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Supreme Court of Texas.
City of San Antonio, Petitioner,
v.
Charles Pollock and Tracy Pollock, individually and as next friends of Sarah
Jane Pollock, a minor child, Respondents.
No. 04-1118.

October 18, 2006

Appearances:
Sharon E. Callaway, Crofts & Callaway, A Professional Corporation, San Antonio, Texas, for petitioner.
Kristofer S. Monson, Assistant Solicitor General, Austin, Texas, Counsel for Amicus Curiae, the State Texas, for petitioner.
Sylvan S. Lang, Jr., Lang & Kustoff, L.L.P., San Antonio, Texas, for respondents.

Before:

Chief Justice, Wallace B. Jefferson; Don R. Willett, Harriet O'Neill, David Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, and Scott Brister, Justices.

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CHIEF JUSTICE: ... and the Fifth Court of Appeal District. And the first cause, the Court has allotted 20 minutes for petitioners; respondents had 25 minutes; and amicus curiae five minutes for argument. The Court has allotted 20 minutes per side in the last two arguments. The Court will take a brief recess between the arguments and we expect to complete all of them before noon. These proceedings are being recorded and the link to the arguments should be posted on the Court's website by the end of the day. The Court is ready to hear argument in 04-1118, City of San Antonio versus Pollock.
COURT ATTENDANT: May it please the Court. Miss Callaway will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF SHARON E. CALLAWAY ON BEHALF OF THE PETITIONER

MS. CALLAWAY: Mr. Chief Justice, may it please the Court. In the limited time I have to stand the City would like to focus on two issues

that are primary concern to this statutory jurisprudence. The first being the court of appeals on precedent and holding that a person might receive compensation under the Takings Clause for personal injuries. The second issue is the Court of Appeal's decision that an expert's opinion that benzene cause this acute lymphoblastic leukemia which on the face of the record is enclosure in it's bad guilty nonetheless supports the judgment because it is some evidence. Turn- ...

JUSTICE: Why isn't this constitutional taking his claim?

MS. CALLAWAY: Why isn't this constitutional?

JUSTICE: What isn't it?

MS. CALLAWAY: Because it you start with the words of the constitutions which which we must, those words only refer to property. And in addition, it is unconceivable in our government that there will be a provision would stake or sovereign can't take a person, can't take a human being because that is the requisite for taking under the clause. Property must be taken for couple of years. So that would mean if this, if this provisions, the Takings Clause is interpreted to mean that you compensate someone for personal injuries that means the state can take a person. And it's totally contrary to our jurisprudence, to the language of the clause and it got to be state, makes reference to this. You have to keep in mind that ...

JUSTICE: Genter is there an issue of waiver though on that? On a claim here that the state waive, that the City wiaive it's ...

MS. CALLAWAY: There can be no issue of waiver on the Takings Clause. That issue of waiver goes to whether the state pled sovereign immunity under the Tort Claims Act. But under the Takings Clause the burden is very very clearly on plaintiff to forgive. If you wish to compensate within this Takings Clause, you must come forward and prove up a Takings Clause. No matter what your cause of action is you must go through the Takings Clause. So there's no issue of waiver. The City had no burden here. The burden is on the client to prove up this case as a taking.

JUSTICE: What's the difference between lymphoblastic and lymphocytic leukemia?

MS. CALLAWAY: I had -

JUSTICE: Term both, term to use.

MS. CALLAWAY: I had, I had no idea, your Honor. Although we have traditionally referred to throughout the record it's "ALL." And I don't know the difference, perhaps Mr. Lang does. but I'm sorry I didn't know it. And returning to this notion of taking a person, the-- where that comes from is this, you have to keep in mind that the Takings Cause is a limitation. It's, it's not a clause of action ...

JUSTICE: So you, you can see they put suit that lost the value of their home in this-- if they prove that there's intentional obligation except [inaudible] ...

MS. CALLAWAY: Yes. Yes. This argument goes only to the 7.5 million in personal injury damages. And we do have a separate argument that I haven't gone through the Takings Clause and proved that the Takings Clause proved an affirmative act. And, and that rises a question, Jennings t a very clear what "intention" all means. But the question is: Can't that reminds after Jennings is failure to act. In this case, there's really been pled as you should have replaced that system before 1995, it's really the che-- is, is what the case was all about and you were negligent in your repair of it.

JUSTICE: So any cause of action that's Robinson takings claim, maybe it's, you bring your takings. You took my properties so it's DTPA and it's conversion as anything else you can dream up. The fact that

common law for hundreds of years has said, "While you get this damage in a motional language and attorney's fees if it's takings rule has been no longer apparently miss that few times that you get property damage but none of the rest of it."

MS. CALLAWAY: That's correct. And I don't think ...

JUSTICE: We, we have never said that.

MS. CALLAWAY: Right. I don't think that cou- ...

JUSTICE: I think the old liberal cases brief at the office.

MS. CALLAWAY: Well, in old liberal cases if you look at those cases they're very often and that's, that's the problem with what the court of appeals relies on and what the Pollock signed. If you look at those cases, they date back, back to the late 1800's and early 1900's. There's no mention on those cases that the Takings Clause and what reason there's no mention of the Takings Clause in those cases. Is it-- as I-- it is that in that time's he raise-- brought the sense-- that would crack ...

JUSTICE: Counsel, the railroads, railroad system ...

MS. CALLAWAY: In fact. It was proprietary. In any time the city-- and that, that notion in our jurisprudence is-- it's very light coming. It's the '30s before you start saying a discussion of when the City acts it acts on its governmental function. It's not until 1997 that the Tort Claims Act delineates all these various functions as their for normal functions. And so it go back to that Daniels' case that they relying on, which is a railroad case, you will see that there's no mention of the Takings Clause, there's no immunity because it's a proprietary function. And in fact, all the cases that the Pollock's rely on and that the court of appeals in term relied on or either or all, all common law distance cases, they're either private entities like the Vestral case or they are, what we were just discussing Dayart, our situations where the government was acting in it's for proprietary function. When your acting here for proprietary function, you can be sued like an-- like a private individual. So those cases are all private entity cases and is such-- there's no discussion of immunity. And I also had absolutely no legal relevance.

JUSTICE: You try the cases from other stage from country almost taking issue. Has the U.S. Supreme Court or the Federal Circuit spoken on whether taking this in the-- a person and context the of the U.S. Constitution.

MS. CALLAWAY: I do not know about the United States Supreme Court that there is a case in the Third Circuit and I-- can't find to [inaudible]-- I'll have to give that it's a-- the Jones-- sorry. It's the Jones versus Philadelphia Police Department 57 Fed. ITPX(939), Third Circuit, 2003. And that's where they say-- it's our starting off few minutes ago to say it-- the Takings Clause has to do with eminent domain which any sovereign has and there's a limitation on that power. So you start with the notion and that's what's happening in a Takings Clause. They're saying if you exer-- exercise your eminent domain power, we can't do anything about that but we can put a limit on it, we have to compensate people. And in Jones, the court talks about is just untenable in our way of thinking to think that we can take a person. You can injure a person on behalf of the state and you simply have to pay for, that you simply doesn't fit with our jurisprudence.

JUSTICE: Or doesn't Crawford stand for that proposition?

MS. CALLAWAY: City of Uvalde? No, your Honor. The cause were they only damage was. and if you look at the case it says, the measure of damages was for bad bills and for the reasonable market value of lost stuffs. And there you had a situation where the City caught that-- the

City cause some flooding on the plaintiff's land. So it wents on to the land that go straight the water on the land become sick and some other died -

JUSTICE: So you have ...

MS. CALLAWAY: - and that is personal property. That's not a personal injury that is personal property.

JUSTICE: Then Justice O'Neill was referring to the City Fort Worth where in-- where injuries compensation lot in injured child.

MS. CALLAWAY: That was a-- as a-- as I recall, that again has no discussion of the Takings Clause. It simply is a proprietary of the Citys acts in a proprietary function. And it therefore, that comes a common law nuisance case. And that's been the problem all along in this case, is appellants have assumed if they prove up common law nuisance case they have also established a Takings Claim, that they don't have to worry about the Takings Clause or any interpretations to it. All they have to say is to show is with proof with common law, with nuisance you come along nuisance does not equal taking. You've got to go through this Takings Clause. The only cases that they sought that have anything to do with the Takings Clause are that the City of Uvalde versus Crow. I'm sorry, your Honor, I did misunderstand there. And that as I explained was personal property nothing to do with personal injury and the Gangsfell case which again is only property damage and speaks only property and damage. So neither, neither one can support that. And now that my turn to the second issue, in the-- that we take to focus on this morning and that is causation issue. The court of appeals held that there were some evidence of causation. And both-- and that was despite the fact that both the expert's opinions on the face of the record, you didn't have to go beneath the record. You didn't have to question scientific reliability or methodology, just on the face of the record, that would enclose [inaudible] specialty. And it's long been the longest day that in a medical causation of a disease case you've got to prove an exposure right. You've got to prove an exposure right that causes the disease. It is not enough for one person or even two persons to come in and sit on the stand and say, "Benzene causes ALL."

JUSTICE: Well, 7-- 702 says, you know, you got to get their opinion and the reasons but not the underlying data unless you object on cross-examine. You didn't object and so why is of this enough in the absence of an objection?

MS. CALLAWAY: We didn't object to the admissibility. We did preserve a no evidence challenge. And this Court in Coastal Trans. Co. versus Crown Petroleum made clear that their is a low hand between a pure no evidence challenge. And that's what our challenge was from the very beginning and the JNOV and in our motion to modified judgment. It was very clearly no evidence of causation of the opinion respectively.

JUSTICE: Well, of course-- do that a lot-- later. So if, if that's the rule-- the fact of the matter is rule 702, the evidence is wrong. In every case, you have to give your opinions, state the reasons, and introduce the epidemiologist studies, the relative risk and everything. Even if there's no objection at all, plaintiff has just to do that.

MS. CALLAWAY: But your Honor, we are not, we are not arguing that this violate 702. That's the different [inaudible] ...

JUSTICE: I, I, I know, I know, but the deal is, we're going to say no evidence later, -

MS. CALLAWAY: Well, ...

JUSTICE: - and so really what we need to do is we're just wasting time on 702. What we need just need a firm rule after having a preposition you got to do everything happen or says plaintiffs every

case period.

MS. CALLAWAY: No, I don't think so. Your Honor, in this case-- in this atate we've always been able to bring no, no evidence after the admission of testimony. No question about that. And what I think Coastal did is draw a distinct line sign- ...

JUSTICE: But the whole, but the whole point of 702, the whole point of 702 was saying, you know, you didn't have to have the hypothetical question that in every fact from the case, you know, da, da, da, da, da, da, da, da, would he had opinion yes what is it? Okay. We're not going to do that anymore. Just ask him eminent opinion why is it they say it and then somebody wants to has you that you can do that on cross-exam et cetera. But in fact you have to have all of that stuff in in every case ther is no evidence.

MS. CALLAWAY: Well, you do enough causation analysis. I don't think, I don't think that there is a conflict between 702 and your basic no evidence analysis or the causation and have there is, you know, the benchmark of how do you prove causation and proving causation is entirely separate from the Daubert type challenge. And that is all the City waive was a Daubert type challenge to the scientific reliability. The City is not trying to go in and say, "The science is wrong or criticized the studies." The City says take the studies on their face and on their face, but they don't say benzene causes ALL. They don't say their exposure bright is 200 to 500 tons that, that the experts testified to. And what happened was the causation expert failed to make the distinction between the part from millions stated in the studies in the parts for billions stated in his, in his own experts-- the other expert that did the exposure right. And I don't see any conflict between 702 and causation is always going to be a separate analysis from back as Toseful says, from back in Rome and the Dallas case going back to the '30s, we've always said an expert-- and that's predating rules 702-- we've always said that an expert can't support-- his opinion cannot support the judgment if is not there conclusion. There's got to be some support guard. And when you have no support and what Coastal said is, "If you want the court to acting in it's date keeper function, and if you want it to look at the methodology, if you want it to go into the science, in a Daubert type analysis, then you've got to object." But the notion, you know, Havner says, "If you got non-probative evidence, of fair conclusion. Does that tran-- does your failure to object to admissibility transform it into probative evidence; no." And we said that over and over. The Volkswagen case repeats that it's-- and it's a concept that goes way back.

JUSTICE: Well, in Volkswagen versus Ramirez, if I may interject here, the expert there had no studies to rely on and had no evidence, no facts, I should say, no studies taken, no concrete physical evidence at the accident site and look at bad and said that's the expert's opinion without any of that support is conclosure on its face. In this case, we go into some detail in analyzing the studies that the expert got to pre-tell purportedly relied on. You're right a Coastal Transport, we do align between no evidence and scientific methodological analysis. I'm not sure how bright that line is, how, how bright do you see it and how do you distinguish Ramirez from your case here where you do have to go on studies and read them and analyze them.

MS. CALLAWAY: My time is expired, but I'll respond to your first question.

JUSTICE: Just ...

MS. CALLAWAY: The different here is, and I think the one-- I think here's what I think the line in Coastal is. The one in Coastal is that

you may not go into the science, you may not talk about scientific reliability. What you have to do is you are limited to the face of the record. I can't criticized the methodology and that's not what we're doing here. There has to be some support. Here, there have to be studies in their [inaudible] into evidence therefore there in the record and hen you look at the studies take, them totally as true I am not quibbling with that. There's-- the exposure rate is thought stated in terms of parts of a million and will not support the opinion of parts of the billion. It's 200 or 500 times more if we don't have that support there. Moreover, none of the studies say, "Benzene causes ALL in big through or otherwise." And that's not quibbling with the studies, that's not quibbling with the methodology that saying "Here's the support. Look on the face of the record and it does not support so you have a suggested opinion."

JUSTICE: Thank you, Miss Callaway. The Court will now here from the amicus, State of Texas.

COURT MARSHALL: May it please the Court. Mr. Monson will present argument Amicus Curiae, State of Texas.

ORAL ARGUMENT OF KRISTOFER S. MONSON ON BEHALF OF THE PETITIONER

MR. MONSON: May it please the Court. This case should be decided on jurisdictional grounds. Whether the plaintiff's claims fall within waiver of immunity created by article I, section 17 or the waiver created by the Tort Claims Act is deep threshold question of law. And that question cannot be waived. I'd like to focus on the two things that make article I, section 17 claims different in every other claim against the governmental defendant; the intent requirements and the measure of damages. Those two elements stands from the eminent domain doctrine. Article I, section 17 recognizes the existence of inherent sovereign authority of eminent domain which is the ability to act inconsistently with private property rights by taking damage in or destroying property. With it places limit on that power by saying that you have to pay compensation or tame permission. By including personal injury damages in article I, section 17 recovery, the Court of Appeals has effectively extended the power of eminent domain to include personal injury. And that cannot be the underlying law of article I, section 17.

JUSTICE: I'd like to briefly address your question just expressed here. Does railroad cases at Pollock case the best example include private entities exercising delegated in the mandatory? Therefore, for any tort there isn't within the scope of their delegated statuary domain authority. They have no immunity because it do not confirmed immunity but they grant them a domain. They're only granted the power to be free of tort lawsuit for getting the do-- I mean that-- domain.

JUSTICE: So you can bring nuisance personal into damages against for pipelines [inaudible] -

MR. MONSON: Absolutely.

JUSTICE: - everybody else even though eminent domain.

MR. MONSON: Becau-- And that, that depends on whether it falls within category of eminent domain or outside of it because the common law as it would apply otherwise, applies to every tort that isn't within the eminent domain power.

JUSTICE: Could you evets-- an intentional nuisance could the City

be sued for the property damage value for creating an intentional nuisance?

MR. MONSON: If there is evidence of the decision made by the City that it knows the property damage substantial like to result from its acts. And it decides to act notwithstanding that knowledge.

JUSTICE: We got to put toxic waste dump somewhere, we're put in here, it's going to take all your's property values down then you can't recover it.

MR. MONSON: As long as this City is objectively aware at the time of extra decision that the damages going to occur. That's exactly right. But in this case ...

JUSTICE: But not a personal injury.

MR. MONSON: Never personal injury. And that stands for from text of article I, section 17 and the nature of the eminent domain power, each which address property. As your properties ...

JUSTICE: Other, other similar cases from the U.S. Supreme Court or federal circuits on the, on the Fifth Amendment taken.

MR. MONSON: Well, the Fifth Amendment is taking its clause as a little bit different from ours because it only addresses the taking private damage obstruction property. And the-- we know that, that only occurred-- the United States Supreme Court that has held that you have to possessor taking property. The addition of the words "damage" or "destruction" of the Texas Constitution extend the scope of the consequential damages overtaking do not possess through enou-- merely trespasser against damages in addition to permanent takings of property. So if you can't really reach the same issue under the Federal Constitution [inaudible].

JUSTICE: The section 17 specify the type of damages are recoverable. Isn't it statute vague us to that this is any damages?

MR. MONSON: It does not say any damages. It says that, "Property cannot be taken damage or destroyed without compensation indicate therefore or without the landlord permission." In either case that would only gave the obligation with compensation.

JUSTICE: Is this adequate compensation then?

MR. MONSON: Adequate-- yeah.

JUSTICE: This is what?

MR. MONSON: Adequate compensation is sufficient money to put you back in the demand of damage that your property values is going down by virtue of states act-- of the government taking for its actions. Any ...

JUSTICE: So-- I, I got this. So you could bring a claim, "You've damage the value of my property," just as a taking claim without nuisance at all.

MR. MONSON: Absolutely.

JUSTICE: So in fact you don't have a nuisance claim against the government.

MR. MONSON: That's exactly right. Article I, section 17 is not ...

JUSTICE: So we need to change Tower versus Lights. We were all wrong in fact there's no reason to have a nuisance actions against the government. All you can get is what you get on this trade as a Takings Claim.

MR. MONSON: I'm almost out of time. May I answer it?

JUSTICE: Yes.

MR. MONSON: In Tar-- City Tower versus Lights the court merely recognize the fact that in many cases there will be a recovery for actions that cause a nuisance that also constituted taking. But in Jennings and Gragg the court clarified that it is fact the nuisance has

been created by itself that creates the obligation be compensation. It's the governmental decision to act inconsistently with rivate property rights. With the knowledge that it is doing so in order to effect public purpose that triggers the obligation to pick compensation. And that's the only thing that can trigger jurisdiction for article I, section 17 claim.

JUSTICE: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Mr. Lang will represent argument for the respondent.

JUSTICE: Mr. Lang, how do you passes eminent domain of a situ-- [inaudible] problem. How do you passes that here?

MR. LANG: I'm sorry, your Honor.

JUSTICE: This eminent domain issue, eminent domain issue, how do you pass that? I mean that seems to be a very clear things to property damage and ...

ORAL ARGUMENT OF SYLVAN S. LANG, JR. ON BEHALF OF THE RESPONDENT

MR. LANG: Yes, your Honor. May I submit-- can I ask just on moment. May it please the Court. It's our privilege to appear before you on behalf of the Pollock family and presents arguments-- argument in this important case. The eminent domain of argument that the City and the AG brought up is completely contrary to the intent and the precedent underlying article I, section 17.

JUSTICE: What is, what is it precedent?

MR. LANG: The precedent underlying article I, section 17 is this Court said in Jennings is that, "f any nuisance arises to the level of a constitution taking and you established a taking within the meaning of the constitution, the nuisance clause of action is preserved."

JUSTICE O'NEILL: But Jennings didn't involved personal injury?

MR. LANG: No, it did not, your Honor. But this Court went out of it range Jennings to eliminate a simple common law nuisance saying there's no simple common law nuisance exemption for governmental immunity. And if you're going to bring in nuisance cause of action, it must arise to the level of a constitutional taking. And the language to Jennings was quite clear. This Court specifically refer to two elements of damage, physical discomfort and depreciation value of land, cite to the Court of Appeals' opinion and Gotcher. This Court said that, that cause of action, those elements of damage, they're not for a simple nuisance. They are bottom on the Constitution of Texas, that no property shall be taken damage or destroyed for public use. This Court wasn't alone in doing that it recognize the opinion in Bragged from the Dallas Court of Appeals it said the exact same thing and in ...

JUSTICE: But traditionally, the government needs my house for freeway. I don't get the value of my house plus my-- a motional language for having moved from the old family home. Right?

MR. LANG: Absolutely correct, your Honor, because ...

JUSTICE: That cause-- just those attorney was so silly. They should have pled a nuisance?

MR. LANG: No, your Honor. That was a taking of property. And if it's a mere taking and there's no substantial ...

JUSTICE: They get more money gives the government just make your property on a, on a not as pleasant. Can you do if I actually take

over?

MR. LANG: Mere annoyance and discomfiture is in the form of a mental language. And this Court has said, "That it is in crucial ..."

JUSTICE: Right. And it goes pass the annoyance and that's the matter of, you know, whether the jury really thinks this is really bad things to do or not.

MR. LANG: No, your Honor.

JUSTICE: In fact you're going to get more money if it's nuisance then if I just take the whole thing.

MR. LANG: Just as first history of nuisance substantially and appears with the nuisance adjournment of property, as in Crawford, as in Town of Jacksonville versus McCraken where a homeowners health is injury. This Court has recognize that that is nuisance cause of actions but it must try ...

JUSTICE: They only missed what we've done and I'm asking you. The effect of that is-- that in fact if the government-- if you sue a nuisance, you just made my property unpleasant, you get proper damage and really up to the statutory caps as much personal injury, emotional language as you want. Whereas that they take the whole house, all you get's the house. That's what you think the law is and should be.

MR. LANG: That-- Well, that is with the law is with the exception of the statutory caps. There are no statutory caps under article I, section 17. It is a waiver community for a constitutional nuisance and we are squarely within Crawford.

JUSTICE: But then let's-- There's a huge fundamental issue here. Article I, section 17 says, "No person's property may be taken damaged or destroyed for or applied to public use without adequate compensation being made."

MR. LANG: Yes, your Honor.

JUSTICE: And so there are exceptions. The government can take if adequate compensation is made; can damage, destroy or take property as long as it provides compensation in that domain proceedings. Does the portion of your argument mean that as how we mention that the government can take a personal damage to a person as long as it's for public use and as long as adequate compensation can be made. That would be a pretty start on proposition.

MR. LANG: And that's what the government and the City are trying to do which is to start up the score.

JUSTICE: Well, then answer that question.

MR. LANG: The answer, the answer to that, your Honor, is: No. The language of article I, section 17 on its face, initially, was to require the government to pay in advance for the taking of property. When the words "damaged" and "destroyed" were added, this Court recognized that those words were added to define the remedy for any damage which in such case is the legislature might authorize to inflict. And the nuisance cause of action, if it is a constitutional nuisance with that standard, allows for the recovery of feasible discomfort and injury to health. And this Court recognize, in Gotcher versus Farmersville, City of Houston versus George, that Crawford's rule involve governmental action. The City tries to say it's proprietary case; it's not. This Court three times has interpreted Crawford as a governmental action case and that Crawford's rule of liability is constitutional.

JUSTICE: And once as a proprietary usually ...

MR. LANG: I'm sorry, your Honor.

JUSTICE: And then one time as the proprietory [inaudible].

MR. LANG: Crawford?

JUSTICE: In the Austin case?

MR. LANG: That may be, your Honor. But the language in Crawford if I may says, "When in the prosecution of a public work, it relates a nuisance or permits it to remain. It is liable for all the injuries that result from a failure on its part to properly exercise the power possessed by. And ..."

JUSTICE: Two years later we felt that was proprietary case. Then in some years later, we may have thought it was a governmental case settle different lines of it.

MR. LANG: And the way that the authority, in 19-- 1999-- in 1931 this Court recognized it is governmental, in 1972, in the City of Houston versus George, it was recognized as governmental. And two years ago, when this Court said, "There is no simple nuisance exception." Crawford was recognized as governmental. And that is the precedent of this Court. [inaudible] ...

JUSTICE: I want to ask-- mention that was pointed out article I, section 17. In what case have we held and considered that case, article I, section 17 Takings Claims that under taking that personal injury is recover? What case have we held that specifically? as regards to a governmental entity.

MR. LANG: I believe in Crawford. Crawford did not ...

JUSTICE: Crawford doesn't mentioned article I in section 17.

MR. LANG: Absolutely true, your Honor. But this Court in Jen- ...

JUSTICE: My question was: Which case have we considered article I, section 17 takings and held as a governmental entity that personal injury is recover-- recoverable. There's a specific question.

MR. LANG: I don't have a citation for, your Honor.

JUSTICE: But you think with their cases that are all around that proposition that lead us-- should lead us to that conclusion. Is that your position?

MR. LANG: It is, your Honor. In Jennings, this Court described it as "well settled authority that both physical discomfort and depreciation of value of land are both recoverable in a nuisance action only if the nuisance arises to the level of a constitutional taking." Simple nuisance won't not get you there. Justice Brister, we are not trying to say that if the lead is off the box and the waiver occurs you can bring a DTPA claim or any other claim. Here, we are focusing solely on nuisance, which was clearly recognized in Jennings two years ago. I want to also briefly address the public policy of this Court in recognizing that article I, section 17 protects the right to peaceful and helpful entailment of property. In Depew versus City of Waco, this Court wrote: The constitution of Texas and the decisions occurs-- of the courts reveals a zealous regard to the rights of the individual citizen.

JUSTICE: Sure-- I mean, you know, nobody but the government can come and just take your whole house. The government is different. They can, they can come and take the whole [inaudible]. And there's no question about it and o-- you know, in any emotional language, you don't get any personal injury, you don't get any inconvenience, you don't get nothing. If we have a rule like this where people are going to say, "Well, it's just a nuisance and I've got this all emotional language." Aren't we encouraging the government to do more taking people's houses away, don't us?

MR. LANG: I don't believe so, your Honor. The nuisance cause of action requires a substantial interference with the use and enjoyment of property. If the government were to make the economic decision early on, "We're going to put a landfill here. It's going to be dangerous. We

know it. Our consultants have told us they're fencing men in. We're going to tell this people, you're going to move and we're going to buy your property." I think the Pollock should probably have appreciated that instead of being told, "It's just methane. It's not dangerous. You can live here."

JUSTICE: So when was this-- when did this become an intentional taking?

MR. LANG: This was an intentional taking in the mid-1980s, when the City was told clearly by tone experts and it seem believes. There's benzene in the gas, the benzene is migrating as a super highway to the utility of means into the home. And it is poisonous. It will cause leukemia. It will cause cancer to lymphoblastic systems. And from 1987 through 1998, the City's gas collection system was completely ineffective. The [inaudible] gas were filled up.

JUSTICE: So but the intentional act is that they did nothing.

MR. LANG: No, Sir-- your Honors. Let me, let me answer that. The intentional act is twofold. In our pleadings, we clearly said, "They permitted, cause, allowed, and maintain actions." We also plead failures. There's no question we plead both. If an intentional failure arises to a contrast decision, that is an action. And, and the Court of Appeals described it that way. That consistently Jennings and Gragg and City of Keller, it takes no in conduct-- actions. In this case, all of the evidence is equally probative of actions. The City continue to maintaining news the same logic collection rows that were fill, the same gas collection-- tubes and pipes that didn't worked. And they continued to do this for five years. In 1989-- October 18, 1989, here's a memo, "The West Avenue landfill and Methae-leche recovery system at this landfill are in need of major repair maintenance." In December of 1994 ...

JUSTICE: But you're saying your, your argument is, the intentional-- when they decided not to come fix it right, they intentionally took the property [inaudible].

MR. LANG: It's mo-- the answer to that is yes, your Honor. But also, when they continue to use the same system knowing that it was substantially invading the Pollock's property ...

JUSTICE: The system was already there. The landfill was already there. The methane was already come in. It's nothing to your claim. There's nothing more than that. They-- when they didn't fix it, that was the intentional act.

MR. LANG: No, your Honor. It's the continue used of it; the continued to use of the same systems.

JUSTICE: They want to put more stuff in the landfill.

MR. LANG: Actually, that's true that they were changing the, the pipes, they were changing the lect-- leggee collection wells. And the City's ...

JUSTICE: So they were trying to fix it?

MR. LANG: The City's witnesses testify that this happened in the absence of negligence. This is just like the Robinson case that were cited in Jennings. If the City is on noticed that what they're-- the Robinson case remarked itself-- if the City is on noticed that what they're doing is causing a substantial invasion, at that point-- and it's causing part their liability attentions. And we fall so squarely within Jennings and Robinson that-- frankly I'm shocked at some of the arguments that the City is making.

JUSTICE: You talk about experts in Robinson now. As I understand that, there was testing all around the Pollock's property but Pollock's property itself, the realty nor the house were actually tested of the

presence of benzene. Is that correct?

JUSTICE: The Pollock's property was tested for landfill gas on three occasions. Each time they tested for landfill gas, they found landfill gas. The City did not test the organic comp-- the organic content of the gas in Pollock property, although there're experts, the Texas Department of Health, the DNRCC all pulled in to do it.

JUSTICE: So there was no test that determined benzene-- the presence of benzene on the Pollock's property or in their house?

MR. LANG: Absolutely correct, your Honor.

JUSTICE: But there were test that determined there was landfill gas on the Pollock's property itself?

MR. LANG: Three times.

JUSTICE: So testing determined there was benzene in certain amounts. I'm sure you're going to address the intention that part the amount worth 200 times different depending on-- based on the study you've-- that the, the three days that you're relying on. I guess it was a study. But there was a testing that determined benzene around the Pollock's property?

MR. LANG: There are two times in the 20-year of history of the City actually tested the content of the gas. There was a water sample in a water well about 50 feet from the Pollock's backyard and found very high levels of benzene. In fact, there were several water well test [inaudible].

JUSTICE: Most marking wells are those wells drinking water wells?

MR. LANG: They were marking wells with Edward's Aquafirm in, in the foster job right there in neither and they were-- they were test wells that both the Edward's required and the Local Water Board. Justice Wainwright, the, the other time the gas was tested for organic content was in 1998 after an entirely new gas collection system was installed. And that new gas collection system was also ineffective completely for stopping the migration of gas. And what they did is to test the gas that at GMP9 which is Gas Monitoring Program, 50 feet from the Pollock's backyard and it found the content of benzene. Then correct for landfill engineer used an EPA landfill model. He didn't make it up, he used 10,000 pages of the cities on records and computed that the level of benzene on the gas was a hundred and sixty parts per ...

JUSTICE: But in Exxon Corp. versus Makofski, court says, "ALL, most common form of vulcanian children, that the experts all agreed we don't know what causes it in a vast majority of cases." Since I note it was assumed for the sake of argument is correct. In this case, we've got a major conclusion that this ALL was caused by benzene, not the Court happens to know that scientist are agreed that we-- it is-- child that was looking-- there is no scientifically reliable evidence in a case where somebody objected to it and looked at all the studies. There is no scientifically reliable at the time benzene to ALL and children because there's no argument here we approve case defining-- because there is no Robinson% objection. In this case we got to prove exactly that over no evidence to challenge. Didn't that problem at?

MR. LANG: No your Honor. And I agree that on the record in Makofski the decision is absolutely correct. In Mako--

JUSTICE: [inaudible] next?

MR. LANG: In Makofski, there was an objection; repeated objections to reliability, here we have none. In Makofski, the exposure medium and the studies relied on were totally different. The exposure involved children and adults drinking water. And in that case, studies were complete ...

JUSTICE: So instead of benzene and the sole outside their house, they were drinking it in Makofski.

MR. LANG: No ...

JUSTICE: And that would enough but it's okay here to overcome a no evidence challenge?

MR. LANG: Correct, your Honor. In Makofski it's our, it's our fault. There were-- there was insufficient evidence of exposure. And the link between benzene and ALL was not shown in the record on that case. Our case is totally different it involves [inaudible] exposure of the fetus in the first trimester. Dr. Patel explained that in [inaudible] exposure the first trimester is particularly damaging to the developing DNA of fetus. And he explained how during organogenesis, the development of the organs, the fetus is particularly susceptible to the DNA mutations. He also explained just as when in terms of dose, that cumulative and chronic exposure to the fetus on the first trimester is totally different and more excessive than a single [inaudible]. In the studies involving workers exposed to benzene in single [inaudible] of 31 ppm is definitely more than a single [inaudible] of a hundred and sixty ppb. But the City has completely mischaracterized her exposure. The hundred and sixty ppb was: daily, chronic; weekly, chronic; and cumulative in the first trimester. Her exposure was wave low than 200 times that of an adult worker. And in fact, the fetus was three ounces in the first trimester versus a hundred and fifty pound adult. Dr. Patel also ...

JUSTICE HECHT: Is it true that the study do not show that a chronic exposure in level saying 160 ppb, as at some point amounts to, to exposure of 31 ppm or more.

MR. LANG: Justice Hecht, the studies cannot say that exactly. But, but language from, from Plaintiff's Exhibit 159 says the following, "Key mode of exposure to benzene correlated to increase mutation frequency and leukemia risk." In the same study exhibit 159 on the last page has several sentences that make clear that the leukemia risk is greatly increase in [inaudible] transfer. And it isn't just limited to ALL. And if you look at the footnotes on that article, it actually refers to ALL and leukemia in the act of it. In Makofski the record was such that they didn't proved the association. And here, I'm just going to read a few excerpts form those studies, "Chromosomes specific aneuploidy plays a key role in benzene-induced-leukemia. Benzene has a clear dosed dependent effect on the aneuploidy of chromosome 9, causing direct genetic damage in the fetus following nocturnal exposure. Key changes related to the development of childhood leukemia which occur before birth." Dr. Patel did not make this up and his studies clearly establish the link that first of all, benzene is ketogenic on the fetus. That sect- ...

JUSTICE: Very interesting in all these. What this assuming that, that-- your argument is very good-- we assume you don't prevail on this, what is the-- what would be the result to other people that lived what your client did exposed not may be the benzene which mother cancer causing agents that are in the same situation other concrete scientific evidence that the exposure cause to this disease to either manifest in here on or sometime later during life. As I give the City or these other municipalities pass on, is that a conduct or I would ...

MR. LANG: I think it does, your Honor. In fact several of the points that the City makes which is we don't have test of record therefore you can't proved exposure. The reason we don't have test inside the house is for 20 years they disregarded with their employees and their experts told them to do. And if, if on the other hand, with

regard with the liability, if the intentional failure to act does not create liability, if this Court doesn't find that that is in fact an action, then the City is encourage to do nothing. If they are in the face of, of knowledge that what they're doing is causing substantial point insulating them from an intentional failure to act these facts gives them that great life.

JUSTICE: Let me asked you about Dr. Patel's opinion. I'm, I'm looking at it, it's last page, page 5 it says,-- it's his medical opinion, I'm paraphrasing some-- "There's reasonable medical and scientific certainty linking maternal exposure to benzene, organic acids and hydrocarbon to the environment with the development of ALL and cephalic." It has three causes there. Is that sufficient? Is his opinion sufficient?

MR. LANG: In this case, your Honor, it is because there is ro-- objection to reliability, methodology or foundation. It's ...

JUSTICE: Let's, let's put that question to the side.

MR. LANG: Yes, your Honor.

JUSTICE: The next person says, "There's three causes for the development of ALL." Is that sufficient to established reasonable medical and scientific certainty that one of them is the cause?

MR. LANG: Yes, your Honor.

JUSTICE: Approximate cause?

MR. LANG: We read his report which was submitted without objection along with his testimony at trial. It's very clear that the focus is on benzene and it's destruction of the DNA and [inaudible]. He explained in detail, track that is benzene and it's metabolite and what they do to distinguished in the first trimester.

JUSTICE: Did you exclude the effect of organic acids and hydrocarbon on the development of ALA-- ALL?

MR. LANG: I think what you said, your Honor, is that they also contributed. They usually contributed to the mutation of the DNA and the chromosomal damage. And the chromosomal damage is not a mere signature injury in this case like the situation in the [inaudible] in San Antonio. They had no exposure evidence. In this case, we had exposure evidence from then craft, his report. Last month, Gamary, the City's expert, that they didn't bring but we ready is that position. We also had exposure evidence from the Pollocks who testified that they smell the gas in their home and it was so strong that they had to close to their doors. All the experts agreed that that odor was the [inaudible] organic such as benzene. Your Honor-- your Honors, in this case, the only ipse dexit testimony the only bare unsupported conclusions came from the City's own expert Doctor Didet who did no literature search; he cited no studies he didn't know what chromosome was his serous-- his deposition when I ask him to identify the trash of its. But he was hired with the express focus to undercut the reality of the doctors. He wrote it in his notes of his pre-deposition for us. And that's the preceding is done in his entire appeal. They have undercut the reality of this Court precedent. They have undercut the reality of article I, section 17. They have undercut the reality of their own shameful record of the landfill. This case can be affirmed on its merits. This case can be affirmed on the City's waiver for them to stand before you and say they didn't waived immunity. When they didn't pleaded, they didn't pass special exceptions, they didn't file a plea of the jurisdiction and they didn't file a motion for summary judgment. For the precedent of this Court, we fall squarely within it and there's no extension of the law at all. That's all we have, your Honor.

JUSTICE: One, one question, final question. Do you know the

difference between the lymphoblastic and lymphocytic leukemia?

MR. LANG: Yes. Both lymphoblastic and lymphocilic are the same. The difference between AML and ALL is based on the circulating cells and ALL is circulating lymphocytes that suppose to AML which is magolgenic cells. [inaudible]

REBUTTAL ARGUMENT OF SHARON E. CALLAWAY ON BEHALF OF PETITIONER

MISS CALLAWAY: How us try to avoid problem with personal injury damages under the Takings Clause by saying, "Well, the the cases cite like City of Dallas versus Jennings, that case has used the word 'discomfort'and relies on City of Keller versus Lights, you gather the City of Keller versus Lights." First of all, that discussion is in the context. It's really a Tort Claims Act case because the Court finds there's no intentional taking therefore they don't even going to an announce of such that taking. So it says nothing about taking. In addition, it cites reinstatement second of tort (a)21(d) which makes very clear that there is a legal distinction between the interest and being free from interference with your, with your property either you use in enjoynment of property and an interest in being free from emotional distress. And what it says is that the former, you have a property lot to use and enjoy your land. And if someone interferes with that, the nature of damages or in the nature of an annoyed and discomfort. That is a property right. However, ...

JUSTICE: What's, what's the discomfort? the discomfort in moving? discomfort in packing bags? the discomfort in what? I mean, that's -

MISS CALLAWAY: I would cite the discomfort here you had such, such subsided in the backyard and I, you know, [inaudible] ...

JUSTICE: Place-- They don't like methane.

MISS CALLAWAY: Right. They smell methane. That's -

JUSTICE: What about?.

MISS CALLAWAY: - it's out in the backyard. That's discomfort and that is a interference with the property right. It's not an interference with the personal right. And I think there was statement which Lights quotes, makes that distinction very clear. Also, this Court and other appellate courts had, had might clear that under that the, the use of the word "damaging" in the Takings Clause is to reach just set of interference. It's not just taking the property it's also interfering with the right. That's a dict-- a property right, right used in enjoyment and that recognized a damage element of discomfort and annoyance. And that is not to say-- that's, that's what the finding here was it was lost of use of enjoyment. And that is interference with the property right; nuisance itself is interference with the property right and it's define in us very terms "interference with enjoyment use of land."

JUSTICE: What can it be the discomfort of saying your child diagnosed with this disease? Discomfort enough enable to see your child go play in the backyard because yours, the next possible exposure right there.

MISS CALLAWAY: That, that is the middle anguish, your Honor. That is a personal injury damage. And the text of the Constitution cannot be expanded. And this Court has recognized that however again in the Bulian case cited in the brief that you cannot take those words and expand them. No matter how uncomfortable or how questionable the end

result might be to the Court, the Court cannot rewrite the Constitution. And it very clearly because it's the state points out, hooks to eminent domain power very, clearly is also tied to property concept that will not ever include middle anguish damages or personal injury damages with regard to ...

JUSTICE: In what situation can a City or State be responsible for landfills that contain cancer-causing agent or some other agents that migrate off the property. There're two errors of some type of underground water contamination and gets people ill ...

MISS CALLAWAY: When there is of sovereign immunity under the Tort Claims Act that is the caused of action tort.

JUSTICE O'NEILL: But there will never be a waiver under the Tort Claims Act. I mean, it's very limited. You-- I'm sure you'd argue that there is no waiver under the Tort Claims Act.

MISS CALLAWAY: In this particular case because they didn't, they didn't proved up the case and they didn't get a finding in the case of condition of property.

JUSTICE: But it would be very difficult to make a Tort Claims Act claim here. It's a really the answer to justice within these questions: No remedy.

MISS CALLAWAY: There might be no remedy. But as I said, the Court is bound by the notion of sovereign immunity and there must be an express waiver. And until the court finds an express waiver under either under the, the Takings Clause or under the Tort Claims Act there is no liability. And that has long been the law of the state. With regard to causation, argument-- Justice Brister, asking where he draw the line. I think he draw the line as a very clear line. There's a great difference between attacking causation and no evidence and what Havner says about causation and trying to attack what Havner says about statistical significance. We cannot go into the statistical significance part of Havner because we did not object to the scientific reliability. We didn't make a Daubert objection and we have not tried to do that. Nothing about Daubert changes causation analysis. For hundreds of years in this state, you have had to proves cause and fact. And in a toxic tort case like this, "cause" in fact means exposure right. And here you have conclusory and speculative opinions both as to the exposure right taken from the bottom of the well. My time is up. Thank you very much.

JUSTICE: No further questions? Thank you, Counsel. The cause is submitted. And the Court will take a brief recess.

COURT MARSHALL: All rise.

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