ORAL ARGUMENT – 10/3/01
00-1020
COUNTY OF CAMERON V. BROWN, ET AL.

KRAEHE: This case presents a very simple question of whether or not darkness at night under the wide open sky is open and obvious, and whether or not a governmental entity can be liable in a premise defect cause of action for its failure to provide lighting at night under the wide open sky.

O'NEILL: But this is not just darkness at night under the wide open sky is it? I mean we had a bridge, the decision had been made to light the bridge. And I believe there seems to be a misconnection between the briefing here because the presumption seems to be on your part that there was no lighting. It was just a dark night. And the argument on the other side is that once the decision was made to light the bridge, there was a duty not to do so negligently. How do you address that argument?

KRAEHE: I would address that argument by saying that the CA in its decision makes no sense unless it is assumed that darkness at night under the wide open sky and this particular bridge is a dangerous condition. Because that is the only fact under which the respondents in this case can have a cause of action a premises defect.

O'NEILL: How do you account for the fact that Kenneth Conway wrote a letter that acknowledged that the condition of the bridge posed a serious threat and was dangerous?

KRAEHE: I would say that Kenneth Conway is someone who is safer than the reasonable person. And that as a matter of law darkness at night under the wide open sky cannot be a dangerous condition. It is not unreasonably dangerous to have darkness at night on a bridge, on a road, in a lot of circumstances. But in this particular case under the facts alleged in the petition, darkness at night is not unusual. It is not unexpected.

PHILLIPS: What if there had been no markings on the bridge, no reflectors, nothing to show a night driver where the bridge ended and the open air started?

KRAEHE: I don't think that in this case those facts would have changed the outcome.

PHILLIPS: That wasn't my question. You talk about darkness at night is not dangerous. Aren't there roadways that could be dangerous?

KRAEHE: I'm not saying entirely that darkness at night is not dangerous. What I am saying is that it is not an unreasonable - does not impose an unreasonable risk of danger that would create liability for a governmental entity.

PHILLIPS: So the highway dept is just wasting its money in terms of liability if it put

reflector strips down in the middle of the road and markers showing where the roadway ends?

KRAEHE: I think it's a good thing to make a roadway as safe as possible. But under the facts of this case, I think the only thing alleged was that the bridge was dark. It's not unusually, unreasonably dangerous. It does not pose an unreasonable risk of harm to someone who is using the roadway in a reasonable manner. There are thousands and thousands of miles of roadways in Texas, and probably thousands of bridges, and thousands or narrow roadways that have very little shoulder, or that have barriers on the side that are dark.

HANKINSON: Do you agree with the CA in the way it sets out the elements that must have been pled in order for the plaintiff to show that sovereign immunity was waived in this case? I'm not talking about its interpretation. I'm just talking about what legally the plaintiff was required to plead in order to show a waiver of sovereign immunity.

KRAEHE: I believe the CA may have made a slight error when it said that we had to have knowledge of a premise defect or of a defect in the premise. I think what the law says under Payne is that we had to have prior knowledge of a dangerous condition. I think there is a distinction.

HANKINSON: Other than that, do you agree with the elements that were required to be pled?

KRAEHE: Essentially, yes.

HANKINSON: And you're asking us to interpret the pleading as actually pleading that nighttime created an open and obvious danger. Is that right? Your position is is that this case presents a question of whether darkness at night in Texas is an open and obvious danger.

KRAEHE: That's correct.

HANKINSON: So you're asking us to interpret the pleadings as alleging that if I understand correctly?

KRAEHE: Their pleadings I think are that they are alleging that darkness at night is not open and obvious. But I'm saying that as a matter of law it is.

HANKINSON: No, I understand that. But we have to properly review the pleadings and whatever other evidence may have presented relevant to the waiver of sovereign immunity issue in this case in order to determine whether or not this lawsuit goes forward. And so I'm looking at the pleadings and asking you if the way the case was pled, did they plead that nighttime was an open and obvious dangerous condition?

KRAEHE: They didn't plead that.

HANKINSON: Didn't they in fact plead that once the decision was made to light the bridge

that then there was negligence in maintaining the lighting system on the bridge, and that in fact it was that failure that was the open and obvious condition? Isn't that kind of what the pleading says in essence?

KRAEHE: I think that's what they do plead.

HANKINSON: Then for purposes of the waiver of sovereign immunity, why are we not to interpret the pleadings if that's what they say in that manner as opposed to what you say? Aren't we legally obligated to do that with respect to considering the sovereign immunity issue?

KRAEHE: I don't think so because legally I don't think you can interpret these pleadings to be anything other than a premise defect cause of action.

HANKINSON: But if we look at the face of the pleadings, they don't claim that nighttime was an open and obvious danger. They claim that negligent failure to maintain the lighting system is what created the dangerous condition. Why aren't we obligated as a court to take that as the basis for their waiver of sovereign immunity claim when we review it?

KRAEHE: I don't think that creates a waiver of sovereign immunity.

HANKINSON: Why not? Assuming that that's the way we interpret the pleadings as opposed to the way you want us to do it, why wouldn't that?

KRAEHE: As I understand the Texas Torts Claims Act they can show waiver of sovereign immunity one of two ways: either by showing applicability of §101.021, that there was tangible personal property or motor vehicle involved; or under 101.022, by showing a premises liability, either license or liability or special defect liability. This is not a special defect, so it falls under license or liability. It doesn't fall under .021 because this is a premise.

HANKINSON: I understand we're dealing with a premise defect and that's the kind of claim that we have. The question I'm asking you is that when you read the briefing in this case, you put a spin on the pleadings that says that what you think they are claiming is that the open and obvious danger was the fact that it was nighttime. They say that the open and obviously dangerous condition was the fact that the bridge was lighted in some places and not in others, which was negligent maintenance of the lighting on the bridge. And I'm asking you that under the premises defect basis for waiving sovereign immunity, why are we not required to read the pleadings the way that they are stated as opposed to the way you would have us interpret them?

KRAEHE: I think if you read the pleadings either way, they still lose. Because if they are pleading that the danger was open and obvious, then they can't show liability for premise defect under a licensor theory, and therefore, they can't show liability under the Texas Tort Claims Act, and if they can't show liability under the Texas Tort Claims Act then...

HANKINSON: Why is that? Why couldn't something be open and obvious to the owner of the premise and not to the licensee? Is that always the case, that if it's open and obvious that means everybody should know and there's never a claim based on a premises defect?

KRAEHE: I think the term open and obvious means that everybody knows, anybody can see who's reasonable, or reasonable prudent person can see that there is a dangerous condition. Therefore, they are charged with knowledge of it and they are charged with the responsibility of taking precautions.

HANKINSON: Does that mean that people shouldn't be driving on this bridge, that people should be able to say I'm not going over the causeway, I'm staying here on the island because when I look out on that bridge I see some lights out, therefore, I'm not going to do it? Are you saying that people should not have been using the bridge?

KRAEHE: I'm saying that a person driving across the bridge under the conditions alleged in this pleading would have know that it was a dark bridge.

RODRIGUEZ: When they entered the bridge and when they first started the bridge was illuminated. Isn't that right?

KRAEHE: I don't know if that was...

RODRIGUEZ: Isn't that in the record that the beginning portion of the drive onto the bridge that the lights were illuminated then, and at the middle portion of the bridge the lights were out, because of what they alleged to be defective wiring?

KRAEHE: Actually, the facts alleged in the pleadings are quite a bit different from the facts that the 13th CA cites...

RODRIGUEZ: I'm asking what does the record reflect on that point?

KRAEHE: That half the bridge was lit, and I'm talking about both lanes of traffic - it's not entirely clear in the record. But the way it's pleaded in the petition is that one lane of traffic all the way across was lit, the other lane of traffic all the way across wasn't lit. The lane of traffic that they entered was not lit from start to finish. That's what's in the pleadings.

HANKINSON: The pleadings says the first part of the bridge was illuminated for traffic heading towards South Padre Island; however, at the location of the accident there was no illumination.

KRAEHE: That's the way I understand it.

O'NEILL: Is there any scenario you can imagine where you have a lighted structure

where under your theory there would be a waiver?

KRAEHE: I think there may be some cases where some artificial situations, for example, let's say you had an outdoor arena. It's an outdoor situation and you invite 10,000 people there for a nighttime football game. And people are leaving the arena and all of a sudden the lights go out and there's a stampede.

O'NEILL: You would say there would be liability there?

KRAEHE: That might be a situation.

O'NEILL: Let's say it was the causeway. The decision had been made to light the underpart of the bridge for boat traffic coming through. And let's say that on the particular evening in question half of those lights did not work and a boat came through. And because of the way the entry through the causeway was lit it caused the boat to run into the causeway. Would that be a scenario that would fit your definition?

KRAEHE: That might be.

O'NEILL: So then why would this be any different?

KRAEHE: Well navigation lights are governed by federal law, and there's a whole bunch of standards set out in regulations as to how navigation lights will be lit.

O'NEILL: But we're not talking about the policy decision on how they are going to be implemented. We're talking about once that policy decision has been made maintaining those lights. So let's say that you have the lighting system on the bridge for boat navigation as opposed to car navigation, and half of them were out, and it caused the boat to run into the bridge. And I believe you just said that that would be a situation where immunity would be waived.

KRAEHE: That probably would be. I would say that because the navigation lights are different from illumination lights.

O'NEILL: But aren't these lights on the causeway for drivers intended for the same purpose, to help people navigate over the bridge? I have a very difficult time drawing that distinction where there would be waiver in the boat situation, and not waiver in the car situation.

KRAEHE: I would say that a stop light is used for a different purpose than a street lamp. The street lamp is there to provide illumination. A stop light is there to actually tell someone to stop. The same thing with a navigation light. It tells people to stop and go. It's not there to provide lighting so that you can see more.

ENOCH: It seems to me that if I'm outside and it's dark, and I get the benefit of light

and I recognize without that light I won't have the benefit of light, that that could be an open and obvious condition. I could anticipate that if the light went out I would have to be prepared to do whatever I am doing in the dark. But is that the same thing as saying when I go into the light and I'm maintaining a speed or a direction of travel that's dictated by the understanding that I now have that this is a lighted avenue, and I come over a hill and all of a sudden the lighten disappears, isn't it also anticipated that there will be a moment that my eyes won't work? There will be a moment that I can't focus on what I'm doing. There will be a moment when I'm incapable of doing the proper control and anticipating. Isn't that a problem in this case if the evidence is not that the open and obvious was that it's nighttime, but it's the anticipation that in one instance it's lighted, and so I'm able to see and in the next instance it's not lighted. Because it was lighted my visions _____ now I am not able to see, doesn't that pose kind of a problem with what this discussion is? How do you deal with that?

KRAEHE: I don't think so. For the simple reason that even if a decision is made to provide nighttime illumination on a roadway, the gov't cannot provide nighttime illumination everywhere. So there will always be a point for the nighttime illumination ends, and if we accept the premise that a roadway at night or a bridge at night that is dark is an unreasonably dangerous condition, then we must also impose on the government the duty to warn whenever illumination ends. In other words, there will be road signs going up all across the state of Texas, maybe 500 yards before artificial illumination ends on a roadway saying, Warning, Darkness Ahead.

O'NEILL: What if the lights are defective and that they pulsate, and they are not supposed to do that, and it causes the driver to be distracted because the light is flashing on and off?

KRAEHE: I can imagine maybe if there are certain kinds of light that are excessively bright or strobing that could cause disorientation.

O'NEILL: So there could be a defective condition of lighting that would get you there?

KRAEHE: I can't personally think of a street light ever having that effect on anyone. I can imagine other kinds of lights - maybe if someone had a big search light and they accidentally pointed it at a road and blinded half the motorist, that might be of the kind of light that could give rise to liability. But I don't think the absence of a street light is something that is a dangerous condition. It's not unreasonably dangerous for street lights to be out at night. And the dangerous condition that results and that's being alleged here is darkness, and darkness at night is the presumption. When the sun goes down it's dark.

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LAWYER: The state also requests that this court reverse the decision of the CA and affirm the TC's dismissal for lack of jurisdiction. To address some of the questions that have already been asked, I want to go initially to Justice O'Neill's question, where she asked that given that the governmental entities had already made the decision to light the roadway, why isn't there a cause

of action? However, the fact that a governmental entity has made a decision to light a roadway and may in fact have some responsibility to maintain the roadways does not mean that the plaintiffs don't have to establish all elements of a premises liability cause of action. That is our argument. Whether the state or the county has some responsibility to maintain this roadway is irrelevant with respect to whether the plaintiffs can establish that the lack of lighting created a dangerous condition and whether they can establish that they had no knowledge of this open and obvious danger.

BAKER: But you're talking about the merits aren't you rather than jurisdiction?

LAWYER: No.

BAKER: You just went through the elements of how to prove a premises defect case.

LAWYER: Yes, I did.

BAKER: Don't they just have to plead a claim that will fall under part of the tort claims act?

LAWYER: They have to state a cause of action that would fall under the Texas Tort Claims Act.

BAKER: When did they not state a cause of action in this pleading?

LAWYER: They can't state a cause of action under the Tort Claims Act, because to do so they would have to actually be able to state all the elements of a premises liability cause of action. And as a matter of law they cannot do this because when you look at the facts as alleged, they cannot establish that this lack of lighting created a dangerous condition, and they also cannot establish as a matter of law...

HANKINSON: Why not? That's what their pleadings say.

O'NEILL: And even the Cameron county park system director, again, wrote a letter saying this was a serious safety hazard.

LAWYER: That apparently was his opinion, and you have to look at the context of the letter.

BAKER: Well isn't that enough to at least get them past your plea to the jurisdiction?

LAWYER: No. It's our position that that does not. Under TXDOT v. Jones this court held that you actually have to state a cause of action under the Tort Claims Act.

HANKINSON: That's what we're trying to understand. In what way have they failed to state

the elements necessary to show the waiver of sovereign immunity? In what way did they fail to do that?

LAWYER: As a matter of law, the facts that they allege do not state a cause of action.

HANKINSON: Why not?

LAWYER: Because these facts do not state a cause of action showing that there is in fact a dangerous condition.

HANKINSON: Why don't the pleadings coupled with the evidence that the TC considered including a letter that Justice O'Neill has referenced get you there?

LAWYER: Because just saying something is so does not make it _____.

HANKINSON: So this is a plea to the jurisdiction, not a summary judgment motion. So we're not looking at determining whether or not there are factual issues to be resolved or not. We are weighing the pleadings in this case.

LAWYER: Yes. That is correct. But when you weigh the pleadings and you look at the facts that they've actually alleged, they are complaining about the fact that there is no lighting on the bridge. That is what they are complaining about.

O'NEILL: Again, that is the fundamental distinction I'm having problems with here. They are not claiming there is no lighting on the bridge. And y'all keep trying to put in under that box. What they are claiming is, there is lighting on the bridge, and because there is lighting on the bridge and it's operating defectively it creates a dangerous condition. And that seems to be a big distinction that nobody seems to be connecting on here.

LAWYER: Well it's our position that the fact that the lights are not operating as they should be is in fact not a dangerous condition. That is how we get there.

HANKINSON: Well why isn't that a matter, as Justice Baker said, that would ultimately be resolved on the merits in whether or not they can actually prove their cause of action for premises defect?

LAWYER: There are a number of cases that have held that. Under the Texas Tort Claims Act, and that is different than just any other private party alleging a cause of action against a private individual, because of the state's sovereign immunity. Because of the state's sovereign immunity, the facts have to show that a cause of action actually exist.

JEFFERSON: I was intrigued by your co-counsel's talking about the arena situation. Everyone in the arena expects there to be lighting, and as they are existing all of a sudden the lights

go out, and someone falls down stairs, and he says in that instance there might be liability. Why is this case not similar to that, that you're driving down the bridge, you expect lighting because there is lighting when you enter the bridge and it's going uphill, and then all of a sudden the lighting is gone. And as Justice Enoch was asking, there is going to be some moment of disorientation because of the lighting that you expected to be there all of a sudden going dark. Why isn't what your co-counsel said about the arena applicable here?

LAWYER: For several reasons. The hypothetical about the arena assumes that the lights were cut out and you have no light. When you're on a roadway you have your headlights. You're not immediately plunged into darkness as the CA suggests. The second thing is that, when there is a lack of lighting up in front of you, you can see it before you get to it. That in itself is open and obvious.

OWEN: How do we say that as a matter of law just based on these pleadings? There is an allegation that they came over the top of a hill and the lighting ceased at the top of the hill. How can we say as a matter of law that the particular lighting at this spot did not create a dangerous defect?

LAWYER: Because as a matter of law, the fact that a governmental entity has chosen not to light a roadway is not in fact a dangerous condition. If that is a dangerous condition, then every time there is an accident and there is one street lamp that is out, there will be a cause of action and a governmental entity will be able to be sued in spite of the fact that it's open and obvious as to exactly how much light is available in spite of the fact that that should not create a dangerous condition.

RODRIGUEZ: I want to go back to whether the elements, the cause of action were pled. And I thought I read your briefs to say that the plaintiffs failed to allege no prior knowledge. Are you giving up on that argument?

LAWYER: Absolutely not.

RODRIGUEZ: Why couldn't that be cured by special exceptions?

LAWYER: Because they can't plead that. Under the facts of this case they are complaining about the lack of lighting. That is something that is open and obvious to everyone. As a matter of law they simply can't plead...

RODRIGUEZ: Just procedurally, why couldn't you have filed special exceptions and allowed them to replead that?

LAWYER: Because this court has held in the situation with the plea to the jurisdiction, if you can see from the pleadings that the plaintiffs would be unable to go back and actually allege a cause of action, they are not allowed the opportunity to do that. So looking at the pleadings, there

is no scenario under the facts that the plaintiffs could state a cause of action and, therefore, they should not be allowed...

PHILLIPS: There is no scenario they could say no prior knowledge?

LAWYER: Under the facts of this particular situation where they are complaining about the lack of lighting, yes.

PHILLIPS: You mean they had to notice it as they were approaching the bridge and they could have made a u-turn and waited until the ferry the next morning?

LAWYER: I don't think there is any driver who wouldn't enter this bridge simply because of the lack of lighting. This bridge was unlighted...

PHILLIPS: Then I don't understand how the prior knowledge is established as a matter of law.

LAWYER: It's established as a matter of law because darkness is open and obvious to everyone. There is cases that have held that. They haven't pled that they had no lack of knowledge simply because they cannot plead that...

PHILLIPS: So as long as I can see it's dark, I've just got to anticipate any problem the roadway may have?

LAWYER: If your cause of action is based on the lack of lighting. Certainly if there are other defects in the roadway, there may be liability based on some other defect. But if your claim is that a county should be liable merely based on lack of lighting, then you would not have a cause of action.

O'NEILL: Your argument then that the condition was not known to the victim is based and tied upon your argument that it's open and obvious. Is that right?

LAWYER: Yes.

O'NEILL: So if that notion falls, if this court finds that it was not open and obvious, we don't need to address that point?

LAWYER: That may be correct if this court were to find that darkness were in fact not open and obvious. It seems to me if this court were to find that, then the state would possibly have some duty to light every roadway...

O'NEILL: I just wanted to make sure that you're tying those two elements together. And so that element rises or falls on your argument of open and obvious. Is that correct?

LAWYER: Yes, because it's open and obvious and because licensees are imputed with knowledge that...

O'NEILL: I understand that. So the answer is yes.

LAWYER: Yes.

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RESPONDENT

LAWYER: ...that the gov't is attempting to use is the wide open spaces of the world are dark and we all know that. That is absolutely true. Now what are we to do about a bridge that has lighting on the entrance, and then once you are on this bridge, this two-lane bridge with no way to get out, going in one direction, the lights are out.

O'NEILL: How do we know that that's the case? Is there affidavit testimony that as you enter the bridge, the lights are on?

LAWYER: That is the pleadings in the case. And I think they have to concede that that is the fact scenario that we're operating under in review of...

O'NEILL: As you enter the bridge?

LAWYER: Yes. And on review of a dismissal for want of jurisdiction, obviously the standard is such.

RODRIGUEZ: I wonder how far this is going to take us though. Let's assume a hypothetical of icy bridges in North Texas. If the gov't has assumed responsibility now for putting down salt on these bridges, and they decide to do so for a few bridges, but not all bridges in the area, are we going to have liability in those situations?

LAWYER: I think that's a very good question. I have to go to the statute. Abrogation of sovereign immunity is a creature of statute. I go to Civ. Pract. & Rem. Code, §101.022(a), you have a premises defect. What is the duty that the state or the county owes? It is the same duty a private landowner owes to a licensee. What is that duty? I go to the pattern jury charge, §664 and §667, and do the facts of what you have just outlined fit into the four or three, depending on which claim is made, elements of that premises case. Is there an unreasonable risk of harm that the governmental entity has knowledge of. And again your hypothetical assumes that the gov't has already taken the affirmative step of acting on this. The gov't has already assumed that duty. And that is, that the issue that Justice O'Neill was brining up, that while the gov't might not have an obligation to put salt on that bridge, the gov't has recognized an unreasonably dangerous situation. They have undertaken a duty to act. Well now they are in the situation of a private landowner. And we look at the 4-prongs of pattern jury charge §664 and we say, did they have knowledge of the

danger? was the abrogation of this duty to make this safe something that it caused unreasonable risk of harm? did they have actual knowledge of it? did the motorist have knowledge of that? and did they fail to use ordinary care...

RODRIGUEZ: But doesn't this now put the state and gov't entities in the undesirable position of not salting down bridges and not putting lights out?

LAWYER: One would certainly hope not. I think that certainly the first order of public policy is public safety. And we have to assume that, and I would say that it would be a mistake to make public policy based on the assumption that well if we give them the responsibility of doing this nonnegligently perhaps they will not do it at all.

JEFFERSON: Well the gov't, just like private litigants alter their conduct depending on the exposure to liability. Isn't that correct?

LAWYER: I think that's a fair statement.

JEFFERSON: And one of the public's policy judgments is protecting the public _____. So I think you're going to need to address that argument, that if we go along with you are we giving the impetus of governments to begin drawing back from what everyone would consider to be a safe operation - lighting or sanding bridges?

LAWYER: I think that the gov't stands in the shoes of a private litigant under these circumstances. They have no more or less protections. The protection they have obviously is a limitation of damages that can be recovered, and they can't be sued for not initially taking that step. But once they do, the statute plainly says that's the duty that they owe.

OWEN: Where do we draw the line? Let's suppose I'm driving down a highway in Houston, Texas that's relatively flat, 5 lanes wide, half the lights are out, but there is some disability. How do you decide on the pleadings that there's a dangerous defect or not? Are we saying that every time street lights are out in the city, that the county, the city, the state, TXDOT is liable or has waived immunity?

LAWYER: You're assuming that the gov't did undertake to light this and if the lights were nonfunctioning?

OWEN: Every highway, every interstate highway that goes through a city.

LAWYER: The gov't doesn't have a duty to light any highways. But once they have assumed the duty...

OWEN: How many lights go out before - I mean is it one light if they waive sovereign immunity? If one light goes out, 5 lights, 10 lights, where do we draw the line?

LAWYER: I think it's a very good question. I think that the burden would be on a litigant in that situation, a plaintiff, to show that there was a) an unreasonable risk of harm, and that may be very difficult with one light out to show that there was an unreasonable risk of harm that caused the injury...

RODRIGUEZ: But wouldn't that take every case now to the merits as opposed to jurisdiction?

LAWYER: I think that when you're reviewing something on the pleadings unfortunately you may be looking at what are the merits of this case, what are the fact issues in this case. As Justice Baker said, now we're down to the merits of the case. That may be. I don't think that it's going to cause a flood of litigation because I think it's very, very difficult case to make that one light being out on a highway suddenly causes an unreasonable risk of harm to the motorist. If a person were to bring that suit, and the suit were to be dismissed for want of jurisdiction on the standard that we're looking at right here, I don't know if you could have a situation where the court could say as a matter of law one light out simply does not unreasonable risk of harm make. And there you are. I don't know the answer to that.

HECHT: You would need to try that case.

LAWYER: And I believe that it would be a heavy burden indeed on the plaintiff to try a case like that. I don't think that the gov't should stand in any different shoes than a private litigant as against a licensee if that's what the statute says that they stand in.

BAKER: Both the county and the state insist that your pleadings can't be read to show an allegation of lack of prior knowledge. And the CA agrees with that. But lack of knowledge is implicit from the total reading of the pleadings. What's your answer to their argument?

LAWYER: I like the CA's analysis.

BAKER: If we read the same pleadings could we come up with a different view that it's not implicit, so you failed to meet that prong of the premises defect?

LAWYER: I think that under the standard that we're talking about here with a dismissal for want of jurisdiction without a deposition being taken in the case, under the standard of Ramirez v. _____, in other words they're not just saying we didn't plead it. They're saying we couldn't plead it. Given the opportunity to replead under these circumstances, we could never plead that _____.

BAKER: I understand that argument. But the first part of it is, that it's not pled now and how can it be read into what's there to satisfy the elements that would keep you in court?

LAWYER: I think it can be read in certainly through the fact, as the justices have pointed

out that, on the entrance to the bridge there are lights. You were then plunged into darkness. There is a rise in the bridge. There are the correspondences going back and forth that were before the TC between the county and the state about this serious safety hazard. Clearly 1) the fact that...

BAKER: All that doesn't go to the element of lack of prior knowledge of your claim. And their argument of course is well when you come up over the rise of the causeway it becomes obvious there is no lights. But is that the real test of what prior knowledge is?

LAWYER: I think it has to be under the facts of this case. The government's position is prior knowledge refers to knowledge of darkness in the wide open spaces of the worlds. We all have prior knowledge of that, that some time this evening it's going to get dark outside. The question is not whether the gov't has the obligation to light the great outdoors, and we all know that is not the question that's being presented...

BAKER: Let's say we agree with you that the nature of the premises defect is not the fact that it's dark, but the nature of the premises defect that you're alleging is the lack of lighting part way on the causeway, which is what you alleged.

LAWYER: That is exactly right.

BAKER: Where can we find that you alleged that he didn't know that there were no lights?

LAWYER: I think that if you're looking to the pleadings to see where that is implicit...

BAKER: That's where we have to start don't we?

LAWYER: I think that's true. As I said under the Ramirez v. _____ standard, the question is could we amend to make that allegation. In the pleadings, it is very clear that the entrance to the bridge is lighted. And then according to the analogy the stadium is plunged into darkness. I think it is certainly a fair reading of the pleadings that when one enters a bridge that has lighting on it, one naturally assumes that there is going to be lighting on the bridge and conducts themselves accordingly.

BAKER: But you're on the other side of my question. My question is not that you assume there's going to be lighting, but did you know or not know before you went on the bridge that there was no lighting, which is the element you have to show on the merits to win. But you at least have to plead it to stay in court on the jurisdictional issue.

LAWYER: I think my point is, that the element is the element of surprise. If there are lights at the beginning of the bridge, it is natural...

BAKER: I respectfully disagree with that. Did you plead no prior knowledge or not?

LAWYER: It says in the pleadings no prior knowledge. I think it says in the pleadings - it has a description of the bridge, that there's lights to the entrance. This raises a very interesting question.

BAKER: If you didn't plead it they are right.

LAWYER: If it's implicit in the pleadings, then as the CA pointed out, then their argument fails and in addition if we could by amendment...

BAKER: Speaking of what the CA said. There seems to be a lot of statements by the court's opinion about facts. Is it a fair statement to say that all of the facts that are in that opinion were pleaded by you?

LAWYER: No, I do not think that is correct. I think that some of the facts were derived from testimony and evidence that was presented at the hearing. It was not all contained in the pleadings. No.

OWEN: What if there is evidence that he had been over the bridge 50 times before, and it's the same condition without the lighting or the partial lighting. Did you try to negate that in your pleadings?

LAWYER: Two answers. One is, I think that obviously we've got some fact issues in this case, because the case was dismissed without ever taking...

OWEN: But did you plead that? Did you try to negate that that he had not been on the bridge in this condition before?

LAWYER: We did not plead that. It may be that the persons' who knowledge we should be looking at in terms of knowledge of the darkness is actually Hector Martinez, who was the gentleman who was driving over the bridge that struck the disabled vehicle. Perhaps that's the person whose knowledge we're looking at. This is a case that was dismissed before a deposition was ever taken, and certainly Hector Martinez's deposition was never taken. His knowledge, the second motorist knowledge may be the knowledge that we really need to be looking at here in terms of whether he had knowledge of the hazard. But I think it's certainly a fair reading from the pleadings that you've got an entrance way that's lighted and then you have intermittent lighting after that. And I think that the analogy of the stadium is a very, very good one.

HECHT: What I'm having difficulty with is if you're in a car that's wrecked, and the roads not lit, and you can see that, that it's not a lighted roadway, wherever it is, can't you then at that moment anticipate that you're in a very dangerous condition and you better not be out there because somebody may come zooming along and hit you?

LAWYER: I think that is absolutely correct.

HECHT: How can you get over the hurdle of showing that the plaintiff didn't have knowledge?

LAWYER: When a person is in the midst of the hazzard, they have knowledge. When they have fallen down the unlighted stairs, they have knowledge when they are on the way down. But the question is, the peril was created by the hazardous condition of the lighting on this bridge. The fact that when one person was in the midst of the disaster they were aware of it doesn't _____.

HECHT: Do you claim that the peril caused the first accident or the second one?

LAWYER: The second.

HECHT: So when you're getting out of a car though you can see that this is dangerous.

LAWYER: It may. It may be that the individual who's knowledge we will be looking at in this case should this case go back to the TC is Hector Martinez. Because that's the person who drove onto the road onto the bridge with every expectation that it would be lit, and all of a sudden he's plunged into darkness and there is a hazard that he hits because the highway was unlit. And I think that is in fact the avoidance of collisions, the kinds of a hazard that the county was talking about in these correspondence when they talk about an extreme safety hazard and extreme risk and all that.

HECHT: So you don't the plaintiff that he, himself, didn't know, somebody else who was participating in the event?

LAWYER: That's an interesting question. Perhaps the analogy is this, and I'm not sure of this, in a slip and fall case in a grocery store, I see the slippery part on the floor and I'm aware that it exist; another individual comes and slips in it and drops produce on me. Well I'm the plaintiff, I'm the injured person, my knowledge might not be the applicable one. It might be the knowledge of the person who actually slipped in it, thereby causing the injury.

OWEN: Well if the second driver had knowledge is the state out?

LAWYER: I think it also depends on whether or not we can show gross negligence because if you can show gross negligence, then that prong is taken out altogether. When you're looking at - and here I refer to pattern jury charge, §66.7, which also has to do with a private landowner's obligation to a licensee and the three prongs are these: condition posed an unreasonable risk of harm; defendant failed to adequately warn of the danger or make the condition reasonably safe; and, the defendant's conduct was more than momentary thoughtlessness , inadvertence or error or judgment. In other words, they either knew or were substantially certain that the result or a similar result would occur. If we can show that the state was grossly negligent, and here we get back to some of these correspondences that's going back between the state and county, we don't have to show lack of knowledge. And that's just the law of the State of Texas as it pertains to licensees

against a private landowner, which is basically what we're dealing with here.

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REBUTTAL

KRAEHE: Mr. Bright just stole some of my thunder, because that's what I was actually prepared to address to this court. And that is, a situation in which if we assume that Nolan Brown had knowledge of the unlit condition prior to his entering the bridge on Sept. 16, 1996, would our case be defeated? And it's my position that we can show that gross negligence in this particular case. If we can show that on the occasion in question for almost 1 year the lights were out in this particular bridge, the longest bridge in the State of Texas, and that the lights that were out, Mr. Conway writing letters saying that this presents a serious public safety hazard. They recognized that it was a dangerous condition. We can show that there was gross negligence and even though we may not have pled it in this particular pleading, we could have pled it and we certainly will plead it.

O'NEILL: Did that come up to the TC? Was this argued before the TC?

KRAEHE: No, it was not.

O'NEILL: What are we to do with that?

KRAEHE: We go to the standards of a plea to the jurisdiction...

O'NEILL: I understand, but if your argument now for the first time is now we say we have a gross negligence claim, and can plead it, how can the TC err by not allowing special exceptions to allow you to plead gross negligence if you didn't ask the TC to allow you to do that?

KRAEHE: ...the plea to the jurisdiction it is the TC has to take into consideration what could have been pled even though it wasn't thought of.

O'NEILL: But can't the TC presume by the fact that you didn't plead it and didn't ask to plead it, didn't ask to amend, that you didn't - I mean are we to presume that in every case someone can plead gross negligence and bring it up for the first time on appeal?

KRAEHE: If it defeats a plea to the jurisdiction, yes. Because under the standards of a plea to the jurisdiction, it's not only what was pled but what could have been pled.

O'NEILL: Maybe we should term it in terms of preservation of error. There's something that doesn't seem right if you haven't brought it to the TC's attention and allowed the TC to address it then it just doesn't seem that you have preserved that point on appeal and bring it to us for the first time.

KRAEHE: I haven't addressed this from a waiver situation. But I think that because of

the case law and the case law under Ramirez v. _____ Cons. School System, it allows us under common law to do that, that we have under a plea to the jurisdiction that right to either plead it or what could have been pled. And since we could have pled gross negligence and it does defeat their particular argument as to the plaintiff's knowledge saying we don't have a case, then I think in that case under a plea to the jurisdiction standpoint, we have the ability to later on amend our pleadings.

O'NEILL: Is this in the briefs?

KRAEHE: Yes.

O'NEILL: I understand that you've argued in the briefs that you could have pled actual knowledge on the victim's part. And I've heard the argument in the briefs that as a matter of law if you can specially except and it can be cured, that you should be allowed to do that. I don't recall reading in the briefs you now saying that you have a gross negligence claim that you could plead. As I recall the briefs everyone sort of agreed that there was no gross negligence pled, and I didn't see that as a point under the special exception's discussion.

KRAEHE: You're correct. What we said is because under the plea to the jurisdiction standard what could have been pled then we would therefore defeat their plea to the jurisdiction.

* * *

LAWYER: I believe the plaintiffs are making an assumption in this case that should not be made in asking this court to make an assumption. Basically they say that once the state or the county assumes a duty by putting up a lighting system, then the assumption is that without a lighting system the road is unreasonably dangerous. And that is just like the example that Justice Rodriguez posed was if you make a decision that you're going to put salt out on some bridges, does that mean that you have to salt all bridges or you're liable. And I believe that the plaintiff's position is that, yes, absolutely. They are asking this court to bypass the elements of a premises liability cause of action and assume that once we have made the decision to put in a lighting system, that the road is unreasonably dangerous if for some reason that lighting...

BAKER: No, I think they say something else. I think they say once you put in a lighting system and you fail to maintain it, you may create a dangerous condition. What's your answer to that?

LAWYER: I think they are asking you to do more than that because never have they explained how simply that the failure to have lights on created a dangerous condition. They don't actually really analyze that in their brief at all. They don't cite any cases that show just merely the lack of lighting creates an unreasonable risk such that it's a dangerous condition.

PHILLIPS: Apparently some of the state employees felt that.

LAWYER: There was one governmental employee that talked about there being a safety hazard, but that is not the same thing as a court deciding whether that hazard creates an actual dangerous condition under a premises liability cause of action. The fact of the matter is, that the state makes all kinds of modifications to roadways every single day that make roads safer. And we want the state doing that.

BAKER: All that had to do was put up the lights and they would have made the road safer here wouldn't they?

LAWYER: If the lights had been on, there would have been some element of greater safety. But the question is, without those lights is the road a dangerous condition? And it's our position that no. Simply having roads without lights does not create a dangerous condition.

ENOCH: To reach the decision that the state and county want in this case, the court would have to decide that as a matter of law if darkness is the causative factor in the accident, then no negligence on the part of the state would ever be the basis for the waiver of sovereign immunity. Just darkness as a matter of law. A difficulty I have in coming to that conclusion is because it seems to me I could think of a scenario where the state is in charge of providing lighting for safety purposes, the lighting is negligently maintained and therefore goes out and as a result to someone's surprise they are unable to see and they are therefore injured. The state could go back to the decision in this case and say wait a minute. If it's the darkness that caused the injury, the mere fact that the state had a light that went out does not waive sovereign immunity. It would seem to me to hold as a matter of law here that darkness causes these injuries, the facts that a light went out could never be the basis for liability of the state is a very, very broad holding.

LAWYER: Certainly under the facts in this case, the fact that lights were out do not create a dangerous condition.

HECHT: I just don't understand that argument. If you're standing there on a dark roadway and somebody can come along and hit you, it looks to me like you're in a dangerous condition. How can everybody know that but the state?

LAWYER: It's not a dangerous condition because it doesn't create an unreasonably risk of injury. You have to look at the...

HECHT: Of course it does. You're standing there in the dark and somebody's going to hit you. Now maybe the state's not liable for that. I don't know. But surely you know - I mean you're making the argument that the plaintiff should have known as a matter of law that he was in a dangerous condition. How can the state not know?

LAWYER: The state certainly may know that the lights were out. But the question is whether in fact that condition was a dangerous condition...

OWEN: How do we know that the second driver might have been driving 15, 20 mph slower if the first part of the bridge had not been illuminated and when he came over the rise into the nonilluminated part of the bridge, he was going to fast to stop. Aren't we supposed to construe these pleadings fairly liberally in determining if there is jurisdiction?

LAWYER: First of all, I don't think there is any facts in this particular record at all that a rise in the bridge played a part in this particular accident. Second of all, the second driver is not the plaintiff, he's not the licensee that we're looking at...

OWEN: Isn't what the second driver knew critical here?

LAWYER: With respect to the plaintiffs proving up their cause of action, I think we have to look at the knowledge of the actual plaintiffs in this case. But I would suggest that the second driver, too, had to know of the situation of their being darkness on the bridge.

The plaintiffs in this case haven't sued us based on the road condition in this case. Because they cannot sue based on the fact that there was an obstruction in the roadway, the disabled vehicle that they created themselves, they have sought instead to hold the state liable for a condition that they cannot show as a matter of law is dangerous, and they cannot show that they lack knowledge of that condition.