

No. 03-0448

**In the  
Supreme Court of Texas**

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TEXAS A&M UNIVERSITY,  
*Petitioner,*

v.

PAUL A. BISHOP,  
*Respondent.*

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On Petition for Review from the  
Fourteenth Court of Appeals, Houston, Texas

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**PETITIONER'S REPLY BRIEF ON THE MERITS**

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## TABLE OF CONTENTS

Table of Contents .....	ii
Index of Authorities .....	iv
Argument .....	2
I.    Bishop Has Not Established a Waiver of TAMU’s Sovereign Immunity Under §101.021(2) of the Tort Claims Act .....	2
A.    Bishop’s Policy Arguments for Broadening the Waiver of Governmental Immunity Should Be Addressed to the Legislature .....	3
B.    TAMU’s Sovereign Immunity Is Not Waived for the Faculty Sponsors’ Allegedly Negligent Supervision Because The Sponsors Did Not Use Tangible Personal Property to Proximately Cause Bishop’s Injury .....	4
1.    The Act does not waive immunity for negligent-supervision claims .....	4
2.    Bishop’s attempts to distinguish <i>Cowan</i> are unpersuasive .....	6
3.    The “condition of property” cases do not support Bishop’s position .....	8
4.    The Court should grant the petition for review to clarify whether <i>Cowan</i> overrules <i>Smith v. University of Texas</i> ...	11
C.    The Court of Appeals Correctly Concluded That the Wonios Were Independent Contractors and Therefore not Employees .....	13
II.    The Faculty Sponsors’ Supervision of the Drama Club Cannot Waive TAMU’s Sovereign Immunity Because Drs. Curley and Lesko Were Entitled to Official Immunity .....	17

A.	TAMU’s Arguments Are Not Inconsistent . . . . .	17
B.	Bishop Again Misidentifies the Act for Which the Sponsors Were Entitled to Immunity . . . . .	18
C.	Bishop Does Not Dispute that the Question of <i>Kassen’s</i> Applicability Is an Important Issue That the Court Should Address . . . . .	20
D.	Bishop’s Waiver Argument Is Meritless . . . . .	20
	Conclusion . . . . .	21
	Certificate of Service . . . . .	23

**INDEX OF AUTHORITIES**

**Cases**

*Anchor Cas. Co. v. Hartsfield*, 390 S.W.2d 469 (Tex. 1965) . . . . . 14

*Bishop v. Tex. A&M Univ.*, 35 S.W.3d 605 (Tex. 2000) (per curiam) (*Bishop II*) . . . . . 14

*Christilles v. Southwest Tex. State Univ.*, 639 S.W.2d 38  
 (Tex. App.—Austin 1982, writ ref’d n.r.e.) . . . . . 10

*City of Dayton v. Gates*, 126 S.W.3d 288  
 (Tex. App.—Beaumont 2004, no pet.) . . . . . 12

*City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994) . . . . . 21

*Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540 (Tex. 2003) . . . . . 5

*Dallas County Mental Health & Mental Retardation v. Bossley*,  
 968 S.W.2d 339 (Tex. 1998) . . . . . 5, 8

*Harris County v. Dillard*, 883 S.W.2d 166 (Tex. 1994) . . . . . 3, 4, 12

*Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354 (Tex. 1998) . . . . . 16

*Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994) . . . . . 2, 20, 21

*Kerrville State Hosp. v. Clark*,  
 923 S.W.2d 582 (Tex. 1996) . . . . . 10, 11

*Koch Ref. Co. v. Chapa*, 11 S.W.3d 153  
 (Tex. 1999) (per curiam) . . . . . 16-17

*LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*,  
 835 S.W.2d 49 (Tex. 1992) . . . . . 6, 12

*Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308 (Tex. 2002) . . . . . 14-15

*Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297 (Tex. 1976) . . . . . 9, 10

<i>Palsgraf v. Long Island R.R.</i> , 162 N.E. 99 (N.Y. 1928) .....	6
<i>Robinson v. Cent. Tex. MHMR</i> , 780 S.W.2d 169 (Tex. 1989) .....	9, 10
<i>San Antonio State Hosp. v. Cowan</i> , 47 Tex.Sup.Ct.J. 221, 2004 WL 74441 (Tex. Jan. 9, 2004) .....	2, 5, 7-10
<i>Sem v. State</i> , 821 S.W.2d 411, (Tex. App.—Fort Worth 1991, no writ) .....	5-6
<i>Smith v. Univ. of Tex.</i> , 664 S.W.2d 180 (Tex. App.—Austin 1984, writ ref'd n.r.e.) .....	11, 12
<i>Tex. A&amp;M Univ. v. Bishop</i> , 996 S.W.2d 209 (Tex. App.—Houston [14th Dist.] 1999 ( <i>Bishop I</i> ), rev'd, 35 S.W.3d 605 (Tex. 2000) (per curiam) ( <i>Bishop II</i> ) .....	14, 16, 17
<i>Tex. A&amp;M Univ. v. Bishop</i> , 105 S.W.3d 646 (Tex. App.—Houston [14th Dist.] 2002, pet. filed) ( <i>Bishop III</i> ) .....	<i>passim</i>
<i>Tex. Dep't of Criminal Justice v. Diller</i> , 127 S.W.3d 7 (Tex. App.—Tyler 2002, pet. denied) .....	12
<i>Tex. Dep't of Mental Health &amp; Mental Retardation v. McClain</i> , 947 S.W.2d 694 (Tex. App.—Austin 1997, writ denied) .....	12
<i>Tex. Dep't of Pub. Safety v. Petta</i> , 44 S.W.3d 575 (Tex. 2001) .....	5
<i>Tex. Natural Res. Conservation Comm'n v. White</i> , 46 S.W.3d 864 (Tex. 2001) .....	6
<i>Thomas v. Harris County</i> , 30 S.W.3d 51 (Tex. App.—Houston [1st Dist.] 2000, no pet.) .....	16, 17
<i>Univ. of N. Tex. v. Harvey</i> , 124 S.W.3d 216 (Tex. App.—Fort Worth 2003, no pet. h.) .....	9

**Statutes and Rules**

TEX. CIV. PRAC. & REM. CODE §101.021(2) .....	1, 2, 8, 9, 14
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**PETITIONER’S REPLY BRIEF ON THE MERITS**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

This case presents at least three important questions that the Court should address. First, do allegations of negligent supervision—specifically, the faculty sponsors’ failure to learn that a real knife would be used in the staging of “Dracula”—constitute an actionable “use” of tangible personal property for which the Tort Claims Act waives immunity? *See* TEX. CIV. PRAC. & REM. CODE §101.021(2). Second, can TAMU be held liable for the conduct of the Wonios, who were independent contractors and did not use tangible property to proximately cause Bishop’s injury? And third, does the governmental-versus-medical-discretion dichotomy of *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994), apply outside of the

context of state-provided medical care? Bishop neither rebuts the significance of these issues nor persuasively addresses their merits. The Court should grant the petition for review and reverse the judgment of the court of appeals.

## **ARGUMENT**

### **I. BISHOP HAS NOT ESTABLISHED A WAIVER OF TAMU’S SOVEREIGN IMMUNITY UNDER §101.021(2) OF THE TORT CLAIMS ACT.**

Contrary to the court of appeals’s holding and Bishop’s arguments, the Tort Claims Act does not waive sovereign immunity for claims of negligent supervision. Instead, under the “use of tangible personal property” exception, immunity is waived only if a state employee actually used tangible personal property to proximately cause the plaintiff’s injury. *See* TEX. CIV. PRAC. & REM. CODE §101.021(2); *San Antonio State Hosp. v. Cowan*, 47 Tex.Sup.Ct.J. 221, 221-22, 2004 WL 74441 (Tex. Jan. 9, 2004). The court of appeals’s erroneous holding that negligent supervision constitutes an actionable “use” reflects continued uncertainty in the law that requires clarification. *See Tex. A&M Univ. v. Bishop*, 105 S.W.3d 646, 656-57 (Tex. App.—Houston [14th Dist.] 2002, pet. filed) (*Bishop III*).

Bishop’s alternative theory—that TAMU’s immunity is waived by the Wonios’ use of the knife—fails for two independent reasons. First, even if the Wonios used the knife and the stab pad by instructing Dennis Rittenhouse and Bishop in their use during rehearsals, it was not their rehearsal instruction but Rittenhouse’s use of the knife on opening night that proximately caused Bishop’s injury. And even if Rittenhouse’s use of the knife could be attributed to the Wonios—a theory that is inconsistent with this Court’s precedent—TAMU’s

immunity would not be waived because the Wonios were not TAMU employees but independent contractors as a matter of law. *See Harris County v. Dillard*, 883 S.W.2d 166, 167 (Tex. 1994). Bishop largely ignores these points in favor of policy arguments complaining that the law is unwise or unfair. The Court should grant the petition for review, reverse the court of appeals judgment, and dismiss Bishop’s claims.

**A. Bishop’s Policy Arguments for Broadening the Waiver of Governmental Immunity Should Be Addressed to the Legislature.**

Bishop initially argues that TAMU should be held liable for failing to prevent a real knife from being used in the staging of “Dracula” on the theory that a private high school would be liable in analogous circumstances. Resp. Br. at 12. But the Legislature has rejected the policy choice Bishop urges; the Tort Claims Act does not make state entities liable in every circumstance in which a private entity would be liable. For example, by requiring that injury must be proximately caused by a governmental employee’s use of tangible property, the Act does not waive immunity for claims of negligent supervision, even though a private entity could be held liable for negligent supervision. *See* Part I.B.1, *infra*.

Similarly, Bishop urges the Court to create negligent-supervision liability to promote safer college campuses, Resp. Br. at 22-23, arguing that “colleges must answer for the acts of their employees.” *Id.* at 23. But this argument—a central theme of Bishop’s brief—involves, in Bishop’s own words, “pure considerations of public policy.” *Id.* at 22. Bishop’s complaints that the Tort Claims Act promotes unwise or unfair policies should be addressed to the Legislature, not to this Court. *See Dillard*, 883 S.W.2d at 167-68 (“We have

repeatedly held that the extent of waiver of governmental immunity is a matter for the Legislature to determine . . . . To accept plaintiff’s argument would extend the waiver further than the Act provides, something which we will not do.”).

**B. TAMU’s Sovereign Immunity Is Not Waived for the Faculty Sponsors’ Allegedly Negligent Supervision Because The Sponsors Did Not Use Tangible Personal Property to Proximately Cause Bishop’s Injury.**

**1. The Act does not waive immunity for negligent-supervision claims.**

Bishop repeatedly urges that the faculty advisors should have known about the Wonios’ decision to substitute a real knife and that their failure to prevent the accident was negligent. Resp. Br. at 16-18, 20-21. But Bishop’s assertion of negligent supervision—even if true—would not establish a “use” of property by TAMU employees for which the Tort Claims Act waives immunity. The Court recently clarified in *Cowan* that an employee does not “use” property by allowing non-employees to use it. 47 Tex.Sup.Ct.J. at 221-22. The court of appeals’s holding that “negligent supervision is a use of tangible personal property” is contrary to *Cowan* and should be reversed. *Bishop III*, 105 S.W.3d at 657.

Even assuming *arguendo* that the faculty sponsors’ failure to prevent the students from using the knife was negligent, the sponsors’ undisputed lack of knowledge of the knife<sup>1</sup>

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1. Without actually disputing the faculty sponsors’ lack of knowledge, Bishop wrongly faults TAMU for failing to provide a record reference for its statement, “‘it is undisputed that [Drs. Curley and Lesko] were wholly unaware’ of the knife.” Resp. Br. at 15 (quoting Pet’r Br. at 9). As TAMU’s brief discussed, both faculty sponsors testified that they were unaware of the Wonios’ decision to allow the students to use the real knife until after the accident, *see* Pet’r Br. at 4 (citing 3.RR.545, 649, 658), and that their prior experiences with the Drama Club gave them no reason to believe that the production of “Dracula” would involve any dangerous activity. *See id.* (citing 3.RR.567, 664). Bishop does not cite any contrary testimony suggesting the faculty advisors had prior knowledge of the knife, and the undersigned counsel has not found any in the record. Instead, Bishop makes the illogical argument that TAMU’s statement “ignore[s] the record” because

in no way constitutes “use” of the knife. Bishop’s real complaint regarding the faculty advisors is not that they used any property to harm Bishop, but simply that they failed to prevent an accident in which tangible property was involved. *See, e.g.*, Resp. Br. at 21 (“By choosing not to exercise their control, the advisors erred, and the school is responsible for this inaction.”), 23 (arguing that “the University’s inaction creates its liability”). The Tort Claims Act does not waive immunity for negligent-supervision complaints in which the injury was not directly caused by an employee’s “use” of tangible property. *See Cowan*, 47 Tex.Sup.Ct.J. at 221-22; *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 543 (Tex. 2003) (immunity not waived for bus driver’s failure to supervise passenger who used tangible property to harm disabled plaintiff); *Tex. Dep’t of Pub. Safety v. Petta*, 44 S.W.3d 575, 580-81 (Tex. 2001) (no waiver of immunity for allegations of negligence in training and supervision of police officer); *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex. 1998) (hospital’s failure to restrain suicidal mental patient not cognizable under Tort Claims Act).

*Cowan* squarely rejects Bishop’s theory that the State’s employee need not “directly use” the property that caused the injury. *See* Resp. Br. at 33 (citing *Sem v. State*, 821 S.W.2d 411, 416 (Tex. App.—Fort Worth 1991, no writ).<sup>2</sup> Just as “[p]roof of negligence in the air,

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some evidence indicated that the faculty sponsors “should have known a knife would be used.” Resp. Br. at 15. But opinion testimony that the faculty sponsors *should have known* about the knife is not evidence that they *actually knew* of it. Despite his complaints, Bishop still fails to dispute that the faculty sponsors lacked actual knowledge of the Wonios’ decision to allow students to use a real knife in the play.

2. Bishop’s reliance on *Sem*—the sole case cited for his erroneous theory—is misplaced because *Sem* predated by several years this Court’s recognition of the employee-use requirement in §101.021(2). *See*

so to speak, will not do” to establish liability in the absence of a duty owed to the plaintiff, *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928), the Tort Claims Act does not make a governmental entity liable for its employee’s alleged negligence based on use-of-tangible-property “in the air”—*i.e.*, in circumstances where someone *other than the employee* used an item to proximately cause injury. In other words, a plaintiff cannot satisfy the Act’s employee-use requirement simply by associating a non-employee’s use of property with an allegation of negligent supervision on the part of an employee who did not actually use the property at issue. The Court should recognize Bishop’s argument that the faculty advisors were “directly involved in the use of a real knife,” Resp. Br. at 20, for what it is: a transparent attempt to circumvent the Act’s “use” requirement by attributing a non-employee’s use of property to an employee.

**2. Bishop’s attempts to distinguish *Cowan* are unpersuasive.**

Bishop denies that *Cowan* stands for the proposition that a governmental employee does not “use” tangible personal property, for purposes of §101.021(2), by providing a potentially dangerous item to a non-employee who then uses the item to cause injury. Resp. Br. at 30. But Bishop ignores the facts of *Cowan*, in which the plaintiffs alleged that the

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*LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992) (recognizing employee-use requirement in §101.021(1)); *Tex. Natural Res. Conservation Comm’n v. White*, 46 S.W.3d 864, 869 n.2. (Tex. 2001) (concluding that “use” should be interpreted consistently between subsections 1 and 2 of §101.021). In its initial opinion, the panel recognized *Sem*’s failure to apply §101.021(2)’s employee-use requirement and found *Sem* inapposite for that reason. See *Tex. A&M Univ. v. Bishop*, 996 S.W.2d 209, 215 (Tex. App.—Houston [14th Dist.] 1999 (*Bishop I*), *rev’d*, 35 S.W.3d 605 (Tex. 2000) (per curiam) (*Bishop II*)).

defendant's employees provided a mental patient on suicide watch with a walker and suspenders, which the patient transformed into an instrument of suicide. 47 Tex.Sup.Ct.J. at 221. In holding that the defendant's immunity was not waived under §101.021(2)'s "use of property" provision on those facts, the Court rejected the theory now advanced by Bishop: that a governmental entity's immunity is waived for its employee's negligent supervision and provision of property that is subsequently used by a non-employee to cause injury. *See id.* at 221-22.

Bishop seeks to distinguish *Cowan* on the basis that the property provided by the state employees in *Cowan* was not owned by the defendant state hospital. Resp. Br. at 30. But the Court in *Cowan* did not reject the plaintiffs' liability theory on the ground that the defendant hospital didn't own the property at issue; it rejected the plaintiffs' claim because no state employee used the property. 47 Tex.Sup.Ct.J. at 222. Moreover, Bishop fails to explain why the identity of the owner is significant, and he points to no case law or statutory language explaining the relevance of his purported distinction.

Bishop also attempts to distinguish *Cowan* based on his allegation that a knife, unlike a walker and suspenders, is "inherently unsafe." Resp. Br. at 30. But Bishop misunderstands the nature of "inherently unsafe" property. The Court in *Cowan* used the term "inherently unsafe" to describe a *condition* of property—*i.e.*, property that was "defective or that [] lacked some safety feature." 47 Tex.Sup.Ct.J. at 221. As the Court noted, the walker and suspenders in *Cowan* were not alleged to have been defective, *see id.*, just as Bishop has not

alleged in this case that the knife was defective, *see* 3.CR.678-79. *See also* Part I.C, *infra*. Bishop’s attempt to distinguish *Cowan* by the nature of the property at issue is unpersuasive.

Bishop further purports to distinguish *Cowan* by arguing that Diane Wonio used the knife and the stab pad to demonstrate the three-step process she had choreographed and that she instructed the students in the use of those items. Resp. Br. at 31. However, this distinction is irrelevant because the employee’s use of property must proximately cause the injury. *See* TEX. CIV. PRAC. & REM. CODE §101.021(2); *Cowan*, 47 Tex.Sup.Ct.J. at 221-22. It was Dennis Rittenhouse’s use of the knife that proximately caused Bishop’s injury, not Diane Wonio’s demonstrative use; it was in his hands, not hers, that the knife became the “instrumentality of harm.” *Bossley*, 968 S.W.2d at 342. There is no valid basis to distinguish *Cowan* from this case, and the Court should reject Bishop’s attempts to do so. *Cowan*’s use requirement applies with full force in this case and mandates the conclusion that no state employee used tangible personal property to injure Bishop.

**3. The “condition of property” cases do not support Bishop’s position.**

Bishop does not allege that the knife lacked an integral safety component or otherwise complain that its condition was defective. 3.CR.678-79. Instead, he relies on the “integral safety component” cases to argue that the statutory waiver of immunity for a governmental entity’s provision of a defective item makes the provision of a non-defective item an actionable “use” of property. *See* Resp. Br. at 34-35. But the waiver of immunity that results from providing a defective item flows from the *condition* of the property, not its *use*. *See*

TEX. CIV. PRAC. & REM. CODE §101.021(2). Bishop’s attempt to bypass the “use” requirement is inconsistent with the language of the statute and the case law interpreting it.

The distinction between claims based on the use of tangible property and claims based on an item’s condition was unclear when the Court decided *Lowe*. See *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 300 (Tex. 1976) (holding that allegation that state employee furnished football uniform without knee brace “states a case within the statutory waiver of immunity arising from some condition or some use of tangible property”). However, the Court has subsequently clarified that claims that an item is defective or lacked an integral safety component are complaints about its condition. See *Cowan*, 47 Tex.Sup.Ct.J. at 221 (“Respondents do not complain about the condition of Cowan’s walker and suspenders. They do not assert, for example, that the walker and suspenders were defective or that they lacked some safety feature.”); see also *Robinson v. Cent. Tex. MHMR*, 780 S.W.2d 169, 174 (Tex. 1989) (agreeing that *Lowe* was correctly decided as a “condition” case, but opining that *Lowe*’s alternative holding based on “use” was erroneous and “essentially dicta”) (Hecht, J., dissenting); *Univ. of N. Tex. v. Harvey*, 124 S.W.3d 216, 222 (Tex. App.—Fort Worth 2003, no pet. h.) (“A governmental unit may waive immunity under the condition of tangible personal property portion of section 101.021(2) if it provides equipment that is defective because it lacks an integral safety component.”). And the Court has held that a state actor does not “use” non-defective property for purposes of §101.021(2) merely by providing it. See *Cowan*, 47 Tex.Sup.Ct.J. at 222 (“By providing Cowan his walker and suspenders, the

Hospital did not ‘use’ them within the meaning of section 101.021(2).”). Contrary to Bishop’s argument, the waiver of immunity conferred under §101.021(2)’s “condition of property” language for providing defective property does not transform the provision of non-defective property into a “use” of such property.

Only under *Lowe* and *Robinson* has the Court permitted claims against the State for injuries proximately resulting from the condition of tangible property when the property was not used by a state employee. *See Robinson*, 780 S.W.2d at 171; *Lowe*, 540 S.W.2d at 300. While those cases allow claims based on the provision of property that lacks an integral safety component, the State maintains its immunity for the provision of a non-defective item absent a state employee’s use of the item to cause injury. *See Cowan*, 47 Tex.Sup.Ct.J. at 221-22. Because the Court has effectively cabined the “integral safety component” cases by strictly limiting their precedential value, *see Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 585 (Tex. 1996), Bishop’s reliance on these cases as transforming the supervision or provision of a non-defective item into an actionable “use” of property is nothing but wishful alchemy.

In a similar vein, Bishop erroneously argues that the state is liable whenever one of its political subdivisions “supplies equipment to university students but fails to properly supervise the use of that equipment.” Resp. Br. at 34 (citing *Lowe* and *Christilles v. Southwest Tex. State Univ.*, 639 S.W.2d 38 (Tex. App.—Austin 1982, writ ref’d n.r.e.). As noted above, *Lowe* is inapplicable because this is not an “integral safety component” case.

*See Clark*, 923 S.W.2d at 585. And except for the panel below, no court of appeals has relied on *Christilles* for the proposition that a state employee “uses” property by furnishing a non-defective (but allegedly inappropriate) item to a non-employee.

Bishop reveals the weakness of his position by arguing that this case is “more like *Lowe* [] or *Christilles* []” than *Cowan*. Resp. Br. at 31. In essence, Bishop asks the Court to return to an interpretation of the Tort Claims Act that prevailed more than twenty years ago—one that failed to distinguish between “use” and “condition” claims and provided a broad waiver of immunity whenever a plaintiff alleged governmental negligence in conjunction with some use or condition of tangible property. But over the past decade, the Court has consistently construed §101.021(2) to give meaning to the “use” provision consistent with the limited waiver of immunity intended by the Legislature. The Court should decline Bishop’s invitation to return to the unbounded waiver of immunity favored during the era of *Lowe* and *Christilles*.

**4. The Court should grant the petition for review to clarify whether *Cowan* overrules *Smith v. University of Texas*.**

Bishop’s lead authority for the proposition that a governmental employee’s negligent supervision of a non-employee’s use of tangible personal property constitutes an actionable “use” of such property is *dicta* stated in *Smith v. University of Texas*, 664 S.W.2d 180, 188 (Tex. App.—Austin 1984, writ ref’d n.r.e.). Resp. Br. at 32-33. The panel below also relied chiefly on *Smith*’s statement but recognized the broad split among the courts of appeals on this issue. *Bishop III*, 105 S.W.3d at 655. However, the split is deeper and more current than

either Bishop or the panel opinion acknowledges. Compare, e.g., *id.* at 656-57 (concluding that negligent supervision constitutes “use”), and *Tex. Dep’t of Mental Health & Mental Retardation v. McClain*, 947 S.W.2d 694 (Tex. App.—Austin 1997, writ denied) (finding waiver of immunity under §101.021(2) for provision of wheelchair footing or metal rod to violent patient who used items to fatally beat fellow patient), with *City of Dayton v. Gates*, 126 S.W.3d 288, 290-91 (Tex. App.—Beaumont 2004, no pet.) (listing cases concluding that negligent supervision not actionable under §101.021(2) and citing *Bishop III* and *Smith* following “*but see*” signal), and *Tex. Dep’t of Criminal Justice v. Diller*, 127 S.W.3d 7 (Tex. App.—Tyler 2002, pet. denied) (holding TDCJ’s immunity not waived for provision of plastic mesh bag to inmate, who used bag to hang himself).<sup>3</sup>

A decade ago, this Court declined to address whether *Smith* was correctly decided. See *Dillard*, 883 S.W.2d at 167 n.2. But the Court’s ambiguous treatment of *Smith*—in one case describing *Smith* as “erroneous,” *see id.*, while stating in another that “the negligent use in *Smith* was that of the government employee,” *see LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 n.1 (Tex. 1992)—has not helped to resolve the disagreement in the courts of appeals over whether a state employee’s negligent supervision of a non-employee constitutes an actionable “use” of property. In wrestling with this issue, the panel

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3. Bishop erroneously describes *Diller* with the following parenthetical: “(satisfying ‘use’ requirement by evidence that an inmate hung himself with a bag supplied by state employees).” Resp. Br. at 29. As noted above, the *Diller* court reached the opposite conclusion, holding that the TDCJ’s immunity was *not* waived, because the inmate’s own use of the bag—and not the TDCJ employees’ use of it to transport the inmate’s clothing—proximately caused the inmate’s death. 127 S.W.3d at 11. And although Bishop’s citation describes *Diller* as “not designated for publication,” the court of appeals granted a motion to publish on December 18, 2002, and the case was recently published in the Southwestern Reporter.

below noted the lack of Supreme Court authority on point and specifically mentioned this Court's refusal to address *Smith*, which the panel apparently interpreted as an implicit endorsement of *Smith*'s negligent-supervision theory. *Bishop III*, 105 S.W.3d at 655. The Court should address this issue to resolve continued uncertainty in the courts of appeals.

The parties' disagreement over *Cowan*'s reach further illustrates why the Court should grant TAMU's petition for review. If *Cowan* has effectively overruled *Smith*'s statement that negligent supervision constitutes an actionable use of property—as TAMU argues—the Court should say so, and the court of appeals's holding relying on *Smith* should be reversed. On the other hand, if *Cowan* is distinguishable—as Bishop argues—then the law will remain unclear, and the courts divided, absent a decision from this Court illuminating the distinction. Either way, the Court should grant review to address this important question and provide certainty for the benefit of lower courts, practitioners, and governmental entities.

**C. The Court of Appeals Correctly Concluded That the Wonios Were Independent Contractors and Therefore not Employees.**

Bishop emphasizes that the Wonios were paid with University funds, suggesting that this fact alone makes the Wonios employees of TAMU for purposes of Tort Claims Act liability. *See* Resp. Br. at 15 (“The evidence supports the jury’s decision that Michael and Diane Wonio were in the paid service of [TAMU], thereby creating liability under §101.021 of the Tort Claims Act, as the jury found.”), 26. But the Act specifically excludes from its definition of “employee” a person in the paid service of a governmental unit who is an independent contractor. TEX. CIV. PRAC. & REM. CODE §101.001(2). The court of appeals

held in its original decision that the Wonios were independent contractors as a matter of law, *see Tex. A&M Univ. v. Bishop*, 996 S.W.2d 209, 215 (Tex. App.—Houston [14th Dist.] 1999 (*Bishop I*), *rev'd*, 35 S.W.3d 605 (Tex. 2000) (per curiam) (*Bishop II*)—a holding that this Court did not disturb and the panel declined to revisit on remand. *Bishop II*, 35 S.W.3d at 606; *Bishop III*, 105 S.W.3d at 653-54. Bishop’s sole challenge to that conclusion is based on an erroneous theory that is unsupported by the case law.

Bishop argues that the Wonios were not independent contractors because TAMU had the “legal right to control [] them” or “retained control over their services.” Resp. Br. at 13. But the test for independent-contractor status is whether the payor controls the details of the payee’s work, not whether it retains any control over the payee. *See Limestone Prods. Distribution, Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (per curiam); *Anchor Cas. Co. v. Hartsfield*, 390 S.W.2d 469, 471 (Tex. 1965). As Bishop admits, the Wonios controlled the details of staging the play. Resp. Br. at 19. The Drama Club’s bylaws gave the director “complete artistic control of the production,” designated him the “principal architect of all aspects of the play,” conferred responsibility for lighting, sound, set, and prop requirements, and gave him full control over casting and rehearsals. 6.RR. at Ex. D-4, §IV; 4.RR.761-62. Nor did the Wonios—who were paid by the job instead of on an hourly or annual basis, were paid with student-activity funds instead of from the state accounts from which University employees were paid, were not paid on a regular basis and did not have federal taxes withheld, did not receive a salary, benefits, or vacation—otherwise resemble

TAMU employees in any way. *See* Pet'r Br. at 24-31. Together, these facts conclusively establish the Wonios' independent-contractor status. *See Limestone Products*, 71 S.W.3d at 312-13.

Although Bishop claims that TAMU "could control details of the play," *see* Resp. Br. at 19, the conclusory testimony he cites does not establish control. Diane Wonio's testimony that she "assume[d] the university could control the details of the play" was based on her observation that it is "common practice" for the "owners of the facilities" to "determine what will or will not be produced within that facility." Resp. Br. at 18 (citing 3.RR.510). Ms. Wonio's assumption was inaccurate as applied to TAMU, because it was the student members of the Drama Club who selected the plays they would perform, not TAMU officials. 1.RR.209; 3.RR.527. But even assuming TAMU retained authority over what plays would be shown, that authority does not demonstrate control over the details of the director's work but merely defines the scope of the work the director is contracted to perform. *See Limestone Products*, 71 S.W.3d at 312 (fact that delivery company instructed driver where and when to pick up and deliver loads did not demonstrate control over details of driver's work).

The other evidence cited by Bishop as demonstrating TAMU's right to control is (1) the Wonios' testimony that the faculty sponsors could have prohibited the use of deadly weapons as play props, *see* Resp. Br. at 18, and (2) Dean Hearn's testimony agreeing that the sponsors could have prohibited weapons in the play, and "*to that extent* [the faculty sponsors]

do direct the details of the work of the Wonios.” *Id.* at 17 (emphasis added). This evidence reflects, consistent with other record evidence, that TAMU retained control over the Wonios’ work only to the extent that TAMU had the right to require compliance with the weapons ban and other campus safety policies. *See* Pet’r Br. at 25-26, 28-29. A payor’s right to make an independent contractor observe the payor’s safety policies does not mean that the payor controls the details of the contractor’s work, because the payor retains this basic right regardless of whether the payee is an independent contractor or an employee. *See Thomas v. Harris County*, 30 S.W.3d 51, 54 (Tex. App.—Houston [1st Dist.] 2000, no pet.); *Bishop I*, 996 S.W.2d at 214; *see also Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 357-58 (Tex. 1998) (by requiring an independent contractor to comply with general safety guidelines and standard safety precautions, a premises owner does not assume a duty to ensure that independent contractor does nothing unsafe; premises owner merely owes duty to ensure that any safety rules it promulgates do not unreasonably increase probability and severity of injury). Thus, testimony that TAMU could have made the Wonios comply with its safety policies is not evidence that TAMU controlled the details of the Wonios’ work.

Every independent contractor is subject to the general control of the person or entity that pays him, but this basic element of control does not make the contractor an employee of the payor. The payor “must have some latitude to tell its independent contractors what to do, in general terms, and may do so without becoming subject to liability.” *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 156 (Tex. 1999) (per curiam). TAMU’s right to require compliance

with its campus safety policies does not change the Wonios' status from independent contractors to employees.

Similarly, Bishop misplaces reliance on testimony that TAMU approved the Drama Club's choice of the Wonios as directors and had the right to dismiss directors if necessary to achieve compliance with TAMU safety policies. Resp. Br. at 15. The right to hire and fire applies to both independent contractors and employees, and is unrelated to the details of directing the contractor's work. *See Thomas*, 30 S.W.3d at 54; *Bishop I*, 996 S.W.2d at 214. Accordingly, TAMU's right to approve directors and dismiss those who refuse to comply with its safety policies is not evidence that TAMU controlled the details of staging plays. Bishop's failure to address the holdings of *Thomas* and *Bishop I*—which refute his only bases for claiming that TAMU “controlled” the details of staging “Dracula”—eviscerates his theory that the Wonios were TAMU employees.

## **II. THE FACULTY SPONSORS' SUPERVISION OF THE DRAMA CLUB CANNOT WAIVE TAMU'S SOVEREIGN IMMUNITY BECAUSE DRs. CURLEY AND LESKO WERE ENTITLED TO OFFICIAL IMMUNITY.**

### **A. TAMU's Arguments Are Not Inconsistent.**

Bishop wrongly accuses TAMU of taking an “inconsistent position” by arguing that the faculty sponsors are entitled to official immunity. Resp. Br. at 11. Following this Court's decision that Drs. Curley and Lesko were employees with respect to their roles as faculty sponsors, TAMU has consistently argued that: (1) Drs. Curley and Lesko did not use the knife or any other personal property to injure Bishop; and (2) independent of this point,

TAMU cannot be liable for their failure to learn about the Wonios’ substitution of the real knife shortly before the play opened because they are entitled to official immunity with respect to their decision not to attend all rehearsals of “Dracula”—which was the only way they would have learned of the Wonios’ decision. TAMU has properly presented this official-immunity argument as an alternative basis for reversal if the Court were to approve the court of appeals’s holding that the faculty sponsors’ allegedly negligent supervision constitutes a “use” of property. *See* Pet. Br. at 32 (“Even if the Court determines that Drs. Curley and Lesko’s allegedly negligent supervision of the Drama Club or failure to prevent use of the knife is an actionable “use” of property under the Act, the court of appeals’s decision should still be reversed because Drs. Curley and Lesko are entitled to official immunity for their exercise of discretion in declining to attend play rehearsals.”). Bishop’s effort to paint these independent bases for reversal as inconsistent misstates TAMU’s arguments.

**B. Bishop Again Misidentifies the Act for Which the Sponsors Were Entitled to Immunity.**

In his merits brief, Bishop knocks down the same “straw man” he created in his response to the petition for review—namely, his argument that TAMU’s employees had no discretion to ignore the campus weapons ban. *See* Resp Br. at 37; Resp. to Pet. for Rev. at 4, 6, 8-9. Bishop has framed the issue as a question that can only be answered in his favor in an effort to avoid the real official-immunity issue: whether the faculty sponsors had any discretion in their attendance of play rehearsals. That is the relevant inquiry because Drs.

Curley and Lesko did not know about the Wonios' decision to have Dennis Rittenhouse use a real knife in the play until after Bishop was injured. *See* Pet'r Br. at 32; Reply to Resp. to Pet. for Rev. at 8. And because the Wonios substituted the real knife only one week before the play's opening performance, it was only by attending all play rehearsals that the faculty advisors reasonably could have learned about the Wonios' decision. *See id*; *see also Bishop III*, 105 S.W.3d at 665 (Hudson, J., dissenting to denial of reh'g en banc) ("The evidence does not show the advisors had any reason to believe direct supervision was required or necessary."). Bishop's silence in response to this point speaks volumes.

Bishop's framing of the issue treats the faculty advisors as if they intentionally disregarded the Wonios' violation of the weapons ban, when in fact they were plainly unaware of it. *See* Resp. Br. at 39 (arguing that test for good faith is whether "a reasonably prudent faculty advisor [could] have believed that using deadly weapons was a practice that should have been allowed to continue."). Instead of confronting this flaw in his theory, Bishop attempts to shift the Court's focus away from the faculty members' entitlement to immunity by blaming them, or TAMU employees generally, for the Wonios' failure to comply with the weapons ban. *See id.* at 37. But TAMU's liability—if any exists in this case—must be predicated on the negligence of specific employees. Bishop cannot disqualify Drs. Curley and Lesko from official immunity for their acts as faculty advisors by reiterating the obvious point that a real knife should not have been used.

**C. Bishop Does Not Dispute that the Question of *Kassen's* Applicability Is an Important Issue That the Court Should Address.**

The disagreement of the justices on the panel below reflects the confusion among the courts of appeals as to whether the “medical/professional discretion” distinction the Court drew in *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994), applies outside of the medical context. *See* Pet’r Br. at 37-39. TAMU’s opening brief pointed out that the panel’s holding in *Bishop III* threatens to expose thousands of governmental employees to personal liability for discretionary decisions made in good faith and within the scope of employment, contrary to the Court’s jurisprudence. Consequently, TAMU urged the Court to address the issue to prevent the panel’s decision from impairing the ability of the State and other governmental entities to hire and retain qualified employees. Pet’r Br. at 39-40. Bishop does not contest these points and does not even respond to these arguments in his brief, resting instead on the bland assertion that the panel’s analysis was correct. *See* Resp. Br. at 38. TAMU’s rebuttal of Bishop’s assertion is set forth in prior briefing and need not be repeated here. *See* Pet’r Br. at 32-38.

**D. Bishop’s Waiver Argument Is Meritless.**

Bishop halfheartedly argues that TAMU has “arguably” waived “any defense of governmental [sic] immunity” by failing to brief whether the discretion exercised by the faculty sponsors was governmental in nature. Resp. Br. at 38 (citing *Bishop III*, 105 S.W.3d at 662 (Edelman, J., concurring in denial of reh’g en banc)); *see also id.* at xv, 11. Bishop’s waiver argument is misplaced because TAMU does not assert that the faculty sponsors’

discretion was “governmental” in the *Kassen* sense. Rather, TAMU’s argument is that *Kassen*’s governmental/medical discretion standard has no application outside of medical-malpractice cases, that the court of appeals erred in applying *Kassen* in this case, and that Drs. Curley and Lesko are entitled to official immunity under the *Chambers* standard the Court has consistently applied in cases other than claims based on treatment provided by state medical personnel. *See* Pet’r Br. at 32-40; *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994). Whether TAMU “waived” an argument that it declines to assert does not affect the Court’s ability to consider the arguments TAMU has consistently made.

#### CONCLUSION

The Court should grant the petition for review, reverse the judgment of the court of appeals, and either dismiss Bishop’s claims for want of jurisdiction or render judgment that Bishop take nothing. In the alternative, the Court should remand the case for the court of appeals to consider the faculty sponsors’ official immunity under the *Chambers* test.

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## CERTIFICATE OF SERVICE

I certify that on April 5, 2004, I caused to be sent a true and correct copy of this  
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