

ORAL ARGUMENT – 02/05/03
02-0293
IN RE STATE BAR OF TEXAS

O'NEILL: Does the CA in this case have jurisdiction to determine whether the TC had jurisdiction?

AUCEVEDO: In terms of whether or not we should have petitioned initially with the CA?

O'NEILL: Yes.

ALEVEDO: It's our position that the facts of this case are unique enough and compelling enough particularly because of the jurisdictional nature of the question that a compelling reason exists to have presented it to this court first. Because the DC's act of vacating BODA's judgment directly conflicts with this court's exclusive jurisdiction over BODA's judgment.

O'NEILL: But the CA would have had jurisdiction. You could have gone to the CA first.

ALEVEDO: Could have gone to the CA, but we believe that the case presents a compelling reason to bring it to this court first, not only because it directly conflicts with this court's exclusive jurisdiction over BODA judgments, but specifically interferes with a prior ruling of this court.

O'NEILL: I don't understand why it's compelling. I mean I understand substantively it's compelling, but the CA could determine that just as easily. Is there some exigency here that - I mean in an election contest often those are compelling reasons for us to take them and often we do. But there is no reason they can't go to the CA first.

ALEVEDO: No. But in this case it's this court's judgments and rulings that are being attacked and in fact have been nullified by what the DC has done. And this court has recognized in other situations similar to this, most specifically the McCall case and Jefferson case and In re State Bar, that it will entertain mandamus and prohibition in this court initially when a DC issues an order that's beyond its jurisdiction and it's particularly a disciplinary case.

PHILLIPS: All three of those were mandamus. They weren't direct appeals.

ALEVEDO: All three of those were mandamus cases.

JEFFERSON: And it was clear in all three that it didn't go to the CA?

ALEVEDO: It did not go through the CA. Those were filed directly with this court. In all cases temporary relief was granted; and all three of those cases those were petitions that were filed directly with this court. And in fact I believe in McCall the court also recognized that these kinds of issues are important enough to the jurisprudence of the state as a whole to warrant immediate

intervention by this court.

By vacating this judgment the DC judicially interfered with the established disciplinary rules and the structure in a way that's not provided for. The DC directly interfered with this court's prior orders in this case in that this court had already affirmed Mr. Watson's suspension and had considered and rejected the disqualification...

HECHT: If we hadn't ruled on the disqualification issue where do you raise it?

ALEVEDO: You would raise it the way - either the way Mr. Watson did, which would be before this court and the only court who has jurisdiction to judicially review BODA judgments.

HECHT: But if you didn't find out about it until a month after that and so he didn't raise it at all, then what does he do?

ALEVEDO: The proper way would either have been to raise it with this court - the preferable way would to have been to go back to a separate panel or a different BODA panel and raise it with the court who entered the judgment to begin with.

HECHT: There is no procedure for that here.

ALEVEDO: It would be - their procedures are governed by the rules of civil procedure. You could file a motion to vacate or motion to set aside. I think the authority from that comes from the rules themselves.

HECHT: So you think that if you first found out about the disqualification during a period of time when there was still time to raise it, but after you could raise it in the proceeding itself - it was already final here, that what you should do is go back to BODA and file a case? The rules just don't speak to what you do.

ALEVEDO: I think the authority is derived from the rules. It comes from the rules themselves in that if you look at the rules, they don't contemplate a DC's involvement in BODA proceedings except for those limited enforcement actions. You've got a rule that only gives this court exclusive judicial review over BODA judgments, and you've got a rule that gives BODA exclusive jurisdiction over revocation proceedings that arise from grievance committee judgments. I mean a DC does not have jurisdiction to enter those kinds of judgments.

HECHT: I'm just trying to find out where do you go? And you say BODA. And I just said there's not a rule on it. And you say it's just implicit in their authority.

ALEVEDO: You take those rules that provide for that. And you couple it with the law that collateral attacks against another court's judgment can only be brought in a court of equal jurisdiction. And a DC is not a court of equal jurisdiction in these kinds of proceedings because they

could not enter a judgment or consider a revocation proceeding arising from a grievance committee judgment. And the authority is implied or necessarily implied from those express powers.

JEFFERSON: So you go back to BODA and then would the DC have jurisdiction over that?

ALEVEDO: No. It would be judicially reviewed by this court because all of BODA's determinations and judgments are exclusively reviewed by this court.

ENOCH: In the grievance context the lawyer can choose either the DC route or the BODA route. One's an administrative route for the disciplinary proceedings and one's a court route for the administrative proceedings. If they elect to go to court they go to the DC, they go to the CA, they come to the SC. If they go to BODA, BODA functions like a TC?

ALEVEDO: They can function as both. In this instance they functioned as a TC.

ENOCH: Then they make a decision, then the SC acts as the appellate review of BODA. And your analogy to the rules is, if you're attacking DC's judgment for the judge being disqualified you go to a DC to attack that. And by analogy since they chose the BODA route and now they're claiming BODA would disqualify, they would go to one of the other panels of BODA to have that resolved.

ALEVEDO: That's correct. Because the rules do not contemplate DC involving themselves in BODA judgments and they are crossing over to this administrative side of the disciplinary system. The only instance in which a DC has the ability to involve themselves in a BODA judgment is when the bar seeks to enforce the BODA judgment. And the only reason that they are involved at that stage is because BODA does not have contempt powers or the ability to enforce the judgment on their own.

HECHT: And we've said that you could bring some challenge to the whole structure, such as a constitutional challenge. I suppose you could bring that in the DC.

ALEVEDO: You could. But even the Jefferson case which says that says you can't raise a challenge if it's directly related to a specific proceeding. And that's what you have here. He's not making a general attack. He's attacking his specific judgment. He wants his judgment that's already been affirmed by this court to be declared void.

HECHT: It's hard to read the motion for remand and the motion for rehearing in our court to ask for a decision on the merits on that disqualification issue. But you think it does?

ALEVEDO: We believe it does. Because when you look at the motion to remand - we've already asked for was originally remanded back to BODA for development of this evidentiary hearing based upon this disqualification claim. And the same thing was raised in the motion for rehearing. The motions lay out the identical claims, the identical facts, they make the same legal

arguments. The commission, the bar filed a response on the merits of the claim. There is no procedural or technical argument made. It was made on the merits of the claim. The reply was as well. And I don't see how you can say that the court didn't reach the merits of the claim because the motions were directly attacking BODA's ability, BODA's jurisdiction over the case. In order for this court to determine whether or not a remand would have been warranted, they necessarily would have had to determine whether there was any _____ chain to that disqualification issue. It was the only claim that was made in the motion to remand, and it was the first issue that was raised in the motion for rehearing. And this court overruled those motions and rejected that claim.

We believe that the effect of overruling those motions is controlled by this court's decision in Humble Oil, which says that we looked at those claims in our motion for rehearing, we overruled them. And what that means is that the TC cannot go back and cannot reconsider that issue. This is not a situation where the court declined to hear Watson's appeal. These kinds of appeals from BODA go from BODA directly to this court. They are not discretionary. The court rules on every single one of them. They took the case. They specifically affirmed the judgment. So in effect it's the court's judgment as well. And what the DC has done is it has stepped in here and in effect nullified that judgment and nullified that ruling. And it's our position they simply do not have the jurisdiction to revisit that issue..

HECHT: Do you think the effect of the TC's order was in essence suspend the discipline of the attorney?

ALEVEDO: I think it just got rid of it. I think it completely voided the judgment and allowed Mr. Watson to practice law. That's what the effect of vacated or declaring the judgment void.

HECHT: So it was important for you to get a stay of that order to, as you think, follow the rules that do not permit suspension of the discipline in those circumstances?

ALEVEDO: It was particularly important to get a stay of that suspension, because otherwise there is no way to take that back. Mr. Watson it out there practicing. There is no way to undo that at some later point. And so what's particularly important that at least at this point that that judgment of the TC be stayed so that the status quo remain the way it was. So that that suspension judgment, which again had been affirmed and the disqualification issue had been decided, kept that judgment in effect.

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LAWYER: Besides improperly seeking to declare the BODA judgment void, Watson is also improperly seeking an order that would require BODA and the State Bar to adopt new rules of disciplinary procedure and that would enjoin all disciplinary proceedings in Texas until such time as Watson's new rules are implemented. These claims for additional relief, however, are simply nonjusticiable. And, therefore, a writ of mandamus should issue directing the DC to dismiss

Watson's claims for want of subject matter jurisdiction.

The DC simply cannot give Watson the further relief he seeks because neither the State Bar nor BODA have the power acting alone to implement Watson's new rules. BODA and the State Bar can merely propose new rules to this court which may either accept or reject them, in whole or in part. And not only that, but the relief that Watson is seeking would inappropriately bypass the important step of having a referendum on any proposed rule by the State Bar, which as this court knows, only this court can order. Furthermore, by ordering the State Bar and BODA to implement new rules, the DC is trespassing upon an area reserved exclusively to this court as head of the judicial department of our state government.

O'NEILL: If the DC's jurisdiction is limited to enforcement what comes under the parameters of enforcement? If it went to the DC on a motion to enforce the judgment and the lawyer says well you can't enforce it because this or that. You can't enforce it because there was disqualification. You can't enforce it for this or that. And what if the TC doesn't throw the judgment out and says, Well I'm not going to enforce it.

LAWYER: The DC's judgment in that case would not be declaring a judgment of BODA and by extension a judgment of this court void. The court would simply be saying because of some defense raised...

O'NEILL: So the court could refuse to enforce it and get the same result.

LAWYER: Yes. The court could basically order a take nothing judgment.

O'NEILL: It would be the same result. The lawyer would still be practicing law.

LAWYER: In effect the lawyer would be - the court would only be saying it's not going to enforce the BODA judgment. But it would not be declaring the judgment void. Which would be attack.

O'NEILL: But in either event there would still be the lawyer practicing law.

LAWYER: That could be an effect.

PHILLIPS: And what then does the state bar do with that judgment?

LAWYER: Going to have to take it up the chain.

PHILLIPS: Are there cases when a judge has done that?

LAWYER: Not to my knowledge. What you would end up having here is if the claim is that this cannot be enforced because the judgment is void and the DC simply says no, I'm just simply

going to enter an order or a judgment saying that BODA take nothing. BODA would have to appeal that and argue that basically the effect of what the DC is doing is declaring a judgment of BODA and this court void.

PHILLIPS: It wouldn't go to the CA and not to this court?

LAWYER: It would be an enforcement proceeding brought by the State Bar for BODA. And if the DC refused to grant the relief, then it would be brought up to this court by mandamus.

O'NEILL: Would it be by appeal?

LAWYER: It strikes me that it might be an appeal directly to this court. But if not appealed, then by way of mandamus.

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RESPONDENT

MARBLE: J. O'Neill your question about whether this can go to the CA first? I don't think there is any prohibition going to the CA first. In fact there are recent decisions where this court even on statewide election issues has required the relator to go to the 3rd CA before it came here.

PHILLIPS: Do you agree that McFall and Jefferson both went directly from a TC to this court on mandamus?

MARBLE: I agree that they went directly here.

PHILLIPS: Was there any protest by the real party of that proceeding?

MARBLE: The only one that I am aware of is the O'Quinn case, and I think that's State Bar v. Jefferson. And I don't think there was a protest. As to the other two, I don't know. But I don't think there was any protest. In all three of those cases there was an actual TRO, an injunction or a TC writ, which directed BODA or the other entity within the State Bar to actually stop an ongoing disciplinary process. In other words it wasn't completed. They are actually either going through the grievance procedures or they are in front of BODA trying to exercise their jurisdiction. And they can run into a DC and say, TRO or injunction. And in those cases it gets granted and it comes directly up here to this court. And I don't think it ever goes to the CA. I don't think there is a complaint. There is a case that Ms. Aucevedo referred to, referred to as Sua. I think she wanted to refer to State Bar v. Heard. And that was when the Houston DC ignored a mandatory suspension provision and set aside and stayed that. And this court held that in light of the fact that you ignored that direct statute it could come directly to this court.

What actually was requested in both the motion for rehearing and in the motion to develop a record, there was a request to remand it to BODA to develop an evidentiary

record on the disqualification issues. And that's referenced in the separate motion, and in the motion for rehearing it's cross referenced. That was the relief that was requested. They are telling you now that we should have gone to BODA where this issue should be decided. And this court denied our request to send it back there.

If you look at page 14 of BODA's brief. They say the DC has jurisdiction to hear a collateral disqualification challenge to a decision rendered by an administrative tribunal. And it cites a case. Our position is when you have a completed administrative proceeding, a district judge would at least have jurisdiction to hear that collateral disqualification challenge. That makes it different than your State Bar v. Jefferson, the McFall case and the other case where we're trying to enjoin - prevent the State Bar or BODA from conducting their activities during the grievous process. In this case it's through and it's completed. You all denied the motions and that's why it ends up in DC.

There is no case that's cited in the briefing that's been filed this far which said if the decisions made in this court, it has to go back to this court. There is a doctrine in Bill of Review that if you challenge it by Bill of Review you must go refile your case within the same court under the same cause number.

ENOCH: How would you challenge a DC's judgment that you determined was decided by this qualified judge after the judgment is final?

MARBLE: It's discussed in Prof. Hodges article from 1960 on collateral attacks. And it depends on how it's brought up. If you are sued on a void judgment, then you raise it as a defense in the lawsuit where you are sued. If it's one that you are seeking affirmative relief to say I think it should not be enforced, you can file it in any DC that has jurisdiction over the parties in the judgment. It's not a direct appeal bill of review. You can file it in a DC with the right parties. It can be the same one. It can be a different one. The case law doesn't say you must go back to that judge or that decision...

HECHT: Then if your argument was that a member of the panel is CA disqualified, you think you start in a DC there too?

MARBLE: It would depend on when and where you made your argument and you found out.

HECHT: After it was all over you go back to the DC or not?

MARBLE: I think the answer to the question is, you have to because of the nature of limited jurisdiction. I don't think I can walk in to the 14th CA in the original petition and say I now want to challenge a justice that sat on the CA. There was a suggestion in one of the answers to one of the questions that you asked J. Hecht that you just go back to BODA. When this gets raised, I believe BODA is out of the jurisdiction. In a normal appellate to the SC situation, I don't think that

once the jurisdiction attaches here and we're on petition for review, I don't believe I have any jurisdiction or ability to go back to an appellate court and say I want you to look at these issues.

HECHT: You ask?

MARBLE: We ask you to let us do that. You would have jurisdiction to send this back. But if - for example. If I'm through the appellate process and there is a case that's actually deals with this, we file our petitions up here in the SC and then I try to go back and seek additional relief in the CA, this court says mandamus any attempt to do that. I forget the name of the case but it's within the last 5-6 years that that happened. So I don't think that we can simply unilaterally say we're going to go back to BODA now and have the issue looked at. We did what we were supposed to.

OWEN: We have seemed to make a distinction between grounds for recusal and constitutional disqualification of a judge. And what is it that Mr. Gonzales did in these proceedings that would make him constitutionally disqualified?

MARBLE: There are two situations. One, there is a general constitutional question as to whether this was tried to a fair impartial tribunal when he is a partner at Hughes & Luce at the time that the WalMart Litigation is continuing.

HECHT: You think that's grounds for disqualification?

MARBLE: Yes. But the Texas constitutional - the direct final interest is the one that's discussed in the case law. And by virtue of being a partner in that firm, his relationship to WalMart it is a direct financial interest...

OWEN: Can you cite me the constitutional provision that says if this happens the judge is disqualified?

MARBLE: It's in Fry v. Tucker and it's also discussed in the Gulf ____ case and in Somerall v. _____. The constitutional provisions are cited there. There is a discussion by Ms. Aucevedo about the Humble Oil decision. If you read the relief that's requested by both BODA and the State Bar they are asking this court to grant the pleas to the jurisdiction they filed in the DC. I don't know of any case outside of certain sovereign immunity situations involving foreign states that this court can actually take on mandamus and grant a plea to the jurisdiction. There was a _____ of interlocutory appellate review that could have been taken under the CPRC. They didn't take it. To the extent that they are asking and saying we want you to grant the relief, the plea that we filed, I think that's foreclosed by Hooks and by the Bell Helicopter case.

ENOCH: We've been pretty clear in some of our opinions that if the lawyer chooses to go the BODA route, the lawyer can't then attempt to get involved in that route by going to the DC. We've been fairly jealous in guarding the clear distinctions between those two routes they go.

MARBLE: I believe there is two situations. There is one situation where the - as far as the disciplinary process, the lawyer can make a decision on which way he wants to go. He can go through the DC. We go through de novo. We go through the administrative process. That scenario does not apply to Mr. Watson because Mr. Watson was on a probated suspension and this was a motion to revoke his probated suspension. That has to go through BODA and it was not a decision where Mr. Watson says I'm going to choose BODA over the DC. By the statutory provisions it has to go there. The enforcement and the administrative process would be handled either by BODA or through the disciplinary process. I don't believe Mr. Watson went to the DC the first time around. It was through the local grievance committee through an agreed judgment.

I believe Hooks and I believe Bell Helicopter preclude this court from just granting a plea to the jurisdiction. This court says it won't do that.

PHILLIPS: You say before the CPRC was amended that we might have had that mandamus jurisdiction. Now we don't because of interlocutory appeal?

MARBLE: I think that the CPRC provision does not take away mandamus jurisdiction from this court. My point is, is that in the Bell Helicopter case and Hooks v. Fourth CA, this court has said we will not rule on a plea to the jurisdiction even if we think it should be granted and even if the litigants may have to spend more time. What I'm saying is that's part of the relief they are asking is they want this court to grant the plea, which the DC denied. There is nothing which distinguishes that request from those two. And they did have a route of interlocutory appellate review under §51 CPRC: a governmental entity can take an appeal with a motion which denies a plea to the jurisdiction. So they have circumvented the statute in that sense to the extent that they are here trying to get that ruling.

The other argument that's made by BODA and the State Bar is that this interferes with the SC judgment and with enforcement of the judgment. I think the court has to look at two line of cases that are discussed in the party's briefing. There is a line of cases that begins with this court's decision in Milam Oil in 1919 and continues up through Holloway v. 5th CA in 1989. And it stands for the general proposition that this court will not issue writs of prohibition to adjudicate a res judicata defense. There is another line of cases and those cases are Humble Oil, City of Orange and Cherokee v. Ross which says that this court will issue a writ of prohibition to enforce its jurisdiction. In Humble, Cherokee v. Ross and City of West Orange, this court issued an opinion and remanded the case with instructions that the TC could consider only a limited issue. In Humble the court affirmed the TC, reversed the CA and said that the only issue the TC had left that he could decide was an accounting request by the plaintiffs. In the City of Orange this court affirmed what the TC did and said that the TC was not to relitigate certain population issues. This was an annexation question and the ability to annex was going to be based on the population of the areas. This court said you cannot relitigate that. The TC decided it was going to relitigate it.

In Cherokee v. Ross, there was a preferential right to purchase and a severance of a reformation claim. This court affirmed the TC and remanded it back saying that the only issue

the TC could relitigate was the reformation claim and the TC decided it was going to do more than that. It was going to litigate the whole case. It had already come up here. This court said it couldn't do. And in those cases the court has granted writs of prohibition because it conflicts with the instructions and the mandate in the judgment and the enforcement.

There is language in Milam which I would direct the court to that says there is a distinction between the enforcement of this court's prior judgment and a judgment which is filed asserting that the judgment should not have a fact for another reason. And in the Milam case the plaintiffs in the TC had filed a subsequent lawsuit after this court issued an opinion actually tried to join the proceeding in this court on rehearing and filed certain rehearing arguments. This court ruled on those and basically reiterated its prior opinion. It goes back down to the TC. There's another lawsuit filed and this court holds it's not going to issue a writ of prohibition. It all should be handled through a res judicata defense. And if there was no violation or attempt to interfere with this court's prior judgment. And I think if you see what this court did when it simply denied the motion to remand this case back, we fall within the Milam Holloway line of cases which says the res judicata defense needs to be asserted in the court, taking up for appeal, and this court rules on that as a matter of court.

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RESPONDENT

LAWYER: I would like to address two points. First of all, I would like to return to a question that J. Hecht was asking Ms. Aucevedo concerning where in the rules might one find the authority for bringing up collateral attack in BODA? I think that the court would look to the BODA internal disciplinary rules nos. 1.02 and 1.03. In 1.02 the rule states that BODA shall have and exercise all the powers of either a TC or an appellate court. And in rule 1.03 it says except as varied by these rules and to the extent applicable, TRCP applies with rules of appellate procedure and rules of evidence. Those are two rules that we can point to that would give BODA the authority to hear a collateral attack.

The second point that I would like to address has to do with opposing counsel's argument concerning the fact that BODA and/or the State Bar had an adequate remedy by appeal by way of interlocutory appeal as to their pleas to the jurisdiction.

I think the important point here to remember is that the court has extended jurisdiction over the BODA and the State Bar's plea to the jurisdiction. The rule, the Black Letter law is that when mandamus relief is available as to one more rulings in a case, such as here concerning the motions for summary judgment, then the court may exercise discretion to address other errors in the DC that would not independently provide a basis for mandamus relief such as BODA's plea to the jurisdiction.

If you look at the record and you look at for example the pleadings that were filed by BODA in the DC, BODA filed a motion for summary judgment and a separate plea to the

jurisdiction. In the motion for summary judgment, that motion of BODAs addressed the merits of the disqualification issue and it also raised the preclusion issue. Then in the plea to the jurisdiction, BODA raised its arguments concerning justiciability about the asking the DC to act outside of the administrative disciplinary scheme and then also asking the DC to create new rules. So if all we were complaining about here was just the denial of our plea to the jurisdiction, then maybe opposing counsel would have a good argument that interlocutory appeal would have been enough. But here we're also attacking the judgment of the DC in its partial summary judgment that declares the BODA judgment void. So combining those two things it is entirely inappropriate for BODA and the State Bar to come before this court as it did. It did not have to take interlocutory appeal.

As far as the remand and the rehearing in this case, we believe that it is important to note that what was going on in that motion for remand and motion for a hearing was nothing less than an attack on the jurisdiction of BODA to render the judgment it did. And by extension it was an attack on this court's judgment, because derivatively if BODA did not have subject matter jurisdiction this court would not have had subject matter jurisdiction.

O'NEILL: How should our judgment read? What do we do?

LAWYER: We respectfully request that you grant the mandamus relief and a writ of prohibition if necessary.

O'NEILL: But it would order the TC to vacate.

LAWYER: Vacate the summary judgment and dismiss all of Watson's claims for lack of subject matter jurisdiction.

O'NEILL: Then what happens on the enforcement case?

LAWYER: There is not an enforcement case.

O'NEILL: Because?

LAWYER: Because what Watson did here was he brought a collateral attack and we simply defended. We have not - the State Bar nor BODA have brought an enforcement action.