Because you may agree that you have the same issue here. It's just a matter of degree of proximate cause. And that's what I'm trying to get at.

KNOUSE: I actually think what would be proper would be for the TC to instruct the jury as to operation and use, which is going to be a problem obviously to say what arises from operation and use. Although I do think that that would be the factual issue, is did it arise from the operation of the bus. But you've also got to take into the fact what type of affirmative action or negligent action did he do. And that would be forcibly ejecting Whitley off in a dangerous area. Do you find from a preponderance of the evidence that the bus driver's action in forcing Whitley off the bus was negligent? Yes or no. And then perhaps you would have to have yet another issue as to, Do you find from a preponderance of the evidence that the actions of the bus driver arose from operation of a motor vehicle?

I will have to say that I'm coming right off the top of my head with that simply because I have seen no case in the State of Texas that has defined that jury issue. And it's perhaps because a lot of these cases don't even get the opportunity to go to a jury. And should.

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REBUTTAL

SIMMONS: Respondent has made his intentions clear. He would like very much for the ultimate result is for the legislature or this court to abolish governmental immunity. This court has held for 150 years almost that the waiver of immunity is a matter to be addressed by the legislature. And in fact, the legislature has codified that under §311.034 of the Texas Gov't Code.

Back to the subject of this appeal. There are no limits on this CA's decision. If let stand, then anytime we drop an individual off and we carry almost 16 million individuals a year...

HANKINSON: I don't read the CA's opinion as saying that, as saying anytime DART drops a passenger off at a bus stop they are going to be responsible or they've waived immunity and will be responsible for what happened. It seems to me the key language from the CA's opinion is that the bus driver used the bus to place Whitley in a dangerous situation. And that these facts are somewhat unusual in that this isn't where he intended to get off the bus, and it wasn't even a bus stop and that circumstances had arise on the bus. And certainly then the subsequent act of letting the other passenger off nearby, that seems to me to be the key language which seems to have a limitation on it.

KNOUSE: With regard to dangerous location...

HANKINSON: It's used the bus to place Whitley in a dangerous situation. I don't view it as just being that spot. I view it as being the totality of the circumstances, meaning the other passenger on the bus who had threatened him. The fact that this was a dangerous part of town. It wasn't even a bus stop and not where he wanted to go. And then the fact that the other passenger was let off two blocks later at that time voicing her intent to get Mr. Whitley. All of that to me becomes the package that makes the dangerous situation.

KNOUSE: That would mean that of those 16 million people that we carry, we would have to monitor their interactions. If there's any kind of apparent friction between the passengers, we then would have to make sure that we have to monitor their behavior off the bus. I mean the point here is that it is impractical in its application because it applies to more situations than what may appear on the...

HANKINSON: This is a ruling on a plea to the jurisdiction. As I understand it, we are taking as shrewd the allegations in the petition. And those that I recited, I believe, are what were alleged in the petition. So it seems to me that the CA did try to limit what it was doing in saying that the totality of these circumstances that caused it to conclude that this injury arose from the use of the bus. Now if it's limited in that way, why isn't this an injury that arose from the use of the bus?

KNOUSE: This injury, this attack could have occurred at anytime and in any location. The bus did not have to be a part of this for this injury to have occurred. This individual could have waited another day, another week, he could have done it at anytime. And that's why by simply saying that the driver's knowledge of this location, knowledge of this information and putting this person is off is dangerous, because that means that anytime the driver can be said to have knowledge of a bad area, or that there's problems between passengers on the bus, or they may be a problem with passengers on a bus, then that means that DART is not responsible for the supervision of those individuals.

HANKINSON: But that seems to me that that goes to the liability determinations that would ultimately be made in the case, that if the case were to go forward on the merits a jury might choose to agree that this was not the proximate cause, and so on. Right now we're only dealing with the facts alleged in the petition to determine whether or not there's jurisdiction resulting from a waiver of sovereign immunity.

SIMMONS: On that point, I would say two points. That is why the legislature added the plea to the jurisdiction as a means for governmental entities to resolve these issues before they spend funds filing a lawsuit that they did not authorize for. Because the legislature did not say you're responsible for a negligent supervision. They did not say that you're responsible for things that occur to individuals well after they have left your bus. They did not specifically authorize any of those cause of actions that are mentioned in this petition.

HANKINSON: Is it your view then that use or operation of a motor vehicle only means you have to get run over by the bus, or you have to get hit by the bus in order for it to come within the waiver, or do you think it's broader than that?

SIMMONS: I think that if you have an injury that is directly related to that bus. For example, again I give the example before: someone slipping and falling; someone grabbing hold of a pole and it breaks loose and they fall back and they are injured. There are a variety of ways that the instrumentality can directly cause that injury. Under this scenario, even under the facts presented by the CA, if this event had occurred the next day, we would still have been responsible for that injury.

O'NEILL: That would be much clearer if the legislature had said caused by rather than arises from.

SIMMONS: I would say it would have been much clearer, but I think they put the words "arises from" for a particular reason. They wanted to make sure that there was some definite nexus cause of action by that motor vehicle equipment and that injury.

O'NEILL: But saying caused by would make that nexus clearer.

SIMMONS: It would make it clearer, but I think even under the language that is in there this case does not meet that standard. Because none of the things that he's basically arguing here - supervision, misuse of information are specifically authorized by the statute.

O'NEILL: But you would agree that arises from is broader than caused by?

SIMMONS: Yes.

PHILLIPS: Do you agree with opposing counsel that this case should be based solely on

the pleadings and not on any of the summary judgment evidence that was presented to J. Marshall?

SIMMONS: The _____ was submitted as both evidence forward, the plea to the jurisdiction, and the summary judgment. It was provided by affidavit as such. And as a matter of fact, on page 82 of the record, it specifically states evidence of Harold Whitley in opposition to defendant's plea to jurisdiction and _____ motion for summary judgment. He provided for both. So this court has the ability to look behind the pleadings to be sure that there's jurisdictional facts that support the imposition of the waiver of immunity for suit. And the point here is not that ultimately we would win this case at trial. The point is whether the limited funds of a governmental entity or any governmental entity should be tied up in litigation that was not specifically authorized by the legislature.