

ORAL ARGUMENTS - 9/3/96
95-1014
CITY OF TYLER V. ADELINE LIKES

GRAYCHECK: I am here today representing the City of Tyler in an action that arises out of a flood that occurred more than 10 years ago in April 1986. This flood involved water entering the house of the respondent, which was built in 1950. And the original complaint concerned an insufficiency of the drainage culverts that were installed in 1925 and 1938.

Interestingly as well, the 1986 flood that allegedly was the result of insufficient drainage was the first time that water had entered this house from this particular drainage ditch. There are two primary issues before the court today, the first being what effect does §101.061 of the Civil Prac. & Rem. Code, part of the Texas Tort Claims Act, have on this case due to the fact that these structures were built nearly 60-70 years prior to the incident in question? And secondly, can a property damage claim in general give rise to compensable mental anguish damages? Specifically if so can those damages arise under the Texas Tort Claims Act in light of the dichotomy provided by the legislature?

It is important at the outset to remember that when this case was originally filed by respondents they sought only property damage claiming that due to the negligent and insufficient drainage provided in this particular area that the city had unconstitutionally taken either temporarily or permanently their property. It was only after the city filed its summary judgment action showing that the original claim was in fact baseless, that respondents added a claim of unspecified mental anguish damage.

ABBOTT: Should we always disregard amended petitions?

GRAYCHECK: I think it's important in this case to look at the fact of what they originally thought they were trying to claim.

ABBOTT: Should we disregard an amended petition? Yes or No.

GRAYCHECK: No. Although the original petition I think has an impact other than the effect of what, the amended petition brought forward. In effect this case I believe provides its substance to this court's concern expressed in the past that mental anguish damages would become the refuge repository for every type of damage whether it's substantiated or not, or at least the repository for unchecked damage awards by the juries.

CORNYN: You didn't move for summary judgment on the basis that she suffered no compensable mental anguish damages did you?

GRAYCHECK: It's our position that we did move for summary judgment _____ their issue by claiming that there was no damages available in this case that they pled for that they were entitled to.

CORNYN: Under the Tort Claims Act?

GRAYCHECK: Under the Tort Claims Act. Specifically we alleged in our summary judgment evidence and I believe the proof showed that only property damage was being sought.

CORNYN: That's a no evidence point on damages?

GRAYCHECK: In a summary judgment case it would have to be no evidence point at least on the damage question. If we have established that there was no such damage and they have not brought forward that proof, the summary judgment should be sustained.

CORNYN: So the CA was in error on page 4 when it said that you didn't move for summary judgment on the basis that Like suffered no mental anguish damages?

GRAYCHECK: I believe that's correct. I know respondent hit hard on that, that we didn't specifically say: You did not suffer mental anguish damages. What we did say was that the damages you are seeking to recover, the damages that you brought forward are not mental anguish damages, they are property damages. That's all they have ever been. You are simply trying to call them something different to recover or get past the bar provided by the Tort Claims Act.

The Tyler CA despite this court's repeated rulings on mental anguish damage awards ignored those rulings and instead relied on three no writ cases found that damage due to flooding is the type of damage that makes it self evident that mental anguish damage would occur. The flood damage that the Tyler CA found created a self evident mental anguish situation is in fact directly contrary to this court's holding in Parkway v. Woodruff where this court in fact found that a jury which apparently concluded that flooding was an event from which mental anguish may be inferred was in fact a conclusion that was at odds with the very definition of mental anguish damage. The court there going on to explain that flooding is one of those events that happen regularly in our society especially if you live in East Texas. The court found there that because there was nothing other than the flood to point to to give rise to mental anguish damages, that the jury's award necessarily had to be based on sympathy or other jury personal experience, which is not a proper basis for an award.

CORNYN: Why doesn't the affidavit of Ms. Like where she said she suffered many sleepless nights and loss of sleep because of the flooding, and then when she heard thunder and rain she would get up at night and feel like she would have to move her car up the hill; why isn't that the sort of disruption in one's daily routine that would satisfy the Parkway test?

GRAYCHECK: That is in fact what respondent is contending is that her suffering is better than the Woodruff's suffering was. And then she goes on to claim basically these nebulous claims that well I suffer sleepless nights; I suffered mental anguish. She makes some conclusory statements. But if you look at what she's actually claiming both in her petition and in her affidavit, she always ties what she's claiming to the property damage she suffered. In her petition she states that she suffered mental anguish, emotional pain, torment and suffering from the loss of many personal irreplaceable items.

CORNYN: Why isn't that good enough the part I just read or referred to, why isn't that good enough to satisfy the disruption of one's daily routine aspect of the Parkway test?

GRAYCHECK: Again that comes from her affidavit, the part that she read. And I believe if you read that entire provision, it starts out: This flooding caused me to suffer mental anguish, torment, emotional suffering as many irreplaceable items were irreparably damaged. And I suffered a tremendous loss of money and property. Further, this mental anguish, the mental anguish caused by the loss of her property was aggravated by the invasive nature of the flood. I felt violated and etc., etc. She's continuously and constantly tying her feelings, her emotions to the suffering that she's lost in property, in money, in pictures, in keepsakes, in having to repair the damage afterwards. For a long period I would hear thunder at night and I would feel compelled to move my car up to the top of the hill. Again, it's her car she's concerned about, not her personal safety, not her person. It's her property she's concerned with. And that's what she's moving up to the top of the hill. If as respondent alleges that she's so deeply affected by this event, that she just can't get on with her life because of it, we would ask why is she still living in that house some 10 years later? Why is she still residing there without any concern about moving, building up a wall around the property or something to keep the water out? She lives there day to day to day and the only time that it affects her so dramatically where she's got to just ruin her life is when it comes to a court of law asking this court to award her money damages.

PHILLIPS: Let's suppose the evidence was uncontroverted that her life had been ruined. Take another case if you will. Is she entitled to recover then under the state of the law if she can show that she did have to move, it ruined her marriage, she couldn't sleep anymore, etc.?

GRAYCHECK: It's our position that no she still would not be entitled to recover mental anguish damage. And again we get back into the entire evolution of this damage beginning with the requirement that you have to have a physical impact, some type of physical injury in order to give rise to the damage. The courts have found that was required to show that damage was genuine.

CORNYN: Well that's not the law anymore?

GRAYCHECK: No, it's not the law anymore.

CORNYN: Isn't mental anguish a physical injury under our law?

GRAYCHECK: And then we get into which came first the chicken or the egg.

CORNYN: Answer my question please. Is mental anguish a physical injury?

GRAYCHECK: It is considered a physical injury. But again when we start analyzing especially when you limit personal injury like in the tort claims act case you start analyzing which comes first the chicken or the egg. If she doesn't have a physical injury, she can't have property, but if the property gave rise to the mental anguish is mental anguish personal injury even though it's related solely to property? And we would contend that even if mental anguish damages are recoverable because of loss to property, which is really what we're talking about here, if loss to property can arise mental anguish damage we would contend that the legislature's dichotomy in the tort claims act between property damage and personal injury damage would prevent mental anguish damages arising from property damage under the tort claims act situation.

HECHT: You seem to be arguing, and let me be sure I understand, that if the mental anguish is over a property loss, then it's not recoverable?

GRAYCHECK: That's in essence what we are arguing, that property damage alone should not give rise to personal injury damage. Because then we start getting into an analysis of what's enough property damage? Is one timber enough - a landscape timber floats away in a flood - is that enough to give rise to mental anguish?

HECHT: How do you square this argument with DTPA cases, which recognize mental anguish _____?

GRAYCHECK: The DTPA cases and most of the cases that this court has found give rise to mental anguish damage all involve some type of culpable mental conduct or culpable conduct on the part of the defendant. The DTPA case requires a knowing violation by the defendant. Just like this court's recent announcement under 21.21: a knowing state of mind is required in order to give rise to those damages.

HECHT: If this had been reckless conduct on the part of the City they had been told over and over again you've got to fix this, you've got to fix this; they said we don't have to. We don't care.

GRAYCHECK: I would contend reckless conduct would probably be sufficient if you have evidence of something other than just that the violation or the damage itself if you can show wilful conduct, reckless, conscious disregard, those that give rise to a heightened standard of damage under our law would probably be sufficient to make the damage cognizable because then it is likely such damage would occur.

ABBOTT: There are many occasions when someone may engage in intentional conduct and the person who suffer the injury truly really isn't all that injured. There may be other occasions where someone doesn't engage in intentional conduct; it may be just that the most vagueness of negligent conduct where

someone could suffer immeasurably. It seems doesn't it that we should be focusing on the extent to which the person who is injured has suffered as opposed to the extent to which the person causing the injury may be culpable?

GRAYCHECK: I don't believe so at least not at a threshold level.

ABBOTT: So it doesn't matter to the extent to which Ms. Likes may have suffered. All that matters is whether or not the government, the City of Tyler intentionally caused her to be suffering.

GRAYCHECK: No. If you get past the threshold where you are entitled to recover mental anguish damages, then the degree of anguish would be necessary to be proved in order for a jury to award those damages. But there must be I believe, and I would contend in this day and age especially, there must be some threshold that mental anguish damage is not available until you pass that threshold, whether it be a culpable mental state, certain relationships like a doctor/patient or some relationship that gives rise to a heightened duty. Absent those types of things mental anguish simply becomes this blank check that the jury is given to fill-in when they decide a case. That's the danger there. Culpable mental anguish there has to be some threshold to get to it.

ABBOTT: Let's say when you got back to your house after this oral argument and your house was wiped out with a flood would you just be carefree and fancy and happy?

GRAYCHECK: No I could actually speak from personal experience if I tell you I wouldn't be carefree and happy.

ABBOTT: You would be upset and frustrated?

GRAYCHECK: That's correct.

ABBOTT: You would suffer mental anguish wouldn't you? You would feel anguish about the loss of your house in that property and what you have to go through to repair your house?

GRAYCHECK: There are those that would contend stepping up to this podium causes a degree of anguish or mental anguish. That's exactly my point: When do we reach a level where that anguish becomes compensable? The fact that my house floods if it's not from something that was done intentionally, or maliciously, or recklessly at least by a governmental entity, it's not something that I should be able to recover for although the property damage if it was caused by somebody's negligence I could recover for. But the legislature has said at least as far as a governmental entity is concerned: You may not recover for that.

ENOCH: If the court concludes that mental anguish can't arise from property damage, is the

affidavit by Ms. Like sufficient to get past a summary judgment in this case?

GRAYCHECK: I find it difficult to provide a direct answer in light of the previous authorities that this court has handed down especially the Parkway v. Woodruff case where the court outlined the testimony in that case, and that testimony was as intense or more intense than provided by Ms. Likes. And this court found without any problem that simply is not sufficient to give rise to the damage. So I would have to contend based on the authorities from this court: No, her affidavit should not be considered sufficient even if property damage can give rise to mental anguish claim.

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RESPONDENT

JARRELL: Your honor I would like to take some exception to a few comments that have been made concerning Ms. Like's affidavit. And I apologize that in my brief to the court there were a few typographical mistakes. That first sentence that Mr. Graycheck quoted actually reads:

This flooding caused me to suffer mental anguish, torment and emotional suffering, period. Many irreplaceable items were irreparably damaged and I suffered a tremendous loss of money and property. Agreed, that did occur. Further, mental anguish was aggravated by the invasive nature of the flood breaking into my home. I felt violated by the intrusion of the flood water into my house and have not since felt truly safe in my home both for my personal safety and the safety of my property.

OWEN: If the same showing had been made in Boyles v. Kerr, if the plaintiff there had said: I am sick to my stomach; I can't sleep; I don't feel safe in my home any longer; if she had made those allegations are you saying that the outcome should have been or would have been different in Boyles v. Kerr?

JARRELL: In Boyles v. Kerr I apologize but I am not familiar with the holding of the court in that case. But I would say that in this instance, that the violation would rise to a level of a compensable injury. Yes your honor. This is true mental anguish. This is not a mere disguised property claim.

OWEN: Well that's what I am trying to slice here. Are you saying is it mental anguish or are you saying it's personal injury? Precisely what are you saying about it? Are you saying that in cases where you can only recover for personal injuries if you show that the mental anguish was such that it rises to personal injury then you are able to recover? I am not clear on exactly what your argument is?

JARRELL: Our argument is that this is mental anguish and that it does have a physical

manifestation. Perhaps that's the clearer way to say it. The mental anguish that you suffer did have a physical manifestation. And this court has consistently upheld the award of mental anguish damages where there is a physical manifestation of that mental anguish.

HECHT: But have we ever done so in a case that involved only injury to property?

JARRELL: I would argue that there was more than just an injury to a property. The injury here was similar to a...it's been similar to an invasion of privacy right cases that this court has upheld mental anguish damages. In this case a person has a zone of privacy, an expectation of privacy in their home, and when that is violated by an event such as the flooding of this magnitude I would argue that there has been an invasion of a person's expectation of privacy in their home and...

BAKER: Did you raise that in the TC?

JARRELL: I did not argue that specifically but we did in the TC the affidavit was before the court concerning the invasive nature of the water. There was some 3½ feet of water in this lady's house.

BAKER: Do you have any authority that says that that type of event is a constitutional invasion of the right to privacy? That's what you're arguing now isn't it?

JARRELL: It's similar.

BAKER: What other source is there for "invasion of the right to privacy?"

JARRELL: I was tying that into the recent opinion of this court in Motor Express v. Jerry & Irma Rodriguez where it recognized there a few situations where claimant who is not physically injured by the breach of duty may recover mental anguish. It did quote the Billings v. Atkinson case which was an invasion of privacy case.

HECHT: So if your claim was that your neighbor moved the boundary too far over on your side, that's an invasion isn't it? If that made you suffer considerable mental anguish damages would they be recoverable?

JARRELL: In a boundary act dispute unless the neighbor routed the fence through your living room and said that's where it's going to be, that might give rise to mental anguish because you are invading the privacy of a person's home and their expectation of their privacy. I am saying that's an analogous situation.

HECHT: But you would not recognize recovery in a boundary dispute? If you really suffered there was no question that the plaintiff really did suffer, had to go get psychiatric treatment because it was

very disturbing.

JARRELL: I would say that a boundary dispute, in other words they fenced off the property and denied you access to it, I would say that yes there would be a possibility of mental anguish under those fact circumstances.

HECHT: It would be pretty close to allowing it in virtually every action where it was really suffered wouldn't it? Well what's the difference in that case and just a simply breach of contract where you just really feel like you've been rooked by this thing and you are really upset about it?

JARRELL: In this case what we have though is a city that was maintaining a culvert. And the City had control of the culvert, they were apprized that there was problems with their maintenance of the culvert itself and that water was backing in this area. And they did nothing. We had testimony in there that nothing was done in order to take care of that. And that approaches the reckless conduct that was mentioned earlier by the court.

HECHT: If the City were more innocent then you should not get mental anguish damages against them in this case?

JARRELL: I think that the court's earlier trouble with trying a person's issue on mental anguish with the degree of culpability of the actor is well placed, because I think you have to look at the mental anguish damages from the person who suffered them rather than viewing the mental anguish through the culpability or lack of culpability of the actor that may have caused them.

BAKER: What about their argument under §101.061?

JARRELL: There's a little bit of conflict about when it was actually improved. There were 2 culverts running underneath the Broadway and Daubs intersection. One was probably built by the railroad and the State of Texas early on in the century, but there was no record. And then the second one there is testimony to the effect that the second round culvert was actually jacked through the roadbed some time in the 50s.

BAKER: So all of those statutes were before 1970 aren't they, which is what .061 sets the cutoff date?

JARRELL: That's the cutoff date. But there is case authority to the effect that the Act simply does not apply to...

BAKER: Which means that _____ except for common law _____. So what was your allegation that would get around .061?

JARRELL: My allegation was if the City was negligent, and the instruction for maintenance of those culverts and those acts of negligence occurred prior to 1970, then it would be governed under common law. And there are several appellate court cases: Mitchell, and the City of Fort Worth v. Adams that stand for the proposition that when you would have an act or omission that occurred before 1970, and it would have been a proprietary act of the city at that time, then the city is not immune and the case should be tried under common law to determine whether or not it was.

BAKER: What would be the measure of damages for negligent construction of the this act?

JARRELL: The measure of damages will be those that were permitted to common law.

BAKER: Including mental anguish?

JARRELL: That's an interesting question. I would say that it would be the state of the common law. I haven't researched this issue because I have not thought of that. I believe it would be the state of the law at the time either the case was filed or the time of admission.

BAKER: 1986?

JARRELL: Yes. I would like to point out that there is a point here. There was no allegation by the City in their motion for summary judgment that Ms. Likes suffered no mental anguish damages. Rather their characterization was simply that these are merely disguised property claims. I would refer the court to the transcript at 426 and 427. I believe that what Mrs. Likes has alleged in there is not tied to property rights, but is a true statement of the mental anguish she suffered. She suffered many sleepless nights and loss of sleep because of the floodings and the feelings of helplessness and frustration. She further suffered aggravation of arthritis and headaches. The evidence before the court was not merely her affidavit, but also the deposition testimony of Mr. Harlan Smith, who was a young gentleman who was a tenant at her house several years after this event occurred. He testified and I've made references to it in my brief, that she would be up at all hours of the night unable to sleep, and he was kind enough to sit up and talk with her, and that a large amount of what she spoke about concerned the flooding, her anxiety concerning the flooding, and he gives testimony as to headaches, the aggravation, stress, and much that she went through. And I would refer the court to that also.

Concerning the negligence issues that were raised by the City of Tyler I think the testimony of Ron Fix that was attached to the summary judgment motion, Mr. Fix is particularly well qualified to give testimony concerning this as he has several advance degrees in water management and hydrology. And I believe Mr. Fix is now at the University of London completing his studies in hydrology and water resources. His testimony raised a fact issue in that he said that the channels and the culverts were in an extremely poor state of maintenance, that there were trees growing up, that there was blockage, and he saw the culverts over an extended period of time as the downtown Rotary Club, which he was a

member, met in the woman's building and the access to the rotary meeting had him walk over a bridge where he could observe the culvert. And he observed it all the time. And the testimony to which I refer to in my brief shows that he always saw significant debris blocking the culverts, there were small trees, sand and debris growing up inside the culverts themselves, and that they were not maintained. And particularly on the other side of the grove bed that there were large trees and debris and he stated that it had not been maintained for a large period of time.

His testimony further goes on to point out that this blockage impeded the flow of water and that it quite possibly could have caused the flooding in Mrs. Likes home. So we believe his testimony does raise a fact issue concerning the negligence of the City itself.

Further Mrs. Likes' reported a statement by Keith Williams who was an assistant City engineer of the City of Tyler at that time, that he reported that they were not constructed properly. And that appears at the transcript at 357, 358.

HECHT: How important to you is it that this flooded her home? If it had flooded a carport would that be the same?

JARRELL: I think it's important that it flooded her home.

HECHT: If it had been a garden down on the back-end of the property she might not be entitled to recover even if she felt just as strongly about it?

JARRELL: I think it's important that her actual home itself was flooded. Perhaps a garden flooding carrying away a prize pumpkin for the state fair could give rise to damages. But I think in that case there would have to be more evidence of much more reckless or intentional conduct. But in this case, there is knowledge that there was a problem with this system and nothing was _____ to do it. In fact Ms. Likes testimony does go to the effect that she had informed Mr. Williams and he said the City was not going to do anything about it. In fact Mr. Williams' testimony is very interesting. In vol. 5 of the transcript, Mr. Williams first at page 672 he measured 3½ feet of water in her house. Her home is located at 118 W. Dobbs. And he measured some 3½ feet of water in her house. Secondly, at page 670 (and I'm reading a quote; this is concerning the area of Mrs. Likes' home): The six blocks from Chilton Shaw to Dobbs Broadway he listed 4 priorities (he did an investigation of the flooding that occurred in the City afterwards and he set 4 priorities that the City should consider): 2) a modification of the 6 blocks from Chilton Shaw to Dobbs Broadway; this is where nearly ½ the residential flooding happened; in the public's opinion flooding of one's homestead is a serious invasion of their privacy and can be very traumatic to a family. This is Keith Williams, Ph.D., assistant City engineer. And he also talks about that there's a quote on the third paragraph; he says: That the two drainage maintenance crews do the best they can at removing blockage from the open channels, ditches, creeks and streams; 80 miles of storm sewers and 3,000 curb _____, but with so much work they obviously have to set priorities. They do not remove growing

vegetation from the creeks on private parties, they only remove dead trees blocking the flow of flood water. Drainage maintenance gets an average of only \$3 for _____ to support its work.

And he further states that on pages 665 & 666 of his reports that he believes that the culvert system at the Broadway and Dobbs intersection where the backup occurred on Mrs. Likes property is inadequate to drain the property.

In regards to Parkway v. Woodruff, and once again this is not a no evidence point, this is a summary judgment case, I believe that Mrs. Likes has shown both the nature and the severity...

HECHT: Did she show that the flooding “jeopardized her personal safety”, that’s footnote 10?

JARRELL: I think that can be inferred from having 3½ feet of water in your house. It would be one thing if you had soaked carpet, but 3½ feet of water could jeopardize...

BAKER: Is this a single story home?

JARRELL: No sir it was a two story home.

BAKER: Is her bedroom upstairs?

JARRELL: I believe it was. But her personal safety that was an area in the back that was occupied by a tenant, by Mr. Harlan Smith, and it...

BAKER: But he’s not suing?

JARRELL: That’s correct. He was not an occupant of the home at that time that the flooding occurred. But 3 ½ feet of water in your home could have jeopardized her personal safety.

SPECTOR: Does the record reflect how long she lived in that house?

JARRELL: The record does. She purchased the home from Bernard and Lindsay Wolfe in 1954. And she married Col. David Likes in 1972, and they moved to Memphis for 13 years and returned to Tyler in 1985. And during the time she had rented the home to a local attorney during that time.

SPECTOR: She’s owned the house for some time?

JARRELL: Yes, that’s correct.

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REBUTTAL

GRAYCHECK: The standard must be such that we can be confident it is justice that we are handing out and not a lottery check. When we give the jury that charge, when we give the jury that blank check, we must know that they are properly considering the element of damage of mental anguish. Otherwise, we are no longer meeting out justice but we are simply contributing wealth. The jury once back there as the court has held in Woodruff can fill in that blank based on a lot of factors that have nothing to do with mental anguish. We ourselves have difficulty in determining what is/what is not mental anguish or at least what is/what is not compensable mental anguish. To allow a jury to consider that in every case would be senseless as far as I am concerned for the justice system.

ABBOTT: What do you think is adequate injury in order for someone to be able to recover for mental anguish?

GRAYCHECK: I believe the dichotomy that this court has gone down in its various cases is the proper dichotomy. If there is wilful conduct on the part of the defendant, if there is a special relationship between the defendant and the plaintiff that give rise to the cause of action, if there is personal injury, in these situations we can be confident that mental anguish would and should result. In other situations the fact that mental anguish may in some situations arise or not does not mean that we should provide a remedy for those situations in all situations.

I believe just as Justice Hecht pointed out earlier if we are going to do so in a property damage situation why not in a contract situation? I have known lots of people involved in contract disputes that get very, very excited very, very hot and suffer serious anguish as a result of those disputes. Why not allow them to recover mental anguish as well? I believe the reasoning is clear that those situations should not give rise to a _____ mental anguish claim because those are situations that did not give rise to conduct that should raise that type of damage.

PHILLIPS: Can you tell me any other types of actual damage which depend not on the plaintiff's injury or state of mind, but depend on the defendant's level of conduct? We have punitive damages but what you're articulating here sounds to me like this is _____ punitive damages the way to get around the US SC increasing restrictions.

GRAYCHECK: And quite honestly that's what it's become at least in the TCs. If they can't get the punitive let's try to make the jury mad and put a blank in there saying mental anguish and let the jury award whatever amount...

PHILLIPS: But what rationale is there for, and I'm not saying there's not one, _____ rationale for saying that it depends on the defendant's conduct rather than on what the plaintiff actually suffered?

GRAYCHECK: To me the rationale is basic fundamental tort system: What are we supposed to be doing in our justice system? We are supposed to be redressing agreements, providing compensation to make the plaintiff whole. If the system is not doing that it needs to be adjusted. And in the mental anguish arena we know the system is not doing that. It's not making the plaintiff whole anymore, it's become a way to hit it big.

PHILLIPS: So is Parkway wrong?

GRAYCHECK: I think Parkway is correct. Parkway says: No, in all situations you cannot recover mental anguish. There is some language in there and some people may be reading that to say: well if I can simply prove enough anguish, I can get there. But I don't think Parkway actually says that yet. I think it's important that we remember here at the end that this is in fact a Texas tort claims act case. The legislature despite the common law requirements has imposed a specific dichotomy for what may or may not be recovered.

CORNYN: Are you saying that the quantum of evidence to recover mental anguish damages is different than a tort claims act case?

GRAYCHECK: No, I am saying that because the legislature has specifically ruled by its statute that you may not recover property damage, that you should not be allowed to bootstrap on top of that property damage some nebulous mental anguish personal injury claim.

CORNYN: What I can't understand is whether you are making two arguments or one argument. One you can't recover mental anguish for property damage under the Tort Claims Act; and 2) there is not enough evidence to support a recovery for mental anguish damages here. Are you making both those arguments?

GRAYCHECK: Yes sir.

CORNYN: And you preserved both of those in your motion for summary judgment?

GRAYCHECK: Yes. They are both preserved. In general mental anguish should not arise from the property damage just like it shouldn't arise for contracts.

CORNYN: Under any circumstances?

GRAYCHECK: Well I think under any circumstances. I have yet to see one that would without something outside. Specifically also under the tort claims act because the legislature has taken property damage away you should not be allowed to use that property damage to catapult yourself into a claim. That's the basis of our argument. And I think it's important in a situation with a city such as Tyler, as

you've heard repeatedly from respondent's attorney, the city didn't do anything. If you read Fisks's deposition that they want you to say is some evidence, it's clear what he's saying that: City you didn't provide enough drainage. We don't care that these culverts were put in 60 years ago; you should have come back in and done a capitol improvement project.

ABBOTT: What is your response to the argument that when the City did put in the drainage it was before the existence of the tort claims act, and at that time under common law what the city was doing was characterized as a proprietary function?

GRAYCHECK: Two-fold. First I think the intent of the legislature in drafting that statute was to put a bar on those types of claims. It was in essence a limitations provision under the tort claims act. We are going to let you sue the state, or city, or government forward from 1970; anything back is out. You can't go back that far. That was the intent of that statute. I think it was intended to prevent them going back and presenting this claim.

ABBOTT: Does that not make that an unconstitutional retroactive law?

GRAYCHECK: No it did not apply retroactively. It applied prospectively. Prior to that when the Act was passed you couldn't sue at all. There was no waiver.

PHILLIPS: You're saying opposing counsel was wrong, this was not a type of municipal function for which the City did have liability?

GRAYCHECK: I think definitely opposing counsel was wrong specifically in his own words. He tells you we have 2 culverts side-by-side. The state put this one in, the City put this one in. If the dichotomy that he proposed is correct, the city is responsible for putting this one in and is negligent and it can be recovered because that's proprietary, but the state cannot be sued because it's governmental. To me to say you have two culverts side-by-side; you can sue over one is proprietary, the other one you can't it's governmental is a meaningless distinction. And if that's the law, then the law is wrong. It as simple as that.

PHILLIPS: If there's anything that's a partial cause _____ city's prohibited, then it's got to extend, you can't sue over anybody's conduct?

GRAYCHECK: My contention is if the same act is governmental in one situation that very same act has to be governmental across the board. Otherwise we are drawing artificial lines or distinctions not to appease legal distinctions, but simply to allow recovery under certain situations.