ORAL ARGUMENT – 11/14/01
00-1007
STATE OF TEXAS V. GONZALEZ

DUNCAN: This case poses a simple question the legislature has already answered: When can you sue the state for the vandalism of a stop sign? The answer is in only one situation - when the state has actual notice of the destruction of a sign and fails to timely correct it. In this case, the state has been sued for something different: its strategies for anticipating and preventing future vandalism. That suit falls outside the only waiver for sign vandalism and is therefore barred.

The key to this case is the exclusion from the immunity waiver in .060(a)(3), the Tort Claims Act. That is a categorical subject matter exclusion from the waiver in the tort claims act. How do we know that? The introduction to that section says, this chapter does not apply to a claim arising from. That simply says you cannot sue the state for a claim arising from the removal or destruction of a sign by a third party. That is the beginning and end of this case we submit.

The "unless" language in that subsection is a narrow exception to that exclusion. It does not apply in this case, because there is no evidence that the state had actual notice that the sign had been removed or destroyed on Feb.8 when the accident occurred. That is the removal or destruction out of which this claim arises. The "unless" exception does not apply. The state retains immunity. And that is the end of this case.

The CA got around (a)(3) by construing the word "condition" in (a)(2) to mean the repeated or frequent vandalism of a sign. And that is where this case overlaps with the case that this court heard last month in Garza. Condition cannot be interpreted that broadly as the CA did. In this case it's even clearer why it can't be interpreted the way the CA did. And that's because (a)(3) says it's can't be interpreted that way. (a)(2) of the Tort Claims act should not be interpreted to allow a claim. In other words a vandalism claim based on something less than actual notice. Because (a)(3) bars that claim.

For that reason, we urge the court as we urged it in Garza, to define condition if it feels it needs to go beyond what I just said, as a physical flaw in the traffic sign that impedes the traffic control function. That definition shows for another reason that there is no condition in this case. There is no physical flaw in this sign. There is no evidence that this sign was defective, was installed contrary to MUTCD, was installed or maintained in anyway contrary to law. Which leads to my third point. What are the plaintiffs actually attacking in this case? And it is the discretionary decisions that the department may or may not make in combating vandalism. In other words, should we have a 24 hour patrol? Should we change the way the sign is installed so that it is less breakaway or more breakaway? Should we have a concrete barrier around the sign? Should we move the sign further from the road? It is undisputed, these acts are within the discretion of the department. This court's decision in Miguel compels the result that those acts are outside the waiver of immunity...

BAKER: But they argue that it's not a discretionary matter. It's a maintenance matter, and that makes the difference. Why isn't it simply a maintenance matter as they assert?

LAWYER: For two reasons. When the courts have defined maintenance they have said it is to keep a sign or signal in its original condition.

BAKER: No, we could have said that pretty well sums it up if the signs were not in their original condition.

LAWYER: Which leads to my second point, which is why? Why weren't they in their original condition? Because criminals were knocking them down.

BAKER: What I'm trying to get at, the reason why the accident happened is the absence of the traffic control sign. Is that right?

LAWYER: No. We disagree with that. The reason this accident happened is because the sign was removed or destroyed by a third party.

BAKER: I mean there was no sign there.

LAWYER: The sign was down.

BAKER: There were two right?

LAWYER: There were two. The one west bound was missing. That one vandals had taken. This one was down in the grass. It had been knocked down. The evidence was that these signs had been popped out probably by a vehicle. They had been knocked down. The evidence in this case all shows that its vandalism.

BAKER: Well I understand that's your basic point that (3) applies and (2) doesn't. But I'm having difficulty buying an argument that the reason why this occurred is because it's a discretionary matter, not a maintenance matter.

LAWYER: Maintenance is not in the tort claims act. When courts refer to maintenance what they are referring to is a nondiscretionary implementation of the discretionary act.

BAKER: Well I agree with you to put a stop sign there or not in the first place is discretionary. And so if there was none there and you made that decision you're not liable. Ordinarily if you decide to put one there you're supposed to keep it up so it will serve its purpose, which is "maintenance." I think that's what they are arguing. Under their view you didn't maintain it.

LAWYER: (a)(3) defines what actionable maintenance is. And it's this: to correct the

removal or destruction of a sign by a third party within a reasonable time after actual notice. That's what maintenance is in (a)(3). We did that.

BAKER: Let's say we don't disagree with that, but that is agreeing that it's maintenance not discretion.

LAWYER: I think what I am trying to say is that because maintenance isn't in the tort claims act it's just a buzz word. We have to say what is behind it? It's a nondiscretionary implementation of a discretionary function. There is no nondiscretionary implementation of discretionary action in this case, because all the actions they complain about are themselves discretionary. It's just like in Miguel: we're complaining about the placement of the warning barrels. And they say, oh well these guys on the maintenance crew they place these warning barrels. It's not a discretionary decision. But this court said, their placement of those warning barrels was guided by Tex Dot policy, and that's the same case we have here.

HANKINSON: This is a very unusual circumstance in that there was repeated vandalism and the Dept. was on notice of the repeated vandalism and just continued to put the sign up in the same way it had it up before.

LAWYER: It did.

HANKINSON: And that seems to me to be the crux of what's going on here. So can you address the analysis that the CA used, which was to zone in on the specific facts of this case that gave this to be a condition at this intersection that was created by the way TexDot handled the circumstance?

LAWYER: That to me asks, what is a condition in (a)(2)?

HANKINSON: And that's what I would like for you to answer because they define a condition in a way that brought this case under §2, which seems to me to be the crux of the matter.

LAWYER: It's our position that every single case in Texas except two defines condition in such a way that it cannot be the way the CA defined it. The cases that have defined condition have focused on a physical flaw, something wrong with the sign. For example, suppose the metal in this sign was defective for some reason and the sign couldn't stay up. Suppose somebody couldn't read the sign because it had been so weathered by rain that you couldn't read the stop sign. That's what a condition refers to.

HANKINSON: But as I recall from the CA's opinion they also talk about condition with relationship as vis a vis these particular signs in the way they were mounted, the way that the pole was buried in the ground that that meant that the condition of these signs were susceptible to vandalism. And that it really was the condition that was at issue.

LAWYER: First of all, if that's what a condition is, vis a vis vandalism, then every sign in the State of Texas and every traffic light in the State of Texas has a condition. I would submit that any sign is susceptible to vandalism.

HANKINSON: I understand your argument about §3. I just want to hear what your best argument is as to why the unusual facts in this case - 6 times the sign is vandalized in 17 days, and evidentially was very susceptible to being vandalized which is what I understand the CA hung its hat on making it a condition. Maybe it wouldn't have been a condition the very first time it happened. But the fact that it happened 6 times in 17 days is what made it a condition. And that's what I need for you to address for me.

LAWYER: Aside from the statutory, you can't interpret condition that way. Forget about (a)(3). You can interpret condition that way because what it does is it allows you to attack discretionary decisions. Therefore it runs over .056. Section .056 and (a)(2) ought to be interpreted so they exist peacefully together. When you allow a suit to attack the susceptibility of a sign to vandalism because of what the state is or isn't doing to prevent it, what you're saying is you're allowing a court or a jury to say, Well state we think you should have done something different and continued to put the sign up in accordance with your design specifications and call the police. You should have done something else. But I can't figure out what they want us to do. Because everything they want us to do is either within our discretion or it's flat out wrong. It would make the signs more dangerous. Building a barrier around the sign, sinking the sign in concrete, that causes a greater hazard I would submit than the vandalism itself.

The reason these signs are installed the way they are is because traffic engineers have made a discretionary judgment call about how they ought to be designed. So that's my first answer to your question. If we allow that to be a condition it runs over .056. A second reason is it violates the text of .060(a)(2). That provision asks the state to correct the absence, malfunction or condition of the sign within a reasonable time. Well it's easy to know what correcting an absence is. You put up another one. It's easy. And you know what correcting a malfunction is. You fix it. But if condition is susceptible to vandalism what are you asking the state to correct. What are you asking it to do? Are you asking it to make sure that a vandal never comes there again and does a criminal act. I submit that that would be a waiver of unprecedented...

HANKINSON: Well it seems to me though the answer is not that the state should do nothing when it has this kind of circumstance.

LAWYER: I disagree that the state did nothing in this case.

HANKINSON: That seems to be the argument that you're making there is that the response is is that there just wasn't anything. It was discretionary so the state should do nothing. And I realize that's not the crux of what we're dealing with here. But I think that that's what the CA was wrestling with and why we have to deal with the issue of whether or not these special circumstances make this a condition.

PHILLIPS: If this is so clearly a (a)(3) case how come you did not object to a charge _____ the section that the CA _____?

LAWYER: As I understand it, this case was submitted as a premises liability case. The case never should have been submitted in the first place because the facts of the case show that the state retains its immunity from suit.

The erroneous definition of condition is implicit in the charge to the court. It's asking the jury to find a condition. And in fact the jury didn't even know what it was supposed to find. That's why I asked the question: are we focusing on the state's knowledge of the whole series of events or just this one event? So I feel like we did object and we certainly preserved the error insofar as we even have to because this goes to immunity.

I believe we did object that condition should be defined in a different way. The court didn't define it at all. We were stuck at that point with the court charging this case as a condition case. If it's not a condition case, it's a vandalism case. We were stuck with it. We had to come up with something for the court so we said, well define it as a downed stop sign which basically limits our exposure to (a)(3). Liability frankly.

ENOCH: At some point couldn't the sign be inappropriate or the circumstances in which it's being used be a condition of property that would waive immunity?

LAWYER: I think at some point yes. The way that the state chooses to install a sign could rise to the level of a condition under certain circumstances. If there is something inherently wrong with the mounting of the stop sign that means it cannot perform its intended function, I think we're closer to a condition there. But again, we have to be careful not to run over .056. The two sections should be interpreted together.

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RESPONDENT

MCELHANEY: I agree with Justice Hankinson that the crux of this matter is, can these particular facts create a condition and implicate (2) rather than (3)?

O'NEILL: But how can you extricate that from the design question? That seems to be the difficulty here, because the only real permanent fix would be a change in the design, and isn't that a discretionary function?

MCELHANEY: First of all, I disagree that a permanent fix would be a design change. I think it would be a maintenance change. And this goes back to how this court has developed the law in Miguel, Abel and Asco(?)...

O'NEILL: Well tell me the type of maintenance change you're talking about that would

eliminate this problem permanently?

MCELHANEY: Let me go back and make sure that we have the proper framework to understand what is discretionary and what's not discretionary. Because I think that affects your question regarding design. What this court has said is that the initial decision making process as to whether there should be a traffic control device at a particular location, what kind of traffic control device to be installed there, that is discretionary because the legislature and TexDot has to make certain policy decisions. But they make that decision to have a certain level of traffic control function at a particular intersection. Once that decision is made, then the implementation of that decision, and like in this case, the maintenance of that particular...

O'NEILL: What if the intersection as designed isn't working properly, not because of a downed stop sign, but because it's just not controlling traffic properly and they decide to tinker with a few things to make it right, that's not maintenance.

MCELHANEY: You're absolutely right. Because that is going back to the policy decision that was made by TexDot to determine exactly what kind of function needed to be created in this particular intersection, how much notice the...

O'NEILL: I guess what I'm having trouble with, it appears to be the items that you think they have not included as anchoring it properly or more designing the anchoring of the stop sign in a different way. And that just seems to me to go with design.

MCELHANEY: Maintenance means to preserve the traffic control function as it was established by TexDot. That's what maintenance means. So when you look at it from that perspective those specific tasks that should be undertaken in order to preserve the traffic function are not discretionary tasks. And that's even more solidified by the fact that you look through the Texas manual on uniform traffic control devices and there's a specific section in there which was before the TC and before the jury that talks about the various tasks that a sign worker could employ in order to resolve this vandalism prone nature of the sign.

And there's evidence in this record that those sign workers needed no specific authority to be able to do those tasks. For example, could they have moved the sign, the pole, over farther away from the street? Yes. That is something that...

OWEN: But what evidence is there in this record that but for that this would not have happened?

MCELHANEY: Actually, Mr. Soto, the sign worker, testified that that could have made a difference...

OWEN: It could have made a difference, but he didn't say in reasonable probability or but for.

MCELHANEY: It's fair to say that his testimony is that it would have made a difference. And there's also the welding. And the welding was another one of those tasks that's listed in the...

O'NEILL: How do they decide whether it will then be safe? An arguments been made that if you do certain things it will become unsafe in other ways. Isn't that a discretionary decision?

MCELHANEY: That's a very good question. That's why there are specific tasks listed in that particular manual. That policy decision had already been made. And that was implicated that the policy decision was made by TexDot.

O'NEILL: And how do they choose between those tasks which one to apply?

MCELHANEY: They get to decide based on the fact that the sign worker is there and knows that particular location. And the evidence is, this sign worker moved poles all the time. He had complete authority to go ahead and work with those signs so that they would be less...

OWEN: We had a case that dealt with the barrels. And I assume that this was in the manual as well. You could use barrels. You could use warning signs. The manual would let you use either. And whoever made that decision chose the barrels. And we said the decision to choose barrels as opposed to rails or warning signs, which were all approved, was a discretionary decision. How do you distinguish that case?

MCELHANEY: The distinction here is that is exactly the decision of what level of traffic function is going to be provided at that location? Deciding to use the type, that is barrels in that particular case, that's the Miguel case, is a decision that determines what type of traffic function is going to be supplied at that particular location. That decision was already made in this case. TexDot had already decided what type of traffic function would be provided at this particular location.

ENOCH: Let's assume that's the case. Then what value is there to this section 3, as I understand it, on the vandalism actual notice deal if you could always argue, and it seems to me you could always argue - it doesn't matter this happened 6 times in 17 days - you could always argue that knowing the nature of the neighborhood, knowing the nature of the community that the sign was put in, for all of those considerations the failure to make this a vandalism proof sign was a nondiscretionary act. Couldn't you make that argument irrespective of the actual facts in this case of the vandalism occurring?

MCELHANEY: The reference here is really time frame. The initial decision of TexDot to provide this specific type of traffic function at this specific location, that is what this court has held is a discretionary act. And that's the law that's jelled and it's a good one.

ENOCH: Maybe I wasn't clear. Your argument is that having been vandalized they now were aware of a condition that needed to be corrected, which is you need to put a nonvandalism possible sign there. Isn't that your point?

MCELHANEY: In a way it's my point.

ENOCH: Couldn't you make the argument that simultaneously with or immediately thereafter or whatever it's no longer discretionary for them to decide to post a sign that is not vandalism proof if they were aware that within that community there was a propensity to take street signs down or something. Couldn't you be making that argument?

MCELHANEY: I think that you make a good point. And that is, if in part of the decision making process was that this particular area is one that is vandalism prone or it's not vandalism prone, if there was evidence in the record that that was part of the policy making process to determine the level of stability or the type of vandalism prone sign would be placed in this specific location, I would say that initial policy decision which would have taken into consideration the vandalism prone nature of the neighborhood, that would be discretionary. But that's not the facts of this case.

OWEN: Knowing vandalism they nevertheless made a decision on what type of sign to put back up. Why is that different from the example you just gave us?

MCELHANEY: The difference is that once the sign was placed out there and the traveling public can rely on that sign, then it becomes an obligation of TexDot to maintain the sign so it retains the same level of traffic control function.

OWEN: What about the barrels? Let's suppose that TexDot had made the decision to put barrels at the split in a freeway, and time after time cars would hit the barrels and there would be severe injuries or death. And the allegation was made, well you can use barrels but you build them with something different that would cut down on the number of serious injuries or death. If TexDot doesn't do it is that a discretionary decision or is that maintenance?

MCELHANEY: Assuming that the barrels were still performing the traffic control function for which they were initially placed there, then that particular decision would be discretionary.

OWEN: TexDot chose the specific kind of barrel that it wanted to put at that intersection. And no cars went over or off the intersection down onto the freeway below, but the cars that did hit the barrels people were severely injured or killed. And that happened over and over again, and TexDot didn't change out the kind of barrels or change what it filled the barrels with. Would the failure of TexDot to do that be maintenance or a discretionary decision?

MCELHANEY: It would be discretionary because that does not address - and I'm assuming that the barrels were put there for a specific traffic control function...

OWEN: To provide some sort of buffer for people who would otherwise hit the concrete split, and to keep the car from going off the edge.

MCELHANEY: Assuming that it was not effectively performing the traffic control function for which it was placed there, then I think that a dutiness triggered for the state to rethink its decision...

OWEN: So what is initially placed there you say at some point that has to be rethought and that's not a discretionary decision?

MCELHANEY: I think you can create facts that would go that far. But that's not this case.

HANKINSON: What is the evidence that you rely upon in this case to show that the state was performing a maintenance function once this series of events was put into motion?

MCELHANEY: There's a number of pieces of evidence that support that. If we define maintenance as performing some work to preserve the traffic function control, then the instances when the state went out and attempted to correct the situation might move toward maintenance, although it wouldn't be effective maintenance and it wouldn't have corrected the condition or, by the way, if we move to (a)(3) it would not have corrected removal or the destruction problem either.

HANKINSON: What specific evidence - do they just keep going back out and put the sign up the way it had been placed before?

MCELHANEY: Yes. They did that and then there is one other thing, and I think that this is important to note. The TexDot unit recognized that they had a severe problem here. And that this intersection was not serving the traffic control function that it was intended to do. And so the supervisor issued an order that this TexDot unit would monitor this intersection twice a day. They would go through that intersection twice a day to monitor to see if the signs were down or not. The evidence is undisputed that they failed to follow their own directive on the weekend that this accident occurred. And it's important to understand the context. The sign was down or removed on Feb. 2, on Feb. 3, on Feb. 5, on Feb 6, and then we get to the weekend of Feb 7 and 8. And during that time frame the order was still in place for the TexDot unit to monitor this intersection. They needed to check the signs twice a day and they didn't do it.

OWEN: I thought the order was Monday through Friday and they would rely on the sheriff's department on the weekend?

MCELHANEY: They relied on the sheriff's dept to review it at night. There was no provision in the order that that obligation would not continue throughout the weekend. And even if that order was for just Monday through Friday, and it wasn't, then that still shows a failure on the part of TexDot because they know that it's going to be...in fact it's important to remember that the two weekends before the sign had been down. So they knew. In fact there's testimony of one of the maintenance workers where he says, we knew as soon as we put it back up that it was going to come back down.

HECHT: So is the CA wrong when they say that it was up on the 7th?

MCELHANEY: There is some evidence that it could have been up on the 7th.

HECHT: A dept. employee observed the signs were in place on the 7th. Is that right?

MCELHANEY: Yes. The 7th. The accident occurred on the 8th.

HECHT: I thought you were arguing that the policy was not in place on the weekend?

MCELHANEY: In fact that testimony is that the maintenance worker just happened to be going through the intersection and noticed that it was up. There's also some evidence that...

BAKER: Did he happen to be going through because he was supposed to be twice a day?

MCELHANEY: No. Also that Saturday there was a maintenance worker that was working and very near that specific location. Mr. Soto was working on another sign, an exit sign, for Hwy 83, and so he was very close to the location, easily could have followed that directive to go inspect. And he says that he didn't.

JEFFERSON: This whole situation could have been avoided if there were increased police involvement at that intersection, right? If it had been monitored more closely by law enforcement, which has nothing to do with the condition of the sign or the way that it is installed. Is that right?

MCELHANEY: I wouldn't say that it has nothing to do with the condition of the sign. But I think it would have helped.

JEFFERSON: But this whole situation - without respect to what TexDot did or didn't do - if police had monitored that area more closely, then this accident wouldn't have occurred?

MCELHANEY: That's a good point. And what's important to add to that point...

JEFFERSON: Which puts this more into the category of an (a)(3) vandalism.

MCELHANEY: Let me point out that the police department was contacted by TexDot, and TexDot told the police dept, We're going to monitor it during the day. We're asking you to monitor it in the evening. So I think that's an important point, that TexDot realized it was their obligation to inspect because inspection is part of maintenance.

HANKINSON: When talking about the evidence of maintenance, it sounds like a discretionary decision on the part of TexDot to go check the intersection twice a day. Is that a discretionary decision, a policy decision?

MCELHANEY: No.

HANKINSON: As a maintenance decision?

MCELHANEY: That is a maintenance decision. And the case law says that's a maintenance decision. Maintenance includes inspecting. And remember that's one of those tasks that is contained within the Texas Manual and Uniform Traffic Control devices.

O'NEILL: But how often to inspect is discretionary.

MCELHANEY: You know that could be true. So let's look at that. If we follow the analysis that this court has used relating to when discretionary becomes nondiscretionary, it's discretionary until the policy is created. Once the policy is created from that point on the implementation and the carrying out of that policy is nondiscretionary. And that is an important point here.

OWEN: So if TexDot has across the state, well we're going to inspect our highways once a week and they don't, are they liable for the failure to inspect highways?

MCELHANEY: Potentially yes. And that follows this court's case law.

OWEN: Even though they don't have knowledge, notice or any kind of other notice, just the failure to inspect can supply the notice?

MCELHANEY: That's a very good point. No. There would need to be some kind of notice: either constructive notice under (a)(2), or actual notice under (a)(3).

HANKINSON: I have a problem with looking at §2, when §3 seems to explicitly deal with this circumstance. The legislature anticipated that there might be vandalism, or third persons might interfere with the operation of traffic control devices and, that in fact, they specifically addressed that circumstance. Why doesn't 3 by its very terms apply to this circumstance, and why should we try to read around it and get under section 2?

MCELHANEY: You don't need to read around it. If I could refer the court to the exact language of (a)(3). First of all (a)(3) addresses the removal or destruction of a traffic control sign. That refers to a single incident. We're not talking about a single incident in this case. We never have complained based on a single incident. Our complaint was with maintenance of that intersection...

HECHT: But you do have a removal or destruction of a sign.

MCELHANEY: Yes. Because that happened repeatedly. And the repeated nature of that...and it wasn't the single incident. It was the...

HECHT: I understand that you can make that claim under (2). But under (3) it doesn't say repeated, single. It just says removal or destruction of a sign. Doesn't (3) apply?

MCELHANEY: No. I would say it does not apply under these facts.

PHILLIPS: If (3) applies can you still win because of exfoliation?

MCELHANEY: We can win because exfoliation? We could also win because the state failed to correct the removal or destruction. Even as late as Feb. 6 when they popped that sign back up, they knew at that time, the evidence is undisputed, that popping that sign back up was not going to correct the removal or the destruction. That it was going to happen again. That evidence is in the record.

OWEN: You say the definition of maintenance should be to preserve the original traffic control function. If we were to take that definition, I think it's our Miguel case, the barrel case, wouldn't that case have come out differently because the argument would have been in that case that the barrels were not preserving their original traffic control function, that you needed railings and warning signs and something other than the barrels. If we accept your definition that means we decided Miguel incorrectly?

MCELHANEY: No. Miguel is really dealing with that initial decision making process.

OWEN: But it became clear that it wasn't working.

MCELHANEY: But the fact is, it wasn't working because of a condition, some kind of flaw in the actual maintenance...

OWEN: Well it was designed to keep these people from running off the road and they ran off the road, so it didn't preserve the original traffic control function. So if we use your definition, our result in Miguel was wrong wasn't it?

MCELHANEY: I would disagree to the extent that the facts in this case are different than Miguel. Because what you have is an initial policy decision that reflected on exactly that issue: How are we going to do the job here diverting traffic, of guiding traffic? In this case, the issue of maintaining vandalism prone signs was not - there's no evidence that that was part of the analysis of determining exactly what kind of sign is going to be placed. That initial decision by TexDot to determine what traffic control function and what type of traffic control function to be created in that particular location, that's how it's different from Miguel.

O'NEILL: If we were to adopt your construct, and this is what I'm having a problem with, I understand you say that once is not enough for a condition, but at some point it arises to the level of becoming a condition. Who is to make the qualitative choice at what point it becomes a condition? Once? Three times? Five? Seven? Over what period of time? Over what continuum?

How are we - isn't that kind of a slippery slope to get on and who is to make that choice? Is it a jury or is it us as a policy matter?

MCELHANEY: I think it's the TC's responsibility.

O'NEILL: As a legal matter?

MCELHANEY: I think it's a legal question. Now are there factual underpinnings? Yes. But is it a legal question for the court? Yes. I think it's a legal question for the court. And I think that it's not something you need to get to in this case because it's undisputed in this case that the signs were vandalism prone, and that it was happening over and over and over again, and that TexDot knew it was going to happen again, and they knew that the actions they were taking were really not correcting the removal or the destruction _____.

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REBUTTAL

LAWYER: I do want to talk about exfoliation. They can't win this on exfoliation for this reason. The trial judge abused his discretion by giving that instruction in the first place. Why? Because the missing evidence in this case is irrelevant to the actual notice of the sign being down on the 8th. And more than that, we've rebutted any adverse inference coming from that missing logbook by showing the equivalent evidence through the time sheets, through the equipment utilization forms, and the monthly signed reports.

I will show the court to our exhibit 4. Exhibit 4 is page 2 from Soto's log book. Page 1 is missing. Page 2 is our exhibit 4. It shows what kind of information is in the missing log book. It's not a call-in log. It's not a Mr. Soto gets a call and the sign is down, and he notes I need to go repair it. That's not what this logbook is. They would have you believe that from their brief. But it is not. Our exhibit 4 shows that. It is simply a record of repairs made already.

There is testimony in the record at what the time column on exhibit 4 is, and it's not notice of. It's when I got to the intersection and repaired the sign.

OWEN: Is there any evidence that there was a gap in time between the time I got to the intersection to repair and when I made the repairs? Like it might have been hours or days later.

LAWYER: Not at all. What that logbook shows is that I went to, and this is what the entry on the 8th says, which is the day of the accident: I went to the intersection at 4:45.

OWEN: In the past history is there any evidence that the log had ever shown: well I went out there and saw it, and then I went back to the shop and it was a couple of days or hours before I got back to fix it?

LAWYER: There is no evidence that the logbook would have shown anything like that. And that's why it's irrelevant to the issue.

And I refer myself to your discussion of exfoliation in Trevino v. Ortega, Justice Baker, because we agree with that scheme. And this is where we fall in on that scheme. The plaintiffs cannot show that their ability to present their case was hindered by this missing bit of evidence. They are trying to use exfoliation presumption to pull facts out of thin air. The instruction first of all only rises to the level of the weaker of the two instructions, because this evidence is not prejudicial. And so therefore the instruction alone couldn't even withstand the no evidence point. But more than that, we rebutted the presumption so that it never should have been given in the first place by showing what in fact that logbook would have contained. And what it would have contained is this: repairs on the 5th, repairs on the 6th, repairs on the 8th after the accident. That's no evidence of our actual knowledge prior to the accident. This was a harmful instruction because it invited the jury to find actual notice from no evidence whatsoever.

HANKINSON: Ms. McElhaney says that the maintenance that TexDot was using at this intersection included inspection. Do you agree that inspection is maintenance?

DUNCAN: No, I do not.

HANKINSON: Then why not?

DUNCAN: Whether we inspect, when we inspect, how often we inspect, that is a discretionary decision.

HANKINSON: She says that we are going to find in the record the manual that's going to identify specific maintenance tasks and that one of those specific maintenance tasks is going to be inspection. You don't agree with that?

DUNCAN: No, I don't agree with that. In King, this court said that the MUTCD even when it says shall it's not a nondiscretionary legal duty for purposes of the tort claims act. That ends that whole line of argument as far as we're concerned. Anything that MUTCD says is a nondiscretionary policy level decision that cannot allow a suit under the tort claims act. This court has already held that in King.

HANKINSON: But if TexDot makes a decision, even if it is discretionary, a policy decision to inspect an intersection, then the actual carrying out of that inspection is not in fact discretionary at that point in time. And if they fail to inspect and follow through under their policy, then you've gone beyond a discretionary decision making. Isn't that right or am I misunderstanding how that works?

DUNCAN: That is their argument. And it is possible that if a policy decision were made to inspect at certain times, and it were shown that it was not done, that could overcome the

discretionary problem. But here is why it doesn't in this case. There is no evidence that there was a policy level decision to inspect this intersection on the weekends.

HANKINSON: If that's the case, then it's not a discretionary function. In fact it is a maintenance function that on the job they were trying to preserve the traffic control function by making sure it was working. Don't you catch yourself coming and going on that?

DUNCAN: No. Maintenance is discretionary. If there were a policy decision at the level of say for example the city council voting that we should have a maintenance policy, then that might come within the kinds of cases that say: when you make a policy decision then negligently fail to implement it, you could be liable if it results in a condition. But we don't have that evidence here. We don't have the evidence of a policy level decision. And in fact if you look at the record it shows that our decision makers at TexDot said, Yes we have the discretion to order overtime construction. But in this case we decided not to do it because it's within our discretion and we chose to rely on the police. Now this evidence that they are talking about of the nighttime verses daytime, if you look at that evidence in their record cites, it is pure speculation. At most the person who called the police who is not a policymaking person said, We think that perhaps the vandalism is occurring more frequently.

HANKINSON: Do you agree with Ms. McElhaney's definition that maintenance involves the preservation of traffic control functions designed by Tex.Dot?

DUNCAN: No, I don't. Maintenance involves keeping the sign in its original state. What she's referring to is the definition of condition from Lawson, which is the (a)(2).

HANKINSON: What I heard you say in terms of defining maintenance sounds like the same thing is preserving the traffic control function as designed.

DUNCAN: No it's not. Any maintenance in this case involved keeping the traffic sign up as it was originally put there. In other words, was it originally put there with the screw in or a breakaway design? Was it originally put 12 feet from the road? Maintenance is keeping it in that state. In maintenance we ask: the state put it there in a certain way. Did it continue to maintain it in that way? That's what maintenance is. The condition definition she is referring to is a different idea altogether. That only comes into play when there's a physical defect in a sign, and then we ask is that physical defect preventing the sign from performing its traffic control function.