Fifteenth Court of Appeals
Texahoma, Texas

No. 15-19-00001-CV

CITY OF BALBOA BAY, Appellant

v.

Lindsay **BLUTH** and Lucille Bluth, Appellees

On Appeal from the 555th District Court, Balboa County, Texas
Trial Court No. 18-001-CV
Honorable Lionel Ping, Judge Presiding

Sitting En Banc: Harry Styles, Chief Justice, and Zayn Malik, Liam Payne, Niall Horan, Louis Tomlinson, Justices

Per Curiam: Liam Payne, Niall Horan, Louis Tomlinson, Justices
Concurring Opinion by: Liam Payne, Justice
Dissenting Opinion by: Zayn Malik, Justice
Dissenting Opinion by: Harry Styles, Chief Justice

Delivered and Filed: January 8, 2020

PER CURIAM OPINION ON MOTION FOR EN BANC RECONSIDERATION

The appellees' motion for en banc reconsideration is granted. We withdraw our prior opinions and judgment. Because there is no substantive ruling on the controlling question of law, we have no choice but to dismiss this appeal for want of jurisdiction.

Per Curiam

CONCURRING OPINION

I concur in dismissing this appeal. The motion for en banc reconsideration persuaded me to change my vote in this case. Although the other non-panel members do not wish to explain this court's decision, I believe that given this court's dismissal after the lengthy delay in this case, it is important to explain our judgment dismissing this appeal. I write separately to provide this explanation.

FACTUAL BACKGROUND

Appellee Lucille Bluth detests single-use plastic bags. She once tried sneaking gold Krugerrands into the prison that confined her husband, George, attempting to re-use a single-use plastic bag she found in her condo. But the bag broke, and a few Krugerrands fell on her left foot. Although she was not injured, Lucille felt inconvenienced because she had to find and use a sturdier paper bag. On another occasion, Lucille was driving her car, ran out of gas, and stopped at the Balboa Bay Buc-ee's. A Balboa Bay police officer, John Taylor, was in his patrol car in the parking lot. As in other cities, the Balboa Bay Buc-ee's is very popular due to the unforgettable customer experience, reasonably priced gasoline, wide variety of affordable and quality goods, and exceptionally clean restrooms. Because the parking lot was so packed, Officer Taylor was unable to get out. Frustrated, Officer Taylor activated the lights on his patrol car and briefly put on the siren for the purpose of cutting through all the cars pulling in to get gas. The loud sound and lights distracted Lucille, and she tripped on a single-use plastic bag someone had discarded earlier.[1] Lucille fell and injured her left foot. She blamed Officer Taylor, but she blamed the plastic bag more.

[1] The plastic bag bore the logo of one of Buc-ee's nearby competitors.

In an affidavit, Officer Taylor stated he was at Buc-ee's during his shift to make a quick stop for same tasty Beaver Nuggets. His affidavit further states he was frustrated because he had just gotten back into his car and there were too many cars coming into the parking lot. Officer Taylor's affidavit further stated that his stop was not job-related, and he was not responding to an emergency or any other job-related call when he activated his patrol car's lights and siren. He stated in his affidavit that he did so to exit the parking lot quickly and to carry on with his general law enforcement duties to serve and protect the community.

After she tripped and fell over the plastic bag, Lucille began a public information campaign in support of a municipal single-use plastic bag ban. While preparing her campaign, Lucille was concerned she would not gain much support because discarded plastic bags were not a big problem in Balboa Bay. Her negative experiences with plastic bags were relatively unique. The City, like Buc-ee's, always had a reputation for being clean and having no significant litter problems. To make her case to other Balboa Bay residents, Lucille focused her campaign on single-use plastic bags being "unsafe and unsightly," and described the plastic bags as "The Bags Beneath Balboa Bay," to convey that plastic bags were "too low brow" for Balboa Bay residents. According to Lucille's campaign materials, Balboa Bay residents should not have to see people carrying groceries, or anything else, in a single-use plastic bag because they are "ugly" and break easily, thereby causing safety risks to users.

Lindsay Bluth, Lucille's adult daughter, agreed plastic bags should be banned, but believed her mother's concerns were selfish, and a plastic bag ban should be passed for the more altruistic purpose of preventing litter and protecting the environment. One day, Lindsay Bluth saw her husband, Tobias, put a plastic bag in the toilet and flush.[2] Inspired, Lindsay began her own public

[2] Tobias executed an affidavit that stated he was flushing plastic bags filled with blue paint because he wanted to contain the blue paint in the sewage system. His affidavit explained he was flushing away the blue paint, along with

information campaign about plastic bags. Her campaign focused on how plastic bags have harmed the environment, and attempted to persuade Balboa Bay residents that they have an obligation to support a bag ban to stop litter, manage solid waste disposal, promote reduction of waste at its source, save the environment, and—ultimately—save the world. Like Lucille's campaign, Lindsay's campaign also used the slogan, "The Bags Beneath Balboa Bay," but to convey there were plastic bags literally underneath the city.

City council members received numerous calls from Balboa Bay residents who had seen and were influenced by the campaigns. Sally Sitwell, a city council member who was familiar with both campaigns, was also impressed by a blog post, "*Bigger than Bananas": Bob Loblaw's Law Blog Law Bombs the Bag Ban & the Bags Beneath Balboa Bay*, which persuaded her to draft a municipal ordinance to ban the distribution of single-use plastic bags at points of sale. Councilwoman Sitwell believed that in Balboa Bay, as in major cities throughout the United States, the illegal disposal of plastic bags presented an environmental and solid waste concern to the residents of Balboa Bay. Her proposed ordinance included a finding to that effect. The other four councilmembers disagreed with the proposed findings and instead recommended simply finding that people carrying items in single use plastic bags was contrary to the aesthetic values of Balboa Bay and presented a safety concern to users. The proposed ordinance was amended to remove the initial findings, and to add findings regarding only aesthetic values and user safety.

Councilwoman Sitwell's office commissioned an independent environmental study on the impact of discarded plastic bags on Balboa Bay. The study revealed that mild sewer blockages were being caused by discarded plastic bags, but the study was inconclusive as to the high coincidence of blue paint found at the sites of sewer blockages. When the council was confronted

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his dreams of becoming an actor and of joining the Blue Man Group. Inexplicably, Tobias attached his resume and headshots to his affidavit.

with the results of the study, only one other councilmember agreed the sewer blockages were significant. The others rejected the veracity of the study because of the unexplained blue paint. The amended draft municipal ordinance was not further amended. The council unanimously passed an ordinance banning all single-use plastic bags that businesses provided at checkout and points of sale, with a finding that such plastic bags were "ugly" and having people use them to carry items out of stores was contrary the City's aesthetic values and because they break too easily. The title of the ordinance was "A Ban for the Bags Beneath Balboa Bay."

TRIAL COURT PROCEEDINGS

Furious with the city council, Lindsay Bluth filed suit seeking a declaration that the municipal ordinance was preempted by the Texas Solid Waste Management Act. Lucille intervened in the suit, suing the City for negligence caused by Officer Taylor's use of a motor vehicle, specifically, by his activating the patrol car's lights and siren for no reasonable purpose and merely to advance his private interest. Bluth alleged Officer Taylor owed her a duty of reasonable prudence when using his patrol car and its devices, and he breached this duty by turning on his patrol car lights and siren for no legitimate reason. No party objected to or disputed Lucille's intervention in the suit, and the trial court permitted Lucille's intervention.

The City agreed its governmental immunity over Lucille's suit was waived under the Texas Tort Claims Act, but filed a motion for summary judgment, arguing: "There is no evidence the City or Officer Taylor owed any duty to Lucille Bluth or breached that duty by activating the patrol car's lights and siren." The City filed a traditional motion for summary judgment on Lindsay's declaratory judgment claim. After Lucille and Lindsay filed their responses, the trial court heard both motions together. At the summary judgment hearing, the trial court stated on the record:

> This case is too tough. I'm new to the bench anyway. Let's just let the court of appeals decide this. I'll deny the motion, but grant permission to appeal so I don't have to actually decide this mess. For the record, let's just say summary judgment

> is denied because of…. umm… a fact issue? Yes, the facts are in dispute. That's it. Let's go with that. So ordered.

The trial court's written order denied summary judgment, and expressly granted the City permission to appeal. The order did not state the controlling question of law or indicate the trial court had made a substantive ruling on the controlling question, but generally concluded that the order involved a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation.

APPELLATE COURT PROCEEDINGS

The City timely filed a petition for permissive appeal in this court. Lucille and Lindsay filed a response opposing the petition, generally arguing the case was inappropriate for a permissive appeal. A single justice of this court granted the petition. On original submission, a three-justice panel consisting of Chief Justice Styles, Justice Malik, and myself heard oral argument in the case. The panel issued its decision in this case, reversing the summary judgment orders and rendering judgment in the City's favor as to both Lindsay's and Lucille's claims. Justice Malik dissented.

Thirty days after the panel's opinion and judgment issued, Lucille and Lindsay filed a joint motion for extension of time to file a motion for panel rehearing and a motion for en banc reconsideration. The motion requested a 60-day extension. The extension was granted. Sixty days later, Lucille and Lindsay filed a motion asking the panel to reconsider its decision in this case. Lucille and Lindsay did not file a motion for en banc reconsideration at that time. Sixty days after Lucille and Lindsay filed their motion for panel rehearing, the panel denied the motion.

Fifteen days after the panel issued its order, Lucille and Lindsay filed a motion for en banc reconsideration. In the motion, for the first time, Lucille and Lindsay argued this court lacked

jurisdiction to accept the permissive appeal because the trial court did not make a substantive ruling on the controlling questions of law. Lucille and Lindsay asked that this court grant their motion and dismiss this appeal for want of jurisdiction. Lucille and Lindsay's motion did not change the mind of the other two panel members, but persuaded me and the two non-panel members to grant the en banc motion and dismiss this permissive appeal. I write to explain why.

THIS COURT LACKS APPELLATE JURISDICTION OVER THIS PERMISSIVE APPEAL BECAUSE THERE ARE NO SUBSTANTIVE RULINGS ON THE CONTROLLING QUESTIONS OF LAW

On original submission and on panel rehearing, no party referred this court to the case law requiring substantive rulings for permissive appeals. Several of our sister courts have held that, for a court of appeals to have jurisdiction over a permissive appeal, the trial court must have made a substantive ruling on the controlling question of law. *See, e.g.*, *City of San Antonio v. Tommy Harral Constr., Inc.*, 486 S.W.3d 77, 80 (Tex. App.—San Antonio 2016, no pet.) (citing authorities). A mere denial of a motion for summary judgment is not a substantive ruling. *See id.* Furthermore, on the record, the trial court expressly declined to decide the controlling question of law and "punted" the question to the court of appeals. *See Gulley v. State Farm Lloyds*, 350 S.W.3d 204, 207–08 (Tex. App.—San Antonio 2011, no pet.). This is an inappropriate use of the permissive appeal procedure. *See id.* Consequently, although this case meets all of the statutory requirements for a permissive appeal, this appeal simply hasn't got that one thing: a substantive ruling. This appeal must therefore be dismissed for want of appellate jurisdiction. *See Tommy Harral Constr.*, 486 S.W.3d at 80.

–Liam Payne, Justice

DISSENTING OPINION

I respectfully dissent to dismissing this appeal for want of jurisdiction. This case has kept me up all night because, frankly, this court has already decided the merits of this case. I write to preserve the reasoning in my original dissent on the merits for why the panel erred. I begin by responding to the City's and Justice Malik's arguments, *infra*, that Lucille and Lindsay's en banc motion is untimely.

THE EN BANC MOTION WAS TIMELY FILED

The City argues Lindsay and Lucille's motion for en banc reconsideration is untimely. I disagree. The Dallas Court of Appeals recently addressed the timeliness of motions for en banc reconsideration under similar circumstances. *See generally Cruz v. Ghani*, — S.W.3d —, No. 05-17-00566-CV, 2019 WL 3282963 (Tex. App.—Dallas July 22, 2019, pet. denied) (en banc). The Dallas court held that a motion for en banc reconsideration is timely if it is filed within 15 days of a motion for panel rehearing being denied, even if the panel does not modify its opinion or judgment. *See id.* at *5. Here, Lindsay and Lucille filed a motion for en banc reconsideration 15 days after the panel issued its order denying panel rehearing. It is immaterial that the panel did not modify its original opinion or judgment. *See id.* The en banc motion was timely filed and therefore extended this court's plenary power over this appeal.

THIS COURT HAS APPELLATE JURISDICTION OVER THIS PERMISSIVE APPEAL

Constitutionally, this court's appellate jurisdiction is determined by statute. Thus, whether this court has jurisdiction over an appeal is a matter statutory construction. *Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 788 (Tex. 2019). We begin by looking to the text of the statute. Courts of appeals have jurisdiction over permissive appeals under section 51.014(d)–(f). TEX. CIV. PRAC. & REM. CODE § 51.014(d)–(f); *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 731 (Tex. 2019). The text of these statutory provisions is as follows:

> (d) On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if:
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> (1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and
>
> (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.
>
> (d-1) Subsection (d) does not apply to an action brought under the Family Code.
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> (e) An appeal under Subsection (d) does not stay proceedings in the trial court unless:
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> (1) the parties agree to a stay; or
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> (2) the trial or appellate court orders a stay of the proceedings pending appeal.
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> (f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

TEX. CIV. PRAC. & REM. CODE § 51.014(d)–(f). As anyone can clearly see, there is no substantive ruling requirement in the text of this statute. Respectfully, I believe our sister courts have read into the statute a requirement that is plainly not there. *See* Michael J. Ritter & Ben Allen, *Beware the "Substantive Ruling" Requirement*, 80 TEX. BAR J. 504 (2017) ("[N]either the statute nor the corresponding rules expressly require a trial court to make a substantive ruling."). The summary judgment order in this case was properly certified under the plain language of the permissive appeal statute. We have appellate jurisdiction over this appeal. *See* Michael J. Ritter, *Permissive Appeals in Texas Courts: Reconciling Judicial Procedure with Legislative Intent*, 36 REV. LITIG. 55 (2017) (explaining all there needs to be for appellate court jurisdiction over a permissive appeal is "written permission" and a "timely petition").

THE SWDA DOES NOT PREEMPT THE BAG BAN
LINDSAY V. THE CITY

On original submission, Lindsay and the City primarily disputed whether the supreme court's decision in *City of Laredo v. Laredo Merchants Association* is dispositive in this appeal. 550 S.W.3d 586 (Tex. 2018). In *Laredo Merchants*, the Supreme Court of Texas held that the City of Laredo's bag ban was preempted by the Solid Waste Disposal Act (SWDA). The relevant SWDA provision provides, "A local government . . . may not adopt an ordinance . . . to . . . prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by state law." TEX. HEALTH & SAFETY CODE § 361.0961(a)(1). It is undisputed that plastic bags are containers under the SWDA. *Laredo Merchants*, 550 S.W.3d at 586–95.

In *Laredo Merchants*, the supreme court construed the phrase "for solid waste management purposes." The supreme court concluded, "We think it clear that the Ordinance was adopted for solid waste management purposes." *Id.* at 595. The supreme court reasoned, "The Ordinance's stated purpose and its intended effect are to control the generation of solid waste by reducing a source of solid waste on the front end so those single-use materials cannot be inappropriately discarded on the back end." *Id.* at 594–95. The Balboa Bay bag ban's stated purpose and intended effect are to prevent people in Balboa Bay from carrying around items in plastic bags because they are unsightly and break too easily. It is therefore "clear that the Ordinance [in this case] was [not] adopted for solid waste management purposes." *See id.* at 595.

WHETHER OFFICER TAYLOR OWED LUCILLE A DUTY TO USE ORDINARY CARE
LUCILLE V. THE CITY

I would hold Officer Taylor owed Lucille a duty of ordinary care. This is a summary judgment case. The question is not whether we, sitting as jurors, would find in favor of Lucille, but whether Lucille should be barred as a matter of law from having a jury decide her case. *See*

generally TEX. R. CIV. P. 166a. For summary judgments, we view the evidence in a light most favorable to the non-movant; here, the non-movant is Lucille. *See Scripps NP Operating*, 573 S.W.3d at 790. The City moved for summary judgment on the grounds that there is no evidence that Officer Taylor owed Lucille a duty of ordinary care in operating the patrol car or breached that duty by activating the patrol car's lights and siren.

First, it is well established that a driver of a car has a duty to operate the car in a manner that avoids foreseeable risks of harms to other. *See Hatcher v. Mewbourn*, 457 S.W.2d 151, 152 (Tex. Civ. App.—Texarkana 1970, writ ref'd n.r.e.). It is undisputed that Officer Taylor was operating his car. He therefore owed Lucille a duty of ordinary care. The evidence Lucille produced would enable a reasonable factfinder to conclude Officer Taylor had no legitimate governmental interest in turning on his lights and siren. Specifically, Lucille produced affidavits from other Buc-ee's patrons that Officer Taylor "scared everyone" in the parking lot because there was no obvious emergency and he startled lots of people by the way he used his patrol car.

Second, if Texas law does not currently recognize a duty under these circumstances, I would hold that Texas law should recognize a duty under these circumstances. *See Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 503 (Tex. 2017) ("When a duty has not been recognized in particular circumstances, the question is whether one should be."). The parties argue this issue is one of first impression and I agree. It is foreseeable that when an officer turns on his sirens and police lights that others will divert their attention. Indeed, the obvious purpose of sirens and lights on a patrol car is to alert others to an officer's presence. However, these devices are specifically intended for law enforcement purposes, not personal agendas. Here, the evidence shows Officer Taylor was in a parking lot full of other drivers and he was unable to exit. It was foreseeable that the use of the patrol lights and siren would distract others attempting to navigate a heavily crowded area and subject them to a high risk of harm of running into other cars or shoppers. It is also

foreseeable that the use of the patrol car's lights and siren that pedestrians would avert their eyes from where they are walking and cause them, like Lucille, to trip, fall, and injure themselves. The evidence further shows there was no emergency to which Officer Taylor was responding, and he took a detour to the Buc-ee's for personal resaons. The evidence, viewed in a light most favorable to Lucille, shows Officer Taylor was abusing his status as a law enforcement officer by using the lights and siren on his patrol car to get out of the Buc-ee's parking lot faster than customers who were not law enforcement officers. Thus, the balance of duty considerations favor recognizing a duty, if one does not already exist. *See id.* Thus, the trial court correctly denied the City's motion for summary judgment.

CONCLUSION

For these reasons, this court has appellate jurisdiction over this permissive appeal, and I would affirm the trial court's orders denying summary judgment.

–Zayn Malik, Justice

DISSENTING OPINION

I, too, dissent to dismissing this appeal for want of jurisdiction for the reasons stated in Justice Malik's dissent. However, I would hold the motion for en banc reconsideration is untimely and should be denied on that basis alone. In response to Justice Malik's dissent, I write to preserve the panel majority's reasoning for why the trial court erred by denying both of the City's summary judgment motions. This court has already decided this case and by contorting the permissive appeal statute, the court in today's decision flips the entire purpose of permissive appeals on its head.

THE EN BANC MOTION IS UNTIMELY

Lindsay and Lucille's motion for en banc reconsideration was not timely filed. Under Texas Rule of Appellate Procedure 49.7, a motion for en banc reconsideration "must be filed within 15 days after the court of appeals' judgment or order, or when permitted, within 15 days after the court of appeals' denial of the party's last timely filed motion for rehearing or en banc reconsideration." TEX. R. APP. P. 49.7. "When permitted" is a clear reference to Rule 49.5, which permits successive motions for rehearing, including panel and en banc rehearing, only when the court modifies its opinion or judgment. *Id.* R. 49.5. Here, the panel did not modify its opinion or judgment. Thus, the panel's mere denial of the motion for panel rehearing, without a modification to the opinion or judgment, did not restart the clock for Lindsay and Lucille to file a motion for en banc reconsideration. *See Cruz v. Ghani*, — S.W.3d —, No. 05-17-00566-CV, 2019 WL 3282963, at *6 (Tex. App.—Dallas July 22, 2019, no pet. h.) (en banc) (Whitehill, J., dissenting).

Lindsay and Lucille had at least two options to timely file both motions. They could have filed their motion for panel rehearing and en banc reconsideration together within 15 days of the panel issuing its original opinion and judgment. *See* TEX. R. APP. P. 49.7. They also could have timely filed their motion for panel rehearing together with a timely motion for an extension of time to file their motion for en banc consideration in the event the motion for rehearing was denied. *See*

R. 49.8. Instead, Lindsay and Lucille expressly requested 60 days to file both their panel motion ***and*** their motion for en banc reconsideration. This court granted the motion with the understanding that both motions would be filed within that 60-day period. Instead, Lindsay and Lucille deliberately chose to file only a motion for panel rehearing, and not file their motion for en banc rehearing within that 60-day extension. Lindsay and Lucille also could have attempted to file the motion for en banc reconsideration during the time that the panel was considering the motion for panel rehearing. Lindsay and Lucille declined to do so. Instead, Lindsay and Lucille waited until after the 60-day extension they had requested, and after the panel denied the motion for panel rehearing, to file their en banc motion.

The whole purpose of having deadlines to file motions for rehearing and motions for new trials is finality—to finally resolve disputes and to conserve judicial resources from endless re-litigation of issues. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). And, the whole purpose of permissive appeals is to promote judicial economy. *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 731 (Tex. 2019). The parties have been waiting a long time for this court to resolve the disputed legal issues in this case. Instead, forgoing numerous opportunities to file a timely en banc motion, Lindsay and Lucille filed an untimely en banc motion raising an issue they could have raised a long time ago.

The untimeliness of the en banc motion is important for two reasons. First, the untimely en banc motion does not extend this court's plenary power to grant this motion. These opinions are issuing 70 days after the order denying the timely filed motion for panel rehearing. Because the en banc motion is untimely, this court's plenary power expired 40 days ago—30 days after the motion for panel hearing was denied. Consequently, this court lacks the plenary power to grant the motion for en banc reconsideration or to change the panel's decision. *See* TEX. R. APP. P. 19.1. Second, the untimely en banc motion does not extend the time to file a petition for review in the supreme

court. *Id.* R. 53.7(a). Today is ten days beyond the deadline to file a petition for review. Thus, the supreme court would not even have jurisdiction to grant review in this case.

THE SWDA PREEMPTS THE BAG BAN
LINDSAY V. THE CITY

I would hold the SWDA preempts the Balboa Bay Bag Ban. Respectfully, Justice Malik too narrowly reads the supreme court's decision in *City of Laredo v. Laredo Merchants Association*, 550 S.W.3d 586 (Tex. 2018). As I read *Laredo Merchants*, the supreme court held *all* bag bans were preempted because all bag bans are "for solid waste management purposes." *See id.* at 594–95. The supreme court acknowledged there may be numerous purposes or benefits of a bag ban, but so long as solid waste management is one purpose, the other purposes cannot save the bag ban. *Id.* The record in this case supports this conclusion. Improperly discarded plastic bags were causing sewage-blockage problems for Balboa Bay. An improperly discarded plastic bag also caused Lucille to trip and fall. The record shows other solid waste management purposes were implicated in Lindsay's campaign and the original draft of the municipal ordinance. This places the Balboa Bay Bag Ban squarely within the category of other bag bans the supreme court declared unconstitutional in *Laredo Merchants*. As far as I am concerned, *Laredo Merchants* points us in only one direction: the Balboa Bay bag ban is preempted.

OFFICER TAYLOR DID NOT OWE LUCILLE A DUTY OF ORDINARY CARE
LUCILLE V. THE CITY

I would stand by the panel majority's original decision to reverse and render judgment in favor of the City on Lucille's negligence claim against the City. Lucille provided no evidence that Officer Taylor owed her a duty in support of her negligence claim against the City.

Justice Malik would hold that, clearly, a motor vehicle operator has a duty to operate his motor vehicle in a reasonably prudent manner. I do not dispute this. However, negligence claims based on this duty are different from Lucille's negligence claim. Here, Bluth does not allege

Officer Taylor negligently operated his motor vehicle and injured her in how he drove the patrol car. Instead, she alleges and her evidence shows it was a distraction caused by the lights and siren on the car itself, not in how he drove the patrol car. This case is fundamentally different from an operator of a motor vehicle who is driving down the road to ensure his ***vehicle*** does not hit another driver or person. When a person drives a motor vehicle, the foreseeable risk of harm is that the vehicle itself might collide with another car or a pedestrian. *See Hatcher v. Mewbourn*, 457 S.W.2d 151, 152 (Tex. Civ. App.—Texarkana 1970, writ ref'd n.r.e.). The foreseeable risk of an auto collision is simply not at issue in this case.

Moreover, I respectfully disagree that the duty considerations weigh in favor of recognizing a duty in this case. *See Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 503 (Tex. 2017). I agree with Justice Malik that the whole point of the lights and siren on a patrol car is to alert others and catch their attention. But it is not foreseeable that the use of lights and a siren on a patrol car will cause others around to stop using ordinary care to protect themselves and others from foreseeable risks. For example, police officers often activate their patrol cars' lights and sirens on public roads. It is not foreseeable that other drivers on the road who see the lights or hear the siren will stop using all ordinary care in the operation of their own vehicles. Thus, the lack of a foreseeable risk of harm bars the existence of a duty in this case.

Additionally, I disagree with Justice Malik's weighing of the risk and magnitude of harm against the burden on the defendant. In a parking lot, the risk of harm may be present, but the magnitude is relatively less than the risk posed by vehicles traveling at high speeds on a highway. Moreover, the burden on the defendant may be small if a defendant is a private person who is honking a horn in a full parking lot and distracting others for no legitimate reason. But here we are dealing with a law enforcement officer who is on the clock and hired to serve and protect the community. Obviously, a police officer who is stuck in a full parking lot and cannot get out is

compromised in his ability to perform his job functions. These facts are undisputed and weigh against recognizing a duty under the facts of this case. *See id.*

CONCLUSION

This court has already decided this case in the due course of appellate proceedings. Today, after the parties and this court have spent considerable amount of time and judicial resources to resolve this dispute, the court alarmingly exceeds it power to waste the judicial resources expended to dispose of this appeal on a mere technicality that has been judicially mischaracterized as jurisdictional defect and that has no support in text of the statute actually passed by the Legislature. The panel correctly decided this case on original submission, and this court now lacks the power to change that. For these reasons, I respectfully dissent.

–Harry Styles, Chief Justice

The Supreme Court of Texas

No. PD-20-0001

CITY OF BALBOA BAY, Petitioner

v.

Lindsay **BLUTH** and Lucille Bluth, Respondents

From the Fifteenth Court of Appeals, 15-18-00001-CV
On Appeal from the 555th District Court, Balboa County, Texas
Trial Court No. 18-867-CR
Honorable Lionel Ping, Judge Presiding

ORDER

The City of Balboa Bay filed a petition for review ten days after the court of appeals issued its per curiam opinion and judgment on en banc review. We request full briefing in this case, limited to the following issues, as the parties may fairly reframe them:

1. Does this court have jurisdiction to grant the City's petition for review? Was the motion for en banc reconsideration "timely"?

2. Did the court of appeals have interlocutory appellate jurisdiction? Is a substantive ruling a prerequisite for appellate jurisdiction over a permissive appeal?

3. Does the Solid Waste Disposal act preempt the Balboa Bay Bag Ban?

4. Did Officer Taylor owe Lucille Bluth a duty of ordinary care? The court will not consider arguments that the trial court lacks subject matter jurisdiction.

The briefing schedule will follow.

IT IS SO ORDERED