ORAL ARGUMENT – 12/02/04
02-1031
REATA CONSTRUCTION V. CITY OF DALLAS

LAWYER: The Dallas CA's decision from which we appeal suffers from several independent fatal flaws, conflicts with binding decisions of this court, and cannot be allowed to stand as a matter of established law.

There are three independent reasons for that conclusion. First, as this court correctly concluded and held in its per curiam decision in this case, the City of Dallas waived immunity from suit by invoking the jurisdiction of the TC seeking affirmative relief there. The Dallas CA failed to follow approximately 70 years of established Texas law in binding decisions of this court by overruling the TC on that issue.

Second, the City as a home rule municipality waived immunity from suit in its charter, and the legislature waived immunity from suit in the local gov't code §51.075.

O'NEILL: Don't you have to look at on an individual claim basis. If the government were to file suit on one discrete claim, is that just sort of Katy bar the door. Anything is then allowed against the state?

LAWYER: No it doesn't. It has to be related to the facts and circumstances germane to the controversy.

O'NEILL: But is it anything that might arise, any claim that could possibly be asserted based on the circumstances, or do you have to examine each individual claim?

LAWYER: You examine each individual claim to see the facts and circumstances are germane to that claim and arise from the same facts and circumstances. A great example out of the Wichita Falls CA, there was a case in which a county hospital filed a lawsuit for sworn account. And there was a counterclaim for medical malpractice. The court held that there was no waiver by filing that lawsuit, because the counterclaim was not germane to the cause of action. The cause of action was whether the money was owed or not.

OWEN: At the end of the day where does this all get you? Because all we said in the original opinion that we issued was that it's a waiver of immunity from suit, not a waiver of immunity from liability. So how does this advance your cause at the end of the day?

LAWYER: First of all, you are absolutely correct. Waiver from immunity from suit is the sole issue before this court. Immunity from liability is not here. The way it advances our cause is it gets us in court so that we can then prove that there is also a waiver from liability. We, in this case, for example, pled a cause under the Tort Claims Act for which there is waiver from liability.

We also pled a cause that the City was acting within its proprietary function, which this court has long held...

OWEN: Well you don't need a waiver from suit for either of those claims.

LAWYER: I believe that's correct, and I believe that's one of the reasons why the Dallas CA erred.

OWEN: On the narrow point of the counterclaim.

LAWYER: On the narrow point of the counterclaim, if the City should enjoy immunity from suit, the law is crystal clear with respect to the facts and circumstances germane to that action. If they invoke the jurisdiction of the court, they waive immunity from suit in that case.

OWEN: But not liability?

LAWYER: Not liability. That is correct. That is a separate and distinct issue and again that's not presently before the court.

HECHT: The question is, how does it help you to get immunity from suit if you are not going to get any closer to immunity from liability by doing that?

LAWYER: It keeps us in court and allows us to prove the facts and circumstances that would entitle us to a waiver of immunity from liability.

HECHT: But you say under the Tort Claims Act that you could make those arguments under the Tort Claims Act and then you would have both waiver of suit and of liability.

LAWYER: That is correct and we did that.

HECHT: And the state argues in its amicus that you are just postponing the day of - sure you are there but you are just wasting everybody's time because you can't possibly get a judgment.

LAWYER: I understand their argument and I believe the court will understand. We have a complete difference of opinion on that issue. We believe...

HECHT: And I'm wondering what that is though.

LAWYER: Once we are in the lawsuit, that we can prove - we pled and we believe that we can prove the facts and circumstances that would establish immunity from liability has been waived or does not apply at all. For example, in this...

HECHT: Why would a judge be more willing to listen to you under the Tort Claims Act

if the plea from the other side is the plea to the jurisdiction or something than he would be once you are in the door. I don't understand why it helps you. It looks like to me you get to make all the same arguments at some point. And then you win or lose. And the only question is do you do it sooner or later?

LAWYER: The principle on law upon which gets us to court, the immunity from suit, is separate and distinct from immunity from liability. There is different principles that flow there. For example, when the City acts in its proprietary function as opposed to governmental, there is no immunity from suit. If we plead and prove a cause of action under the Tort Claims Act, there is no immunity from suit for those actions. That's how it advances our case.

HECHT: You can't win any money in this case from the City, do you get anything else of benefit like settle or apportionment of the plaintiff's damages, or something that justifies the City being involved?

LAWYER: In this particular case, we would because there are other parties involved that were suing my client for monetary damages and we would get a submission to the jury that the City was at fault. And by keeping them in the case we would get that submission.

HECHT: Wouldn't you get that anyway?

LAWYER: Under the current law, I believe we would. But under the law applicable to at the time, the answer is no.

HECHT: And so you think at least if you don't get any money from the City itself, you would still be entitled to some relief from the damage claims against you because liability would be assigned to the City?

LAWYER: That's correct. The jury would go through and apportion the damages. If the jury apportioned any damages to the City under that scenario it would reduce the judgment against my client. Even if we couldn't recover on our claim against the city. And that's one aspect. That's one area where immunity from suit and being able to keep the city in the suit advances our claim. In addition to the others I mentioned which is the City was acting proprietary function of this case from which they had no immunity and also we pled and intended to prove a cause of action under the Tort Claims Act.

OWEN: If they affirmatively sued you for negligence, as an affirmative defense you could say they were comparatively responsible for contributory negligence, however you want to describe it, and you would be entitled to that offset. You would be entitled to apportionment responsibility findings even though you can't sue them directly.

LAWYER: I believe under the state of the law as it existed prior to the recent tort reform, you could not apportion the damages.

OWEN: If they sued you?

LAWYER: Under that scenario, I believe that is correct unless there is immunity from suit.

OWEN: They are a claimant. So why aren't they under ch. 33, a claimant's own negligence is taking into account.

LAWYER: I now understand the question. If it was just the two parties, I believe the court is right. That doesn't apply to this case because there are actually in excess of 25 parties, all seeking relief against my client. And if the city enjoys immunity from suit, under the old law we would not be allowed, at least it's my understanding, we would certainly argue differently. At least the risk, we would not be allowed to have the City on the jury form with the jury apportioning liability to the city.

OWEN: But you could argue the empty chair like defendants did for years.

LAWYER: It would not be an empty chair in this case because they invoked the jurisdiction of the court. And they are there.

BRISTER: But the question is, even if they weren't there and you couldn't get a jury question, you could get a sole proximate cause instruction and say we're not negligent because somebody else was.

LAWYER: Under that hypothetical that would be a correct statement. However, that's very little relief in the practical world.

HECHT: If this were a contract claim, not a tort claim, then there would be a waiver of liability.

LAWYER: That's correct.

HECHT: And so what is your position on how much the government opens itself up to by way of counterclaims or cross claims if it sues on a contractual obligation?

LAWYER: If it's sued under the contractual obligation it would be ____ in contract. That's how it would open itself up.

HECHT: How much can the other side _____? Unrelated contracts you said no. That would have to be the same transaction?

LAWYER: The same facts and circumstances that give rise to the cause of action. If in a contract case, more than likely it would be the same contract. In a tort case, the facts and

circumstances leading to the tort.

HECHT: So you think the old Borden and Bates cases are still good, or at least your argument doesn't run afoul of those, because they were trying to sue on something else?

LAWYER: I believe that's true.

HECHT: The state argues that at the most there should be some sort of recoupment claim like there is in the federal system. Do you agree with that or not?

LAWYER: Absolutely not. For one thing, under the federal system that recruitment is pursuant to the statute and there is no single statute in the State of Texas. So based on that alone, there should not be recoupment. But besides that, above and beyond that fact, once a private litigant establishes that a sovereign has waived immunity from liability or otherwise does not enjoy immunity from liability, then they are entitled to all the rights the private litigant would have. So once we are in court, because there's been waiver of the immunity to sue, then we have another hurdle. And that's to get over immunity from liability. There are several ways to do that. One is the tort claims act, which has caps. The other is to prove that the city was acting in its proprietary capacity which there is no limits. And when it acts outside its governmental function it's not entitled to immunity at all.

The Dallas CA ignored in its opinion longstanding precedent from this court going back to Anderson, Clayton from 1933. Nearly 70 years. That case was reaffirmed by this court in Kinnear in 2000. In that case the Commission on Human Rights sued under a statute and this court made it quite clear that the jurisdictional issue of immunity from suit was decided when the Commission filed that lawsuit. I would note that that was a per curiam opinion of the court. The attorney that will be arguing the case for the City was on the court at that time and at least impliedly agreed by not dissenting.

O'NEILL: Do you agree that the counterclaim asserted in that case was waived anyway?

LAWYER: In the Kinnear case?

O'NEILL: The Kinnear case. Well the arguments been made that really that case can be decided on that or limited to that basis. It was a claim for which there is a waiver in any event, which would support the award of attorney's fees.

LAWYER: That's not how the court decided the case though. The court explicitly said, expressly said that when the Commission filed sued...

O'NEILL: In Nueces county.

LAWYER: Right.

O'NEILL: So there's an argument made that it was more of a venue question.

LAWYER: I believe that that would be an improper reading of the Kinnear decision. The Kinnear decision makes it clear that once they decided, once they filed the suit, the question of jurisdiction was resolved at that time. And in fact, I believe it was the I.T. Daily case, that in a concurring opinion written by J. Hecht and joined by now CJ Jefferson and J. Owen. J. Hecht wrote it's long been held that the state can make immunity by filing suit. That's been the law of this land since at least 1933. It's been the supreme law of the State of Texas since that time. Arguably this was the law in the state since 1904, when the Klout(?) was decided.

O'NEILL: I don't get the impression that anyone would argue with that proposition. It's just how broad is the scope of that waiver. What is properly defensive and what's affirmative. There is a line of authority that says if it's affirmative it's barred by immunity, but if it's properly defensive only it's not. So there's nothing really that would preclude that analysis.

LAWYER: Once the sovereign invokes the jurisdiction of the court by seeking affirmative relief, then _____ issues of private litigant for all matters to remain to that controversy, the facts and circumstances that arose at that time. That's been black letter law. That's the supreme law of this state. And it has been for nearly 70 years.

WAINWRIGHT: Let's go back to sue and be sued language. Putting waiver by conduct to the side for a second. In your second point you said that the city waived immunity in its city charter and the legislature waived immunity by statute. Are both of those waivers necessary?

LAWYER: No they are not. The wavier by the City and its charter is sufficient. The City has, a home rule municipality, has all the rights to enact whatever legislation it needs to for its own self governing as long as it doesn't conflict with the constitution or general laws of the state of Texas.

WAINWRIGHT: And you think that home rule authority includes the right of municipalities even if there was no statute on the books from the legislature to waive immunity for themselves?

LAWYER: Absolutely. There's no question about that.

WAINWRIGHT: Well the city's immunity derives from the state. Correct?

LAWYER: The city's immunity derives from the state and the constitution and the home rule act.

WAINWRIGHT: So as long as the legislature does not contradict a city's attempt to waive immunity, then you think the city can do it independently even if there is no statute on the books?

HANKINSON: That's an absolute, correct statement of the law. Filing a lawsuit is not waiver

by conduct. Waiver by conduct as has been used in this court deals with the facts and circumstances. Waiver by conduct has always with this court dealt with the actual conduct of the facts and circumstances at issue, such as how a municipality handled a contract. It has to be something performance based. It has never been and this court has never indicated that conduct in this context has anything to do with seeking affirmative relief and invoking the jurisdiction of the TC.

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RESPONDENT

HANKINSON: I believe that the question that is before the court today is whether the court is going to recognize a waiver by litigation conduct rule in our immunity law. If the court were to do so, I believe it will dramatically change the landscape of Texas immunity law, because it cannot be reconciled with the relevant statutes, and it cannot be reconciled with this court's controlling precedents.

And I think the reason why it can't be reconciled goes to the first question that J. O'Neill asked. And that's because such a rule asks the wrong question. And in fact forecloses the ability to ask the right question and the question that has always been asked under Texas law when immunity is raised.

The right question and the one that we have always asked under Texas law is whether the courts have subject matter of the claim being made against the government? An equitable court created waiver rule asks a different question: Whether the government appears as a claimant or a defendant? And if the answer to that question is that the government has appeared as a claimant, then immunity is waived.

There are very serious consequences to changing the question. An equitable court created waiver rule will result in a trumping of the legislature's various immunity regulation statutes. This case is a prime example of how this would work. It creates a very broad waiver as the court has intimated in its questions.

If we start by looking at Wichita Falls State Hospital, which is one of this courts most recent pronouncements and a very comprehensive view of immunity law in Texas, we know that the fundamental principle that underpins immunity law is the need to protect the public fist(?) and allow the legislature to manage it.

HECHT: But there has to be some ability to defend yourself if the government sues you.

HANKINSON: Absolutely.

HECHT: How far does that go?

HANKINSON: I believe that J. O'Neill correctly characterized what the law is. It is as to

matters defensive, germane to the claim as opposed to matters affirmative in terms of affirmative relief in order to fulfil the underlying policy.

HECHT: For example. In this case the city sues alleging negligence in the cutting of a waterline, and the defendant wants to counterclaim and say no it was your negligence in not telling us where it was. Can you bring that claim?

HANKINSON: I think you can because it's defensive. The city is claiming damage to its water main. A defensive claim would be no it's not my fault. It's your fault.

HECHT: So its kind of contributory negligence?

HANKINSON: Absolutely.

HECHT: And so you've got to submit that, and if it was just as between those two parties, the defensive answer might defeat the claim but wouldn't result in a recovery?

HANKINSON: Absolutely.

HECHT: But could they use it now in this more complicated setting to assign part of the responsibility to the plaintiffs to the city so the plaintiffs can't recover against the city anymore than Reata can. So it's just a question of whose responsibility is it.

HANKINSON: I think that they cannot pass through a contribution claim because that too would be an affirmative claim. It's the plaintiff's affirmative claim then. A contribution claim is derivative. So again, we run into this same problem, which is why the matters have to be defensive in nature. And I think that there is a second piece to the puzzle about what the state waives, and the state then consents to be subject to the same procedural rules as any other litigant.

OWEN: It's not really a claim for contribution is it? That's been abolished. We are now under proportionate responsibility even under the previous statute. It was proportionate scheme. And where is the harm to the public fisk if the city can never be libel to either the plaintiff who is suing the city or the defendant who is bringing the city in as a third party defendant just for purposes of assignment of liability.

HANKINSON: Because the legislature has made the policy choice that the governmental entity should not even undertake at the expense of defending the suit...

OWEN: Why would they undertake the expense of defending it if they have no liability? Why would they care if they got named and let the two parties who have the dollars on the line litigate. The city is named. They are a party. They don't need to defend because there is not going to be any liability.

HANKINSON: I guess I'm hard pressed to imagine that we are going to allow the government to be made a party to a lawsuit and then expect them to say we don't care what you do and we're not going to participate or pay to participate in the litigation. Immunity from suit goes to subject matter jurisdiction. That's why we look at it on a claim by claim basis as opposed to a question about how someone is postured and whether the state is in fact seeking affirmative relief.

And the reason why we're looking at subject matter jurisdiction is that the legislature has made the policy choice that the government should not be in court in cases that...

OWEN: But once the government steps in itself and asks for affirmative relief why shouldn't that at least remove the bar to having an assignment of responsibility even though the city or the governmental entity will never have to pay?

HANKINSON: As a defensive matter, I agree with you. But not as a matter of seeking affirmative relief where the government would have to pay money. And it would be a defensive matter to defend against the city's claim by saying it's not our responsibility. It's yours.

OWEN: In this case all the original opinion said was it's a waiver. Once the city comes and makes an affirmative claim, we didn't say it's a waiver of liability, all we said in that original opinion was it's a waiver of immunity from suit. So that if it went back, the city's responsibility if any could be apportioned by the trier of fact. But the city wouldn't have any liability for contribution assuming that it's not covered by the tort claims act.

HANKINSON: I don't think that the state's conduct can vest the court with jurisdiction over a claim.

OWEN: You can on the defensive claim but not when you have a third party mix. I don't see the symmetry there.

HANKINSON: The court's language in the per curiam opinion is language of personal jurisdiction, not language of subject matter jurisdiction. The language in the opinion says that the state by its action waived immunity and submitted to the jurisdiction of the court. For personal jurisdiction principles that rule applies. But a party can never by its action voluntarily coming into court or taking some sort of litigation action vest a court with subject matter jurisdiction.

JEFFERSON: Was Kinnear wrong?

HANKINSON: No. Kinnear was correctly decided, and I believe that it is a leaper case. And if you look at the language in the opinion, it meets that category that you put in your Wichita Falls opinion about leaper. That was an enforcement action by the state under the Fair Housing Act. And the language of the opinion was that once the governmental agency did the affirmative step of bringing the enforcement action, then as a consequence because the legislature had indicated that the prevailing party would recover attorney fees, the state was subject to that. I believe that in the

Wichita Falls opinion, that was characterized as a waiver by the state. That's the language of Kinnear. It's a leaper case. It's not anything more than that.

WAINWRIGHT: You said that an entity can never invest subject matter jurisdiction by its conduct. A very broad statement. So nothing the state could do by conduct or by filing a document could waive immunity?

HANKINSON: That's correct.

WAINWRIGHT: The state could show up with counsel and trial of the governor and the Lt. Governor stand up and say Judge, we are here. We waive immunity on behalf of the state. We want to proceed. We know there's no statute on the books. But that still doesn't waive immunity in your opinion?

HANKINSON: I think that's correct. If you look at all the law on subject matter jurisdiction, either in the immunity context or any other context, the party need not even raise subject matter jurisdiction. A matter can be pending before an appellate court and the word subject matter jurisdiction have never left the mouths of any lawyer involved in the case, and a court can sua sponte. An appellate court can decide that there was no subject matter jurisdiction. The actions of the party cannot give the court jurisdiction. That's why this waiver rule doesn't fit. And when you use personal jurisdiction concepts and overlay them over the subject matter issue that's before the court, then you destroy our immunity law. And the reason why you do that is because again as I said you are asking the wrong question. You're focusing on the litigant's conduct rather than on the claim. And the legislature, and this court has recognized that it's the legislature's responsibility to set up the immunity schemes by statute to consent to whether the state can be sued. And we have the tort claims act.

O'NEILL: Let's talk about that for a minute because the sue and be sued language or plead and implead. Would we have to overrule MoPac to go your way on that?

HANKINSON: I think that MoPac has effectively been overruled by this court's later decisions and by the legislature's actions. I think that MoPac should be formally overruled, because I do not think that it accurately represents Texas law. And I think it is void of any kind of analysis. It's a very broad waiver.

O'NEILL: So we would have to overrule it?

HANKINSON: I think you should because it's causing confusion.

O'NEILL: Is your only argument that the legislature has gone away from it, it's mandate that the waiver be clear and unambiguous?

HANKINSON: No. I think that it also - it's very broad language sue and be sued. It would be a broad wavier that you could sue the city of Dallas for anything, anywhere at anytime. The same

thing would apply to most municipalities in this state. There is sue and be sued language in the education code for school districts, to universities...

OWEN: Again, it only waives immunity from suit, not immunity for liability. In the very next session after the MoPac case was decided, the legislature picked up that language and put it in 3 or 4 different statutes and has done it almost every session since.

HANKINSON: But there are other statutes, in some of the statutes involving universities for example that have sue and be sued language, and then have separate...

OWEN: There are only two to my knowledge out of hundreds.

HANKINSON: And have a second provision in them that indicates that the language should be construed as a waiver or it should not be construed as a waiver.

OWEN: There are only two of those out of all the dozens and dozens.

HANKINSON: I agree. But the point is this in terms of the sue and be sued language that does exist in several enabling statutes as the state has cited. That's a very broad waiver. How do we reconcile that with the very specific immunity statutes that are on the books? For example in this case. They say sue and be sued is very broad, that the city waived immunity under the particular language. If that's the case, does that mean the tort claims act doesn't apply because the city chose to do that, and the city of Dallas has opened itself up to tort...

OWEN: But we've long held that the more specific statutes trump the general statutes. So this is not a wholesale - aren't we just really looking at sue and be sued language on contract claims?

HANKINSON: Well this is a tort claim

OWEN: I know that. Wouldn't the tort claims act govern - trump the more generic sue and be sued language, because the tort claims act is more specific?

HANKINSON: Then the question becomes, for example in the Dallas City Charter. There is language in the Dallas City Charter about a claims process that is to be followed in terms of making claims against the City of Dallas. Does that sue and be sued language then trump the specific provisions in the Dallas City Charter regarding claims. Sue and be sued historically is capacity language.

O'NEILL: That's not what we said in MoPac. Now let's say I'm a contractor and I want to contract with the City of Dallas. And I look at MoPac and I say sue and be sued. If I run into trouble I can sue them. What about reliance on this precedent, people who are out there contracting with the city?

HANKINSON: They need to reword the Dallas City Charter then because there is other language that would have given them notice. And in fact that wasn't the case.

SMITH: Is the City Charter provision in the power section of the City Charter, or is it like a special section regarding litigation matters?

HANKINSON: The sue and be sued piece is in the power section of the City Charter.

SMITH: Which would indicate capacity.

HANKINSON: Exactly. It has the whole list of things that gives the state capacity as _____ county, corporate and politic.

SMITH: MoPac obviously wasn't a city case, and so I think each context is somewhat different when you're talking about universities, the MoPac case, and then this charter. So where the location is and the charter seem to be important.

HANKINSON: I think it is important and I think the problem with MoPac and why I say that I think it's not good law and it's been effectively overruled is there is no analysis of MoPac whatsoever. And if you look at the analysis in Wichita Falls that brings together all of the developments of immunity lawsuits then, and the several requirements that were laid out, if you apply those requirements to the sue and be sued language it cannot pass muster.

OWEN: Why did the legislature when they came back and have tried to amend one of our decisions use sue and be sued to clearly indicate that there would be a waiver from immunity from suit?

HANKINSON: But they also submitted other languages. It wasn't just sue and be sued language in that statutory enactment. It also had express language of waiver of immunity.

OWEN: But there's no denying that sue and be sued was used in that context.

HANKINSON: But it was used in the context of other language to comport with the requirement of the code construction act. That's my whole point. Sue and be sued standing alone doesn't get you there.

OWEN: Sue and be sued, plead and implead, similar language.

HANKINSON: Right. But standing alone it doesn't get there, because if you apply the Wichita Falls test that the statute must waive immunity without a doubt, that ambiguities are resolved by retaining immunity, and there is a separate consideration and, then, finally whether the statute also provides an objective limitation on the state's potential liability, which sue and be sued does not do. It does not take into account the public fisk. So I think that the Pellzell statute came back and was

very specific and meets those requirements. Sue and be sued does not meet those requirements.

SMITH: What's the city's position regarding its ability under the home rule amendment in the constitution to waive immunity? Say they put it in their charter where it was crystal clear they were waiving immunity, or they passed an ordinance waiving immunity with regard to a certain suit. Would that be effective or does it require legislative action?

HANKINSON: No. I think the city has all the powers of self government provided it does not run afoul of legislative or constitutional enactment. In addition to the claims provision, there is another provision of the Dallas City Charter in terms of notice to people which says nothing contained herein shall be construed as creating a cause of action or the giving of any right to institute or maintain any suit or action which would not otherwise exist or be cognizable under the laws of legal claim. So I don't think that there is a notice problem in terms of what people have said. And I think that MoPac is inconsistent with Wichita Falls.

O'NEILL: So do you think MoPac then because the sue and be sued language appears in the Powers clause of the city's charter that we can then distinguish MoPac as opposed to overrule it? Can we limit it?

HANKINSON: I think you could distinguish it. I think the issue that I would imagine the State of Texas would address with you is that sue and be sued language like it exist in so many different places for the same purpose, for capacity purposes in terms of an agency's enabling statute, that I don't know that you would resolve all of the confusion in the law by distinguishing the Dallas City Charter.

WAINWRIGHT: Clearly we've said that the legislature - and now the legislature has said it by statute in 2001, to waive immunity it must be by clear and unambiguous language. Where have we said that that waiver must be by statute?

HANKINSON: One of the most recent cases is Wichita Falls.

WAINWRIGHT: Wichita Falls doesn't really say that. It says if a statute does have a resolution that waives immunity, it must be by clear and unambiguous language. It doesn't say it has to be by statute. Where have we said it has to be by statute?

HANKINSON: Well it says by legislative enactment or constitutional provision. My notes indicate that's the quote that I have. The actual Southwestern Reporter cite is page 695. And it says consequently to waive immunity consent to suit must ordinarily be found in a constitutional provision or legislative enactment. It's under headnote 4, the first paragraph under waiver of immunity.

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THE STATE

LAWYER: Much of the discussion this morning has concerned the scope of arguments that can be asserted against the state when the state brings suit. It is our position that a party sued by the state can raise defenses but not receive an affirmative monetary award.

HECHT: In this case contributory negligence is actually - is that a defense or is that a claim?

LAWYER: To the extent that it's challenging the city's right to recover for the property damage to city property it would be acting as a defense.

HECHT: But it's going to be an active claim. You are going to say was somebody negligent? Was the city negligent? So it's going to be submitted to the jury as an active claim. But you think it's defensive?

LAWYER: It is because it challenges the foundation of the city's right to recover on its claim. It's not seeking an independent monetary award.

HECHT: In a contract case would a setoff be defensive if the setoff related to the subject matter of...

LAWYER: The general answer is no.

HECHT: Why is that? You say the city sues its contractor and says you didn't build this right. And the contractor said well you didn't pay me for what I did build right. And that would not be an acceptable defensive plea in your view?

LAWYER: No. It would not. The reason is is that it doesn't - unless that counterclaim for breach of contract goes to the foundation of the state's claim. Unless that breach by the state would have defeated its own right to recover as a proprietary breach or as breaching a condition precedent, then it's not actually a defensive claim. In modern commercial contracts, even in a single contract, there can be many duties that are independent of each other. Those should be treated like independent claims. And for a breach of that, the court should look to see whether there's been an independent waiver of sovereign immunity from suit.

It's easy to imagine a situation in a modern construction contract case for example where there is a whole web of contracts, subcontracts and tort duties. It can't be that the state by bringing suit to a single duty against a single one of those contractors opens up the whole realm of contract and tort claims, including many contract claims.

To briefly answer J. Owen's question about what's the harm if we're ultimately immuned from liability. One of the harms is that we're not immuned from liability for breach of contract. So some CA's have allowed, when the city brings a tort case, for example both contract and tort claims to be asserted a response.

WAINWRIGHT: If the waiver is by constitutional provision, if that's the assertion without a statute, for instance petitioner's assertion that the city could waive immunity because it is a home rule city. And assume there's no statute. Would you agree that the city could then waive its immunity?

LAWYER: If there were constitutional provisions to that effect, the answer would be yes. I think in the case of the home rule act, the constitution enables the legislature to pass statutes authorizing that. In this case the legislature has.

WAINWRIGHT: Dallas has, as we know, the provision that says it may sue and be sued. Do you think there has to be a city charter provision as well as a statute in order for there to be a waiver of immunity and that they both have to be clear and unambiguous?

LAWYER: Yes. We don't believe that 51.075 is a clear and unambiguous waiver by itself. If you move to the petitioners' argument which is that the city nonetheless might have had power as a home rule ___ city to waive immunity, we think that kind of wavier should also be evaluated under the clear and unambiguous test this court has used for 25 years, including Taylor.

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REBUTTAL

HECHT: What happened to the Northern District suit?

LAWYER: It was tried to a conclusion. We were not happy with the conclusion. We filed a motion for new trial and we intend to appeal. And also the city raised immunity from suit before J. Butler, and J. Butler overruled it. They also raised immunity from liability and J. Butler overruled that. Now the jury overruled us.

In this case what the city is asking this court to do is overrule three separate lines of cases: the Anderson/Clayton case which has been on the books for 70 years; the MoPac decision which has been on the books for 34 years; and the string of cases that have been on the books for a number of years. In doing the jurisdictional analysis on the waiver of the immunity from suit, you are to construe the pleadings liberally in favor of jurisdiction. So in order for the city to prevail here, this court would have to overrule 3 separate and distinct lines of cases.

Interestingly, going to the MoPac decision that Ms. Hankinson just asked this court to overrule, when she was on the bench sitting in one of those chairs, she wrote the Pissell(?) decision. It was an 8 to 1 decision by this court, drafted by Ms. Hankinson. And this is what the court said in 2002, just two years ago about Missouri Pacific. The sue and be sued language shows "intent to waive sovereign immunity for suits." That's just two years ago. A pronouncement of this court, written by then J. Hankinson. The decision goes on and favorably cites MoPac for holding that sue and be sued is the proposition, there is a waiver of immunity from suit. And then finally on page 251 of that decision, the sue and be sued phrase was interpreted by this court to mean "it's quite

plain and gives general consent for a district to be sued in the courts of Texas." It's the same language we are dealing with here.

In addition in the city's charter the city is entitled to implead and be impleaded in all courts in the state of Texas.

The Anderson/Clayton decision specifically says that a litigant is entitled to bring a cross complaint. A few years later in 1939 in the Morgan decision, this court cited with favor of the state the Klout(?) decision, which stated and stood for the proposition that once a sovereign invokes the jurisdiction of the court seeking affirmative relief that they step in the shoes of product litigants for all purposes which would include a cross claim.

With respect to the argument by the city that the court's ruling consistent with this per curiam decision would open the floodgates. The Anderson, Clayton decision has been on the books for 70 years.

O'NEILL: I don't see how it is so inconsistent with Anderson, Clayton. Their position. Because the language says - we said the only exception to the legislatures sole province to waive immunity is when the state initiates suit. But our statement in Anderson, Clayton said except insofar as the rules may be modified in favor of the state by statute, or may be in applicable unenforceable because of exemptions inherent to sovereign _____. So how is that inconsistent because it does seem to leave the door open to the properly defensive argument?

LAWYER: When you read the Anderson, Clayton case carefully, there really is no ambiguity. This court sets forth the question that it's considering the issue, the immunity from suit. And then does the analysis on immunity from suit, so the language the court just referred to cannot defer to immunity from suit. It may for example say step in the shoes for private litigants for all purposes in this case, but you may have certain other immunities like immunity from liability that have to be dealt with later. That's how it's consistent.

O'NEILL: When you use the step in the shoes of the plaintiff language, you're not relying on any case for that sort of - and I've never read anything that says you step in the shoes of a private plaintiff.

LAWYER: I am paraphrasing. But the Klout(?) case says words to the effect that the sovereign in that situation clothes itself in the robes I believe was the language or close to it by the private litigant. And that case was cited with approval by this court in 1939 in the Oregon(?) decision.