

# IN THE SUPREME COURT OF TEXAS

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No. 96-0123  
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CITY OF AMARILLO, PETITIONER

v.

ERICA SHAE MARTIN, RESPONDENT

=====  
ON APPLICATION FOR WRIT OF ERROR TO THE  
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS  
=====

**Argued on October 9, 1997**

JUSTICE ENOCH delivered the opinion of the Court, in which JUSTICE GONZALEZ, JUSTICE HECHT, JUSTICE OWEN, JUSTICE BAKER, JUSTICE ABBOTT, and JUSTICE HANKINSON join.

JUSTICE SPECTOR filed a dissenting opinion, in which CHIEF JUSTICE PHILLIPS joined.

Firefighter Brent Clark collided with two vehicles while driving a City of Amarillo fire truck on an emergency call. We must decide whether the City, Clark's employer, may be liable to Erica Martin, the driver of one of the other vehicles, for Clark's simple negligence. The trial court said yes. So did the court of appeals. 912 S.W.2d 349. However, we say no.

## **I. Facts**

Clark was driving the fire truck with warning lights and sirens operating when he approached an intersection. He reduced speed, but drove through the intersection against a red light. He then collided with two vehicles crossing the intersection, one of them Martin's. Martin sued the City for property damage, alleging that Clark negligently failed to maintain a proper lookout, to maintain a safe stopping distance, and to yield the right of way.

Following a bench trial, the trial court rendered judgment for Martin based on a conclusion of law that Clark had operated the fire truck negligently. The City appealed, arguing that emergency personnel are liable only for reckless conduct, and therefore, the City was entitled to immunity because the trial court found that Clark "was not acting in reckless disregard for the safety of others."

The court of appeals affirmed, holding on rehearing that emergency personnel are liable for acts of mere negligence, and, therefore, that the trial court did not err. 912 S.W.2d at 353.

## II. Texas Tort Claims Act

Under the common-law doctrine of sovereign immunity, a municipality is immune from tort liability for its own acts or the acts of its agents unless the Texas Tort Claims Act waives immunity. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994). The Tort Claims Act waives sovereign immunity for:

- (1) property damage, personal injury, and death proximately caused by the wrongful act or omission *or the negligence* of an employee acting within his scope of employment if:
  - (A) the property damage, personal injury or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
  - (B) the employee would be personally liable to the claimant according to Texas law . . . .

TEX. CIV. PRAC. & REM. CODE § 101.021 (emphasis added). But, the Tort Claims Act includes an exception to this waiver:

This chapter does not apply to a claim arising:

- (2) from the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such a law or ordinance, if the action is [not] taken with conscious indifference or reckless disregard for the safety of others.<sup>1</sup>

*Id.* § 101.055.

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<sup>1</sup> The final clause of subsection 2, imposing liability for recklessness as the default in case no other law or ordinance applies to the emergency action, figured prominently in the court of appeals' first opinion. 912 S.W.2d 349. As enacted in 1987, this clause actually provided that, in the absence of an emergency-action law or ordinance, sovereign immunity is retained "if the action is taken with conscious indifference or reckless disregard for the safety of others." Act of June 3, 1987, 70th Leg., 1st C.S., ch. 2, § 3.05, 1987 Tex. Gen. Laws 51 (amended 1995). The original court of appeals opinion took this language literally and held that sovereign immunity was waived because of the trial court conclusion that Clark had not been reckless. This literal reading of the statute is patently absurd. The Legislature could not have intended to protect reckless driving. *See Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 135 (Tex. 1994) (Hecht, J., concurring) ("[I]n some circumstances, words, no matter how plain, will not be construed to cause a result the Legislature almost certainly could not have intended."); *id.* at 137 (Enoch, J., dissenting) ("[U]nless application of a legislative enactment produces an absurd result, I do not agree that we should simply rewrite a provision in order to achieve what we perceive to be the true intent of the legislature.") (emphasis added). The Legislature remedied the error in 1995 by amending the clause to retain sovereign immunity "if the action is *not* taken with conscious indifference or reckless disregard for the safety of others." *See* Act of May 9, 1995, 74th Leg., ch. 139, § 1, 1995 Tex. Gen. Laws 982. However, the pre-amendment version governs this case, so we have inserted the word "not" in brackets to indicate the obvious legislative intent.

At the outset, we note that the substantive law in effect at the time of the accident controls. *See, e.g., Sadler v. Sadler*, 769 S.W.2d 886, 886-87 (Tex. 1989) (per curiam). Under emergency conditions, an emergency vehicle operator is entitled to various privileges. *See* TEX. REV. CIV. STAT. art. 6701d, § 24(b), *repealed by* Act of May 1, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025 (current version at TEX. TRANSP. CODE § 546.001-.005). However, these privileges do “not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.” *Id.* § 24(e) (current version at TEX. TRANSP. CODE § 546.005). In another section of article 6701d dealing with the duties of civilian drivers, the Legislature repeated that it did not intend “to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.” *Id.* § 75(b) (current version at TEX. TRANSP. CODE § 545.156(b)).

Because article 6701d controls Clark’s action as an emergency vehicle operator in an emergency situation, we look to see if Clark complied with that article. Specifically, we review section 24(e) of article 6701d.

### **III. Interpretation of Article 6701d, Section 24(e)**

The court of appeals is not alone in struggling to understand section 24(e). The Legislature adopted section 24(e) from the Uniform Vehicle Code. Many other states have drafted statutes from the same model, and their courts have also struggled to understand what it means to say that an emergency vehicle driver should exercise due regard for others while responding to an emergency, but must face the consequences of reckless disregard for others.

Several courts have agreed with the court of appeals that provisions such as section 24(e) impose liability for mere negligence. *See Doran v. City of Madison*, 519 So. 2d 1308, 1312-13 (Ala. 1988); *Estate of Aten v. City of Tucson*, 817 P.2d 951, 955 (Ariz. Ct. App. 1991); *City of Little Rock v. Weber*, 767 S.W.2d 529, 533 (Ark. 1989); *Barnes v. Toppin*, 482 A.2d 749, 755 (Del. 1984); *City of Baltimore v. Fire Ins. Salvage Corps*, 148 A.2d 444, 447 (Md. 1959); *City of Kalamazoo v. Priest*,

49 N.W.2d 52, 54 (Mich. 1951); *Cairl v. City of St. Paul*, 268 N.W.2d 908, 912 (Minn. 1978); *Wright v. City of Knoxville*, 898 S.W.2d 177, 179-80 (Tenn. 1995); *Estate of Cavanaugh v. Andrade*, 550 N.W.2d 103, 114-15 (Wis. 1996).

Many other courts also have imposed liability for mere negligence, but placed great emphasis on the circumstances of emergency action. See *Rutherford v. Alaska*, 605 P.2d 16, 18-19 & n.5 (Alaska 1979); *Torres v. City of Los Angeles*, 372 P.2d 906, 916 (Cal. 1962); *Bouhl v. Smith*, 475 N.E.2d 244, 246-47 (Ill. App. Ct. 1985); *Belding v. Town of New Whiteland*, 622 N.E.2d 1291, 1293 (Ind. 1993); *Thornton v. Shore*, 666 P.2d 655, 661 (Kan. 1983); *Stenberg v. Neel*, 613 P.2d 1007, 1010 (Mont. 1980); *Lee v. City of Omaha*, 307 N.W.2d 800, 803 (Neb. 1981); *Fielder v. Jenkins*, 644 A.2d 666, 668 (N.J. Super. Ct. App. Div. 1994); *Siburg v. Johnson*, 439 P.2d 865, 870 (Or. 1968); *Brown v. Spokane County Fire Protection Dist. No. 1*, 668 P.2d 571, 574-76 (Wash. 1983). Of course, a negligence inquiry always considers what a reasonably prudent person would do under the same or similar circumstances. See, e.g., *St. John v. Pope*, 901 S.W.2d 420, 423 (Tex. 1995). Therefore, the emphasis these cases place on the emergency circumstances seems to indicate an intent to create a modified, heightened negligence threshold.

But, courts in Iowa, Louisiana, New York, Rhode Island, and Vermont have held that provisions such as section 24(e) only waive immunity for recklessness. See *Schatz v. Cutler*, 395 F. Supp. 271, 274 (D. Vt. 1975) (interpreting the Vermont statute as imposing a recklessness, or “aggravated negligence,” standard); *Morris v. Leaf*, 534 N.W.2d 388, 390 (Iowa 1995) (equating “due regard” with negligence generally, but concluding that it means recklessness in this context); *Smith v. Commercial Union Ins. Co.*, 609 So. 2d 1024, 1027 (La. Ct. App. 1992) (“The driver of an emergency vehicle can only be held liable for negligence to the degree that it constitutes reckless disregard for the safety of others.”); *Saarinen v. Kerr*, 644 N.E.2d 988, 989 (N.Y. 1994); *Roberts v. Kettelle*, 356 A.2d 207, 213-14 (R.I. 1976).

From our inquiry, it is evident that most courts have interpreted provisions such as section 24(e) to impose liability for negligence. However, as noted above, many of the courts

simultaneously established a negligence standard, but went to great lengths to explain that negligence for emergency vehicle operators is not at all comparable to negligence for civilian drivers. *See, e.g., Thornton*, 666 P.2d at 661 (noting that one of the circumstances to be considered in the negligence inquiry is the emergency vehicle operator’s right to assume that other drivers will yield). Ultimately, we fail to see how this modified-negligence inquiry is meaningfully different from the recklessness standard that we adopt today. More particularly, we believe that a recklessness standard provides a better-defined standard than “heightened negligence.”

Furthermore, emergency vehicle operators and their governmental employers, in most states, are immune from suits based on negligence because the employees’ official immunity is waived only for more culpable conduct, such as gross negligence, bad faith, or willful or wanton conduct. *See, e.g., Logue v. Wright*, 392 S.E.2d 235, 237 (Ga. 1990); *Cooper v. Wade*, 554 N.W.2d 919, 923 (Mich. Ct. App. 1996); *Creighton v. Conway*, 937 S.W.2d 247, 250-51 (Mo. Ct. App. 1996); *Canico v. Hurtado*, 676 A.2d 1083, 1085 (N.J. 1996); *Fahnbulleh v. Strahan*, 653 N.E.2d 1186, 1188 (Ohio 1995). Therefore, a substantial majority of states provide some form of immunity barring suit against governmental employers or employees based on negligent operation of emergency vehicles. Whatever form such immunity takes, the underlying policy is the same: to balance the safety of the public with the need for prompt responses to police, fire, and medical emergencies. In light of that need, and the privileges granted to emergency vehicles, we hold that section 24(e) of article 6701d imposes liability for reckless operation of an emergency vehicle in an emergency situation. To recover damages resulting from the emergency operation of an emergency vehicle, a plaintiff must show that the operator has committed an act that the operator knew or should have known posed a high degree of risk of serious injury. *See Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 213-14 (5th ed. 1984) (defining the usual meaning assigned to “recklessness”).

Basic principles of statutory construction disfavor the court of appeals’ holding that the duty of “due regard” imposes liability for mere negligence. First, the court of appeals erred in focusing

on the “due regard” phrase to the almost total exclusion of the “reckless disregard” phrase in the same sentence. Section 24(e) of article 6701d states that the privileges granted in that section do not relieve an emergency vehicle operator of “the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.” TEX. REV. CIV. STAT. art. 6701d, § 24(e). Any construction of this section to impose a standard of care of less than recklessness would make the “reckless disregard” clause ineffectual surplusage.<sup>2</sup> Of course, we will give effect to all the words of a statute and not treat any statutory language as surplusage if possible. *See Chevron Corp. v. Redmon*, 745 S.W.2d 314, 316 (Tex. 1987); *Perkins v. State*, 367 S.W.2d 140, 146 (Tex. 1963). It is entirely reasonable to read section 24(e) as containing both a cautionary warning to emergency vehicle operators to drive with due regard for others, considering the privileges they are granted, but also a statement that these operators will answer in damages for the consequences of their reckless conduct.

Second, the Legislature specifically excluded operation of emergency vehicles in emergency situations from the general waiver of immunity for negligent operation of governmental vehicles. *See* TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.055(2). Were we to construe article 6701d to impose liability generally on emergency vehicle operators for mere negligence, we would render meaningless the portion of section 101.055 that specifically excludes emergency vehicle operators from the waiver of immunity for negligence.

Third, having liability predicated on reckless conduct better serves the public’s interest in minimizing emergency response delays. We agree with the concerns expressed by the New York Court of Appeals in declining to interpret a provision similar to section 24(e) to impose liability for mere negligence:

As a practical matter, use of the undemanding ordinary negligence test—or even the

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<sup>2</sup> The court of appeals considered it significant that section 75 of article 6701d repeats the “due regard” requirement but lacks the “reckless disregard” clause. *See* 912 S.W.2d at 353. Section 75 describes the duties of civilian drivers when approached by emergency vehicles, and therefore speaks to the duties of emergency vehicle operators only by implication. Section 24(e) is specifically directed to emergency vehicle operators and therefore controls. *See Holmes v. Morales*, 924 S.W.2d 920, 923 (Tex. 1996) (“When two sections of an act apply, and one is general and the other is specific, the specific controls.”).

more “flexible” common-law negligence test that is applied in emergency situations—would lead to judicial “second-guessing” of the many split-second decisions that are made in the field under highly pressured conditions. Further, the possibility of incurring civil liability for what amounts to a mere failure of judgment could deter emergency personnel from acting decisively and taking calculated risks in order to save life or property or to apprehend miscreants. The “reckless disregard” test, which requires a showing of more than a momentary judgment lapse, is better suited to the legislative goal of encouraging emergency personnel to act swiftly and resolutely while at the same time protecting the public’s safety to the extent practicable.

*Saarinen*, 644 N.E.2d at 992 (citations omitted). Using recklessness as the threshold for imposing liability is likewise consistent with the policy we announced in *Chambers*, to balance:

“(1) the injustice . . . of subjecting to liability [an emergency vehicle operator] who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good” [with] the rights of bystanders or other innocent parties if [the emergency vehicle operator] acts in *gross disregard* of public safety.

*Chambers*, 883 S.W.2d at 656 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974)) (emphasis added).

We note that this Court has twice cited section 24(e) and discussed only its “due regard” prong, equating it with a negligence standard. *See Chambers*, 883 S.W.2d at 653; *Travis v. City of Mesquite*, 830 S.W.2d 94, 98-99 (Tex. 1992). Our opinion today is consistent with both *Chambers* and *Travis*. We agree that section 24(e) imposes a *duty* to drive with due regard for others by avoiding negligent behavior, but it only imposes *liability* for reckless conduct.<sup>3</sup>

The dissent does not disagree with our conclusion that article 6701d, section 24(e) imposes liability only for reckless conduct. \_\_\_ S.W.2d at \_\_\_. However, the dissent insists that recklessness is not a requisite for liability unless the conduct is specifically enumerated as a privilege in section 24. \_\_\_ S.W.2d at \_\_\_. For all other conduct, the dissent would impose liability for mere negligence. The facts of this case show why the dissent’s position is flawed. Clark, in fact, was proceeding

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<sup>3</sup> One amicus brief in *Chambers* and one supplemental brief on rehearing in *Travis* argued that section 24(e) imposed liability only for reckless conduct. All other arguments in both cases assumed that section 24(e) imposed liability for negligent conduct. In any event, today’s opinion marks the first time that the Court has focused on and considered the meaning of both standards of care in section 24(e) as they relate to the Tort Claims Act’s waiver of sovereign immunity.

through a red light when the accident occurred. Proceeding through a red light is a specifically enumerated privilege of emergency vehicles in emergency situations. *See* TEX. REV. CIV. STAT. art. 6701d, § 24(c)(2) (repealed 1995) (current version at TEX. TRANSP. CODE § 546.001(2)). Therefore, the dissent should conclude that Clark is insulated from liability for any conduct short of recklessness. However, the dissent does not so conclude because Martin simply pleaded that Clark failed to keep a proper lookout rather than that he failed to stop at a red light. Surely, the Legislature did not intend for the availability of the statute’s protection to turn on which words a litigant chooses.

Furthermore, we think that our reading of section 24 better comports with the Legislature’s understanding of the emergency vehicle statute. Courts in other states have looked at the “due regard” clause that was taken from the same model act as section 24 and perfunctorily equated it with negligence. *See, e.g., Wright*, 898 S.W.2d at 180. In 1995, when the Legislature codified section 24 as section 546.005 of the new Transportation Code, it replaced the phrase “due regard”:

This chapter does not relieve the operator of an authorized emergency vehicle from:  
(1) the duty to operate the vehicle with *appropriate regard* for the safety of all persons; or  
(2) the consequences of reckless disregard for the safety of others.

TEX. TRANSP. CODE § 546.005 (emphasis added). The Legislature’s substitution of “appropriate regard” for “due regard” lends credence to our view that the Legislature intended for emergency vehicle operators in emergency situations to be cognizant of public safety, but only intended to impose liability for reckless conduct.

By imposing a double standard for liability, one for emergency vehicle operators in emergency situations and one for civilian drivers, the Legislature has placed a heavier burden on the civilian drivers. Several policy considerations support this heavier burden. First, emergency vehicle operators typically face more exigent circumstances than do civilian drivers. Emergency vehicle operators are charged with protecting the public’s health, safety, and property, and a few minutes or even seconds can make the difference between life and death.

Second, civilian drivers generally have an advantage when it comes to anticipating and

preventing a collision. Under most circumstances, the lights, sirens, and distinctive coloring of an emergency vehicle make it stand out from the others; by contrast, the vehicle with which the emergency vehicle is on course to collide too easily blends in with the other traffic. We are aware of statistical data showing the frequency with which emergency vehicles, particularly police cars in hot pursuit of criminal suspects, are associated with injurious or fatal traffic accidents. *See Travis v. City of Mesquite*, 764 S.W.2d 576, 579 (Tex. App.—Dallas 1989) (Thomas, J., dissenting), *rev'd*, 830 S.W.2d 94 (Tex. 1992). Some judges are influenced by such statistics, *see id.*, and perhaps they are, or should be, part of the legislative mix. But once the Legislature has made its policy choice by enacting the statute, this Court is constrained to interpret the statutory language, not to decide upon and implement its own policy choices based on legislative facts.

Third, emergency v It is unfortunate that some civilian drivers are less than vigilant in abiding by their duties to keep a lookout for and to yield to emergency vehicles, but emergency vehicle operators are entitled to presume that other drivers will respect emergency priorities.

#### **IV. Application and Conclusion**

For Martin to prevail, she must assert *and* establish that she proved that Clark was reckless as a matter of law. Martin has done neither. In light of the trial court's unchallenged conclusion that Clark was not reckless, we reverse the court of appeals' judgment and render judgment for the City.

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Craig T. Enoch  
Justice

Opinion delivered: June 5, 1998