ORAL ARGUMENT - 3-6-02
01-0299
CITY OF BELLMEAD V. TORRES

WADE: We're here today asking the court to grant petition in this case to correct the error by the 10th CA in two very important respects. The first error that the CA made is that they focused to the exclusion of everything else in what the subjective intent of the entrance to the recreational park was at the time that she entered. In doing that the court failed to consider what the landowner granted permission for the use to be _____; and also focused exclusively on what she was doing at the moment of injury. In that respect, we submit to the court that the CA committed error.

The second way which the court erred was that they concluded that softball, and they didn't limit their holding to softball, but they said all competitive team sports are not recreation within the meaning of the recreational use statute.

The effect of these holdings are entirely at odds with the recreational use statute...

O'NEILL: Where would you draw the line under this statute? If we say it includes sporting activities, could you build a stadium there? At what point would you draw the line under the statute for what's allowed and what's not allowed?

WADE: In responding to whether or not you could build a stadium, the recreational use statute provides for that, because I presume if your building a stadium you're going to be charging an entrance fee, and...

O'NEILL: But if you didn't.

WADE: If you didn't charge an entrance fee, then perhaps you could do that depending upon what activities you're going to be engaged in the stadium. Obviously having a stadium in and of itself may not be recreation. But if you're going to have perhaps free concerts that are held on some sort of pavilion or something along those lines, I think that that may in fact fall within recreation. What we would have to do is look to what does the statute provide for? What does the statute contemplate? What are the purposes that the legislature intended to achieve in setting up the recreational use statute?

O'NEILL: Well if we were to find that the statute is worded such that it appears as though it wants landowners to open up their property for people to enjoy the property itself, the outdoors, nature, things like that, how does that square with someone erecting a stadium or something like that?

WADE: Looking at 75.001(2) defining premises, it talks about premises for purposes of the recreational use statute, including not just the land in its raw form, but also including buildings, structures, equipment, facilities, and it's not just equipment that's attached to the land, but also equipment that is located on the land. So it's not completely outside the realm of possibility that the legislature did in fact contemplate that there would be some sort of structure on the land that would be used in the course of recreating and enjoying the outdoors and the land and engaging in activities associated with the hunting, fishing, hiking, things of that sort.

O'NEILL: If the premises definition were not in there, would your answer be different?

WADE: It would not be different because - Yes. It would be different, but I don't think that it would be dramatically different simply because what you also have to do is you have to look at the code construction act and what it says about terms, such as recreation are used within the statute. The recreational use statute does not provide a confining definition. In fact it doesn't actually define recreation. It says recreation means activities such as, and then it sets out the list. Under the code construction act, when you've got words that have an ordinary meaning that are not given some odd definition by the legislature, you have to consider what their ordinary meaning is, what are they commonly understood to mean by people of ordinary intelligence. And so if those things fall within the ordinary meaning of recreation, then I think that you could include. It would be more expansive as opposed to more rigid. And just limits to those things that are _____ in the statute.

ENOCH: If we decide that it's not the original intent of the person going on the property on what they are doing that decides, but in fact the activity that they are engaged in at the time, does that alter the outcome of this because she was sitting on a swing, or are we still confronted with the fact that she was sitting on the swing as a spectator as opposed to sitting on the swing as a swinger?

WADE: If you take the approach that you look at what the person is doing at the moment to dictate whether or not the recreational use statute applies, I think you in effect get the recreational use statute. And you also don't carry out what I think is the language of the statute, which talks about looking at what the landowner granted the person permission to do when they entered the property. It takes it back temporarily to the time when you enter the property. And then the other problem that you get into is, well according to the plaintiff she says she wasn't in fact swinging. She was just sitting on the swing. And so how do you make this a recreational use statute if that's the test that you apply and you have to consider well was she at 90 degree angle, or had she swung a little bit.

So what I think that the way that the test has to work is if you look at it we're not asking the court to look at what she was doing at the moment, but again to go back to what the landowner granted her use to do when she entered the property. If you look at what she was doing at the moment of her injury and you consider the cases that have been decided on this: Kaufman Spencer, Martinez, they would say that swinging is a recreation within the meaning of the recreational use statute, and so summary judgment would have been appropriate in any event under

that scenario.

ENOCH: But your position is that the way you look at the statute is what was the intent of the landowner when they opened it up as opposed to the intent of the person who came on the property, or in fact the activity that the person was engaged in on the property?

WADE: I don't think that the inquiry can completely ignore the activity the person was engaged in at the time of their injury. Because there are going to be some circumstances where they are going to be engaged in some activity and there is going to be a question about whether or not that was activity that the landowner contemplated that they would engage in at the time they entered onto the property. But in a circumstance where you have a landowner opening up their property and the land is equipped with a swing set, I think you could certainly say that it was contemplated by the landowner when they granted permission to this person to come onto the land, that they were going to engage in the activities for which the land was equipped. If that included softball, then softball. If that included swinging, then swinging. If it included a teeter totter, then teeter tottering or barbequing. Or if there is a pond or a tank there, that that included fishing. And the landowner ought not be limited to well this is the single thing that they came in here for, because typically it doesn't work that way and that's not necessarily consistent with what the legislature intended.

The legislature didn't say we only want people to open up their land for particular things. They want people to go on to land and recreate and again recreation _____ involves engaging in more than one single activity, but doing a number of things that are coupled together. So that if you look at going back to that point in time, what did the landowner contemplate the land was going to be used for? Well if he got someone who goes onto land and may - there is a tank on the land and they erect a rope from a tree and they are swinging into a tank and it's too shallow and they get injured that way. Well was that recreation as it was contemplated by the landowner? You are probably going to have a fact question there.

The ruling as rendered by the 10th CA, I think, it's completely at odds with the recreational use statute, because as worded it's not consistent with the express language of the statute. It discourages rather than encourages landowners to open their land up for use. And also, I think, as worded, at least some are arbitrary and inconsistent results because if you do focus on either what the person was doing at the moment, or what their intent was, they may go onto the property and only have a single purpose in mind, you're going to end with people who are very similarly situated ending up with different standards of care owed to them potentially by the very same landowner. And so for that reason, I think that the ruling by the court is untenable.

The plaintiffs in this case relied upon a S. Dakota case. In fact that's what the 10th CA cited in issuing its decision saying that softball was not a recreational activity. That case ought not be relied upon. And it's distinguishable in a couple of important respects. First of all, their recreational use statute specifically relates to land. It did not have the same definition that the Texas statute includes, which is premises, which includes equipment, not just equipment that's attached to the property but equipment that is located on the property. And the S. Dakota court

expressly rejected an Ohio court that found that softball was recreation, because according to the S. Dakota court their definition for land was different than the premises definition that is similar to the one that we've got in this case. So I think that's one reason that the S. Dakota court should not have been relied upon. The second point that needs to be made is the S. Dakota court said that we follow the rule that since this is a statute that operates in derogation of that we have got to strictly construe our statute. So they opted to do that and said there is nothing in here about softball or summer sports, so we're going to reject that.

The code construction act specifically provides in ch. 312 that we don't apply that rule. The code construction act expressly rejects the premise that statutes that operate in derogation of the common law ought to be narrowly construed. In fact, it says that our statutes ought to be liberally construed. And if you give a liberal construction, frankly I don't think you even have to get a liberal construction to the statute, you give a meaning to it that gives it its common and ordinary meaning, meaning that it's understood by a person of ordinary intelligence. You ask a person of ordinary intelligence in Texas whether or not softball constitutes recreation, and the answer to that question is going to be yes.

In terms of the test that has to be applied (I'm going back tot he question that question that you asked) we're not suggesting to this court that the court focus exclusively on what the landowner had in mind or limit it to only the equipment that's on there. There is not going to be a bright line test that applies in every situation. It is going to be somewhat fact specific.

BAKER: Isn't it the legislature that either limited or expanded the uses that may be covered as opposed to the landowner having some intent of either limited or otherwise the way the statute is worded?

WADE: If the landowner has intent of how the property is going to be used that does not fall within the definition of recreation, then they don't get the benefit of the recreational use statute.

BAKER: The first part of it says if the landowner opens his or her property for recreation. Then it says their liability is limited to 3 things. Then it says however, but we're going to tell you what recreation means and gives a list. The legislature gives us the list of what recreation means in the context of the statute.

WADE: I don't think that the legislature did strictly define what recreation means.

BAKER: But that's what this case is all about. What they said in there they thought it was, and what we're arguing about whether something is within that list or not within that list.

WADE: I don't think we're arguing about whether or not something is within that list. It's clear that softball is not within that list. What we're arguing about is what recreation means. What the statute includes is recreation means activities such as, and it includes a list that is not

exclusive and is not exhaustive. If they intended to limit it just to those things they would have said recreation means and gotten rid of the latter part of that phrase.

BAKER: Basically you would ask our court to follow the Martinez v. Harris Co case?

WADE: To the extent that the Martinez court found that swinging was recreation, and also more importantly found that that list is not an exclusive list. That's not the universe of things that constitute recreation.

There have been two cases decided more recently. One of them interestingly is by the 10th CA, Fry v. City of Waco. And in that case, the 10th CA implicitly found that swinging was recreation. That involved a youngster who got hit in the head with a swing that didn't have a bumper on it. And in that case it was determined that the summary judgment in favor of the City of Waco was appropriate. And that's cited at 50 S.W.3d 645.

HANKINSON: Would you agree though that the types of activities that are mentioned, the such as, have similar characteristics in terms of being outdoor recreational activities as opposed to organizational sports? I mean hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, cave explorations, water skiing and other water sports certainly are different in nature than playing softball, football or basketball.

WADE: I would say that there are things that these have in common and then there are many things that they do not have in common. Picnicking, as you frequently see that coupled with - and I can't imagine that the legislature was thinking...

HANKINSON: The point being that the list, the such as, the list must have some meaning otherwise the legislature would have just not given a definition. It could have just said recreation. And we know from a subsequent amendment that they added any other activity associated with enjoying nature or the outdoors, which to me also characterizes everything that is on the list in 1996. So how are we going to give meaning to that list if in fact there are no limits to it and anything we do for recreation then becomes part of the definition.

WADE: The purpose for the list I would submit to the court is to make sure that certain things that a person might not ordinarily think of as recreation, such as cave exploration, or such as birdwatching are in fact included.

HANKINSON: Because I'm a birdwatcher, I consider that to be recreation. I mean that's one of the things I do for fun and I do think that people that explore caves consider that to be the case as well. But they clearly are activities associated with the outdoors or nature in someway. They don't include organizational sports.

WADE: They do not. But the amendment that was added in 1997, any other activity such as enjoying nature or the outdoors, I mean certainly softball falls with that. And I think that the

intent of that amendment was not to limit...

HANKINSON: You may play softball outdoors, but it's not generally - when we talk about outdoor sport, we're talking about things like typically hunting and fishing and those kinds of things. Things that have you out enjoying nature in someway. I mean my point is is that you say it's this such as rather than an inclusive list, and I agree, and yet there seems to be common characteristics of everything on the list, and softball would not fall within those particular characteristics.

WADE: With cave explorations, is that something that you do outdoors in enjoying nature? I guess it depends upon who you ask. Softball, is that something that you do outdoors? Perhaps the focus is not enjoying nature, but that is something that's certainly participated in in Texas, in Texas summers that involves enjoying the outdoors. Enjoying the fresh air.

HANKINSON: If you play basketball outside it's covered, but if you play basketball in a gym it's not?

WADE: I think that that may be correct.

O'NEILL: But you would say in a gym it would be covered because that's a structure on the premises?

WADE: No, I would not say that it would be covered.

O'NEILL: Maybe I misunderstood. Because when I had asked about if a stadium were built or something and I thought your answer was premises under this statute that makes it unique is defined to included buildings and structures. So it would seem to me with that premise that your answer to J. Hankinson's question would be it wouldn't matter whether the basketball was indoors or outdoors under the statute.

WADE: No. I'm sorry. I do think that it matters. The fact that a stadium is built does not necessarily in the example that I was thinking of is, in the city of Waco they have an outdoor pavilion built which they have concerts that are free to the public and people bring picnics and things like that, and they also enjoy at the pavilion various plays and things of that sort. And I think that just because those are taking place in, not a stadium as you termed it, but a pavilion, I don't think that those things would necessarily be excluded from the definition of recreation. But I do not think that basketball that's played indoors falls within the ambit of the recreational use statute.

ENOCH: But hockey might under the statute?

WADE: Hockey does...

ENOCH: Because you've got a big ice rink hockey might be covered?

WADE: I think that's certainly under the...

ENOCH: In a parking lot maybe not?

WADE: I'm not sure.

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RESPONDENT

ENOCH: Mr. Levy, is softball such as water sports?

LEVY: No it is not. The such as language in the statute at the time this case or the facts given rise to this case came into being in 1996, the statute included such as language. Such as picking berries or flowers. Such as rock climbing, which is an outdoor activity. Such as building a snowman up in the panhandle. Such as sleigh riding. Softball is a sport. It is not an activity that even remotely falls within the list.

O'NEILL: Do we look at softball or do we look at the swing set? Let's presume that we look at what she was engaged in at the time she was injured. And I realize she was spectating a sport, but she was also on a swing. So let's presume that we're talking about the activity being swinging.

LEVY: In answer to your full question, the statute reads entering on the premises.

O'NEILL: I understand. But presume with me if you will that the test would be rather than purpose that you entered, the activity you are engaged in at the time.

LEVY: I believe that the activity you engage in at the time is a factor to be considered both because I think it is evidentiary as why you entered the premises, and I also believe totally consistent with premises liability law generally that you can have while on the premises such a substantial diversion from the reason you first entered the premises so that in fact you do focus on the activity. For example, assume your dog is lost, you go on a premises to find your dog. That is not recreation by any stretch of the imagination. But you find your dog while you are on the premises, you begin to engage in fun activity and stay with the dog. I think at that point focusing on that activity because it is such a significant diversion. It's not a momentary change...

OWEN: What is she was on the swing set sitting there as a spectator and there was a little girl swinging next to her and the bar at the top at the top had broken, they both fall onto the ground. One could recover and the other could not under your scenario?

LEVY: I absolutely think that is appropriate under the statute. This case came to the court following summary judgment. The reality is, it is not just where she was at, whether it be the

bleachers on the ground or on the swing. The activity that she was engaged in for purposes of the record and what's before this court clearly indicates that she sat on the swing set because the bleachers were full, had ants on them, to watch the activity being a softball game. I think if in fact at the time recreation did include swinging, then the young lady that's swinging that is injured in fact would not be covered under the statute. But we must remember that in this particular case, the grant of permission to enter these premises was for an organized activity arranged by a sponsor, shown in the record, that a fee was supposed to have been paid (and I guess there's a debate whether one was or was not paid) where organized activity takes place. And if you look at that organized activity, 1) clearly the statute doesn't speak to an organized competitive sport or softball, but none of the activities listed in the statute are organized or competitive team sports.

O'NEILL: Are you conceding that if the activity we focus on is swinging that is covered by the statute?

LEVY: No. At the time this was issued, I think the analysis needs to be thus and thus. I believe the statute is clearly more expansive than the list. I don't debate that. I think that's correct by its wording. I think the questions becomes then is swinging something traditionally done in the outdoors? Arguably it is. You can swing by putting a swing up on a tree and swing that way. And so since the statute includes structures, I believe that actually the activity of swinging could come within the purview of the statute.

But in terms of making what I would consider to be a star wars type leap to competitive sports in this case, such as softball, none of the activities in the statute are structured. None of them require score keepers, coaches or uniforms. None of them require that they begin at a set time, in a set place or that they are governed by an extensive set of rules. None of them involve enjoyment or for softball for example does not truly involve the enjoyment of the outdoors.

O'NEILL: How do you square the hockey amendment? That makes no sense to me.

LEVY: I think it makes less sense when you look at the fact that is includes municipalities, but not everyone else. I think that when you look at that what it basically says is, I think those are some potentially more inherently dangerous activities. They only include indoor things by the amendment. And specifically I think perhaps the legislature was of the impression that indoor activities would not otherwise be covered, which is consistent with what's the case in certain other states, but as well the legislature interestingly required that the municipality post a very substantial disclaimer for those particular activities in addition to including those activities as recreation.

But when you look at the actual issue of softball, or in this particular case in 1996, a competitive team sport, the only way you get to what happened in this case is to say that that list is surplusage. It has absolutely no meaning whatsoever. In which case the legislature clearly was wasting its time by including things the next year as specific as bird watching when they had included nature study. And back in 1989 they included cave exploration when they included other

activities. There is nothing at all that indicates that this whole complete other category either being softball, or more specifically to this case being the actual organized activity that took place on this premise should be included.

OWEN: So a pickup game of softball after a picnic that's one thing, but organized softball is something different?

LEVY: I think that focusing on the word softball may not be as appropriate as having a catch, throwing the ball around, having a bat and ball practice. I do think that the court may need to make a distinction between an organized activity with other teams and groups if the court wants to make the jump to sports. I believe the legislature has not included that in the definition and in the 1997 amendment by talking about enjoying nature and the outdoors. And nature and the outdoors is very consistent as J. Hankinson pointed out with the other activities on that list.

OWEN: So in my example of a little girl on the swing would be barred by the statute but not the spectator?

LEVY: If the court goes to the point of saying that because a swing, and swinging is something that traditionally involved just enjoying nature, and the fact that it's on an organized swing set is something that doesn't make the distinction, then yes, that little girl wouldn't recover. But I do think the court should consider this. The recreational use statutes dating back to about 1965 with this model act came about because the concern was opening up additional lands for recreation. And it would be unfair to landowners to have to police these wide expanses of land to include those expanses of land in terms of maintaining them, inspecting them...

O'NEILL: Where do we find that? I hear you. But where do we find that purpose written or stated?

LEVY: I don't believe the limited Texas cases that focus solely on the activity...

O'NEILL: You said there was a national act.

LEVY: There is a model act that's found in general model acts back in about 1965 or 1968, which is actually referenced in a case out of Arizona. It's Herman v. City of Tucson, 4 P3d 973, and also in Lindville v. City of Jamesville, 516 N.W.2d 427. And also the Reddinger case which I don't have the cite.

O'NEILL: Does the model act have the same premises definition or land definition?

LEVY: The model act was more narrow. And only 13 states to my recollection adopted the model act, although 48 states I think now have a recreational use statute. That clearly was - it said hunting and certain other things, and I think it may have said any other recreational purpose. The Texas act although it has more words in it, I don't believe is necessarily even as broad

as the model act, but I don't want to just speak out of term.

O'NEILL: But does the model act express the purpose as you have just stated that it is intended for landowners with big properties not to have to police them for outdoor nature sort of activities?

LEVY: No. What I'm speaking to is the model act I believe said that the purpose behind it was to open large acreages of private land for public use without having to invest public resources for the acquisition of those lands.

OWEN: But that's basically what we said in City of Dallas. It wasn't intended to apply to governmental entities and the legislature promptly came back and amended the statute...

LEVY: Yes. Came back. And so I think the legislature shows that they can make amendments that are necessary. But I think the issues is, when you start dealing with something for example an organized activity that takes place in a ballfield, and back to your question that has to do with a swing set, I think that in effect if you broaden the act to include things not directly mentioned that involve nature or the outdoors. I agree it's expansive in that respect. That what you are doing is giving cities for example a reason to turn the blind eye towards any kind of routine maintenance of any of the equipment that they put up, which I think has a terribly deleterious effect on the using public particularly...

PHILLIPS: What do we do with the words such as?

LEVY: I think the such as is important judge. As I say, for example, and I think rock climbing is a perfect example, that is clearly something you do in nature, although more modern day you have these indoor rock climbing things. But I think rock climbing would be included, because that is such as something you do outdoors even before the 1997 amendment.

PHILLIPS: If I go out with a kid and throw a baseball that is probably such as. But if 5 other people come up and we get enough people to sort of have a game, then that's over the line. Similarly if this woman had decided to swing a little bit she would be covered, but if she is sitting still she's not.

LEVY: Not necessarily. I think you've raised two questions that I don't think are an issue, but I would like to address them. One is, I think the court if they want to in this case can delve into the idea of at what point does sort of throwing around a baseball transcend into actually participating in a sport? That's not this case. This case involved an organized sports activity. I also think that the court needs to consider this momentary diversion. For example. Let's say you enter to have a picnic, but you decide to use the restroom, and in using the restroom something bad happens that isn't gross negligence or wonting or willful. I would suggest to the court that that is protected, that the landowner is protected when someone takes a momentary diversion to go to the restroom. I think if there is a complete change, and what I would submit to the court is, have the

tournament been over I don't think there's any serious debate that this woman remained on the premises because she had an interest in the result of the tournament, and she remained on the premises to watch the game because they might have received a trophy. And I believe that the record indicates she was sitting on the swing as a spectator. If the tournament was over, the game was concluded and she decided to stay on alone or with her husband, and at that point began swinging or they took out and laid a picnic on the ground and stayed, I think at that point it is not a momentary or other short term diversion. And I think that the statute would apply to that particular activity.

PHILLIPS: Any kind of line drawing on this is going to lead to some messy facts. Like if you start playing competitive horseshoes after your picnic that may be a sport, but if you...

LEVY: But I think that that's what the courts wrestle with all the time in terms for example if you enter the property as an invitee but you exceed the scope of your invitation, you could become a trespasser. That's a fact question. I think in this case it does involve looking at facts. I don't believe that the subjective intent of the party coming on the property is what the court should focus on. I also don't believe that what the landowners grant of permission is ought to be significant, because in that case if someone goes into a public area to find a lost dog, if a police officer is chasing a bad guy and gets hurt, the fact is if the land was open because of a grant of permission that doesn't make any sense. Or a person delivering something to the concession stand. I think that the focus ought to be on the nature and purpose of entering the property, and then focusing on the activity both to see if the entrance onto the property is legitimately what someone says it is, or to see if the purpose changed significantly enough so that in fact you basically don't just look at the reason they initially came. I think the opposite is more problematic for the court and is not directly here. And that is when you go on the land for purposes that would clearly be excluded, for a picnic, and then after the picnic for example you're taken ill and something else happens long after your purpose for the picnic ended, I think that's going to be potentially more problematic.

PHILLIPS: I'm trying to get back to the purpose of this act. You're talking about now deleterious it would be if cities were exempted from keeping their equipment up. But the swing set clearly they can let it get in bad shape under this as long as people are swinging on it.

LEVY: If in fact the court says swinging is included.

PHILLIPS: And it would be easier to keep a swing set in good order - I mean you know more of what the nature of the injury would be and how to prevent those than prevent football injuries or baseball injuries.

LEVY: But I also don't think that the purpose of the statute is prohibiting injuries per se. If the purpose of the statute is to open up the land, which I believe it is, one of the parade of horribles is well gosh then public areas wouldn't allow people to have these organized team activities. And I think the reality is 1) the protection in part can be to have these folks sign a waiver; and 2) to require as the legislature has chosen to do with hockey and whatever, to post a sign. There are other protections.

The other thing is, that to the extent this property is used as an activity to generate a fee, and after all this was the Bellmeade softball complex. This was not just some run of the mill park. They built the place. Yes there is a rundown concession stand there and there are some bathrooms and a couple of swing sets, but the purpose for this thing existing was in fact to play softball. I believe the record will show there were two softball fields.

I do want to address the spectator issue, because I don't believe that the statute includes being a spectator, which I think is another issue to be addressed by the court if they focus on what this particular woman was doing at the time.

OWEN: That's not recreational outdoors to sit out on a pretty sunny day on bleachers and watch a...

LEVY: I think frankly, that if you look at statutes in other states, there are statutes in other states for example in the Washington, 965 N.W.2d 1112, that the statute specifically included not only the activity of recreation, but viewing the activity. All activities that are in this list involve some type of direct participation by the person doing it. Admittedly some require more physical exertion than others. But the legislature could have included viewing or watching and they did not.

Birdwatching involves the active involvement of the bird watcher. It doesn't involve watching someone else doing birdwatching. Birdwatching, even though it may not be a high physical exertion activity, accept if you're chasing birds...

HANKINSON: You have to hide. You have to...

LEVY: But it is an active involvement by the watcher. It is not a function of watching the birdwatcher.

OWEN: So if I'm picnicking and I've finished my meal and I turn around to watch the kids playing softball next to me, then where am I?

LEVY: I think where you're at is then you look at the actual language of the statute, which is you entered the premises for the purposes of picnicking...

JEFFERSON: What if you're sitting on a swing looking at a bird?

LEVY: That's why I think the statute reads the way it does, is the reason you entered the property. I don't have any doubt that there will be some...

BAKER: If I understand your theory every case that might involve this statute, you have to know as you cross the boundary line what the intent to come on the property is, and you judge every case from that point forward.

LEVY: No.

BAKER: But the way that the CA decided this case, and I think somewhat interesting they never said a word about the swing and the injury, it's all about the softball thing. And you're espousing as I understand it the theory that the CA adopted to decide this case.

LEVY: No. The brief to this court by the petitioner specifically got into the idea that somehow this case was decided based on the subjective intent of the entrant. My belief is that the court should apply an objective test to look at the nature and purpose and consequence of why someone came on the property and that in fact why they were on the property is certainly pertinent. I don't believe the subjective intent as they cross that threshold is pertinent...

BAKER: Well why wouldn't a better rule be to focus on the objective facts of what caused the injury in each case rather than having to go through the mental _____ facts that you did of well it might have been a temporary stop of this activity and then you sat on the swing and then you went to the teeter-totter and that's where you got hurt. But you came on to play softball, so all of that makes no difference.

LEVY: I think that each case basically does involve a factual inquiry.

BAKER: Would you agree or disagree that the CA made the wrong factual inquiry in this case?

LEVY: I believe that the CA did not go far enough in discussing the background of how the case was presented to them. Although they made passing reference to the fact that this woman was at the premises to enjoy softball and remained on the property after that time because she continued to have an interest in the tournament, I don't believe they discussed, although I did brief it, that if in fact the statute included the specific activity or the focus turned to the activity that then in this case the activity she was engaged in for purpose of this record was in fact the activity of being a spectator. But the easy answer to your question is the statute needs to be applied based on its words. And for whatever the reason the legislature has said that you focus on the permission to enter the property. And so to turn around and basically only look at the activity that caused the injury I believe would be inconsistent with the way that the statute was actually written.

I do believe that the activity is important for the reasons I've stated before.

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REBUTTAL

WADE: If you consider the scenario where you've got one person who entered for swinging and one person who entered for softball and they fall off the swing at the same time, one's at a different standard than the other, you end up with an absurd result. And the code construction act specifically says that the statute should not be interpreted to lead to a third arbitrary result. And

that's why you have to look at what was contemplated, what was the permission granted for, and in doing that you look at how is the property equipped.

ENOCH: The city goes out and builds a football stadium for all the highschool to come to and play their football games. And so periodically hordes of people show up to watch the football game and they leave watching the football game. Is it your position that this statute is written broadly enough to include injuries that result to the people who have gone on the property to watch the football game?

WADE: No. Under that fact scenario.

ENOCH: If I build a football stadium where hordes of people are going to come and to keep their children entertained I put a swing set over in one corner, is the person who gets injured sitting on the swings covered when wind comes up and blows a wall over from the stadium, but not the person sitting in the stadium who gets injured by the same thing that injures the person who was sitting on the swing watching the game?

WADE: I think that the landowner gets the benefit of the recreational use statute for the person who's injured on the swing, but not the person who is in the stadium.

ENOCH: And what would be the distinction? What could we say is the distinction between those two?

WADE: I think the distinction between those two is that if you have got a stadium where people are coming on _____ that in fact that probably is not an activity such as hunting, camping, birdwatching, etc. Although there's going to be some gradation in there, because with respect to whether or not swimming is a competitive team sport or whether or not or is like a competitive team sport well certainly it could be engaged in like a competitive team sport. Fishing is certainly engaged in as a competitive team sport in the State of Texas. And I think if you're in a fishing tournament you're certainly going to be covered under the plain language of the statute.

Water sports are included. Water volleyball, water polo under the plain language of the statute you are certainly going to be covered in that circumstance. So I don't think that the legislature necessarily intended to exclude competitive team sports or to exclude softball or to necessarily include a stadium where people come to watch those things. But under the fact scenarios you presented to me, although that's not my case, I would have a hard time saying yes that is recreation within the meaning of the recreational use statute.

But where you've got the child coming in, the landowner contemplates that those swings are going to be used for swinging for that limited recreational purpose whereas perhaps the stadium is going to be, so that in that circumstance you do look at not just what the landowner granted them permission to do, but that's where you also take a look at what is the activity that they were engaged in. But you don't look at the activity they are engaged in at the moment of injury to

the exclusion of everything else, which the court did in this case.

O'NEILL: Does it matter if a fee is paid?

WADE: Not for a governmental entity it does not. I think that 75.003(c) says that except for governmental entities you do look at whether or not a person pays a fee. So although I think that was referenced by the respondent in this case that's not determinative at all for purposes of the court's decision here.

O'NEILL: If we were to interpret this the way that you have asked us to interpret it it would wipe out the tort claims act?

WADE: No, I do not believe it would wipe out the tort claims act. Because you always start with the tort claims act, and look at whether or not there is a waiver of immunity, whether or not tangible personal property is used. And if that's not the case, then you don't even get to the recreational use statute.

O'NEILL: But if it is the case then the recreational statute wipes it out.

WADE: The recreational use statute imposes a lesser standard of care by the governmental entity than they would be subjective to under the tort claims act.

ENOCH: If it's a premises liability claim there would be no standard of care.

WADE: That's right. No duty owed to a trespasser.