ORAL ARGUMENT – 04/21/04
03-0878
TOOKE V. CITY OF MEXIA

GIBSON: This case involves a written contract between the Tooke's, the citizens of Limestone County and the City of Mexia. The City of Mexia contracted with the Tooke's in writing for the Tooke's to provide brush pickup for the City of Mexia. They were to pick up the brush as directed, chip up the brush, and they would be paid by the pound depending on how much it weighed and so forth. This contract was actually a series of one-year contracts up to a maximum of three years that could be renewed or ended by either party at the end of each year by giving 60 days written notice of intent to terminate the contract.

It's undisputed that the Tooke's performed the first year of the contract. Toward the end of the first year neither party terminated the contract as the contract requires. As a result the City, however, even though they did not terminate the contract, simply quit calling the Tookes even though the contract required that they were to call them a minimum of two times per month. As a result of this a lot of time passed and the Tookes were not called. Eventually the City of Mexia sent a written notice after it was too late to actually send a written notice. The Tooke's sued in District Court and recovered lost profits and attorney's fees for that time period up to the - the jury actually awarded damages just up to the time the city terminated the contract.

It's been our position all along that this act that they were performing was actually proprietary action. Brush pickup is not something that is a governmental function, such as garbage collection, lease protection, things of that nature. In this particular case this is something that by definition is proprietary function because most cities don't provide this. If they do provide it, it's just something that's an extra amenity for people within the city.

Having said that, we would ask the court to address that issue because we feel like this is a proprietary function that they were performing. And if so, we don't get into the issue of governmental immunity, sovereign immunity, etc.

Having said that, assuming the court disagrees with our position...

O'NEILL: Why is pickup such as this not the same as solid waste removal?

GIBSON: Ultimate chaos would occur if we did not have garbage collection. It's something that the city has to take over as a political subdivision of the state. We have to have garbage collection, or otherwise we would have hazardous waste, we would have unsanitary condition. This is something that the state or the city has to provide. A brush pickup service is something that's just an amenity. It's not anything that's required that the state has to do in order to prevent a hazardous condition. It's just something that some cities provide if they want to. Some choose not to. It's just not one of those things that's actually something that the state has to provide,

such as police protection, etc.

So our position is this is a proprietary function. In Groesbeck where I live, we have no brush pickup. And that's the case of many small towns. And if we do have it, it's maybe once every 5 years. There will be a special occasion that they will have a brush pickup situation. But that's been our position all along. We would ask the court to at least address that issue.

Again, assuming that we get to the issue of whether or not this is a governmental function, we get to the issue then of whether or not the city has waived its immunity. As I understand the court's series of cases on this issue there are two types of immunity: immunity from liability; and immunity from suit.

Now one of those two according to Federal Sign, Missouri Pacific, immunity from liability has been waived. Once you have a signed contract, once the city signs a contract or the state signs a contract, according to this court's reasoning you waive immunity from liability. So immunity from liability has been waived. The only issue is, is there immunity from suit? And to have immunity from suit, you have to have the legislative consent, you have to have some type of legislative statute that waives immunity from suit. In this case our position is that local Gov't Code 51.075 is that legislative statute. And that statute simply states that a municipality may plead and may be impleaded in any court.

O'NEILL: How do you address the contention that that really only refers to capacity historically?

GIBSON: Historically, I disagree with that issue. Once these corporate entities were established in 1875 and 1913 and back in those days, once they were set up they had capacity. In other words they didn't have to give these municipalities capacity to sue or be sued. Once they were established they had capacity. Capacity is an issue that comes up when you sue an entity and if you sue them incorrectly, if you sue them in a capacity that does not exist, then that's when you would raise the issue of capacity.

BRISTER: Instead of a police department some people might think that's an entity. But if it's just part of the city you can't sue the police department. You've got to the sue the city. So when you set up an entity the question is, you have to sue the board, you have to sue the mayor and so capacity to sue or be sued tells you you can sue the entity in its own name. Right?

GIBSON: That's correct. And I think that that's what the legislature was trying to say.

BRISTER: So you don't disagree that implead or be impleaded addresses capacity? You just say it also addresses immunity.

GIBSON: Right. It addresses both. Again, I don't think that the legislature had to give these municipal corporations capacity to be sued. Once they established the corporation they had

capacity. I think the legislature's intent was the same as this court has said many times was to allow these entities to sue and be sued. This court has said many times that language in fact waives immunity from suit. It's clear and unambiguous waiver of immunity.

The only issue is does plead and implead mean the same thing as sue and be sued? This court has even very recently stated that when the legislature wants to waive immunity they know how to do it by using those magic words "sue and be sued". The issue is does it mean the same thing as plead and implead? The amicus curia brief lists over 20 definitions of different law dictionaries, different courts, Black's Law dictionary of what plead and implead or what implead means. And if you look at those definitions it essentially means to sue, or to prosecute. There's really no distinction. I've not seen one court opinion yet that's been able to describe a distinction between sue and be sued, plead and implead. A majority of the CA have addressed this issue and even recently the Clear Channel case out of the 14th CA tried to determine was there distinction between these two terms? And I've yet to – even the CA's in Waco did not really address what is the distinction between these two terms? They just said, well it's just not clear and unambiguous that these two terms waive immunity. But they don't describe how plead and implead is somehow definitionally different than sue or be sued.

And that's our contention in this case, is that even the 5th circuit has addressed this in the Webb case, and found that this language is a clear and unambiguous waiver of immunity.

HECHT: You say that it may relate to capacity as well.

GIBSON: It may.

HECHT: If you were the legislature and you wanted to just relate it to capacity and not to immunity what would you say? You wanted to use the words because if immunity ever was waived you wanted them to sue and be sued. But you didn't want that phrase alone to waive immunity. What would you do?

GIBSON: I think this perhaps has been addressed in a couple of cases out. One is the Palzell(?) case, and also the Breeden(?) case. I think what the legislature typically does is once the courts start to interpret this language to mean that it's a waiver of immunity, the legislature often goes back and they add words that make it clearer: no this does not waive immunity. I don't think the legislature has to do anything else other than leave it the way it is - sue and be sued. I don't know how you can make it any clearer than that.

HECHT: You say it can relate to capacity and it can relate to waiver. That's your argument. And those are distinct ideas. And if the legislature just wanted the first one and not the second one what would they do? How would they caveat in these words so that they wouldn't get stuck with a waiver of immunity?

GIBSON: What I would do if I was the legislature, and I was making a recommendation.

I would say capacity related to lawsuits as the heading. That's the way I would recommend it. If you want to make it clear, in your heading above this language don't say authority relating to lawsuits, and then say you can plead and be impleaded in any suit. Say capacity related to lawsuits. That way it would be clear. That's the way I would answer that question.

HECHT: And we say it has to be clear. So shouldn't some clarifying language be present or not?

GIBSON: I don't think so because the history of the interpretation of the courts that sue and be sued is clear and unambiguous. And since the legislature is aware of that and if they wanted to change that, then they could easily do it, which they have done in many cases. They have gone back and said nothing we say here is meant to be a waiver of immunity. Such as the Friedman case involving the Texas Education Code. It involved the U. of Houston where the CA interpreted that language to mean okay this is not waiver of immunity. The legislature went back and added a sentence that states nothing in this section shall be construed as granting the legislative consent for suits. The legislature knows how to do this. If they disagree with the CA on a particular statute they can do it at any time.

HECHT: It seems to me that that acknowledges that if anything this phrase is unclear. Because the legislature has to keep going back putting it end, taking it out. If they have to keep doing that doesn't that prove that it's unclear?

GIBSON: Not necessarily, because of the fact that this court has made it clear, that sue and be sued for instance has been reiterated over and over as a clear and unambiguous waiver. That is clear. Therefore, the legislature interprets what this court is saying, the way we're wording this is clear and unambiguous so why change it. Unless we definitely want to make sure we're not waiving immunity.

Again, I would like to point out that if the words are clear and unambiguous - sue and be sued, that plead and implead is essentially the same wording. This statute has been in place since the early 1900's. I found no legal definition that makes any distinction between these terms. Plead and implead is essentially the same legal definition. If sue and be sued is clear and unambiguous, then our position is plead and implead is also clear and unambiguous.

These courts have been interpreting plead and implead now for several years. Essentially through the CA, not this court necessarily. And even the 14th CA changed their opinion and went against their earlier decision in Jackson and said that based on Missouri Pacific we no longer believer our original position.

PHILLIPS: Let's go back to these statutes in the 19th century. They used identical language for municipal corporations and for private business corporations. There is no sovereign immunity for a corporation, so are you saying that that identical language was only referring to capacity in those situations where a corporate charter was being granted, but the same words had

some greater meaning when it related to a municipality?

GIBSON: I don't think it necessarily meant it had some greater meaning. I think to a certain extent it does have something to do with capacity. But at the same time based on the interpretation over the years of the court's interpretation of what this actually means, it does mean more than capacity.

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AMICUS

LYON: Thirty four years ago this honorable court decided the MoPac case. The City of Dallas in their amicus brief has described MoPac as a simplistic approach to finding wavier of sovereign immunity. The City of Dallas has said other courts have blindly followed MoPac. The State of Texas says on its face, MoPac does not appear to be a deeply researched decision.

BRISTER: We want the lower courts to follow what we say whether we were blind - we want them to follow blindly whether our reasoning was any good or not don't we?

LYON: I believe that stare decisis does mean something. And the composition of the court - this court can take judicial notice of, but was CJ Calvert and other Justices - McGee, Reavley, Pope, Statley, Greenhill, Hamilton, Smith and Walker. And I don't think those folks took cases lightly.

SMITH: But at the same time they didn't construe the government code section that we have before us today. That was...

LYON: It did not exist.

SMITH: It would concern a navigation district provision. So it's not exactly on point. It involves similar wording.

LYON: Again, we move forward a number of years to Webb v. City of Dallas, where the 5th circuit CA comprised of CJ King and circuit judges Higginbotham and Jolley, found that 51.075 plead and be impleaded along with the Dallas city charter provision sue and be sued, plead and be impleaded constitute a clear waiver of immunity from suit. I don't think those were lightly decided opinions either.

I may have a little bit different approach to this than Mr. Gibson. But when I think of capacity, I think of things like can an estate sue somebody? No they can't. The personal representative of an estate can sue somebody and with an affirmative defense raise the issue of capacity. Can they proceed in this proceeding in capacity that they claim. We all know that municipalities have to be sued in or sue in their own name. They can't sue as the police department or sanitation department. And so legal capacity as I understand it refers to the capacity of somebody

to engage in a proceeding in the capacity they say they want to engage.

A minor child is represented by a guardian ad litem frequently when there is adverse position between a minor child and a parent. And they proceed on behalf of the child. So I think capacity in this case, I disagree with Mr. Gibson's comments. I think that sue and be sued and plead and by impleaded do mean the same thing. I think they mean that the city waives its immunity from suit and that both phrases are clear, they are unambiguous. And if we do go back historically we find that in the 1600's, in England you had sue and be sued, plead and be impleaded, defend and be defended in all courts.

JEFFERSON: Not that we're here to make policy. I think that's the legislature's prerogative. But assuming we adopt your argument and the petitioner's argument that sue and be sued waives immunity, plead and be impleaded does. What does that do to the financial resources of cities? We hear everyday they are struggling to make ends meat. And now that they open themselves up to suit and the court finds that that's the case, then taxpayers just have to foot the bill. Can they do that? Should we be concerned about that?

LYON: I believe the court should be concerned about it. But when we look at the calculus of immunity from suit and immunity from liability, once a city or municipality or county enters into a contract, they have waived their immunity from liability by virtue of contract. Just as a private person would. So when they enter into that contract, they should be able to a) budget for it; b) understand the fiscal implications for the city and the budget; and c) understand what would happen if they breached the contract. Very often municipalities have contracts that have delay provisions in them, liquidated damage provisions in them against contractors and other folks, and likewise, they sometimes have built-in incentives. So those are budgetary matters that the municipalities and counties and subdivisions can take into account at the front-end...

HECHT: So could the state.

LYON: And so can the state.

HECHT: But you can't sue the state.

LYON: But the state is different than municipalities and we have a separate body of law to deal with it.

PHILLIPS: How do you respond to the state's argument that portions of the Texas tort claims act that relates specifically to municipalities become meaningless if they've had a general waiver?

LYON: I think that the Texas tort claims act crams down this notion of cities having unlimited exposure in the tort claim area. I think the tort claims act a) waives immunity from suit for certain specified torts; the other side of the calculus equation then goes to immunity from

liability. The tort claims act has proscribed caps on damages for municipalities and for other governmental entities. So they have taken care of and shielded that. I don't think that there is any tension between the court holding that 51.075 waives immunity from suit as it relates to contract cases. I don't think that spills over to nor negates the Texas tort claims act pronouncements as far as waiving limited immunity from suit and immunity from liability.

PHILLIPS: Did you say 51.075 would only relate to contracts, and for torts there would still be a different regime?

LYON: Section 51.075 would not act as a wide spread waiver in the tort area by opening up unlimited liability or opening up unlimited claims because the state has promulgated the tort claims act to now proscribe certain limited instances where home rule cities can be sued for tort liability. And they have simultaneously capped that liability.

OWEN: Would you go back to J. Hecht's question and elaborate for me on why you say we should treat cities differently from the state with regard to the waiver of the right to sue on a contract?

LYON: One, cities have been chartered. They have been created by the state. They have been given certain enumerated powers, such as 51.075. They then subsequently enact charters, and many of them will have sue and be sued, plead and be impleaded provisions in them. By virtue of the city being created in that fashion they have subjected themselves to both sue and be sued, and to plead and be impleaded. As this court recently said in Reata, the affirmative act of filing a counterclaim or intervening and seeking affirmative relief waives whatever immunity from suit a municipality might have. But you clearly said as they said in MoPac, we do not decide the question of the extended waiver from liability because that's not a subject matter jurisdiction issue.

I want to point the court to the fact that Brooks on municipal law also has a very clear statement in §202. It says there has never been any question about the capacity of Texas municipalities to sue and be sued. The original legislation for both general law and home rule city so provided. The original 1913 legislation for home rule cities granted the simple authority "to plead and be impleaded in all courts." This also remains current law that has not been amended since its enactment. Citing 51.075. And it says these statutory declarations that cities can be sued would seem to blunt any assertion that cities have immunity from suit as does the state.

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RESPONDENT

DOW: I am here on behalf of the City of Mexia. We would point out to the court that since as early as 1847, the law in Texas has been that absent the state's consent to suit a trial court lacks subject matter jurisdiction. This court stated that in Texas Dept. of Transportation v. Jones, and this court has respected that doctrine in a significant body of law prior to today's date.

The sovereign immunity from suit was discussed as a concept in great detail in Fed. Sign v. Texas Southern Univ.

O'NEILL: Do you agree that the sue and be sued and plead and implead language is synonymous?

DOW: We do not agree that it is synonymous. If it were it would beg the question as to why in many of the statutes that are found denoting a city's authority or power that the phrase "sue and be sued" is in connection with plead and may be impleaded.

HECHT: Lawyers do that all the time. They use three words when one would do just to make sure.

DOW: But we do under construction of our statutes give weight to each and every word within a statute. So it cannot be mere recital if we look at it in terms of statutory construction.

HECHT: So what do you think the difference is?

DOW: It would appear that when sue and be sued language exists, there is at least the possibility that an entity has given itself over to the opportunity for a suit to be filed against it. However, we don't believe that that language in and of itself is clear and unambiguous so as to meet the standards enunciated by this court to waive the powerful doctrine of sovereign immunity, which is granted to the state and its governmental entities.

OWEN: Let's go back to the 1800's. There was a statute that had the sue and be sued language in it. And I believe that was amended at some point. And this court said even when that language had been taken out that it was still a waiver of the immunity from suit. That you didn't even need that. Hamilton Co v. Garrett which cites Watkins v. Walker County.

DOW: I do believe that this court addressed similar situation - for example its analysis in Travis County v. Pellzell where the sue and be sued phraseology was in a statute involving whether or not an action could be brought against a county, but was ultimately deleted. And that was viewed as arguably taking away any authority to construe a waiver.

OWEN: What we said in Pellzell was directly contrary to what we said in Hamilton. Hamilton County was decided shortly after the 1879 amendments. And that court's, at least more contemporary understanding, was that taking the sue and be sued out did not change the import of the statute and that waiver of the ability to sue had been waived.

DOW: I would expect that we still have to look at this court's doctrine as in some sense evolving into the future.

OWEN: What do we do about legislative acceptance then of what we said in Missouri

Pacific and these earlier cases about sue and be sued? It seems like the legislature has acted on our holding or at least statement that sue and be sued waives immunity from suit at least.

DOW: But we believe that they did not show great confidence in that. For example, after the holding in Pellzell, we have cited the statute wherein they amended a statutory reference to suit against counties to specifically add, not only the sue and be sued language, but a separate subsection which states this section does not waive a defense or a limitation on damages available to a party to a contract other than a bar against suit based on sovereign immunity.

OWEN: Which I think they were clearly making it clear that we're not talking about waiver of liability. We are only talking about waiver of immunity from suit. If you look at the bill analysis that preceded this, they used the term "this bill also amends subchapter (a), ch. 262 Local Gov't Code to clearly state that a county may sue or be sued." That's the language they used in the bill analysis. And then the operative language in the statute is sue or be sued, plead or be impleaded, or defend or be defended. They were trying to be I think as clear as they could, but using historical language that this court has said this is the hallmark of waiver of immunity from suit.

DOW: But if they felt that that was sufficient then there would be very little meaning to the subsection (d), which states this shall not waive a defense or limitation on damages available to a party to a contract other than a bar against suit. The liability aspect is waived by virtue of the contract in and of itself. So what additional information are they providing by creating that subsection other than saying they must be concerned that the magic words are no longer magic when they use the term sue and be sued.

OWEN: It seems like they are talking about weighing a defense or limitation on damages. They want to make it clear that these pieces of liability are not waived, but that they are waiving immunity from suit.

DOW: But if sue and be sued means that, then again we think that brings us to the significance of that latter section meaning they felt they needed to craft that language in order to specifically waive immunity from suit.

OWEN: What provision is there historically for someone to get permission to sue a city on a contract? Where do you go?

DOW: To Civ. Pract. & Rem Code §107. There is permission through the legislature by virtue of a state resolution.

OWEN: I thought that explicitly excludes municipalities and only applies to units of state government, and the state government is defined as people having statewide authority.

DOW: And we would agree that it does not specifically address municipalities, but that was a means that was certainly reviewed as an opportunity...

OWEN: So my question is where do you go to get permission to sue a city on a contract?

DOW: We believe that the legislative permission is via that statute.

OWEN: Even though it explicitly excludes municipalities?

DOW: It does not say specifically exclude municipalities, but they are not in the laundry list of entities that are listed there. That would be our belief and those are the situations that have occurred where permission of this type has been granted. We have not seen a challenge to an issue involving that resolution having been addressed by the court and having been denied. So we would assert that that is not...

OWEN: And do you agree that you can't use the administrative procedures on contracts, that you have for contracts with the state where a city is involved? You don't have that available to you either.

DOW: They don't appear to be.

SMITH: Was there anything to prevent the city from just passing an ordinance to allow somebody to sue the city on a contract?

DOW: If a city cannot by contract waive its immunity from suit, we would believe that likewise by ordinance they would not divest the power of the legislature to do that.

HECHT: So you think the only institution that can waive it is the legislature?

DOW: We believe that this court has strongly stated that a waiver of sovereign immunity is within the parameter of legislative power, that being the state legislature, and it is their intention that should govern waivers of sovereign immunity. Otherwise, we may have random dictates across the board by different entities.

OWEN: So Reata was wrongly decided? When we issued Reata it was wrongly decided?

DOW: Reatta's decision at the moment involves waiver by conduct as we have read it. The issue of sue and be sued in the city's charter verses plead and be impleaded did not appear to be reached from that standpoint. And in that instance since the City of Dallas had entered into pending litigation, in essence jumped into a pending lawsuit, we viewed this court as seeing that as an exception from sovereign immunity as the legislature has dictated it, and as the legislature has crafted waiver. So this is a judicial method of waiver from sovereign immunity.

PHILLIPS: I'm interested in your argument that the cities cannot by ordinance waive

immunity. Surely on an individual case, the city can decide to pay the claim for public relations purposes or ongoing business purposes or just a basic sense of fairness.

DOW: Speaking in terms of it as a policy decision of the city, we would agree that that would be true.

PHILLIPS: The City of Mexia could have paid Tooke's claim had it wanted to for whatever reason.

DOW: And we believe the answer to that would be a voluntary payment is not necessarily the same as a waiver of immunity.

OWEN: The contract waived immunity from liability. You agree with that don't you?

DOW: The contract had already waived the city's liability. Correct. But we're speaking again of immunity from suit.

PHILLIPS: Initially you didn't pay the suit. You certainly had the power to say let's give up on this and move on.

DOW: We don't believe that that would construe that action as a waiver necessarily of immunity from suit as opposed to a voluntary action in the context of the city's policy to determine payment to specific individuals as they review other bills that are submitted.

PHILLIPS: The legislature's reaction to Pellzell certainly should give you pause shouldn't it, and give us pause in terms of interpreting this language as something less than a waiver.

DOW: And that is our interpretation that the legislature apparently has had some uncertainty as to the meaning of that language sue and be sued. And, therefore, by crafting that second provision they specifically because they do very frequently specifically set forth a waiver of a bar or immunity to suit.

PHILLIPS: So you think what the legislature wants us to do is to say that all levels of government have immunity. And then they will come in in the next session and pick certain ones out and write a narrow exception to it, or they won't write an exception to it and the bar will stand. You don't think the post Pellzell legislative cure was because they thought our decision was wrong. They thought our decision was just great and it was absolutely legally correct and they wanted to make a change in the policy.

DOW: They wanted to be certain that there was no ambiguity in any of their phraseology. And since the standard is clear and unambiguous they set forth the waiver in clear and unambiguous language.

HECHT: With respect to certain claims.

DOW: Yes. That's correct. With respect specifically to contract claims and there again...

HECHT: Only some kinds of contracts.

DOW: And there again should the legislature choose to do that in a situation such as this case before the bar, we believe the legislature can do that in very clear and unambiguous language...

OWEN: So your view of the world is for a hundred years you can't sue a city and you can't sue the county, and that the only time now that you can is since the legislature responded to us in Pellzell, for the very first time they waived immunity from suit as to counties?

DOW: We would hope that that is very much the significance of this court stating that it's the legislature's decision-making ability that decides where...

OWEN: How many times has the city over the last several years raised a plea to the jurisdiction and saying you can't sue __ on contracts? It seems like we would have some more cases on that. If you really believe that you should be raising it in every contract case.

DOW: And the answer to that is there are not a number of cases that are filed that end up in a full formal lawsuit. In Limestone county wherein this case was based.

OWEN: And you waited 9 years to bring it up?

DOW: It was filed at the termination of the actual evidence in the case. And again there should be no prohibition for a strategy in that regard because we had not heard from all of the witnesses as to whether or not they had obtained the appropriate legislative permission. They had in fact changed council at some point and we inquired of several different individuals who testified as to whether they had ever sought that legislative permission. There was at least one answer that my attorney might have.

WAINWRIGHT: So you do believe that Reata was wrongly decided because it was not a legislative action waiving governmental immunity in that case?

DOW: Yes. Because the court is saying we've carved out a judicial exception. We believe that there could be some argument certainly by the city of Dallas and by the State that that would run contrary certainly to this court's previous decisions not finding any wavier by conduct. It appeared that that was the doctrine of this court not to find situations where that was the case. And so that was in essence a surprise in terms of what had been this court's previous belief.

O'NEILL: But you're talking about different types of conduct. I mean the conduct we referenced in Federal Sign is some sort of performance based, substantial performance type of conduct, whereas in Reatta actually jumping into a lawsuit and invoking the legal process.

DOW: And that was made clear in the decision. I want to go back to our factual situation as it relates to Federal Sign for example. That suit was for an expectation if you will for lost profits because Federal Sign did not actually perform the contract. It was repudiated at some point that another vendor was used. In the City of Mexia situation, again we're dealing with the expectation of the Tooke's as to what they might have received had they actually picked up brush in the City of Mexia. We paid for all work that actually was performed. There is no issue of unpaid invoices, or the acceptance of a performance for which we did not pay. So we're not attempting to undermine their right to receive payment for work that was performed.

OWEN: If for budget reasons you decided you weren't going to pay any of your city employees for the next year - a moratorium on all salaries, where would people who have contracts with the city go to get paid?

DOW: The City of course has the power to raise taxes within certain limitations.

OWEN: The city says we're not going to honor your contract because of budgetary reasons.

DOW: Because of budgetary restrictions the city would opt not to honor the contract at all.

OWEN: Where does those employees go to sue the city to get their salaries?

DOW: I believe that there again the ultimate power to raise funds lies with the city. So if it were determined that those were appropriate actions for which waiver of immunity was proper, the city does have the power eventually to obtain funds. They can come back after...

OWEN: Where do they go to sue the city in the meantime to get their paycheck?

DOW: My answer to that initially was to go through the legislature to obtain that permission.

BRISTER: The same thing. You go to trial in this case and you stand up at the start and the judge says, what about sovereign immunity? And the attorney for the city says we waive it. And in your brief at the CA you say we waive it. And then your brief to the SC you say we changed our mind. We don't waive it. And you could raise it then for the first time under your argument since of course it was just the city that waived it. It never was the legislature. I mean that's a waste of time isn't it?

DOW: But if it is jurisdictional there seems to be no other answer to that question.

BRISTER: So we should continue with a completely wasteful and nonsensical system because it's jurisdictional?

DOW: This court should still allow the legislature to craft what it believes is the appropriate solution. If the legislature believes that contracts in and of themselves because they are dealings between cities and individuals...

BRISTER: No question. If the legislature said, we want it to be this way. But people can say over and over we're waiving jurisdiction, and then trump it and change their mind at the last minute. No question. They could probably get by with that. What we're doing here is trying to guess what the legislature said when they didn't say this explicitly. Do you really think most legislatures intend the world to work where they go to trial and say we waive jurisdiction. And then at the last minute on motion for rehearing in the Texas SC or the US SC and you say we changed our minds. We don't waive jurisdiction. Cancel it all out.

DOW: Of course we would hope that a court would recognize that jurisdiction is a matter that could not and should not be waived even by agreement. If the court has no jurisdiction that would arguably be recognized by the court rather than the parties simply attempting to state, We agree that this court has no jurisdiction, but we'll proceed anyway.

WAINWRIGHT: Do you also believe that Kanear(?) was wrongly decided? It was waiver by conduct in a lawsuit by the Texas Commission on Human Rights without the express legislative - at least from your standpoint without an express legislative statutory waiver?

DOW: Again I'm hesitating to say wrongly decided but it has been contrary to this court's previous doctrine to find exceptions by conduct. And obviously the court has found some instances where conduct can abrogate sovereign immunity from suit. We believe the court has stated its policy against that and that the court wishes for the legislature to have control over the ultimate cost to the state and to the cities of performing governmental functions. And so in essence we believe this court should continue to defer to that as frequently as possible.

WAINWRIGHT: If we decide to stand on Kaneer and Reatta do you necessarily lose in terms of your big picture approach to when waiver occurs?

DOW: In terms of a big picture approach, the answer to that is yes. In terms of the specific case before this court, we don't believe that the City of Mexia by its conduct did anything that would abrogate sovereign immunity as to that entity.

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STATE OF TEXAS

LAWYER: The exchange between petitioner's counsel and J. Hecht, I believe focused on the nub of the issue before the court today. Which is namely, petitioner's counsel agree that the language sue and be sued, or plead and be impleaded can be read and, in fact, should be read to a core capacity. That in my judgment should be the end of the matter, because this court has said repeatedly that waivers of sovereign immunity must be clear and unambiguous.

O'NEILL: Wouldn't that be a retraction from our decision in MoPac?

LAWYER: Yes. And the state would suggest that the first and most direct action for this court to do is to overrule MoPac's standing.

O'NEILL: Then how do you deal with the legislature's acceptance of MoPac? They have been relying on it.

LAWYER: The legislature has not acted to overrule MoPac. That is correct. But in the time since MoPac was decided, MoPac was decided in 1970. And for the first couple of decades there were relatively few decisions. MoPac concerned navigation districts. And MoPac's holding had not been applied in many other contexts until the mid to late 1990's. It's really been in the past decade that the CA's have begun to apply it concerning municipalities and a number of other contexts, and there is widespread confusion in the CA's.

So the fact that the legislature has not acted to address MoPac, we believe does not necessarily suggest that the legislature has embraced MoPac as the correct holding.

PHILLIPS: But can't we take this one step beyond, not only legislative acquiescence in MoPac, but now legislative non-acquiescence in Pellzell(?) to give us at least some hint that they want things clear and unambiguous except when they use these words - sue and be sued, plead and be impleaded?

LAWYER: The legislature after Pellzell(?) didn't act to say a presentment clause in fact does waive immunity from suit. The legislature didn't take issue with that notion. Rather the legislature exercised its prerogative to waive immunity from suit in specified particular instances.

OWEN: Isn't it fair to say though that they were somewhat surprised by Pellzell. Because under Pellzell we were saying basically that for over 100 years you couldn't sue a county. And the legislature immediately responded and said, Wait a minute, you can sue a county, and the original bill is going to let you sue on all contracts. And then they came back in and decided, Well let's trim this back again.

WAINWRIGHT: And the bill analysis expressly referenced our decision there. So it seems to be directly in response to it.

LAWYER: There may well have been individual legislators who were surprised by the

court's holding in Pellzell. There may not have been. But what is relevant is has the legislature acted to waive sovereign immunity?

OWEN: Why would they have such an elaborate scheme, think it's necessary to have such an elaborate scheme for getting permission to sue directly from the legislature, and for administrative processing of contractual claims? They set this all up for state government entities defined as agencies that had statewide jurisdiction, and expressly exclude cities. Why would they have no mechanism at all to redress breach of contract claims against cities?

LAWYER: There are two possibilities. They were not addressing that problem. And there are two possibilities. One, is that an individual who is contracting with the city could go to the legislature and seek a specific waiver.

OWEN: The statute doesn't permit them to do that. That's my point. Why would they have that scheme?

LAWYER: Even outside the statutory scheme the legislature can grant consent.

O'NEILL: Which they have done how often?

LAWYER: I am not aware of their grants. But secondly, a city could be delegated the ability to waive immunity from suit.

OWEN: So you say sue and be sued in a city charter waives the liability from suit?

LAWYER: Not necessarily. The test with respect to sue and be sued or plead and implead, I would suggest should be the test this court laid out very clearly in the Taylor decision. It should be an examination of what was the legislature's intent?

OWEN: So you disagree with counsel who says that only the legislature can waive it. You think a city can waive liability from suit?

LAWYER: That depends. A city can waive liability if the state legislature has delegated that ability to a city.

OWEN: Has the state done that here?

LAWYER: We have not been pointed to any language that suggests that the state legislature has delegated to a city the ability to waive immunity from suit.

OWEN: Are you aware of any city in the State where there's a mechanism to sue that city on a contract?

LAWYER: We are not, and we are not aware of any city in the State that has in its city charter a provision stating we waive immunity from suit. That would be an interesting question. If a city charter passed that and said we waive immunity from suit. The question in that litigation then would be has the state, which is the original repository of sovereign immunity, delegated to a city an authority to do that.

O'NEILL: If we said in MoPac sue and be sued means waiver of immunity from suit, and the city charter then says sue and be sued, then don't they intend the same effect?

LAWYER: For several decades MoPac was only applied to navigation districts. So most of the people following MoPac did not understand it to enact a wholesale waiver of immunity from suit with respect to municipalities. I would note for example that this court when it held in Pozansky(?) in 1884 that cities have immunity from suit. That was long after local gov't code §51.013, or 51.033, both of which provided that cities could sue and be sued, implead and be impleaded, and yet the Pozansky court was not at all concerned. That holding becomes very questionable given you had two provisions on the books saying already sue and be sued, and plead and be impleaded. And yet there was not a tension, because there is a natural reading of those provisions, which is that those provisions were giving corporate capacity rather than waiver.

The proper approach rather than saying sue and be sued are magic words. And unfortunately that's what the MoPac court essentially did. Rather than saying they are magic words. The proper approach is what this court said in Taylor: Look to the legislative intent. Is it possible sue and be sued can be used in context to waive immunity from suit.

OWEN: But it seems to me there has been legislative acceptance of what we have said historically about sue and be sued. It seems to me that the fact that there is absolutely no legislative mechanism, you say there is not, to sue a city, any city in the state of Texas on a contract, seems to speak fairly loudly to me that the legislature thought they had already waived that as to cities on the right to sue. Just the right to sue, not liability.

LAWYER: The question is the default. Is the default that sovereign immunity is retained unless the legislature acts to waive it, or is the default the reverse?

OWEN: Well the question here is did this statute waive it? And we're trying to get at legislative intent. And it seems to me that the fact that the legislature has done nothing to make any provision whatsoever to sue a city seems to indicate to me that they thought that had at least waived the right to sue in this statute.

LAWYER: And looking to this statute, this statute was the home rule act of 1913. Where the sue and be sued clause was found was in a provision that said, among the powers that may be exercised by the cities are hereby enumerated the power to sue and be sued. It doesn't describe it as a waiver. It describes it as an affirmative power of the city. And it further goes on in §5 and 6 to say that the enumeration of these powers is not construed to prevent any other...

OWEN: What does be sued mean then?

LAWYER: Be sued has an interpretation for at least 600 years of corporate capacity.

OWEN: What does it mean in the context of a city to be sued? What were they talking about? Who could sue?

LAWYER: It means that in an instance where there is a waiver of liability from suit they can be named as the defendant and the party and be sued.

OWEN: That's what we have here. There's a waiver of liability by reason of the contract. Why doesn't that mean they can be sued?

LAWYER: There's a waiver of immunity from liability, but not a waiver of immunity from suit.

OWEN: So what do the words "be sued" mean?

LAWYER: Be sued means, for example under the Texas Tort Claims Act, where the legislature has act...

OWEN: This is before the Texas Tort Claim's Act. What did it mean back then?

LAWYER: It means whenever the legislature has acted to waive immunity from suit, that entity being created has corporate capacity. It can be named as a defendant.

OWEN: So if it's it waiver from liability you can be sued?

LAWYER: No. There needs to be waiver of immunity from suit as well.

OWEN: Why would they say be sued if they didn't really mean it?

SMITH: It's like J. Brister's talking about. You can't sue the police department. You have to sue the city. And so if there was a special statute that said the Houston Police Dept. can be sued and be sued they can go out and sue and be sued in their own name. The concept being that the city is a subdivision of the state, and so in the old days you didn't have to sue the state. This was a separate provision that said no, you can go directly against the city and the city is a political subdivision that can be recognized in a court as a separate entity from the state and can sue and be sued at that level.

LAWYER: That's exactly correct. That it is defined in the statute as a power of the municipality. And the power is that they can litigate in their own name, but in doing so there is no reference at all in that statute to a waiver of immunity from suit. The fact that the city has the power

to engage in litigation does not mean that the legislature is acting to waive immunity from suit.

OWEN: Then why didn't they simply say the city can sue. If it can only empower what does be sued mean?

LAWYER: It means that one there is a waiver of immunity from suit, that the individual suing the city can name the city as the defendant.

O'NEILL: If it was intended to be a capacity, power enumeration provision, we didn't get that in MoPac. We just missed that entirely and so MoPac was wrong. And to adopt your position we would have to just overrule it. Your argument does hinge on us overruling MoPac.

LAWYER: No. It is possible to distinguish MoPac. Our first position, we would advance is that MoPac should be overruled. We believe MoPac was wrongly decided. We do not believe it followed the legislature's intent.

O'NEILL: But to limit it to navigation districts would be a fairly contorted analysis.

LAWYER: At a minimum, MoPac did arguably look to the statute that was at issue there. And so at a minimum what this court could say is the approach that many of the CA's have followed, that the words sue and be sued are magic words. It's a per se rule. If you see sue and be sued it's all over. That approach is wrong. Rather, the approach is what this court said in Taylor: Look to legislative intent. So in this case with respect to 51.075, look to the legislative intent behind the home rule act. Look to, for example, the use of the word enumerated powers, The use of §5 and §6 explicitly reserving the immunities and powers of the municipalities. And interpret the legislature's intent there.

OWEN: Going back to some of these older cases. The Hamilton County v. Garrett case, which was in 1884. The courts said even though the sue and be sued language had come out in a recent amendment, that the import of the statute was not changed. We said you could sue a county based on the statute even though the legislature revised it and took the sue and be sued language out. Now that's a pretty strong indiction that we thought a long time ago that you could sue a county even without the sue and be sued language.

LAWYER: But that decision there was looking to the statute. The approach we are advancing is not...

O'NEILL: Where the language was even less clearer than it is the sue and be sued.

LAWYER: The approach we're advancing is that sue and be sued should not be accorded talismanic value. Rather the approach in every instance, the methodology should be examining the particular statute at issue. And in this case the statute at issue is the home rule act of 1913.

SMITH: If we say the sue and be sued waives immunity, what's that going to do to some of the state agencies that have that in their enabling act? Is that going to open them up to waive their immunity as to all of their actions?

LAWYER: It could very well. And that is a significant concern on the part of the state, and a significant reason why we are here as an amicus, because the state has in a number of instances granted corporate capacity to individual state agencies. And in doing so, we do not believe the legislature at all intended to waive immunity from suit. We would note the differing treatments of the Univ. of Houston and the Univ. of Texas at Tyler well illustrates the ambiguity of the language. With respect to the Univ. of Houston there's a sue and be sued clause, an explicit provision saying it does not waive immunity from suit. With respect to the Univ. of Texas at Tyler there's a sue and be sued clause, and an explicit statement saying immunity from suit is waived. And so the legislature understood that sue and be sued by its own doesn't necessarily answer the question.

WAINWRIGHT: Are there examples where the legislature has delegated the ability to waive immunity to a municipality?

LAWYER: I am not aware of any examples. We're not aware of any city charters that have acted to waive immunity from suit. We're aware of a number of city charters that say sue and be sued. But in context, particularly given the 600 years of that phrase being understood as granting corporate capacity (it's the same phrase that's used with respect to other forms of corporations), we believe the most natural inference just from the use of those words is the grant of corporate capacity. If a city charter took the next step and said, We hereby waive immunity from suit altogether or with respect to this sets of claims, we would then be faced with the delegation issue. I'm not aware of any litigation to date or any city that has acted to do so.

WAINWRIGHT: So it sounds like you disagree with Ms. Dow, and it's not the case in your opinion that only the legislature can waive governmental immunity?

LAWYER: It is the legislature's prerogative to waive it. It is possible that it could delegate it but it would have to be the legislature's initial decision to delegate it to another decision.

WAINWRIGHT: And then the municipality would also have to act?

LAWYER: Yes.

SMITH: Isn't it the general concept that home rule and municipalities have all powers, that part denied by the constitution? There are constitutional provisions creating home rule cities, so I don't understand why that wouldn't grant the home rule cities the authority to waive immunity in their city charter with just a statement like you said earlier, that the city waives immunity with regard to contracts, or in individual negotiation of a contract. If I was going to sign a contract with the City of Dallas, I would want some kind of waiver in the contract that says this thing is enforceable and the city specifically waives immunity within the four corners of the contract. Where

I knew before I started working that I would get paid. If you're denying that that's possible, then that might implicate the decision.

LAWYER: It is possible that the home rule act itself enacted such a delegation. I'm not aware of any litigation that has addressed that issue because I'm not aware of any city council that has taken the first step of affirmatively waiving immunity from suit. So were that to happen, I'm sure litigation would follow addressing has there been a delegation already, and that litigation almost surely would focus on the home rule act. And the inquiry would be what was the legislative intent there?

WAINWRIGHT: You may agree that Reata was rightly decided, but if it was it left out a step. And that is, where is the legislative delegation?

LAWYER: With respect to Reata, the state does not agree that Reatta was rightly decided. The city is going to be seeking rehearing and we're going to be filing an amicus brief laying out at length our concerns with Reatta. We believe the Reatta decision potentially enacted a significant change in the law. That being said, the court's conclusion in Reatta whether it was correct or incorrect does not necessarily control this case.

WAINWRIGHT: This case is different. But in looking at each individual instance we've got to make sure it fits in the big picture. That's part of what we do.

LAWYER: Yes. And with respect to Reatta, we believe Reatta was wrongly decided, and we're going to be urging the court to reconsider that decision. But what the court decides with respect to Reatta does not necessarily control this case. We think that's a separate issue and we believe Reatta enacted a substantial change in Texas laws and dramatically expanded the liability of the state.

BRISTER: If it only means capacity how can you have capacity to show up in court and be sued and yet not have the capacity to say we waive jurisdiction? What does capacity mean? It means you represent the party that arguably did something wrong.

LAWYER: It means you may be named as a defendant. It does not necessarily mean you are the repository of the sovereignty inherent _____ immunity. Those are separate inquiries. The fact that that particular institution may be named may come after the V in the case name, does not necessarily mean the legislature has decided to invest that particular institution with the authority to waive immunity from suit.

BRISTER: So in this case go down there, you can do this whole lawsuit. You've got capacity to do this lawsuit. But actually you don't have capacity because you are going to have to come back to the legislature to collect anything.

LAWYER: You have capacity to litigate but only where the legislature says you may be

sued in the first place. The easiest place to understand it is with respect to the state agencies. I don't think anyone would suggest that the state agencies that have been accorded the ability to sue and be sued have on their own the ability to say we waive immunity from suit. Intentional torts, you may sue us now. If a state agency said that, I don't think the court would uphold the ability of a state agency to waive immunity from suit because the legislature did not give the state agency that ____ of sovereignty. Rather it's the legislature's decision to lay out when immunity from suit exist and when it does not.

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REBUTTAL

GIBSON: In Federal Sign this court did not criticize the MoPac decision. In the concurrence by J. Hecht, CJ Phillips, J. Owen and J. Cornyn stated, the legislature has repeatedly considered whether to waive all governmental immunity for contract suits and has refused to do so. Although as MoPac demonstrates it may have done so in certain situations, such as by authorizing particular agencies to be sued.

Likewise, the dissent in MoPac by Justices Enoch, Abbott and Spector reaffirmed the vitality of MoPac.

I believe MoPac still controls. I still believe it's good law.

One of the questions that was raised previously was, should a municipality be able to balance its budget on the backs of its employees? Should they say to their employees it's been real nice having you work for us this month, but we're not paying you. We may not do so next month, and you have no remedy. You can't go anywhere.

Under the state's interpretation, you can't go anywhere. You can go to the legislature. I don't think Judy Tooke and Everett Tooke know anybody at the legislature who are going to waive the city's...

OWEN: Well where do I go if the state doesn't pay me at the end of the month?

GIBSON: That is a question that we have pondered. Can the same thing happen to members of the judiciary when they are seeking to collect their pensions and the state says, Funds broke. And yet the notion of the municipality after the fact of entering into a contract with the Tookes can say we're balancing our budget on your backs, your future profits that you...

JEFFERSON: Isn't the answer political? If the cities started doing that it could no longer engage in contracts with anybody. There couldn't be improvements done in the city with private contractors. They would never agree if that's what the city did. And the city council would be out in the next election if they cancelled pay checks. Isn't that true?

GIBSON: I think the focus should be when you have plead and be impleaded, and sue and be sued, you have waived the immunity from suit. And you don't have the option of balancing the budget on the backs of contractors and employees. You can be hauled into court and sued.

JEFFERSON: But then a city could be bound to a contract that was completely - let's say corrupt even, that it was the product of nepotism or just because the council is in power, they contracted with friends and put the city down the road towards financial ruin. And the consequences are tremendous. All the taxpayers, everybody in that city has to bear that.

GIBSON: Assuming that situation, because the city can sue and be sued, they can file a counterclaim for fraud and inception to set aside the contract. And they are not saddled with the financial consequences of a nightmare attack involving nepotism or ineptness. That's different than what we have in the Tooke case. But the statutory language of plead and be impleaded, and sue and be sued have never been tampered with, have never been fiddled with by the legislature. They know what the words mean. There is nothing wrong with magic words. In fact, magic words may make life a whole lot easier for lawyers, people who contract with cities and municipalities. I dare say that if every contract for the construction of utility services in a city requires lawyers get involved and say, By the way the last numbered item there is the city waives its immunity from suit and liability. Will you sign it? I don't know that we'll ever get any commerce conducted. But it's clear that the legislature by 51.075 has waived immunity from suit in this area and all the court's prior decisions support that conclusion.