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Supreme Court of Texas.
TEXAS DEPARTMENT OF TRANSPORTATION, Petitioner,
v.
Jesus GARZA and Maria Elena Garza, individually and as personal representatives
of The Estate of Rolando Garza, deceased, Respondents.
No. 00-0948.

October 2, 2001.

Appearances:
Kyle S. Duncan, Office of Attorney General, Austin, TX, for Petitioner.
Armando Duran, Dallas, TX, for Respondent.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla Richman Owen, Justice Harriet O'Neill, Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Deborah G. Hankinson, Justice James A. Baker, Justice Craig T. Enoch, Justice Xavier Rodriguez.

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JUSTICE: Thank you, be seated.
The Court is now ready to hear argument from petitioner in Texas Department of Transportation v. Garza.
SPEAKER: May it please the Court. Mr. Kyle Duncan to present argument for petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF KYLE S. DUNCAN ON BEHALF OF THE PETITIONER

MR. DUNCAN: May it please the Court. At issue in this case is whether the State may be sued for its decision to set speed limits. The answer is clearly no. Those decisions are discretionary ones that force the State to obtain sovereign immunity. Disagreeing with the numbers on a speed-limit sign is not a complaint about a condition of tangible personal property under the Tort Claims Act. There is no condition because the allegations and the evidence show that the sign was functioning properly.
There is no tangible personal property because the complaint, in this case, is not about the sign at all. Rather, it's about the governmental decision that the sign merely [inaudible].

JUSTICE: Could you talk to us briefly about jurisdiction, where we have conflicts jurisdiction here.

MR. DUNCAN: Yes, your Honor. The rule of decision in this case that an allegation that a speed limit sets an unreasonably high speed limit and, thereby, presents a condition of the sign squarely conflicts with the Austin Court of Appeal's decision in Bellnoa and with the El Paso Court of Appeals decision in Shives.

JUSTICE: Well, but was that the basis to Garza II here? Wasn't Garza II just decided on law of the case?

MR. DUNCAN: Well, your Honor, that is a very interesting question that has been much on my mind since I read the Court's description of the issues in this case published last Friday. The reason it's an interesting question is because, I think, the Garza II opinion, in part, relies on the reasoning in Garza I. And what it does is it interprets that opinion and comes to the conclusion that Garza I did, in fact, reach a conclusion about the speed-limit sign and the condition waiver under the Tort Claims Act and Garza II decided that that conclusion was binding upon and decided to apply it in this case. It didn't have to do that. We can --

JUSTICE: Why not? Why wouldn't the law of the case -- do you agree that, squarely, in Garza I, that the Court determined that the sign is, in fact, in right condition for purposes of determining the immunity issue?

MR. DUNCAN: No, your Honor, we do not. The procedural posture of Garza I is on summary judgment. This Court indicated in Hudson v. Wakefield that when the case is first up on summary judgment, the court of appeals' decision-making process is very narrow. It's to see whether a factual issue is raised. That was an issue -- that was the way that Garza I was approached and we argued strenuously on the second time around that any language going beyond that holding was dicta. Therefore, it wouldn't establish law of the case.

But even if it did -- because six years had passed between the two appeals. There had been squared disagreement with Garza I's language about the condition. There had been expressions from this Court about the narrowness of the --

JUSTICE: Well, but that's a different question. When an appellate court has answered a question of law in a case and the same case comes up, and the law of the case would dictate that that court is bound by the legal conclusions it reached in the earlier case, and the Court in Garza I did determine that the issue before was whether the signs present a condition that should have been corrected and, actually, made a decision which is a legal determination that it was a condition so I'm a little bit confused.

I understand that there were other developments in the law but the law of the case is designed to ensure predictability in the law and this was the holding in the earlier decision.

MR. DUNCAN: Well, we know that now as a result of Garza II. It was, by no means, a foregone conclusion in Garza II that that was, indeed, the holding. We argued that it was dicta but even if it were, the Court could have said that's a clearly erroneous holding. The Court could have granted rehearing en banc. The Court could have come to a different decision.

But even if all of that is irrelevant, even if this decision truly is based on law of the case, it still comes within this Court's conflict jurisdiction.

JUSTICE: And that's the point of going through this discussion is that if the holding in Garza II is that we are bound by the law of the

case and will not re-look at the issue of condition, then the actual holding is based on the law of the case not on interpreting the statute so as to create a conflict with the two cases that you cite. And that's the question we need squarely answered.

MR. DUNCAN: And in looking at that question, I have looked at the Court's cases and I have not found anything that is squarely on point so the first thing I think we should do is go back to the Government Code provision that gives this Court jurisdiction and interlocutory appeals in conflicting cases. And that language -- the pertinent language is from 22.225(c) is, is this a civil case brought to the Court of Appeals from an appealable judgment of the trial court in which one of the courts of appeals holds differently from a prior decision of another court of appeals.

We believe that Garza II squarely falls within that language and for this reason, the rule of decision in Garza II, the only reason we can apply law of the case if that is the true basis for the decision is that the allegations in this case implicate the condition waiver of the Tort Claims Act. Without that rule of decision, Garza II may come out differently but the important point is, is that with that rule of decision, Garza II would overrule Shives and it would overrule Bellnoa and it would overrule the Padirka from the Beaumont Court of Appeals which I've set out in a letter brief to this Court. This --

JUSTICE: Bellnoa was a '95 case Padirka was a 2001 case so those are prior cases, are they?

MR. DUNCAN: We contend that Bellnoa is a prior case, your Honor. Garza II -- the rule of decision in Garza II and the appeal that we're before this Court in right now would overrule Bellnoa and Shives. It would allow a lawsuit to go forward based on an allegation that the speed limit is unreasonably high.

This Court's analysis in Blan v. Blue looks to the rule of decision in the cases to see whether they are irreconcilable. And I'd submit that this is a much easier case than the conflict in Blan v. Blue. Here, the conflicts among the court of appeal's decisions are apparent on the face of Garza II. The Court very carefully laid out the issue. The Court analyzed the cases, particularly Sparkman v. Maxwell that deal with the condition issue and it came to a conclusion about how it was going to decide the case.

And I'll quote some of the language from that opinion. This is how the Court of Appeals defined its inquiry at page 7 of its slip opinion, "We must decide whether the Garzas alleged the cause of opinion within the limited waiver provision of the Tort Claims Act." It, then, reproduced the fourth amended petition which is the lie petition in this case. It, explicitly, stated at page 9, "We will now review the Garzas allegation that [inaudible] immunity was waived under 060(a)(2) of the Tort Claims Act because of the condition of the speed limit sign. It then cited Sparkman and then it analyzed its prior opinion.

We don't think this is any different than if the Court of Appeals had said -- the Eastland Court of Appeals has looked at this issue and we find that so persuasive we're going to quote from that opinion, adopt the reasoning in that case. That forms the rule of decision in our opinion and it presents a conflict that this Court should resolve.

And this Court should exercise its jurisdiction to resolve this conflict. It is an important conflict because it, essentially, involves the creation of a new waiver of sovereign immunity under the Tort Claims Act for a decision that by all rights is a discretionary decision to set a speed limit.

The Transportation Code could not be clearer. This is a decision

that is based on engineering judgment and this Court has observed in King and Rodriguez that that is the hallmark of a discretionary decision under 056 of the Tort Claims Act.

The definition this Court gave 26 years ago in Sparkman v. Maxwell of condition is problematic and we urge the Court to either disavow that decision altogether -- yes, disavow the decision, definitely, disavow the definition the condition because it has proved to be a problem and I think --

JUSTICE: And why has it proved to be problem?

MR. DUNCAN: I think this case is a perfect example.

JUSTICE: But nobody else has followed Sparkman in that regard; they will distinguish Sparkman in the other court of appeals decision.

MR. DUNCAN: That is true, your Honor. At the risk of commenting on a case this Court will hear next month, this proved a problem in another case involving a down stop sign. It presents the opportunity to a court to go beyond the physical aspects of the sign, to go beyond the traffic regulatory functions that a sign is supposed to be performing. And go to the decisions behind the sign which writes 056 and potentially, 060(a)(1) and (a)(3) right out of the Tort Claims Act.

If this Court is interested in interpreting the Tort Claims Act in a way that is limited, predictable and governed by objective principles, we shouldn't interpret condition to be a state of being.

JUSTICE: Well, isn't Sparkman more like the case where [inaudible] that there should be a 50-mile speed limit and sign posted said 55 and in Sparkman, the city council never have decided that there should be a stop light there but the stop light was so confusing, it didn't function as a stop light. Isn't that more analogous?

MR. DUNCAN: We would very much like Sparkman to be limited to that factual situation. You're referring to the Alvarado decision. If a speed-limit sign is put up in direct violation of law, then we have a different case. If that's what Sparkman is about, then we don't need this definition that says a sign presents a condition when it presents an inadvertent or a deliberate state of being. That's simply not necessary to the decision of the case. And what it does is it allows the court to consider what conditions are created by a sign and that's not what the Tort Claims Act says.

The Tort Claims Act says the condition of the traffic sign or signal or warning sign. That, I would submit, is much more limited than a condition created by a sign. A condition created by a sign could be anything. And I'll refer the Court to the Beaumont Court of Appeals, the Padirka decision. That Court had, specifically, recognized that this is a problem in interpreting condition so broadly.

We believe that the cases including this Court's cases stand for a definition of condition that focuses on the physical aspects of a sign and it requires a nexus between those physical aspects and the traffic regulatory function that a sign is supposed to perform. The best articulated version of this definition is from the Waco Court of Appeals in the Lawson decision. That has been consistently followed by other courts such as the Fourteenth Court of Appeals Henson decision which applies that definition.

But the seeds of that definition can be found in this Court's Lorig decision involving a stop sign obstructed by tree branches. The Court looked to the intended regulatory function of the stop sign in making its decision that a condition was presented.

This makes sense in the light of the text of the Tort Claims Act. It doesn't make any sense to go beyond the physical aspects of the sign because we're talking about a condition of a sign. That word is

[inaudible] absence and malfunction that suggest physicality as well. The subject matter of 060(a)(2) which deals with uncorrected conditions of warning signs or traffic signals, that suggest a nexus with the regulatory function -- after all, why would the Department need to take notice of incorrect physical aspect of a sign that has nothing to do with the sign's purpose.

So, we believe this is a very simple case; 056 would govern because the decision to set a speed limit which is the only target of the plaintiff's lawsuit that is left at this point is a discretionary decision. 060(a)(2) doesn't apply. The Court should interpret that provision in harmony with 056 and order that this case be dismissed for lack of subject-matter jurisdiction.

JUSTICE: Any questions? Thank you, Counsel.

JUSTICE: The Court is ready to hear argument from respondents.

SPEAKER: May it please the Court. Mr. Armando Duran will present argument for the respondents.

ORAL ARGUMENT OF ARMANDO DURAN ON BEHALF OF THE RESPONDENT

MR. DURAN: Good morning, may it please the Court.

I do concur with opposing Counsel as far as this is a very straightforward seeing this case as a -- from a big picture. Opposing petitioners are trying to establish that the Thirteenth Court decision is in jurisdictionally conflictive position with the Third, the Eighth and the Ninth Courts. Well, I submit to this Honorable Panel -- Court that the issue is whether or not the traffic signals, traffic signs, speed limits, traffic lights create a dangerous condition to the public.

The issue is not whether the actual traffic signs, the traffic lights should be changed, removed, lowered or enhanced for that matter. That's not the issue. While I submit to this Court that the Third Court, that would be the Bellnoa case, never does that Court address the issue of whether or not a condition was created. Therefore, there's no jurisdictional conflictive issues here. The Third Court does not and has not addressed ever whether or not there's -- a condition was created in that scenario. Never. At least, I don't see it.

JUSTICE: What's the condition here?

MR. DURAN: The condition in, obviously, in the Garza case was that the State had a 45-mph speed limit posted and it was very near, if not, at a school zone, your Honor. Therefore, the Thirteenth -- we sued claiming that that created a condition under the Texas Tort Claims Act under 101.060(2). Therefore, the Thirteenth Court of Appeals agreed that it was, in fact, a condition created. Therefore, sovereign immunity is, thereby, waived.

JUSTICE: And the condition was people are driving too fast?

MR. DURAN: That is correct. In fact, the driver, a substitute teacher, as I recall the case, was driving right at 45 or right under 45 and according to the deposition testimony, she lost control after she swerved and a lot of students -- many, many students were standing off the grass shoulder and Rolando Garza, 13 years old back then, was struck and killed.

JUSTICE: Does it make any difference to your analysis about the decision process to post the 45-mile-an-hour speed zone sign? You say it's a condition created but the Court has recognized the distinction

between the governmental body determining that that would be the speed limit in that area as opposed to the maintenance worker putting up a sign or taking down a sign after that decision is made. Does it make a difference to your argument if the condition that's created was the result of the governmental body determining 45 miles an hour would be the speed?

MR. DURAN: No, the condition was created and, therefore, caused a dangerous scenario to the public not after it was posted.

JUSTICE: So you do agree with the Department that your real issue is the designation of 45 miles an hour being the speed limit at that place?

MR. DURAN: Well, it depends, your Honor. No, I do not concur with him. The issue here is whether the Thirteenth Court of Appeals is in conflict with the Third and the Ninth Court of Appeals. Not so much whether it's a physical condition, whether it's the sign per se that is causing the condition or the removal or the lowering for that matter of the sign that is causing the condition. That's not the issue here.

See, that's the problem that I have. They're trying to establish a "new issue" so the jurisdiction of conflict arises automatically. Therefore, this Court will have authority to rule on that on those issues. That's the main concern that I have. They want to create a -- I wanna call it a fictitious issue but an issue that is not there in the Court's opinions.

JUSTICE: Did your claim depend on the existence of the sign? Let's suppose that the governmental body here had said, yes, we want a 45-mile-an-hour speed zone here but had posted the sign a mile back or had not posted the sign at all. Wouldn't you still be making the same argument?

MR. DURAN: That depends whether or not that case scenario that the Court had just presented creates a condition of danger or harm to the public.

JUSTICE: No, I'm asking that -- in your case. Where was --

MR. DURAN: In the Garza case?

JUSTICE: In your case? How close was the sign to the school zone? The 45 mile per hour sign --

MR. DURAN: If I recall correctly, it was a few feet within the school zone.

JUSTICE: What if it had been a mile off the road, would you still be making the same argument that that was the condition of the sign?

MR. DURAN: Well, this Counsel would have to reserve in making or forming up an opinion of whether or not a mile away from the school zone would create --

JUSTICE: Even if -- in my assumption -- let's assume that the speed zone was still 45 --

MR. DURAN: Yes, ma'am.

JUSTICE: -- but the sign was not within a few feet of where the accident happened.

MR. DURAN: How far again?

JUSTICE: I would say it was half a mile away.

MR. DURAN: Half a mile again. It depends because -- let me, if I may give a little bit of facts of this -- of my case. Orlando Garza was standing a few feet. I think it was 3 to 5 feet from the sign.

Well, the sign, 45 miles per hour sign was further -- a few feet further from the school zone. But there were several, several students of his -- the same age that were standing past the sign to the outer part of the school zone and many, many more students were standing in the inner part of the school zone.

So, to answer the Court's question on both case scenarios, a mile -- half a mile, it depend -- the students were standing. It's a large population school or highly populated school, it would-be.

JUSTICE: So, you're saying they should have put up -- either lower the speed limit to lower than 45 or posted a school zone 20- mile per hour.

MR. DURAN: That is correct, after [inaudible] according to the Texas Tort Claims Act. It is their foreword kicks in -- the waiver of sovereign immunity under the clause -- the (2) section. His petition is only emphasizing the one and the three clauses, first and third clauses, but the emphasis where the alleged jurisdictional conflictive issue arises, it's under 101.060(a)(2), not one and three.

Now, the concerns that I have is, is that these are not even facts -- they're not on point. The Bellnoa case is a very -- it's way off the track, it's in the [inaudible].

JUSTICE: Mr. Duran, let me just ask you. The Court of Appeals decision in this case seems to be based on the law of the case stating that it was bound by its decision in Garza I, would you please address how this affects the conflict's analysis for jurisdictional purposes.

MR. DURAN: Again -- yes, your Honor. The Garza -- I picked up this case -- I wanna have to [inaudible] use the term -- I revived this case about three and a half years ago. This is a very old case. The accident occurred by September 1988, was that 13 years ago or something?

At any rate, Garza I is what I have studied, so far, is the summer judgment ruling and it was appealed, the 13th Court of Appeals affirmed. They -- the petitioners filed a [inaudible] jurisdiction. The trial court upheld the plaintiff's position. The 13th Court affirmed it and that's Garza II.

JUSTICE: But if in Garza II, the holding was that the law -- that the Court applying the law of the case held that it had already answered the question, of whether this case involved a condition sufficient to waive sovereign immunity, how -- if that is the holding, then how should the conflict's analysis be conducted when we look at the Shives and the Bellnoa case?

MR. DURAN: It would be my position and we contend that it would not be due to the fact that Garza II -- its decision is binding based up on Garza I. That's just the appellate procedure. Now, to answer the question based on the other two, Bellnoa and Shives --

JUSTICE: I'm not sure but --

MR. DURAN: Yes, I call it Shives though.

JUSTICE: Shives, that may be right. Thank you.

MR. DURAN: Thanks, your Honor, and the -- again, the issue that the petitioners have raised is that Garza II is in perfect conflict with the Court's [inaudible] and that's not what we contend because they're creating issues that are not even addressed by Garza II.

Garza II says, "Whether or not we created a condition, never does Bellnoa, never does Shives. In fact, the only one and the first one that is not even on point that addresses the condition issue is Padirka, which is this year's case. That's the only one. Now, the question arises. Does this honorable panel have jurisdiction authority to address that issue? We contended it was not and we asked that we remanded this case and actually we -- that remands get back down and affirm the 13th Court's decision.

JUSTICE: Counselor, may I ask you one question.

MR. DURAN: Yes, your Honor.

JUSTICE: Does the State have an obligation by the law to erect a speed limit sign that recognizes the school zone? Is it required -- is

there some law that requires the State to erect a school zone sign in the area where this incident happened?

MR. DURAN: It depends. There is one case that I do not have right on top of my head that reads that it does not but that is a Court of Appeals' case. The landmark case in this situation is Sparkman. Thereafter, I do not have knowledge whether this Supreme Court has addressed the condition issue.

JUSTICE: And then the follow up question is, I mean, explain to us -- does the State have the discretion whether or not to erect signs around the State, speed limit signs and the speed limit itself, is that a discretionary act of the State or is it mandated by some statute or this Court or the Court of Appeals?

MR. DURAN: Thanks, your Honor. Discretionary is the buzz word. Discretionary, discretionary -- those are the words that Bellnoa, Shives, Padirka and Garza keep pondering upon.

And to answer the Court's question, it depends. If it creates a condition of harm and danger to the public, it therefore kicks in to be non-discretionary. That is the buzz word, discretionary.

And they're trying to establish that Garza's case scenario was in fact discretionary. That's not the Thirteenth Court of Appeals' decision.

Now, let's forget about the Thirteenth Court of Appeals' decision. Are they in conflict with the other courts? The 13th D.A., the main tool that they've been citing back and forth.

Our contention is that they are not in conflict because the only issue that they addressed is discretion whether the decision of the State to erect change, move, alter, or lower the speed limits or change traffic signals, traffic signs, that would be discretionary. That's how they mentioned -- that's their issue.

That has nothing to do with the issue of the 13th Court which means, which have repeatedly stated [inaudible] created [inaudible] has caused or will cause danger or harm to the public per se. So, the actual reality, the actual issue is whether this Court has authority to determine whether the 3rd and the 8th Courts --

JUSTICE: Well, except in Bellnoa, didn't the Court say that the source of the problem, both in Garza and in this case, is the setting of the legal speed limit, not the sign displaying that limit. Isn't that the question of discretion actually whether or not the State is going to set a speed limit?

MR. DURAN: And we agree, your Honor. That is the main issue under Bellnoa, whether or not it was discretionary, but that's not our issue. Our issue is whether or not it created a condition under subsection (2) that is the issue. We don't want to create new questions of law. We don't want to make them up so we can be here today.

JUSTICE: If I understand your argument, let me repeat it to you.

MR. DURAN: Yes, your Honor.

JUSTICE: You don't -- you don't care who made the decision, that is 45 miles an hour -- this place -- your argument is that having made that decision, it created a condition that caused risks and therefore it removed that decision from the discretionary category into saying, "It could not be made and so you say this is ..."

You're saying a governmental authority, the Brownsville City Council, could not decide to post a 55-mile-an-hour speed limit during -- in the residential neighborhood. If they did do that, that would waive sovereign immunity because that would be creating a risk therefore they didn't have the discretion to do that and the city would be liable for any injuries caused. That's your point.

MR. DURAN: That is correct, your Honor.

JUSTICE: And the reason you say that doesn't conflict with Bellnoa and Shives is because Bellnoa and Shives decided that the decision that was made was discretionary.

MR. DURAN: That is correct. And again, that it's a very good -- very good example because the discretionary issue or -- I should call this sub-issue for that matter is because they have kind of overlooked, for lack of a better term, to have ignored the condition sub-issue (2) under the Texas Code. Thank you.

JUSTICE: All right. If we decide that whether or not a decision is discretionary is the threshold question before we get to the decision of whether it created a dangerous condition then there would be a conflict of Bellnoa. If we decide that TxDOT could, in its discretion, set a 45- mile-an-hour speed zone and they are not deprived of that authority to do so even if it created a dangerous condition, then there would be a conflict though with Bellnoa.

MR. DURAN: If the discretionary issue would arise?

JUSTICE: No, if we decided the discretionary was really the threshold determination before we reach the dangerous condition circumstance then there would be a problem with Bellnoa in this case.

MR. DURAN: There probably would not be one but again, that's if and only if, that case scenario. The case scenario would be given -- that's if and only if -- but in this case, in the real life case, the 13th Court's issue is totally different from the issue of Bellnoa and Shives for that case. Now, assuming --

JUSTICE: Only because they decided the discretionary issue first as opposed to looking at whether or not the condition that was created was dangerous.

MR. DURAN: Your Honor, with utmost respect, they never addressed the condition issue. They only addressed the discretionary issue. Well, the State, the municipality, the governmental unit, has discretion. That never addressed the condition. That's the concern. That's why we're here today and I suppose, I have to presume that the condition issue, what, it's under the table? They probably presumed it. They probably assumed it. I do not know. That's why we're here today.

Well, actually the Court lacks authority to address the immunity issue because it hasn't reached -- we haven't reached that level yet. And the only reason we haven't reached that level because of the case law that petitioners themselves have cited before -- in their petition -- petitioner's brief on the merits and I'll address some questions of the Court

JUSTICE: Any other questions? Thank you, Counselor.

MR. DURAN: Thank you, your Honor.

REBUTTAL ARGUMENT OF KYLE S. DUNCAN ON BEHALF OF THE PETITIONER

MR. DUNCAN: May it please the Court. Before we get into the law, I'd like to address some factual assertions that were made. We know from Land that the Court may and must is necessary to determine jurisdiction, refer to the extrinsic evidence of summary judgment record.

Well, that evidence in this case all points in the same direction. This accident occurred nowhere near a school zone. The school zone has nothing to do with this case.

The affidavits from the traffic engineers in this case says there's nothing wrong with the school zone and if the school zone had been extended to include the area of this accident, that would've been a gross dereliction of duty on the part of the traffic engineers.

So, there are not factual issues in this case as to where this accident happened or whether it involved the design of the school zone. As a matter of fact, all of the claims involving the design of the school zone, they've already been dismissed and affirmed by the Corpus Christi Court of Appeals. So, there is no issue on that.

JUSTICE: How close was it to the school zone? Does the record reflect it?

MR. DUNCAN: Let me refer to the affidavits here, your Honor. The Greenhill affidavit, which I have as a tab to my brief, on the second page, page 70 of the record says, "The area of the subject accident was not part of the school zone..."

And I'll skip ahead. "... In this case, the furthest east-edge of the Alamo Junior High School property was 1105 linear feet away from the area of the accident, described in the Texas Peace Officer's accident report and remains unchanged today."

The next affidavit is from another traffic engineer and I quote from page 72 of the record, "There was no justification for extending the school zone eastward for another 1600 feet to include the section of US Business Highway 83 from 13th Street westward to the eastern end of the school zone that had been established.

So it seems like it's a thousand feet away. He says sixteen-hundred because he was thinking that there was an additional 500 feet, I think. I think the record shows it was at least 1105 feet away.

JUSTICE: Would there be any [inaudible] in the school zone and the posted speed limit -- let's say there's a minimum speed limit of 50 miles per hour within the school zone during the times when children are going to school, would the State have the discretion to post a sign like that and would there be liabilities, in extreme example, well, I'm just trying to see how far you're taking this.

MR. DUNCAN: That is a difficult question, your Honor. I can't imagine that scenario actually taking place but if it did, what it really calls in question is, is there any limit to the State's discretion in setting speed limits.

And I can refer you to section 545.353(d)(2) of the Transportation Code and that's an example of the limit of discretion. It flat out says, "The Department may not post a speed limit of greater than 70 miles an hour." So, if we got a rogue speed limit sign out there, that's 85 miles per hour, I think we're safe to say the discretion has been exceeded.

JUSTICE: Well, let's say it's -- minimum of forty-five in the school zone.

MR. DUNCAN: All the evidence in this case shows that the design of school zones is purely discretionary. There is no doubt that the State has a duty to make every school zone safe and every road safe. I don't think that we can locate mandatory duties, however, to say when or at what level the speed limit has to be set.

So, I'm not willing to represent to the Court that there is some point in the school zone where all of a sudden you no longer have discretion. If there is positive law out there that says that, that would change the argument but all the manuals and the procedures that established that sort of thing, had been held by this Court and I specifically refer the MUTCD that this Court held in King, does not establish mandatory duties within the meaning of the Tort Claims Act.

It means the State should do these things but because these things are left up to its ultimate engineering discretion, it doesn't create mandatory duties for purposes of the Tort Claims Act. I hasten to add. There is a distinction to be drawn here between the formulation of policy decisions and their implementation.

This is not an implementation. Alvarado is an implementation case. There is authority particularly Zambori v. City of Dallas. This is a case often cited for this proposition from the Dallas Court of Appeals that the negligent implementation of a discretionary decision is not in fact discretionary.

We don't need to reach that question here because we so clearly don't have the negligent implementation of a speed limit. There is no evidence that the speed limit was not set in perfect accord with all engineering practices -- was the proper speed limit for this area. The affidavits in this case state that and they haven't been controverted and the plaintiffs have had four opportunities to re-plead their case.

JUSTICE: Any other questions? Thank you, Counselor.

JUSTICE: That concludes the oral arguments for the day. With the Court seating in Brownsville, Texas, both of the causes that have been argued this morning will be submitted to the Court with considerable briefs and the oral arguments today and the marshal will now adjourn the Court.

SPEAKER: All rise. Oyez, Oyez, Oyez. The Honorable Supreme Court of Texas now stands adjourned. Ladies and gentlemen, this concludes our [inaudible] for today. Thank you for your attendance.

2001 WL 36163421 (Tex.)