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Supreme Court of Texas.
Texas A and M University System, Texas Engineering Experiment Station, and Dr.
Mark McLellan, Petitioners,
v.
Dr. Sefa Koseoglu, Respondent.
No. 05-0321.

November 14, 2006.

Appearances:
Don Wayne Cruse Jr. (argued), Assistant Solicitor Gen., and Rafael Edward Cruz, Office of Atty. Gen., Austin, for petitioner.
Wayne T. Rife (argued), Law Offices of Wayne T. Rife, P.C., College Station, TX, for respondent.

Before:

Don R. Willett, Wallace B. Jefferson, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, David M. Medina, Paul W. Green, Phil Johnson, Harriet O'Neill

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COURT ATTENDANT: Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas, all persons having business before the Honorable Supreme Court of Texas are admonished to draw near and give their attention for the Court is now sitting. God save the State of Texas and this Honorable Court.

JUDGE #1: Thank you, please be seated. Good morning. The court has two matters on its old submission doctrine. And in the order of their appearance, they are Docket No. 05-0321, Texas A&M University System, Texas Engineering Experiment Station, and Dr. Mark McLellan versus Dr. Sefa Koseoglu from Brazos County in the Tenth Court of Appeals District and 05-0686, First Commerce Bank formerly known as Rouse's Ford Bank of Texas versus Kristine Palmer individually and Kristine Palmer and Prejude Ake Palmer III and independent executors of the State of Prejude Ake Palmer Jr. form the Brazoria County in the Thirteenth Court of Appeals District. The Court has allotted 20 minutes per side and each of these arguments and we will take the brief three sets to 22. These proceedings are being recorded in a length. The argument should be posted on the Court's website by the end of the day today. The Court is now ready to hear argument in 05-0321, Texas A&M University System and others versus Dr. Sefa Koseoglu.

COURT MARSHALL: May it please the Court. Mr. Cruse will present argument for the petitioner. Petitioner has reserved five minutes for

rebuttal.

ORAL ARGUMENT OF DON WAYNE CRUSE JR. ON BEHALF OF THE PETITIONER

MR. CRUSE: May it please the Court. This case will help answer the question, how many interlocutory appeals does Texas procedure require to resolve the problem of sovereign immunity proceeding. The Court of Appeals answered three: this appeal for the University to get a remand; a later appeal for the University to perhaps get a rendition; and a distinct appeal for the University official suing his official capacity. This Court should reverse and hold to the single interlocutory appeal as capable of breaching those questions about sovereign immunity proceeding.

JUDGE O'NEILL: But that, but that would go against the statute's plain language.

MR. CRUSE: If ...

JUDGE O'NEILL: You want us to look at the purpose from the plain language.

MR. CRUSE: In, in regard to the question of 51.014(a)(8) and whether the language pleaded the jurisdiction by a governmental unit encompasses Mr. McLellan's, plaintiff's official capacity, we think that we don't need to go beyond the plain language because the introductory clause at 51.014(a) defines a person as the class of appellants. It doesn't restrict the appellants to being a governmental unit. So in the text of (a)(8) when it says (a), quickly grants or denies a plea to the jurisdiction by a governmental unit. We think that, that's correct as reflecting an assertion of the entities underlying sovereign immunity from suit. In Simons, this Court acknowledge that plea to jurisdiction is a, a term referring to the underlying immunity being asserted rather than to a particular want to pleading [inaudible]. And the court made the same pronouncement again in Thomas v. Warren where there it's fear. And this does best effectuate legislature's intent. And it also reflects the common law understanding legislature have in 1997 when it wrote this provision that into that the phrase that, that sovereign immunity from suit is shared between entity and the official suit in his official capacity because when an official is sued in his official capacity, he is in fact [inaudible] state. It is a different way of styling a pleading to get the same result. A suit against an official under official capacity cannot achieve monetary damages or any judgment against that official as it convene. The only type of relief obtained in the suit, an official capacity suit is relief that compels the governmental entity for which he works to do some sort of task. It's a legal penalty.

JUDGE #3: Why is it you can sue somebody individually in their official capacity? I mean is we just went through-- you know, partially every statute in Texas about the government and they says, they can sue and be sued which we said, gives them capacity. Why should-- why can you sue somebody in their official capacity? Why shouldn't you just suit saving or any if it can suit this a ...

MR. CRUSE: The answer is about differently in federal and state law but I'll focus on the state law and this Court abused that distinction as a way to distinguish out suits that are improperly trying to direct state conduct or direct state officials who are acting within their discretion. So if you were to see an official for having

exercise their discretion in a certain way even if to framed that suit as have-- been having exceeded the balance of their discretion instead of acting even. And the distinction in Texas law is back at least to-- it's not unusual ...

JUDGE #3: But if it's in the official, it pertain your official capacity indeed. I mean, then the agencies exceeded this discretion. I just, I just wonder if is it-- where they came from.

MR. CRUSE: What-- It came from the recognition that the state as sovereign is generally immune from suit -

JUDGE #3: But if I -

MR. CRUSE: - and immunity.

JUDGE #3: Right. - but if you couldn't sue somebody in their-- you know, put aside 1983 and all these other things. If this is just really a suit against A&M, if you could only sue A&M or you could only sue the individual or-- then the problem would go away and you can always beat him.

MR. CRUSE: Well, I think it might generate other problems in the jurisprudence. The, the courts in Texas have developed this doctrine ...

JUDGE #3: Well, I mean this is a problem right here. If, if we ensued A&M, you-- no question they can do the appeal but because you do it again, somebody in their individual capacity then you obvious-- then you arguably don't have an interlocutory appeal. That, that make a lot of sense if as you point out they're identical suits.

MR. CRUSE: Well, I guess-- let me answer the question this way. The, the problem that we're discussing is created by section (a)(8). I mean, the legislature enacted this section, the understanding in Texas was that the entity has sovereign immunity from suit and an official suit in their official capacity is an essence asserting the entities underlying sovereign immunity from suit. There's no indication from the statute that the legislature meant to adopt some other type of waiver immunity that would change that background from law. It-- nor should it have the, the distinction is in useful one for the court to distinguish between appropriate actions at the margins of state authority, restrictions on the scope of discretion given to state officials and a suit that would in proper try to control the exercise of that discretion.

JUDGE #3: So in-- and that would seem to make sense then that it's remedy is by summary judgment. The individual gets out on summary judgment because there maybe some legal on this between what the individual has done as an official versus some other unofficial act and that can be directed out through the evidentiary hearing at the summary judgment.

MR. CRUSE: I think that's exactly right. The, the usage of motion for summary judgment in (a)(5) is a reflection of fact that the official immunity defense which is what the official would have when sued in their individual capacity as a defense against personal monetary liability is very fact intensive. It involves consideration such as whether the official is acting in good faith. And that is the type of issue typically that can be resolved by a motion for summary judgment. So by distinguishing that-- by, by setting aside motion for summary judgment as the proper vehicle for that type of issue, (a)(5) does provide that even for appeal. Whereas, (a)(8) discussing plea for the jurisdiction is talking about the entities underlying sovereign immunity from suit.

JUDGE #3: What that's, that's I guess is my point is that (a)(5) permits the-- provides remedy for the individual official capacity or

otherwise or as (a)(8) as far as the, as far as the government immunity is concerned.

MR. CRUSE: The Court of Appeals suggested that (a)(5) would be a way for an official sued in his official capacity to bring an interlocutory appeal if you later filed the motion for summary judgment. But that wouldn't-- it wouldn't solve the-- a couple of problems. First of all, it wouldn't allow the assertion of sovereign immunity from suit based on the pleadings which is a typical way that it comes up especially in case such as a breach of contract case like this. If the official sued in his official capacity had to waive for a summary judgment hearing, you wouldn't have that option. It also wouldn't permit a plaintiff to appeal from the denial of-- I'm sorry, from, from the grant of such a motion for summary judgment. So it could in a particular complicated case, lead to more fragmentation and in every case, it would lead to-- in every case in which both an official and the entity is sued, it would lead to this the applicative appeal problem part because the legislatures proposed an automatic stay from the filing of a notice appeal under either these provisions. So whichever motion is resolved first, it's very like could be the only issue before the appellate court. So ...

JUDGE #3: The legislature obviously has got in the middle of this in deciding different avenues of, of code violation government and the officials. Why should we step in and say, it's part of the plain language of the statute to well obviously they meant something else when they could have said it.

MR. CRUSE: Well, the, the plain language of the statute, it uses the the phrase "governmental unit" but it also provides a place to look for the definition of that term. And it provides that, it says if you look in section 101.001 of the Tort Claims Act. And this makes sense based on what the legislature was concerned about. They wanted to ensure that-- especially in tort cases, there was an avenue for this type of interlocutory appeal. And so they wanted to ensure that these were at least co-extensive discussions of what the government immunity was-- what the governmental unit was. It would-- wouldn't go against the legislature's intent to say that governmental unit means something narrower in this statute then it has been typically applied in the context of the Tort Claims Act and it would prevent (a)(8) in filling pur-- the legislature's purpose for that section.

JUDGE #2: Do you think the Tort Claims Act definition includes in tort?

MR. CRUSE: In their official capacity, it does and member of Courts of Appeals upheld that so long it's in their official capacity. And to be clear you cannot obtain individual liability against the, against the person who holds the office, do an official capacity suit. That would be an individual capacity suit and we do not believe that would fall within (a)(8), that would have to go through (a)(5). So if-- it's not every tort case in which that official capacity issue comes up but when it has, the Courts of Appeals inconsistently said that governmental unit is meant to encompass those individual so long as they're acting in their official capacity. Turning to the, the second question which is whether the Court of Appeals should have rendered judgment or remanded for further pleading of this case, dual principle that's been announced is what-- the-- redition is proper, the plaintiff has already had a reasonable opportunity to amend. The dispute seems to be when that reasonable opportunity should come. The Court of Appeals says it has to be after some adverse ruling even if that's the first time interlocutory appeal. But in much better rule, it seems to be that

the plaintiff should have to respond to what the plea-- what's the plaintiff on notice of, so that when the trial court is deciding a plea to the jurisdiction, it can make a meaningful determination with everyone's argument in front of it. And so if the issue goes up on interlocutory appeal, the Court of Appeals can make a meaningful determination without having the possibility of a plaintiff simply deciding to stand on his pleadings and wait until he's told that he needs to do a better job.

JUDGE #2: One of those special exception, they can do that?

MR. CRUSE: They could absolutely. Special exception wouldn't raise the court's jurisdiction in the same way the sovereign immunity from suit issue was. And it also ...

JUDGE #2: Summary judgment that no-- they need to do some before a summary judgment is granted 'cause you don't get a second chance after that.

MR. CRUSE: That's, that's absolutely right.

JUDGE #2: The reason you use a plea to jurisdiction is to keep from guessing.

MR. CRUSE: I would disagree with that. The reason he has a plea to the jurisdiction is, is that ...

JUDGE #2: You could've used special exemption, you could've use a summary judgment. But you, you chose to use a plea to the jurisdiction where they don't know which one would you-- what it is. And now we're going to tell them from the Court of Appeals, "You guessed wrong, you should've amended before the hearing."

MR. CRUSE: No, no. The ple-- the question is when you have a plea to the jurisdiction is a distinct sort of category that it may not have had-- it may not have a broad presence in the rules of the statutes but it has a presence in one -

JUDGE #2: Is that any presence in particular?

MR. CRUSE: - it has, it has presence in - one particularly important and relevant provision which is (a)(8) that provides, that a plea to the jurisdiction is appealable to interlocutory appeal. And in (a)-- and in 51.014(b) provides for an automatic stay. And if you combine those two things that means the only judicially, manageable approach to this would be to ask the plaintiff to do what we asked litigants to do in lots of other situations in litigations which is to put your cards on the table to explain what you think your best case is for having a waiver of sovereign immunity, so that when the trial court makes its ruling, it can be meaningful. And if it goes up on appeal, the Court of Appeals can make a meaningful determination.

JUDGE #2: So you're saying a plea to jurisdiction should be governed by the same rules as the summary judgment?

MR. CRUSE: Well, if ...

JUDGE #2: As if that was a special exception, they don't have to put the cards on the table. If they win, it's only if the trial judge says, "You're right. That's not specific enough that they have to do it. They don't have to do it."

MR. CRUSE: That is absolutely right. But in their other situations in a litigation, for example if both sides objecting to the jury charge, both sides have to put all their cards on the table. They don't know how the jury's going to come back.

JUDGE #2: If what we're going to do-- but your rule means we don't know or even so-- so they-- your rule is they always have to put-- if you file a plea to the jurisdiction, they must put all their cards on the table.

MR. CRUSE: If they have-- well, if they have a reasonable

opportunity to amend and they haven't done so then ...

JUDGE #2: Then, let's assume it's filed 10 days in advance like all motions are advanced at the hearing. They have a reasonable opportunity in those 10 days had changed, your rule is place the jurisdiction or just like summary judgments. Once the other side files it, if you make a change, if you want to change, you better do it before the hearing or you're out of luck 'cause you can't do it afterwards.

MR. CRUSE: That's a feature it might share with summary judgments but it shares that feature with many other aspects of litigation as well. And there are points in the litigation process which you can sure that things are moving along. You have to ask both sides to put their cards on the table. And because of the changes that legislature has made to interlocutory appeals including especially perhaps the edition in 2003 of the automatic stay in 51.014(b) that the best approach is to require the plaintiff to put those cards on the table of the outset so that everyone involved in that process, make a meaningful determination.

JUDGE #3: How long does a reasonable opportunity be cured?

MR. CRUSE: Well, in this case, it was four months and during ...

JUDGE #3: Right, I know but I mean in terms of-- I guess as Brister says, they file a motion. How much time do they really have to extend, is ten days enough? -

MR. CRUSE: Maybe ten days ...

JUDGE #3: - the use of discretion

MR. CRUSE: Well, it may depend on the case and it maybe on the situation where the plaintiff feels they need additional time for some reason to respond to a plea if they could ask that of the trial court. But in this case, there would be a 4-month period during which the plaintiff make other types of responses. The plaintiff filed a motion for summary judgment for example on overlapping issues during that time. It's not as if that nothing has happened in during litigation. The plaintiff was actively involved on this issue but had elected as a tactical matter to simply stand on his pleadings on the assumption that he would-- that he could stand on there and tell you he's told otherwise. That, that is a rule that if it is-- if the Court of Appeals' absolute rule that the plaintiff don't always do this is adopted. That will lead to more delaying of process and it's a burd-- the goal of the interlocutory appeal statute, the automatic stay to provide a quick, certain resolution of the question of sovereign immunity from suit.

JUDGE #3: Any further questions?

JUDGE #4: Mr. Cruse wait. As a factual matter, is there any allegation that Mr. McLellan was himself individually a party to the settlement agreement?

MR. CRUSE: Not, not up to the channel we're at all. They-- the settlement agreement doesn't have a signature on it. Which I'm not sure it answers the question fully but the complaint that's been lodged in this case which would probably-- the plaintiff has been lodged in this case only seeks execution of that contract, performance of that contract and remedies that this Court has held-- I see my time has expired and brief it will-- I don't think is ...

JUDGE #3: Complete your answer.

MR. CRUSE: Thank you, your Honor. - that this Court has held that a classic case of a suit against an official being sued against the sovereign is when it seeks to enforce performance of a contract and that was the Harian case from 1923.

JUDGE #3: Thank you, Mr. Cruse. The court is ready to hear argument from the respondent.

COURT ATTENDANT #2: May it please the Court. Mr. Rife will present argument from respondent.

ORAL ARGUMENT OF WAYNE T. RIFE ON BEHALF OF THE RESPONDENT

MR. RIFE: Chief Justice-- I mean Justices, Counsel, ladies and gentlemen. I appreciate very much the opportunity to come forward stand before you today. I've been practicing for almost 20 years and you always look to be able to get-- you know, I have to say this is my first time. So I-- my only hope, wish was that I would've been second on the dockets so I can learn from someone else. So be and I had a good teacher in my state opponent. I'd like to come made to answer the last question ...

JUDGE #1: That's well either or shake or not I'm not sure when -

MR. RIFE: Okay.

JUDGE #1: - counsel take

MR. RIFE: I'd like if I may to address the question you raised at the end of your question. Yes, Dr. McLellan was sued both in his individual capacity. He was a party to this contract, he was a signatory. The dispute arose because he then refused to sign a contract that he'd been negotiated in his capacity individually as well as, as a representative of the Texas A&M University. There were complaints against Dr. McLellan individually that we would've asserted but for this sovereign agreement and those points would've been waived by sovereign immunity ...

JUDGE #3: What-- when they do, what they do wrong

MR. RIFE: Well, it was a number of things that did wrong-- that Dr. McLellan did wrong. First of all, as I believe you alluded to earlier or maybe it was quote-- my opponent did-- you know, the reasons here about Dr. McLellan acting in bad faith. Dr. McLellan, my client, Dr. Koseoglu -- and it took me years to figure out how to say that correctly but it is Koseoglu -- had for a number of years as we planned-- as we studied out the statement of facts established a business. Texas A&M University had for a number of years said, you can go duties on your own time, invested money, invested resources. When Dr. McLellan claim that displaced him, he denied that request ...

JUDGE #3: That's not just-- But-- 'cause it's a bad faith, to his answer.

MR. RIFE: He in effect was bad faith. The problem with bad faith, Judge, was because he-- my client chose to appeal that decision and he said, "I'm, I'm firing you now because you chose to appeal it." He had a no right. He was acting in bad faith. But, but getting back to the case itself, this case I believe is about one thing on both points ...

JUDGE #3: But you also sued in its official capacity.

MR. RIFE: Yes, your Honor. Both officially and ...

JUDGE #3: That is the same as the lawsuit against the university?

MR. RIFE: Well, I think that's what the cases would say that it imposes liability. But, but I also believe if you're going to the second issue which is the question under the Tort of Section 51, there's a case law that said under sub-part 5, it doesn't really matter whether someone has been sued in their individual capacity or official capacity.

JUDGE #2: It makes a big difference to me. Assuming in my individual capacity, I'm not actually have to pay.

MR. RIFE: But I understand that Judge but I'm talking for the purpose of whether or not you can rate or come up on an interlocutory appeal.

JUDGE #1: Why would that, why would that make a difference?

MR. RIFE: Why would it make a difference?

JUDGE #1: Yes.

MR. RIFE: And why the distinction between both the summary judgment aspect and the plea to jurisdiction ...

JUDGE #1: Why governmental unit can you go straight up? And if you're suing in a quite a defendant and in their official capacity that's like a suit against the government. So why make this distinctions?

MR. RIFE: Well, I believe, Judge, it goes back to a couple of issues. First of all, the first thing is that I think that a plea to the jurisdiction -- and this may have been the point you're relating to earlier -- it's merely a facial attack. You're looking at the pleading towards of the gate keeper that determine what, what evidence gets to the jury and you're making a facial attack on those pleadings -

JUDGE #3: And it's a facial attack -

MR. RIFE: - and you go to summary judgment ...

JUDGE #3: - it's a facial attack for the university legs or the official legs. So what's the difference?

MR. RIFE: Because under the summary judgment standard, if we're assuming in and it's individual capacity, your Honor, we then get to-- his attack is on the underlying facts much like in Miranda.

JUDGE #3: But the question was why is it different whether it's the office or the office holder as long as it can be both officials. Why distinguish there?

MR. RIFE: Again, Judge, I think it goes back to the issue of what were you trying to oppose. We were trying to oppose personal liability on document fraud ...

JUDGE #3: Not when your sentiment is official capacity.

MR. RIFE: But we sued him as a, as a signatory to that contract. We were asking him ...

JUDGE#3: I'm assuming, I'm assuming I have to put back the pleadings. You sued him in his individual capacity?

MR. RIFE: Yes, your Honor.

JUDGE #3: Put that away. if you sued him in his official capacity, why is that?

MR. RIFE: Well, I'll acknowledge the case law says that an official capacity suit is in effect a suit that imposes liability on the sovereign. [inaudible]

JUDGE #3: And so the question back again was: So why should we view between the different?

MR. RIFE: Because I think that's what the legislature says and I think it goes back to the point that you were raising earlier when you started out. This Court has not to, to come in and determine what the legislature said -

JUDGE O'NEILL: Well, could it be possibly -

MR. RIFE: - that that's we later we do a distinction.

JUDGE O'NEILL: - could it possibly be that in order to discern the difference between official and individual capacity, you got to get into a bad faith inquiry which is that contains of a more appropriate for summary judgment.

MR. RIFE: I believe that's correct, I agree with you, Justice

O'Neill. And I think that's-- I think that in effect was in Miranda. If you look at the two vehicles that will comparing which by the way, I think Miranda which is decided on we-- a month before Sykes, reaffirm the Brown standard on the amendment issue. But if you look at Miranda, Miranda was comparing a facial attack versus a substantive attack that-- in that particular case, they chose to use the substantive issues which gathered to the underlying issues which were factual questions and ...

JUDGE #2: And in Miranda, we said the process in considering the evidence to the plead to the jurisdiction is summary judgment like.

MR. RIFE: We said it was summary judgment like, that's correct.

JUDGE #2: So it's not Miranda, Sykes along Simon. None of which the Court of Appeals cites in discussing what type of vehicle comes under this particular interlocutory appeal provisions. We said that it is the substance of the vehicle, not the title of the vehicle that determines this-- what are you raising immunity.

MR. RIFE: Well, ...

JUDGE #2: And if you notice from Chapter 51, the legislature used our terms: "summary judgment", that's our term, we defined it; "plead to the jurisdiction", that's our term, we defined it. And we've said that in a jurisdictional attack, it's the substance of the matter. So why shouldn't we presume that the legislature is basing their consideration here not on the technical title of the vehicle or the motion but on what we've said but as you focused on the substance of the motion.

MR. RIFE: I think you post a good question Justice Wainwright. But I'd go back to the point of Justice Brister as before and that is they had one to three vehicles. They chose facial attack, it wasn't a substantive. In this particular case, it was a plea to the jurisdiction on the phase of the pleadings. That is not like a summary judgment.

JUDGE #2: I don't understand when you say that Miranda was a facial attack.

MR. RIFE: No, I said Miranda was a substantive attack. They did address the Brown standard if there was a facial attack for the purpose to amend ...

JUDGE #2: How do you use-- how do you distinguish facial attack and substantive attack?

MR. RIFE: Well, I think you can ...

JUDGE #2: Miranda was certainly substantive. This is substantive matter, isn't it? Are you distinguishing between -

MR. RIFE: I think you're ...

JUDGE #2: - pleadings and facts?

MR. RIFE: Yes, your Honor.

JUDGE #2: I see. So that ...

MR. RIFE: I think basically under, under the standard, under the plea to the jurisdiction standard. And if you look at the cases that the-- that even for example it get on to the second issue that, that rise pursued amendment, they say the first inquiry is solely the pleadings. If you attack and you bring evidence on in the form of affidavits or other things then in fact you've made a substantive attack. And this particular case, they solely chose to attack the pleadings then settles. And they said, "The pleadings," which are the gatekeeper to determine what evidence goes to trial, "are inadequate." In every instance, the courts have consistently said that we're going to allow those, those vehicles to be analyzed. And then if they're found efficient given opportunity to amend but they attack only the face. They didn't put on evidence to say, "Well, the appellant did this

or he didn't do this." It said, you can't sue him because it is, because of the case law on a legal fact, a legal extent what is in factual is oppose to what factual discussion that Justice O'Neill addressed. And I think that's how you give-- I think personally that's how you give meaning to all the terms. I think you-- I would agree to the extent that it says that a plea to the jurisdiction can be used as a vehicle for a substantive attack and therefore if ...

JUDGE #2: You're confusing when you say, substantive versus facial. A plea to the jurisdiction that challenges that whether you sufficiently plead a cause of action is a substantive challenge, what you mean is facial on the pleadings versus factual. Right?

MR. RIFE: That's, that's what I meant.

JUDGE #2: Okay, 'cause both can be substantive -

MR. RIFE: Well,

JUDGE #2: - go in to the merits.

MR. RIFE: They had a choice to attack the underlying facts, they chose not to.

JUDGE O'NEILL: Let me ask you this if, if the facial attack would also get rid of the official capacity claim, then why shouldn't an official capa-- official asserting immunity be able to bring out if it's a facial challenge, did that, did that make any sense?

MR. RIFE: I understand what you mean, Justice O'Neill.

JUDGE O'NEILL: I understand that they ...

MR. RIFE: Not your Honor, I answer the question ...

JUDGE O'NEILL: I understand the factual situation that, that apply if you're looking whether there is good faith or not, that's more convasive to a summary judgment action. But if it's a facial attack, that would vitiate the, the officials ...

MR. RIFE: Aide doesn't follow within the one of the exceptions under the Tort Claim Act have you plead facts regardless whether true or not that gets you through the leg for under Tort Claims Act.

JUDGE O'NEILL: Right.

MR. RIFE: If you're purely showing this-- assuming the sovereign, I would agree with you.

JUDGE O'NEILL: No but then it wasn't underlying ...

MR. RIFE: And you're saying if you make a mistake and you name the individual but in the fact, you've met the sovereign is the same fact?

JUDGE O'NEILL: Well, what I'm saying is there's no-- let's presume we're going under the form of-- you, you-- from the face of pleadings you can tell that no claim can be asserted here. Why shouldn't then the official be able to assert immunity interlocutory if you don't have to look at the underlying facts to, to make that distinction?

MR. RIFE: Well, I think I would agree if there were not an individual capacity suit being brought but that was not the case in this instance.

JUDGE O'NEILL: But that would still leave open the individual capacity claim. It would just bring up the official immunity and knock that out.

MR. RIFE: Well, all you're attempting to do is impose liability on the side and I think that's what you're asking. If I'm wrong-- let me add this, if all your intent is to impose liability on the side then I think you go on the right-- but in this case, we were trying to impose liability on the problem and I think the legislature was clear. I think the other reason-- I think you have to look at as we've raised in our brief is the legislature specifically said but the 101 to determine what a government immunity is. And they have to put those limits to have known what they meant. They could've work that under filed but

they didn't do that file.

JUDGE #3: Let me see if I understand what you just said, are you saying that if you sue Dr. McLellan and the university, Dr. McLellan only in her official capacity, are you saying that-- or doesn't trying to impose individual liability at all. That makes as you would say that both the Dr. McLellan and the university would have an interlocutory appeal?

MR. RIFE: Well, I'm not sure I want to go that far. The question gets back to what are you trying to do. We're looking in a fact in but I think that if you're going to look at the pleading and someone has named Dr. McLellan, you put his name down for a reason. I think you then have to get to the factual issues that Dr. McLellan didn't think there was a basis for the waiver, he should put on facts and said, "I didn't act in bad faith." So to-- so I know I'm probably confusing you but the point is I think you have to look at the pleading, the pleading said Dr. McLellan. If Dr. McLellan wanted to challenge whether this was about him personally or whether it was really about the sovereign. And you just have to put my name down there then you should've put on facts to that point.

JUDGE #2: So.

MR. RIFE: And I think that's what the legislature was saying.

JUDGE #2: Okay. I guess I'm not following that but ...

MR. RIFE: And I'm probably on that beyond the jury job this way ...

JUDGE #2: So, so you wouldn't have any objection that if at the time of an interlocutory appeal, any official claims, any claims that we're attempting to, to find that the sovereign which would include the official capacity claims so Dr. McLellan would go up in interlocutory appeal.

MR. RIFE: I would because I think the question has to be determined by the way of facts. I think you have to look at-- I think it has to be a factual attack whether you call it substantive or looking at a summary judgment standard, it has to be by summary judgment because you have to look at the facts and they could interpret that determination.

JUDGE #2: What if the vehicle is called a motion to dismiss but in the discussion that parties argued about lack of evidence or insufficient evidence and there's affidavits and the whole legal debate is about sovereign immunity and jurisdiction, where does that fit under, (a)(8) or (a)(5)?

MR. RIFE: I think that's confusing. I think that the safeguard of the summary judgment is you get the 21 days notice, you have the right to get amend seven days before the day of the hearing and if you don't, you lost your chance. Motion to dismiss, what does it mean? Three days before; 21 days; what do we have to ...

JUDGE #2: I understand that maybe procedural issues stated but as to 51.014, is it a motion for summary judgment under (a)(5) or a plea to the jurisdiction under (a)(8)? Or does it matter so long as we know the substance of it?

MR. RIFE: I think, I think the problem is or reason because people have not followed the standards of the said out. A motion for summary judgment is a definite vehicle. If you're going to use it, you need to use it -

JUDGE #2: And in Miranda -

MR. RIFE: - you need to abide by those rules.

JUDGE #2: - and in Miranda, we said a plea to the jurisdiction where facts are presented, evidence is submitted, followed a summary

judgment like procedure ...

MR. RIFE: Why? But it didn't-- but still, if you looked at-- if you looked at-- I believe what Justice Jefferson has said, it got into the issue about whether or not the 21 days was there or whether or not you had time to amend that should've-- so forth and so on.

JUDGE #2: And those are good points. The majority opinion said that a plea to the jurisdiction where evidence is considered follows a summary judgment like process.

MR. RIFE: Okay. If I may fortunately though that, that-- I think that, you know, both sides was consistent on the second issue which is on ground. I believe that even if-- I think that if you look substantive the lat-- what the majority said in that opinion, it said that if there is what I talk-- described as a facial attack from the pleadings then you use the standard set up in Brown. If however you're looking at the substance, if you're going to attack the underlying facts and you're going to offer facts, then it's a different standard.

JUDGE: So ...

MR. RIFE: In that particular case, Miranda reaffirmed Brown, and Miranda was only one month before Sykes.

JUDGE #2: So ...

MR. RIFE: And I believe that's this Court pronounce.

JUDGE #2: Is it fair to say that whether the motion is called a plea to the jurisdiction or a motion for summary judgment determines the appeal's rights entirely, the title of the document -

MR. RIFE: I believe -

JUDGE #2: - I mean the first part.

MR. RIFE: - I believe that if we begin to straight to fulfill what this Court's got in preples-- principles on how you construes statutes that's when we create these problems. I think the legislature intended summary judgment to mean summary judgment.

JUDGE #3: If you could amend, what are you going to say?

MR. RIFE: Well, first of all I believe that we're going to, to-- and we have by the way are amendment, it was filed in response to the Court of Appeals depending on the course of remand. We have, we have sued-- obviously under section 1983 we're sued this for prospective-- I mean, we've, we sued for prospective relief, not a retroactive relief. We vet-- we said we would've sued also for injunctive relief to have doctrine for so we reinstated in this position. We would've been able to get the not prospective but retroactive pay, pay he lost to have that reinstated ...

JUDGE #3: So you, so you've ask for different relief?

MR. RIFE: Well, what we said is, what we-- that the case is still agreed to contract case. We say, we had an agreement, we settled an unlike dispute. But the underlying dispute under the lawsuit standard, we have to look at with the claims were underlying and we have to say, was there a raised. Well, if we have never sought several lawsuits, we would been able to sue for injunctive relief to have been reinstated; we would been able to sue to have his back pay; we would also been able to sue against Dr. McLellan individually under the bad faith standards. And we would've sued Dr. McLellan in his official capacity which would've ended up imposing liability on the sovereign also. There are also a number of other things, we believe there's takings of cases, taking cause cases that we could've asserted; that we've alleged; that would've been asserted when we look at the waiver. All of those things have been plead only to get us through laws on that says, "If the settlement settles the case where the underlying claims have been-- where sovereign immunity waived, you get there." And we think, we think

these facts get us there. And if, if I may-- just to go to, to the second issue and, and I believe the, the question that may have been Justice Green that bring-- that brought on up this: How long is enough? This Court has laid out the standard. It's been fall affirm not-- for quite a few years. It was affirmed in Sykes, it was reaffirmed in Miranda and it was recognized in Brown. Brown is a tota-- a different case in effect. And what the court said is as Justice Jefferson said in his dissent Miranda is, you, you come to the point of the decision which by the judge and if the judge says, "Denied," then you do one thing. You don't have to admit. If he says, "Granted," then you have-- then he says, "Before I grant it, I'm going to look at the pleadings and I'm going to decide are they incurably defective." In this case, the Court of Appeals determined correctly that they were not incurably defective. And I said before we dismiss your case, before we let in this Braconian measure, the death penalty we're going to give you a right to amend. And I would take issue with the point that it might seem co-counsel raised earlier which he said, "This is consistent with other things in litigation." This inconsistent with how litigation is held. The pleadings of the driving force we learned in law school that put a pleading down a paper and that determines whatever evidence gets into trial. When you come to summary judgment mode-- hearing, it's like in many trial, you better amend your pleadings or when get into the summary judgment hearing, you can't put on the others. That's why it makes a difference there. But if you don't throughout our cases, if you look to rules of procedures, it is always given liberal leeway to amend. That's why this Court historically adopted a rule that says, "Once we determine there is no summary-- no way for sovereign immunity, we then look to the pleadings and it is totally an issue of whether the pleadings himself are sufficient."

JUDGE #3: Counsel, that's a rule. Why is that not simply, why is that not simply advisory opinion from the court telling you, you don't get their own list, try again. You know, if there next time you don't get there on it, try again. Why ...

MR. RIFE: Well, I think that, I think that implies the same thing we've applied for special exception that would apply for everything.

JUDGE #3: Except to those special statute, you're telling the court, "I don't understand what they're wanting, I don't understand what they're claiming against me and they could testify." So why didn't you do that? Why can't you that one of the exceptions.

MR. RIFE: I think ...

JUDGE #3: They filed a plea to the jurisdiction say, "Well, Judge, we got-- you're going to hear that after a while." I don't understand what you're saying, tell-- like tell me what their saying ...

MR. RIFE: I think the flip side is true. I think that, that to argue otherwise would say that they in effect the State is in one that gets connect to call on every time. And then you get into a problem where you have to-- we have all of these abuse of discretion cases that go up on appeal and said, "Well, he only gave me four weeks, well, he only gave me five weeks."

JUDGE #2: How much time that you need?

MR. RIFE: Judge, in this particular case, your's-- the case law under this Court said, "You could go to the hearing and then decide." And that's what we relied on certainty. we relied on at this Court that said over and over again, and what every other case has said. And, and by the way, O'Neill, I believe is consistent with that. If you look at O'Neill which is what they-- in unwritten opinion, in unreported opinion, the only opinion they need in and then did even goes after the

talk about time. And that opinion, not on the footnote but in the case itself. It said they have waived their right because they are not requested right to obtain number one and number two, the pleadings weren't sure and really defective. They followed the rule in that case because that's what they relied on. And then in a footnote, they make some comment about the lawyers have depend on it. But this Court has always said, has always said and as a litigant, Dr. Koseoglu has a right to go on court and say, "I believe I'm right and if I'm wrong, give me one chance to fix my problem but don't kick me out there."

JUDGE : Further questions? Thank you, Mr. Rife.

REBUTTAL ARGUMENT OF DON WAYNE CRUSE JR. ON BEHALF OF PETITIONER

MR. CRUSE: May it please the Court. I have three very brief points I'd like to make in the rebuttal. First is response to Justice O'Neill's question about why a motion for summary judgment isn't a better vehicle to resolve the distinction between official and individual capacity suits. And the answer is that to make that distinction efforts since you look at the relief being sought. If the relief is to control state action or impose liability on the state, it's an official capacity suit. If the relief is personal liability against Dr. McLellan, it would be an individual capacity suit. And the question of good faith in fact leads to some question. It doesn't come up at that crucial point, it comes up later in evaluating the merits of the affirmative defense of official immunity. So that's the reason why that would be-- why that's not a useful relate to trial that distinction prompt premises. The second point relates to the question of whether the complaint that was actually filed in this case, pages 1-15 of the Court's record, states a claim against Dr. McLellan in his official or individual capacity. And the complaint doesn't use either those magic words. But if you look at the function of what it's doing, it's seeking to impose contract liability on the state. It's not alleging that Dr. McLellan did anything that was outside of his-- that would've created individual liability and it's only seeking to enforce the contract against the state. And you know, although it doesn't use the magic word "official individual capacity" the courts have looked before it proceed from the exceptions of what immunity plead, what the party is seeking to give. And third point I'd like to respond to is the idea that complaint has since been amended by document that was filed after the Court of Appeal's decision in this case. It's somewhat difficult to respond in the sense that it's not before this Court in this appeal but there is an automatic stay impose by 51.014(b). And those appeal in this case was filed on October 18th, 2003. The effective date of the 51.014(b) was for any notice of appeal filed after September 1st, 2003. And the statute says that each days all proceedings of trial court. And the purpose was to allow the Court of Appeals to make a meaningful determination with everything else present and it would support that purpose. If a party could later come back in a minute to try to change the ground rules during the court's review of appeal. But in response to the substance of that the first is that this attempt to go back and add lots of claims that were not actually-- well, that in, in a law some type context that ...

JUDGE #1: It won't settle, they won't settle.

MR. CRUSE: That's exactly right, that these were not the claims

that the parties we're discussing at the time. That the only claim that was being discussed, the only thing that correspond as in the record is it due process-- is a notion of due process that was later flashed out to a due process claim for perspective. And I would point to-- point out to the court that, that claim, a due process claim for perspective relief is also implying lost that in lost in two different claims, it survived the plea to the jurisdiction that list of lower act and the due process claim for mainly perspective relief. And the plurality noted that the only claims for damages that survived was the list of lower act claims. And the, the courts reason it, placed great reliance on the fact that it was a legislative way for immunity for suit-- from suit. And had-- if it were true that just merely had in the due process claim for perspective relief would entirely use our waiver all of that would've been unnecessary. And we think the distinction drawn between those two things, it makes very good sense because the different kinds of liability being imposed on the state and the legislature creates liability for something like that. It was of lower act, it's making a balancing determination of what types of remedies might be available and the decision to impose the state to financial liability. That's not true at all for perspective relief especially in a due process claim. Where that-- outside, that most of plaintiff would be entitle to is the process that they would do. And to allow that-- if, if that becomes the loophole through which this settlement can fit, then in essence, the parties going to post part greater liability on State and legislatures ever considered in this context which would be ins-- on view extension of laws.

JUDGE #1: Any questions? Thank you, Counsel. The file was submitted. The Court will now take a brief recess.

COURT ATTENDANT: All rise.

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