IN THE SUPREME COURT OF TEXAS

NO. 04-0515

STEPHEN F. AUSTIN STATE UNIVERSITY, PETITIONER,

v.

DIANE FLYNN, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TWELFTH DISTRICT OF TEXAS

Argued October 19, 2006

JUSTICE HECHT, joined by JUSTICE WAINWRIGHT and JUSTICE WILLETT, concurring.

Having decided that Stephen F. Austin State University is immune from Diana Flynn's lawsuit because it was not grossly negligent in irrigating its campus the way it did, which is a prerequisite for liability under the Recreational Use Statute,[1] the Court need not consider whether the University was also immune from suit because its conduct fell within the discretionary function exception to the Texas Tort Claims Act's waiver of immunity.[2] The Court nevertheless volunteers that the exception does not apply because "when and where the water was to spray, were operational-

[1] TEX. CIV. PRAC. & REM. CODE §§ 75.001-.004.

[2] *Id.* § 101.056 ("[The Tort Claims Act] does not apply to a claim based on: (1) the failure of a governmental unit to perform an act that the unit is not required by law to perform; or (2) a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.").

or maintenance-level decisions, rather than policy formulation."[3] But suppose the University, for some reason, had made when and where water was to spray a policy matter, and grounds workers had faithfully carried out that policy. The Court's analysis would then except the University's actions from the Act's waiver of immunity because it had exercised its discretion, as a policy matter, to water the way it did. If the government is immune from liability for all policy decisions, it could minimize its liability by making everything policy. The government would be encouraged to make policy on every silly subject imaginable, and the Act's discretionary function exception would swallow most of the waiver. As difficult as it has been "to meaningfully construe and consistently apply" the Act,[4] I would not make matters worse.

The discretionary function exception, like other exceptions in the Act, was taken from the Federal Tort Claims Act.[5] This Court has referred to the exception several times but has never had

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[3] *Ante* at ___.

[4] *Texas Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 591 (Tex. 2001) (Hecht, J., concurring).

[5] *Driskill v. State*, 787 S.W.2d 369, 370 (Tex. 1990) ("The exceptions to the waiver of sovereign immunity contained in the Texas Tort Claims Act are patterned after those contained in the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982 & Supp.1989). Tex. House Interim Comm. to Study Doctrine of Sovereign Immunity, Report to the 61st Leg., 7 (1969) . . . ."). *Compare* 28 U.S.C. § 2680 ("The provisions of [the Federal Tort Claims Act] shall not apply to – (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . . ."), *with* Act of May 14, 1969, 61st Leg., R.S., ch. 292, § 14, 1969 Tex. Gen. Laws 874, 877-878 (codified as TEX. REV. CIV. STAT. ANN art. 6252-19, § 14), *repealed and recodified by* Act of May 17, 1985, 69th Leg., R.S., ch. 959, sec. 9(1), 1985 Tex. Gen. Laws 3242, 3322 ("The provisions of [the Texas Tort Claims Act] shall not apply to: . . . (7) Any claim based upon the failure of a unit of government to perform any act which said unit of government is not required by law to perform. If the law leaves the performance or nonperformance of an act to the discretion of the unit of government, its decision not to do the act, or its failure to make a decision thereon, shall not form the basis for a claim under this Act. . . .").

occasion to analyze it carefully.[6] Texas courts should be guided by the United States Supreme Court's thorough, repeated analysis of the discretionary function exception to the federal statute,[7] but that analysis has been entirely ignored. In this case, the federal exception would not cover the

[6] *See, e.g.*, *State ex rel. State Dep't of Highways and Pub. Transp. v. Gonzalez*, 82 S.W.3d 322, 326 (Tex. 2002) ("Section 101.056 excepts claims based on the State's discretionary policy decisions. For instance, the Act does not waive immunity for decisions about highway design or what types of safety features to install, because these decisions involve the exercise of discretion." (citation omitted)); *County of Cameron v. Brown*, 80 S.W.3d 549, 554 (Tex. 2002) ("But the Act does not waive immunity for discretionary decisions, such as whether and what type of safety features to provide."); *Texas Dep't of Transp. v. Ramirez*, 74 S.W.3d 864, 867 (Tex. 2002) (per curiam) ("However, the median's slope and the lack of safety features, such as barriers or guardrails, reflect discretionary decisions for which TxDOT retains immunity under the Act's discretionary-function exception."); *Texas Dep't of Transp. v. Garza*, 70 S.W.3d 802, 806 (Tex. 2002) ("In other words, the State remains immune from suits arising from its discretionary acts and omissions."); *State v. Miguel*, 2 S.W.3d 249, 250-251 (Tex. 1999) (per curiam) ("Under section 101.056, the State retains its immunity for claims based on its 'decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.' Whether a governmental activity is discretionary is a question of law. The State preserves its immunity for formulating policy because it is a discretionary act. Decisions about highway design and about what type of safety features to install are discretionary policy decisions. A court should not second-guess a governmental unit's decision about the type of marker or safety device that is the most appropriate." (citations omitted)); *State v. Rodriguez*, 985 S.W.2d 83, 85 (Tex. 1999) (per curiam) ("First, under section 101.056, the State preserves its immunity for an act 'if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.' Thus, if the State's action is discretionary, it does not waive its immunity. An act is discretionary if it requires exercising judgment and the law does not mandate performing the act with such precision that nothing is left to discretion or judgment. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994) [a case dealing with official immunity]. Design of any public work, such as a roadway, is a discretionary function involving many policy decisions, and the governmental entity responsible may not be sued for such decisions." (citations omitted)); *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 754 (Tex. 1995) ("In *State v. Terrell*, this Court elaborated on a distinction necessary to analyze governmental liability for policy decisions. 588 S.W.2d 784 (Tex. 1979). Discussing both the police protection and the discretionary powers exemptions to the Tort Claims Act, the Court distinguished between the negligent *formulation* of policy, for which sovereign immunity is preserved, and the negligent *implementation* of policy, for which immunity is waived . . . ."); *Harris County v. Dillard*, 883 S.W.2d 166, 170 (Tex. 1994) (Spector, J., dissenting) ("Prior case law, however, suggests that training and supervision may be discretionary duties for which the County cannot be held liable."); *State v. Hynes*, 865 S.W.2d 943, 944 (Tex. 1993) (per curiam) ("Discretionary acts by the State are not subject to liability."); *State v. Terrell*, 588 S.W.2d 784, 787 (Tex. 1979) ("Section 14(7) excludes liability for all claims based on a government's failure to perform an act when the law leaves performance of the act to the *discretion* of the government. Section 14(7) appears to be broad enough to encompass the exclusion for failure to provide police or fire protection. As we understand the two provisions, the purpose of both is the same: to avoid a judicial review that would question the wisdom of a government's exercise of its discretion in making policy decisions. The interests to be served by these provisions are several – e.g., effective, unfettered performance of officials in making policy decisions and the maintenance of the separation of powers between the executive, legislative, and judicial branches of government.").

[7] *See, e.g.*, *United States v. Gaubert*, 499 U.S. 315 (1991); *Berkovitz v. United States,* 486 U.S. 531 (1988); *United States v. Varig Airlines,* 467 U.S. 797 (1984); *Dalehite v. United States,* 346 U.S. 15 (1953).

University's actions, but not because they were taken at an operational or maintenance level. The Supreme Court has construed the discretionary function exception to the federal waiver of immunity to cover only "decisions grounded in social, economic, and political policy".[8] I would apply the exception in the Texas Act the same way. Even if the University had made watering the campus a policy issue, the policy would not be one protected by the exception. I concur in the Court's opinion except as to Part III.

Nathan L. Hecht
Justice

Opinion delivered: June 29, 2007

[8] *Gaubert*, 499 U.S. at 323; *see also id*. at 335 (Scalia, J., concurring).