

ORAL ARGUMENT – 11/12/03
02-1014
HARRIS COUNTY TEXAS AND BORCHERS V. SYKES

HULL: This is a case alleging that the respondent's decedent was housed with an inmate with tuberculosis, and while housed there, he caught some sort of disease that killed him. Pulmonary infection that killed him despite the fact that he had not had TB.

Petitioners ask the court to address two issues. The first issue is whether the CA erred when it held that any dismissal through a plea of the jurisdiction should be a dismissal without prejudice as opposed to a dismissal with prejudice? There are several reasons why the TC correctly dismissed Harris County through the plea to the jurisdiction with prejudice.

O'NEILL: If you dismiss with prejudice doesn't that then presume that you could never go get legislative consent to sue? It would close that avenue completely.

HULL: The rule we're asking the court to adopt today is that if the jurisdictional problem can't be fixed then it should be a dismissal with prejudice. For example, if legislative consent can be gotten or administrative remedies can be exhausted or the case becomes ripe, or anything like that - repleading...

O'NEILL: How can you say that there is no way they could go get legislative consent? I mean if you dismiss with prejudice you are precluding them from seeking legislative consent.

HULL: In this case the legislature has spoken in the tort claims act, and legislative consent is not a way...

O'NEILL: But they can go get special consent from the legislature. That's not the only way the legislature can waive immunity.

HULL: I would say if they are able to come forth with some indication to the TC that that's what they intend to do, then the TC should dismiss without prejudice. The plaintiff can easily satisfy that burden and if the TC makes a mistake and dismisses with prejudice, simply file a motion to modify the judgment, explain to the TC you've made a mistake and this is why. I can fix this jurisdictional problem.

O'NEILL: Are you saying that if that avenue is available, if the legislature has not in that specific case consented or said they are not going to consent, then that avenue is open and the TC should dismiss without prejudice.

HULL: I'm saying where it's clear that there is a possibility of fixing the jurisdictional

defect, that the TC should dismiss without prejudice. I'm not sure I agree with you, that individual plaintiffs can go the legislature and seek individual - that would be a special law under the constitution. I don't think that's permissible.

HECHT: What do you mean in the brief at page 5: dismissal should be with prejudice unless the plaintiff may at least in theory satisfy some condition that would waive ie seek legislative consent to sue. What does that mean?

HULL: I'm saying that if the jurisdictional defect can be fixed, dismissal should be without prejudice.

HECHT: Well what does legislative consent to sue mean? Doesn't that mean going to the legislature and getting consent to sue?

HULL: Sure it does. But the tort claims act does not allow that.

HECHT: The tort claims act doesn't allow anybody to go the legislature and ask for consent to sue?

HULL: I've never seen that happen. I've never seen that in the act.

PHILLIPS: Could the plaintiffs go to the Harris county commissioner's court and seek a resolution or some type of ordinance that would allow them to bring this case and instruct your office not to file a dilatory plea?

HULL: I don't believe so because it's an immunity from suit. The commissioner's court can definitely waive immunity from liability. Maybe they could. Maybe they couldn't. But that's not our facts. Our facts are that he doesn't come under the tort claims act. He cannot come under the tort claims act under clearly established law. Under this court's precedent in Dallas County MHMR v. Bosley, the TDCJ v. Bosley, TDCJ v. Miller, there is no way his claims could have come under the tort claim act.

HECHT: I'm just trying to understand what you meant in the brief: seek legislative consent to sue. And you say you mean amend the tort claims act.

HULL: No. I did not say that.

HECHT: What does it mean to seek legislative consent to sue?

HULL: I was just giving you an example. The cases that I read most often are contract cases. Prior to ch. 2260 of the gov't code being enacted people who had a contract claim against the government had to go to the legislature and seek permission to sue. If not, the claim was jurisdictionally barred. However, it was a dismissal without prejudice. I believe that's the right

result. However, under 2260 and under the tort claims act, I'm not aware of any avenue where you can go around those acts to go to the legislature in individual cases.

O'NEILL: If you could would your argument be different? And if you could then you're faced with a real dilemma about dismissing with prejudice. Because presume with me that you can do that and always that avenue is theoretically available if not in reality. And so by dismissing with prejudice you would be cutting off that avenue.

HULL: If I were to presume that, I would also presume that the legislature could step in and revive the cause of action. I mean if they are willing to go to that extreme to allow a cause of action to proceed for one person, they could similarly revive the cause of action in some way in the same act. It's just an extremely - I can't see it happening, but if it did happen, the legislature could somehow create the cause of action anew if they wanted to.

OWEN: For decades this court has urged the legislature to revisit the tort claims act and to amend it. What if it were to actually do that? What would that do to an outstanding claim that had been dismissed with prejudice that limitations had not expired on?

HULL: The legislature could step in and revive those claims. They generally haven't done that. When they enacted the tort claims act, they specifically with premise defects they said anything that was built before the enactment of the act, we're not going to make you come under the act. So it sounds to me like the legislature isn't going to do any further retroactive action that.

PHILLIPS: But all this debate, I gather under your second argument you say is irrelevant or at least it can become so. Because you say that a dismissal without prejudice is still a judgment under the language of the tort claims act.

HULL: I believe that's true. The first reason that the CA's erred when they held that a dismissal for want of jurisdiction is not a judgment under 101.106, is because the plain language of the statute is so broad. The statute simply says a judgment. It doesn't say a judgment on the merits. It doesn't say dismissal with or without prejudice. It just says a judgment. In Bosley this court said specifically the immunity conveyed to a governmental unit's employees by §101.106 is triggered by any judgment in an action against a governmental unit including a judgment in favor of the governmental unit. And the court emphasized any. I think the judgment is that broad. And at the time Bosley was written this court looked at it that way. And I think that's the right way to look at it.

LAWYER: But haven't we typically seen judgments as disposing of the merits of the case rather than jurisdictional or other procedural reason for dismissal?

HULL: I don't see a distinction. I know the court generally says disposing of a case demands a dismissal with prejudice because it's on the merits. But if you assert your immunity from suit - your sovereign immunity, your governmental immunity through a summary judgment, the court

would be looking at the same jurisdictional evidence, the same jurisdictional arguments. There is absolutely no difference. And by definition the TC can't in a summary judgment look at the merits of the action because it doesn't have jurisdiction. It's a distinction without a difference. A motion for summary judgment and a plea to the jurisdiction you start with...

PHILLIPS: Are you saying the county could not file a valid motion for summary judgment in response to this lawsuit?

HULL: Certainly they could.

PHILLIPS: In other words they could waive their assertion of a lack of jurisdiction to the extent of filing a motion for summary judgment?

HULL: Well that seems to be the law right now.

PHILLIPS: And that would marshal essentially the same type of proof you bring on a plea to the jurisdiction. And if you succeeded in that, it would leave not doubt that Mr. Borchers was immuned from suit. If your primary concern is your employees as you seem to suggest in the brief.

HULL: Yes. There would be no doubt that Harris County was immuned from suit eventually. If we do that, we waive our right to an interlocutory appeal under 51.014(a)(8). And that leads to inefficiencies for the governmental entities especially smaller governmental entities where they basically are forced then to defend two suits.

HECHT: Is that the principal reason governmental units assert immunity through a plea to the jurisdiction, so that if it's denied they can appeal?

HULL: Absolutely.

ABBOTT: You said a moment ago that the TC couldn't look at the merits of the case. Why is it then that you filed in conjunction with your plea to the jurisdiction evidence that the inmate didn't die from tuberculosis.

HULL: Referring back to Bland ISD v. Blue, the court recognized that in the past it's always allowed jurisdictional evidence to come in to show sham pleadings. And essentially that's what that goes to. It's a sham pleading. He didn't die from tuberculosis.

ABBOTT: So you said the TC could have looked at that evidence in deciding whether to grant the plea to the jurisdiction. Did you allege a sham pleading? Did you allege that the plaintiff's pleading was a sham in order to get the TC to recognize jurisdiction?

HULL: Frankly, I don't know if those specific words are used or not.

WAINWRIGHT: Do you believe that under Bland the only way to consider that evidence under a plea is if the pleadings are alleged to be a sham, or only the monetary jurisdictional amounts are alleged to be a sham?

HULL: Whatever it is you need to get into court, whatever jurisdictional bases you need to get in the court, whether it's a waiver under the tort claims act - 101.021, or whether it's the court's jurisdictional limits, whatever it is, I believe the evidence that's permissible is the evidence that would show that it's a sham, or that - sham is a harsh word, but it's just not true that the jurisdictional pleadings just aren't true. And I believe evidence can be used for that. We have to have some faith in the TC that he's going to use the proper evidence to attack whatever particular elements of the jurisdiction...

WAINWRIGHT: This decision was entirely on the pleadings.

HULL: I believe the autopsy report may have gone in with the plea to the jurisdiction, but I don't remember off the top of my head.

WAINWRIGHT: Do you know if that's in the record?

HULL: Yes it is in the record. Another reason why 101.106 should be read broadly is the policy reasons behind 101.106. As the court pointed out in Bosley, the legislature took several attempts at enacting the tort claims act and _____ over a two year period before Gov. Smith finally signed it. His problem was he needed narrower, and narrower. Part of the enactment was a compromise where individual employees who normally are subject to liability under the common law - the deal was if you wanted to go after the government you sacrificed the individuals. And you make a choice. You make an election. And an election comes under 101.106 when a judgment comes in. And it doesn't matter what kind of judgment. And the election is made for you under 101.106 when that judgment comes in. And again the legislature didn't try to pick and choose between which kind of judgments. When the plaintiff lets the government go to judgment by whatever means or however the judgment ends up he loses the suit under 101.106 against the individuals. That's supported by strong policy reasons.

One of the points we made earlier was it's inefficient for the government to forego its statutory right to an interlocutory appeal simply to assert the 101.106 derivative immunity for the employee, which clearly is contrary to the intent of the act.

* * * * *

RESPONDENTS

USORO: In all of this, I am reminded of the decision by the Austin CA in the case of Liberty Mutual Ins. v. Sharp, which says a court's jurisdiction is conferred by the constitution and the statute. A court without jurisdiction cannot render a valid judgment.

The facts of the case are straightforward and they have not been controverted by Harris county. George Sykes was issued a blue warrant because he left the State of Texas while he was on probation. And when he returned back to the state and tried to get a driver's license, he was arrested by DPS and taken to Harris County.

In Harris County he was kept next to an inmate that had tuberculosis. Even Harris County's own ME reports showed that Mr. Sykes was exposed to tuberculosis. After that, he developed a lot of breathing problems and eventually died.

WAINWRIGHT: Regarding a court lacking subject matter jurisdiction, as you stated it that court would then not be able to render a judgment on the merits. And we can all think of many examples where that certainly is the case. Is not governmental immunity different however where the legislature has said that there's a lack of subject matter jurisdiction? In other words governmental immunity applies in these circumstances unless there's an exception. In that case isn't a holding of a lack of subject matter jurisdiction a ruling on the merits, the case can't be brought in the State of Texas?

USORO: No. A plenary jurisdiction is basically a statement. The word plea comes from the Latin word plac___ meaning to beg. Now when ___ appears before a judge he pleads. When a case appeared before an immigration judge the respondent pleads. So we see that plea is a preliminary action in a case. It does not go to the merits. The Beaumont CA in _____ stated that a plea to the jurisdiction does not go to the merits of a case. Summary judgment goes to the merits of a case.

So in this instance here government action in asking for a plea to the jurisdiction is to beg the court to say judge, you can't touch us. It doesn't go to the merits of a case itself.

PHILLIPS: Your position now is that you do not now have and you never had a valid claim against Harris County?

USORO: No. I did not say that. We do have a valid claim against Harris County.

PHILLIPS: So the relief you're asking for is not merely to be able to proceed against Mr. Borchers. But it's to have your - at the appropriate time - a review of the action favorable to Harris County?

USORO: First of all the 1st CA sent the case back to the TC to grant Harris County's plea to the jurisdiction without prejudice. So we believe we can go back and refile the case against Harris County if we can.

PHILLIPS: As it's now pled, do you admit you did not state a valid claim against Harris County based on the last pleadings you had in the TC?

USORO: No. I do not admit that.

PHILLIPS: But you're not filing a cross appeal here complaining of that part of the CA's ruling?

USORO: No. I did not. I believe that if Carl Borchers is held responsible for what happened to Mr. Sykes, Harris County can indemnify him. It's still a case against Harris County.

PHILLIPS: I'm just trying to get the posture of the claim. We really only looking at whether or not you have the right to proceed against Carl Borchers at this point. Correct?

USORO: Yes.

PHILLIPS: And you're not claiming here that you have a right to proceed against Harris County at this time on these pleadings?

USORO: No. There comes a point where you have to say well what is practical to do at this point? We are not going to pursue a case against Harris County while we do believe that if the case against Carl Borchers proceeds as the 1st CA has directed, a claim against Brochers is essentially a claim against Harris County.

PHILLIPS: So if you had not made the initial claim against Harris County, if your only defendant had been Carl Borchers, we wouldn't be here today.

USORO: I don't think so. Because I didn't bring this court here today. Harris County did. What Harris County is saying is because they received a plea to the jurisdiction against Harris County, that means that Borchers is entitled to derivative immunity when they filed a motion for summary judgment. That's why we're here perhaps. If they had filed a motion for summary judgment on behalf of Harris County, and then on behalf of Borchers, we may not be here today.

OWEN: We have been struggling overtime on what to do with the tort claims act in terms of jurisdiction. Because it seems to us, I think, that at times whether you have the right to sue and whether liability has been waived is co-extensive with the merits. For example, if there were a dispute about whether a county employee were actually driving a truck that hit someone, you wouldn't know till the end of the jury trial was he driving the truck or not. And if the jury found he was not driving the truck, there would be no waiver of immunity and no waiver to suit. And so what judgment would be entered at the end of that jury trial when the merits are co-extensive with the jurisdictional issues?

USORO: I believe that if a case goes to trial and the government entity receives a _____ judgment, in that instance perhaps immunity applies to the employee of the government entity.

OWEN: Let's say if you proceeded against the county as well, but the jury found that

employee was not driving the truck, that somebody else was. And, that, therefore, the county is not liable but there is also no waiver of the right to sue in that case because there was no use by a county employee of a vehicle. So at the end of it we see that there was no waiver under the tort claims act because there was no employee involved using a vehicle. So is the judgment that's rendered by the TC is that a dismissal for want of jurisdiction with prejudice? Without prejudice? Is it a judgment on the merits? Do you see where I am coming from?

USORO: That is something that the government entity has to decide on. If they decide that the judgment shall be on the merits, then they will file the judgment to the TC. If they decide that a judgment has to be on the issue of jurisdiction, then that's what _____ to the TC. In this case though it's a little different because Harris County filed a plea to the jurisdiction and then wants to file a summary judgment in the interest of the employee. It's two different animals.

OWEN: That's what I think we're struggling with. If it's the same facts, what precludes the county from litigating those same facts in a plea to the jurisdiction in front of the TC, and why would the judgment be any different depending on whether it's raised to the plea of the jurisdiction or it's at the end of a fact finding when a judgment is rendered?

USORO: A judgment is different in this instance because we assume that the governmental entity is going to discovery, has taken depositions and then submits a judgment to the TC and gets a judgment, that is different from the plea. The plea says you can't touch me because I'm a governmental entity. In that case you say the court you do not have jurisdiction to _____ judgment against me.

OWEN: Let's say in the plea to the jurisdiction under my example the county files a motion saying dismiss this, our employee wasn't driving the truck. And they submit an affidavit of the employee saying I wasn't driving the truck. And you can't controvert that. Discovery is taken and you can't controvert that. Would it be improper at that point for the TC to go ahead and dismiss for want of jurisdiction?

USORO: No. It would not be proper for a TC to dismiss for want of jurisdiction because the whole case has been presented to the TC. So it's been a case on the merits. It's different from a plea though because a plea is just a preliminary. You do not get to the heart of the case or the merits of the case. In the case where there is trial on the merits, the TC has jurisdiction to enter a judgment on the merits. Because at this point it's too late for a plea.

O'NEILL: The derivative immunity statute seems to contemplate the plaintiff has an election. The plaintiff can either sue the county and the employee, or it can just sue the employee. But if it chooses to go against the county and the employee, then the employee's liability is going to depend upon the outcome of the county. Would you agree that that's sort of the scheme underlying the derivative immunity statute?

USORO: Yes.

O'NEILL: And if that is the scheme, then it seems that the CA's opinion here would always undermine that. If the employee's liability should be derivative of what happens to the county, then isn't that directly opposed to what the CA's did here?

USORO: The problem with what happened in this case is that Harris County chose to go with a plea to the jurisdiction. And if Harris County as has been stated before had simply taken one step forward and filed a motion for summary judgment and got a result in his favor...

O'NEILL: I guess my question is, putting the form aside for the moment, the purpose is if the two are in the same suit - county and employee - and county is dismissed either on the merits or not on the merits, so goes the employee. That seems to be the scheme. And so if you are focusing on the form of the dismissal as to the county entity, doesn't that undermine the scheme that the legislature seems to be putting forward?

USORO: I disagree because the legislature has _____ award. They could have made that the case here. But the language of 101.106 says if a government entity receives a judgment of settlement in its favor, the case is ____ against the government employee. So the question then is, is a plea a judgment. No matter what scheme is out there, if a plea is not a judgment in favor of the government entity, then the government employee is not entitled to derivative immunity.

HECHT: And why isn't it? They won.

USORO: No. They did not win. They said you can't touch me.

HECHT: Well that's a win.

PHILLIPS: This is what's troubling me. The TC in this case granted the plea to the jurisdiction filed by Harris County. And you appealed that decision to the CA. Did you not? You complained about that to the CA.

USORO: Yes.

PHILLIPS: Then why wasn't that action by the TC a judgment for purposes of §101.106? If it had enough finality that you could complain about it to the CA, why shouldn't we treat that as a judgment under the language of the statute?

USORO: I don't think it really has a finality because a plea to the jurisdiction basically is it can appear that using the example of an interlocutory appeal, the difference between the plea and the summary judgment is so many differences. The appeal on a plea is interlocutory; the want for summary judgment is on the merits. On the plea you say the court has no jurisdiction. In a summary judgment the court has jurisdiction. Now review of a plea is de novo and summary judgment is on the merits.

WAINWRIGHT: What if the same holding was made by the TC on the summary judgment instead of on a plea to the jurisdiction, then would you say a judgment filed as to §101.106?

USORO: That is assuming that Harris County had filed a motion for summary judgment...

WAINWRIGHT: Made by summary judgment rather than by a plea to the jurisdiction. And as you know evidence can be when necessary considered under a plea though in some respects it may be similar to a summary judgment. But if this ruling had been made, the same ruling in the summary judgment, would that be a judgment in your opinion under §101.106?

USORO: That would be a judgment. But the difference with that scenario and this scenario is that Harris County submitted no evidence to the TC on the plea. _____ said you can't touch us.

JUDGE: I thought there was evidence that they submitted as we discussed and the petitioner's argument evidence that tuberculosis was not the cause of that inmate's death in conjunction with the plea to the jurisdiction.

USORO: No. The summary judgment evidence and the motion for summary judgment, the summary judgment autopsy report in the motion for summary judgment cited _____.

JUDGE: It was not part of their plea to the jurisdiction?

USORO: No. The plea to the jurisdiction was simply a two page document that said you can't touch me. I'm immuned from lawsuit. And they move on to summary judgment for Carl Borchers. The summary judgment autopsy report from the ME's office said we are _____ immunity.

If the TC grants summary judgment and says I do not have subject matter jurisdiction, that means the TC can't act on the case. If he doesn't have subject matter jurisdiction, he cannot render a valid judgment. In that instance then, the granting of immunity as to Carl Borchers do not apply because there was no subject matter jurisdiction from the beginning and so he cannot grant derivative immunity for _____.

WAINWRIGHT: Would you agree that our task here is one of statutory interpretation on this second issue, under 101.106? That is, what is in the words of the statute "a judgment?" That's our task here. Correct?

USORO: Yes. The task is, is a plea to the jurisdiction a judgment?

WAINWRIGHT: And you're saying that the ruling on a plea to the jurisdiction is not a judgment.

USORO: Yes.

WAINWRIGHT: So our court has never addressed this issue?

USORO: I think the court has gone around it in some way but it hasn't hit this issue on the head. The Beaumont CA says a plea is not a judgment on the merits. The 1st CA says a plea is not a judgment on the merits.

* * * * *

REBUTTAL

HULL: If I may answer a few of your questions J. Wainwright. First of all, the autopsy report was included with the plea to the jurisdiction. It's at Tab F in the appendix to the petition for review. Second of all your question was if the sovereign immunity or governmental immunity, immunity from suit was asserted through a summary judgment as opposed to a plea to the jurisdiction would 101.106 apply? According to this court in an opinion issued 5 days ago it does. Section 101.106 does bar.

The thing that's worth pointing out though in the Merck v. Shilly(?), a summary judgment, they raised the same jurisdictional arguments as they would have in a plea to the jurisdiction. They raised the same jurisdictional facts whether they put them in or not. They could have put both whether in a plea to the jurisdiction or a summary judgment. The fact of the matter is as we traditionally think of a case decided on the merits, that case was not decided on the merits. The Shilly(?) case was not decided on the merits because there was no negation of an essential element of a claim. There was no affirmative defense. There was no trial on the merits. That's a trial disposing of all the issues and parties. Those are the types of things that we typically think of as a judgment on the merits. And that wasn't done in that case, and yet, this court applied 101.106, reversed the CA and rendered judgment for an individual defendant merely 5 days ago.

The CA in this case held with regard to the second issue a dismissal for want of jurisdiction is not a judgment on the merits of a cause of action. Under the SC's case decided just 5 days ago, the Merck case, that's wrong because the 1st CA would say never would a dismissal for want of jurisdiction satisfy 101.106 in derivative immunity. And that's plainly wrong under Merck.

I ask the court to go a step further because the same jurisdictional evidence, same arguments will be used in the plea to the jurisdiction to apply the same reasoning and same conclusions and dismiss _____ Borchers from this case.

O'NEILL: What do we do about intentional torts? Let's suppose the plaintiff sues the county and the county gets summary judgment because it's determined it was an intentional tort, and under the facts the county is not liable. Does that mean that the employee is also entitled to immunity under 101.106?

HULL: Yes. And Merck affirms that. It's the same argument. It's immunity from suit argument and it was through a summary judgment, so Merck would clearly fly.

WAINWRIGHT: The CA suggests that in a plea to the jurisdiction circumstance that the government has a duty to specially except. And I understand in this case plaintiff did amend - had the opportunity to amend and did amend. But let's assume that didn't happen and there was no special exceptions submitted. Comment on the CA's indication that there should be a duty by the government to specially except before there can be a dismissal of prejudice.

HULL: The law is if there is a possibility of amending the plea, then there's a duty by all parties to specially except. In this case the CA...

WAINWRIGHT: So you think it would have been your duty to specially except before being able to obtain a dismissal with prejudice?

HULL: No. I don't believe that at all. We didn't need to specially except in this case and appellee's brief in the CA had quite a bit of authority saying that where it would be futile or useless to specially except no matter what he did to amend his pleadings he couldn't fix them to bring jurisdiction in the TC, then there is no point in specially excepting.

WAINWRIGHT: What if there is an opportunity to amend to state a claim, the government sees that, the plaintiff sees that, who has a duty to specially except?

HULL: The party moving for dismissal whether it's the government or a private party.

WAINWRIGHT: What's the source of that duty?

HULL Case law. The CA erred when it held the case must be dismissed without prejudice when dismissed to a plea to the jurisdiction. When the jurisdictional defect can't be remedied the case should be dismissed with prejudice. A good example of what can happen to a government is today where the respondent said that he intends to refile against Harris County and we will defend yet again.

Also the CA erred when it held that a judgment under 101.106 must be a judgment on the merits. Simply because jurisdictional argument is raised in the summary judgment should not make the judgment anymore or less a judgment on the merits than if it were raised in the plea of the jurisdiction. It just doesn't make sense logically. Also the statute is so broad and this court has construed in dictum the statute very broadly. And I think the court should continue to do now in order to uphold the policies of the act of 101.106.