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Supreme Court of Texas.  
In re UNITED SERVICES AUTOMOBILE ASSOCIATION, Relator.  
No. 07-0871.

December 9, 2008.

Appearances:

Pamela Stanton Baron, Austin, Texas, for Relator, and Mr. Giesel, State of Texas, for State of Texas, Amicus.

Jeff Small, Law Office of Jeff Small, San Antonio, Texas, for Real Party in Interest.

Before:

Wallace B. Jefferson, Chief Justice, Nathan L. Hecht, Harriett O Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Justices.

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CHIEF JUSTICE JEFFERSON: Be seated please. The court is now ready to hear argument in 07-0871 In re United Services Automobile Association.

SPEAKER: May it please the Court. Ms. Baron will present argument for the Relator. Mr. Giesel will present argument for the State of Texas. Relator has reserved five minutes for rebuttal. Ms. Baron will open with the first ten minutes and present the rebuttal.

ORAL ARGUMENT OF PAMELA STANTON BARON ON BEHALF OF THE PETITIONER

MS. BARON: May it please the Court. At issue is whether the wrong court tolling statute Section 16.064 of the Texas Civil Practice and Remedies Code applies to and saves Brite's statutory cause of action for employment discrimination when he filed a suit more than three years after the latest possible date permitted by the Texas Commission on Human Rights Act. USA --

JUSTICE O'NEILL: Do you agree -- do you agree with the Attorney General that whether it's jurisdictional or not, really is something we don't need to address?

MS. BARON: No, I don't. I think that the issue is a threshold question. It's hard to determine whether a trial court abused it's discretion with respect to the merits, unless you first determine that the trial court had jurisdiction to reach the merits. I also think the

issue is squarely presented --

JUSTICE O'NEILL: Well, if the general tolling provision applies --

MS. BARON: Yes.

JUSTICE O'NEILL: -- then there's no jurisdictional issue, right?

MS. BARON: There is still a jurisdictional issue because the trial court would not have had the ability to even get to the question of 16.064 and whether it applies if she had no jurisdiction to reach the merits of that claim.

JUSTICE O'NEILL: Because of the limitations?

MS. BARON: Because of jurisdiction. If she had jurisdiction, she had to dismiss without even considering --

JUSTICE O'NEILL: But the jurisdiction question depends on whether tolling applies, right?

MS. BARON: Well, no it doesn't. Because I think the jurisdictional issue is dispositive, because if you look at the United States Supreme Court case in the US Sand & Gravel case and if you look at the Austin Court of Appeals decision in the Heart Hospital IV case what those cases recognize is that there are different kinds of statutory time limits. There are those that are like a statute of limitations because it protects a defendant's case specific interest in having a claim properly resolved versus a jurisdictional statutory time limit which serves a larger, broader system related purpose. And those that fall in the second category are jurisdictional, and if they are jurisdictional, they are not a pure statute of limitations, and so they are not subject to tolling or --

JUSTICE O'NEILL: But again --

MS. BARON: -- extension of limitations as a -- a pure statute of limitations would be.

JUSTICE O'NEILL: That -- that just seems backwards to me. It seems like if you determine that the general tolling provision applies, then you don't get to the jurisdictional issue because it's tolled. And if it doesn't apply, then limitations has run by the terms of the statute. So, why does it matter whether it's jurisdictional or not?

MS. BARON: Well, I continue to say I think jurisdictional is a threshold question. I do think it's dispositive because if it's jurisdictional, you don't even get to looking to -- at the general tolling statutes because it is a jurisdictional time limit. It restricts not just the right itself, but the power of the court to hear it.

JUSTICE WAINWRIGHT: As we've said, and the U.S. Supreme Court has said recently, we tend to not just consistently and blanketly look at these filing requirements for administrative proceedings as jurisdictional. We said that in Nagal and we cited some U.S. Supreme Court rationale in Nagal where the trend seems to be the other way. What's the most compelling argument you have that this one should be jurisdictional?

MS. BARON: Well, I think we have three key considerations that differentiate this case from those other cases that the court has held requirements not to be jurisdictional in light of Dubai. We have a long-standing controlling interpretation of the statute by this Court as being jurisdictional and we have legislative acceptance of that interpretation. We have what this Court has repeatedly recognized most recently in the City of Waco case as a unique, comprehensive and carefully crafted statutory scheme. And third, we have a unique statutory provision that is an integral part of that scheme. And going back to the Sand & Gravel Company --

JUSTICE BRISTER: [inaudible] the thing we're talking about is the

60-day. You get your right to a sue letter and you got to sue in 60 days.

MS. BARON: We're talking about the two-year time limit, primarily.

JUSTICE BRISTER: Okay. And that you got to bring suit within two years of the occurrence, and nothing in the statute says -- federal or state statutes says it's jurisdictional per se.

MS. BARON: It doesn't say it per se, but I think it's helpful to have a little bit of background. What we have --

JUSTICE BRISTER: Background's great, but -- and you -- but that's the question here. I mean Schroeder and -- we used to say all these things were jurisdictional --

MS. BARON: Right.

JUSTICE BRISTER: -- and we got ourselves in a lot of trouble. And so now, after Dubai, we try to be a little more careful about saying what's jurisdictional or not and -- because if you're right that this is jurisdictional, if this was all filed one day past two years, it all goes to judgment. There's no appeal, and ten years later, they tried to correct -- you could stiff 'em because it's jurisdictional. The court had no jurisdiction to do anything. It was all a waste of time.

MS. BARON: Well, I think that's not true with respect to this particular requirement. This is not a tricky requirement like the equal treaty rights requirement that the Court was looking at in Dubai. You need to know two dates. You need to know the date they filed the complaint and you know the -- need to know the date they filed their suit. And we've had 17 years of experience with these --

CHIEF JUSTICE JEFFERSON: [Inaudible] -- but isn't there a -- a policy behind the Civil Practice and Remedies Code that says sometimes you're gonna -- you're gonna file in the wrong court. We've got a very complex system. Some jurisdictions -- some -- some county courts at law have the same jurisdiction as a district court. I think it's very hard to know. And doesn't the statute say, okay, you're gonna make that mistake sometimes, but we're going -- we're going to excuse the running of the statute of limitations as a jurisdictional matter, it talks in terms of jurisdiction. Why wouldn't that policy override this concern?

MS. BARON: Well, I disagree that it talks in terms of jurisdiction. It talks purely in terms of statute of limitations. But going back to this whole concept, we have 17 years of experience under Schroeder. It has not been -- we have not seen a rush to the courthouse to set aside these judgments. And as a practical matter, when the legislature adopted the --

CHIEF JUSTICE JEFFERSON: Well, when I talked about jurisdiction, I meant 16.064 it says, the period between the filing and the second filing is going to be excused and -- or the limitation will be suspended if because of lack of jurisdiction in the trial court, which goes back to our holding in the underlying case. That sometimes you're gonna file it in the wrong place.

MS. BARON: That's correct. But I think that that provision has not been incorporated into the Commission on Human Rights Act. And I think what you look at is the TCHRA was adopted in a special session in 1983. There have multiple attempts to set out a local deferral agency at that time. And two objectives: one, they wanted it local; and two, they wanted to avoid the problems in the federal system. And the legislative history shows that the federal system was backlogged, that it was taking way too long to resolve these complaints, and in fact, it's important to recognize that the two year time limit in the Texas statute is unique. There is no parallel provision in the federal statute. Under the federal statute, all time for filing suit runs from

the date the EEOC issues its notice of right to sue letter. And that can be three months, that can be three years, and that can be five years. And Texas did not want to adopt the federal system, so it adopted an absolute cut off. And when this statute was first adopted, it said in no event may suit be filed more than one year after the complaint is filed with the commission. What no event doesn't mean -- well, except for the event if you file in the wrong court.

JUSTICE HECHT: The -- so you think it -- the 60-day limitation might be different?

MS. BARON: It might be different. Yes. It's in less definitive terms. It's not an absolute prohibition that says maybe filed, and there are cases I guess early on the Green v. Alco case that the court cited in Schroeder all related to whether or not the one year time limit should be tolled to wait for the commission to issue its notice of right to sue letter, and they said no. This is an absolute statute, and no event means no -- in no event, and if the commission doesn't issue its right to sue letter within -- if you don't file within the 60 days of the right to sue letter, that doesn't matter. You have to meet the one -- one year deadline.

JUSTICE HECHT: And your argument would be the same with respect to the other general tolling provisions like incompetence or something like that?

MS. BARON: Yes. And I think what we do see with statutory causes of action that when the legislature does want to provide for tolling, it -- it can do that. It has done that in the example of the DTPA, that the state cites in its amicus brief and it's done several times in the Workers Compensation Statute where there are various tolling provisions. And that relates back to the core principle of these cases for the last 70 years, on why we don't toll. Because when the legislature creates a statutory cause of action, the elements of that cause of action is in derogation of the common law are part and parcel of the substantive right. It is not part of the remedy and what a statute of limitations does is it simply expands the time for seeking a remedy, but it doesn't enforce a right. So when you have a time limit that restricts a statutory cause of action, when that time is up, the right is extinguished. And a tolling provision might be able to expand a remedy, but it can't resuscitate a right that has been extinguished.

JUSTICE MEDINA: What is -- what is the language in -- in 16.064 (b) intentional disregard of proper jurisdiction, what -- how does that play into all this? Don't you have to show that they intentionally disregarded the rules of filing this case in the -- in the original court?

MS. BARON: If 16.064 applies --

JUSTICE MEDINA: What if I think it does?

MS. BARON: Well, it does -- if it applies generally to age discrimination suits, it still doesn't apply in this case because Brite did file his first suit seeking \$1.6 million in damages with intentional disregard for the County Court's \$100,000 jurisdictional limits. USA offered evidence -- submitted evidence that showed first that he is charged as a matter of law with knowing what the jurisdictional limit of the county court was of \$100,000. At the time he was terminated, his base salary was \$74,000 and his bonus was \$11,000. His petition sought salary bonus and other benefits for the rest of his natural life. And by signing the pleading, Brite's counsel certified that on reasonable inquiry, there were facts that would support that allegation. And so, assuming Brite was planning to live more than one year, we've exceeded the statutory limits of the County

Court. Brite went into this eyes open. Plus, we have other evidence in the record that supports that position.

CHIEF JUSTICE JEFFERSON: Thank you, Counselor. Are there any other further questions.

MS. BARON: Thank you.

CHIEF JUSTICE JEFFERSON: Court is ready to hear argument from the State of Texas as amicus.

ORAL ARGUMENT OF MR. GIESEL ON BEHALF OF THE CITY OF TEXAS, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. GIESEL: May it please the Court. The most appropriate way of resolving this petition is to hold that the general tolling provisions in the CPRC do not trump the specific statutory deadlines in the labor code. And this follows from three separate factors: first, the default presumption against tolling; second, the specific text that the legislature chose for the controlling provisions at issue; and third, the comprehensive legislative scheme that occupies this field and leaves no room to inject tolling into this statutory framework. I'd like to --

JUSTICE BRISTER: How do we -- how do we write that? There's lots of tolling -- there's lots of limitations, provisions, and time limits and lots of statutes. Do all of that -- is 16.064 not going to apply to any of them too?

MR. GIESEL: Under the default presumption not to any specific statutory cause of action that has its own statutory deadline. The -- the logic of the presumption is that when the legislature takes the time to enumerate --

JUSTICE BRISTER: [Inaudible] there's -- there's probably -- maybe hundreds of those.

MR. GIESEL: There -- there may --

JUSTICE BRISTER: [Inaudible] limitations that are outside the civil practice and remedy code limitations chapter.

MR. GIESEL: The -- the question is --

JUSTICE BRISTER: I'm concerned about what I just did if I adopt that and say, well, tolling doesn't apply to any of them. I may find out five years from now [inaudible] like that's a bad idea on.

MR. GIESEL: The --

JUSTICE BRISTER: Is there any way to limit it just to this one?

MR. GIESEL: There -- there certainly is, your Honor. And we think that the default presumption would control in this case, but the other way [inaudible] specifically at both the comprehensive scheme that the legislature drafted for the labor code. It -- it didn't include just one deadline it --

CHIEF JUSTICE JEFFERSON: You said default presumption. Is there an exception to that default or is that just the rule always?

MR. GIESEL: It's -- it is the rule according to decades of precedent when the legislature enumerates a specific deadline, but I think it applies to this particular force here and this would be --

CHIEF JUSTICE JEFFERSON: But have we ever held in any case that the tolling provision applies even when the legislature has specifically given a statutory limit -- time limit?

MR. GIESEL: This Court has not had an occasion to address that issue, and if the Court wanted not to address it in this case, it could resolve it by looking to the specific language that the legislature chose, in addition to the comprehensive detail that the legislature

used for the labor code. And this Court has, on multiple occasions in Schroeder, in City of Waco held that the legislature took the time to carefully craft the remedies. It included a specific degree of detail including deadlines to get into the administrative process, deadlines for how the commission is -- is to carry out the exhaustion process, and then not one, but two separate deadlines emerging from the administrative process in order to bring a cause of action. When the legislature takes that amount of time or takes out time to enumerate a cause of action in that degree of detail, it presumably included what it wanted in the statute and it left out what it wanted left out of the statute.

JUSTICE O'NEILL: Well, it -- it included in there when the suit should be filed and when the deadline should be. But it doesn't really answer the question that the legislature seemed to want is that if somebody, by mistake and I understand you claim here it's an intentional act, that it was filed in the wrong court. But if someone just, whoops, we have a pretty complicated court system in some places, and with overlapping jurisdictions and different court structures. And you know, it seems to me the purpose behind 16.064 was to prevent a sort of whoops situation that I filed in the wrong court. What was to say that by setting the deadlines in the labor code the legislature didn't intend to allow some rope if somebody files in the wrong court. I don't see that they're completely at odds with each other.

MR. GIESEL: Your Honor, I think they are at odds with each other given the policies of the labor code and given the balance of interest that the legislature was trying to accomplish.

JUSTICE WAINWRIGHT: If -- if when the legislature looks at that, it has on occasion, said no tolling. Medical malpractice actions, for example, there is no tolling under most situations and it's expressly stated in the statute. Not expressly stated here though.

MR. GIESEL: That's true, your Honor. I believe the medical malpractice statute may have been geared to limiting what would've been a common law action which is different than a statutory action, and that's the -- why the statutory default rule applies in this case and not to that case. I also think that what the legislature was trying to do in response to Justice O'Neill's question, is they realized that there are -- there is an important interest in providing a remedy for plaintiffs who've been wrongfully discharged. But there's also an important interest in preserving for businesses and for employers on a systemic level the -- the ability to carry out their business without the distraction of protracted litigation. So the legislature provided a powerful remedy as an ancillary to federal law and this doesn't mean by any means that a litigant can't seek recourse under Title 7 if it chooses to do that. But under state law, the legislature was concerned with avoiding the situation of subjecting employers to litigation for years and years after the fact.

JUSTICE BRISTER: So your argument, even if a discriminatory act causes somebody to be rendered mentally incompetent, we wouldn't bring in tolling for mental incompetency. There -- they intended 60 days and you're out of luck regardless of what the discriminatory act did to you.

MR. GIESEL: I -- I see my time has expired, but --

JUSTICE BRISTER: Answer the question.

MR. GIESEL: It was worth the try. The -- I think the legislature could have included an exception if that's what it wanted to do, but it didn't for this case. And --

JUSTICE BRISTER: So the answer is yes. Your argument would cover

mental incompetency and everything.

MR. GIESEL: It -- it covers every tolling provision that is not included in the comprehensive scheme that the legislature enacted. And again, that would not necessarily cover federal claims under Title 7, but it would under state law.

CHIEF JUSTICE JEFFERSON: Justice Wainwright.

JUSTICE WAINWRIGHT: Thank you, Chief. Do you find it curious that the statutory saving or suspension provision in Chapter 16 specifically refers to lack of jurisdiction which was our holding in the -- the prior Brite case?

MR. GIESEL: I -- I don't, your Honor. I think that that -- that statute -- the predecessor to that statute has been around for decades. I think that that was balancing the situation where people brought suit in the wrong court under generally common law actions not statutory actions.

JUSTICE WAINWRIGHT: Do you think that -- that is the linchpin, statutorily created rights versus common law rights?

MR. GIESEL: That -- that is a linchpin for only one of our independent arguments under the default rule. It does not apply to looking to this specific text as we discuss in our brief and to the comprehensive scheme as we discuss in our brief.

CHIEF JUSTICE JEFFERSON: Thank you, Counselor. The Court is now ready to hear argument from the Real Party in Interest.

SPEAKER: May it please the Court. Mr. Small will present argument for the Real Party in Interest.

ORAL ARGUMENT OF JEFF SMALL ON BEHALF OF THE RESPONDENT

MR. SMALL: Good morning. May it please the Court. My name is Jeff Small and I represent Steve Brite. A critical point and -- and we jumped right to the jurisdiction right at the beginning, but a -- a critical point here is that the USAA doesn't ever get to discuss the merits here because they don't qualify for mandamus relief in the first instance. The -- at bottom, their argument is that just expense and delay is good enough to get him into court. And -- and quite frankly, this -- this Court, I know has -- has wrestled with that issue quite mightily, but if -- if the Court accepts USAA's invitation today, and grants mandamus relief here, the question's not going to be is expense and delay enough, the question is going to become how much expense and delay it's going to get me into court. So that's the first issue. Going to -- to the --

JUSTICE BRISTER: We are concerned -- I mean this is -- this is a case with bad facts. As I understand it, eight days after their plea to the jurisdiction was denied you amend to -- whoever trial counsel was, amend to [inaudible] we're seeing 1.6 million in a court with 100,000 jurisdiction. Am I right on that?

MR. SMALL: I -- that -- that sounds roughly close.

JUSTICE BRISTER: So it starts to look like this was a deal -- what -- what -- I am not saying anything about Mr. Brite, but what if we had a plaintiff who decided I'm going to give my employer as much trouble as they gave me. I'm gonna ask for \$2 million in county court and I've got a friend that's a county judge who'll let this rattle around for years, and I'm not paying any fees 'cause I've got -- my lawyers got this on contingency and they're going to pay fees all the way to the Texas Supreme Court until the Texas Supreme Court says, you know, two million is above 100,000. And then, I'm going to go back and do it in

the other court and they're going to have to pay all these -- I mean --

MR. SMALL: Well --

JUSTICE BRISTER: This makes this case a little different --

MR. SMALL: There is --

JUSTICE BRISTER: -- from just -- if this had happened in some other way, it doesn't -- what -- can we take into account on mandamus if somebody's trying to abuse the system?

MR. SMALL: In -- in this particular circumstance, I don't think you can.

CHIEF JUSTICE JEFFERSON: In my hypothetical. In my hypothetical, somebody who knew there was no jurisdiction filed it there just to make the other side waste fees.

MR. SMALL: I -- Judge, I don't think you can, but that being said, because you send this back and say that USAA has an adequate remedy by appeal, we don't win hands down because I promise you USAA is going back to the trial court and they want to talk about intentional disregard. I've got the stack of -- of exhibits that -- that they'll bring. But the -- the answer to your question is, no. This is not -- not the case where -- where that happens.

JUSTICE BRISTER: And I'm wondering why that is -- I mean on discovery, we rarely get involved in discovery to disputes. We do get involved when somebody has just gone way to far overboard. And yes, that's a judgment. But we haven't in fact been flooded with discovery disputes because everybody knows it's got to be really bad before we're going to do mandamus. Would there be -- why wouldn't this be such an exception?

MR. SMALL: I -- I think the -- the problem that you run into talking here at -- at this Court about what Mr. Brite knew, what Mr. Brite's counsel intended gets you into a factual morass that -- that you won't be able to extract yourself from. Counsel made reference to what the evidence shows or what the evidence showed at trial, and the evidence showed at trial that we -- we put on evidence and we believe we proved a number within the jurisdictional limits. Now --

CHIEF JUSTICE JEFFERSON: But -- but the question is if -- let's assume that you won't like this hypothetical, but the Court agrees with USAA nine to zero, that the Civil Practice and Remedies Code doesn't apply and the trial court had no option here. Wouldn't it -- wouldn't it be better just to put you -- put you out of your misery then and -- and -- and decide that here and now rather than denying relief and letting it [inaudible] around in the trial court?

MR. SMALL: I -- I still don't think that you can get to it, Judge, because you -- you've got -- you've got the factual issues and -- and what -- what is, you know what was the intent, and that historically except in extraordinarily rare circumstances has -- has always been a -- a fact issue for -- for a trier of fact, and -- and I don't think this record in -- in this kind of a procedure --

CHIEF JUSTICE JEFFERSON: But I guess -- I guess my question is if there's no fact issue on intent, and we just say you filed this suit beyond the two year limitations period, we say as a matter of law 16.064 doesn't apply, wouldn't it -- you know, I mean that's kind of what we're struggling with if we -- if we see a record and we know it as a matter of law, the plaintiff or the defense -- it doesn't matter -- it's not going to get anywhere further in this case on the -- on the merits or on jurisdiction, why not decide it during mandamus if it's before us?

MR. SMALL: I -- I supposed in a hypothetical where -- where you've got a -- a recording of the trial or -- going yeah, we're going to run



up the bill and -- and we're going to do this and that, the next thing to make -- make their life miserable. But the -- the other side of that is when you get into the intentional disregard issue is it -- it makes no sense for Mr. Brite. It makes no sense for Mr. Brite's counsel to make a conscious decision to -- to mess this up. We're now seven and a half years after Mr. Brite got terminated and -- and he's still has no relief and -- and USAA has -- has no resolution to the issue.

JUSTICE O'NEILL: But here's what I have a hard time getting my mind around is if the face of the petition shows damages in excess of the jurisdictional limit, if you could tell that from reading the petition, what kind of intent inquiry is there?

MR. SMALL: The -- the face of the petition doesn't show that.

JUSTICE O'NEILL: Well, I -- I thought --

MR. SMALL: I -- I think -- I think that -- well, several -- several things. If you'll recall, Justice O'Neill, the underlying case here dealt with front pay and -- and the -- the argument was that because of the speculative nature of -- of front pay and because of -- of the fact that Mr. Brite might have had a job --

JUSTICE O'NEILL: Well, that goes to whether you can recover it. But I mean the fact that you've pled for it, you've asked for front pay and it says [inaudible] jurisdictional limit.

MR. SMALL: Well, the -- the -- it -- it -- it goes -- I think -- I think it goes all to the -- was it within the jurisdictional limits of the court or wasn't it within the jurisdictional limits of the court. And the -- the conundrum that trial counsel is faced with is, do you put a number out there, you know, it could be this much --

JUSTICE O'NEILL: No.

MR. SMALL: And -- well --

JUSTICE MEDINA: I -- I think you fairly evaluate the case. If you're asking for future damages including loss of income and benefits for the balance of the plaintiff's life, you take all that in evaluation. You, as a lawyer or whoever the trial lawyer is, should know what the value of that case is. And when you don't do it right, you put your client at risk like this client -- your client is here now. Put him at risk. If he gets a judgment, he's not gonna keep it. So maybe the relief should be against the lawyer for malpractice.

MR. SMALL: Well, I -- I would tend to disagree with that, your Honor. The evaluation is -- is made obviously at the time that the suit is filed in -- in May 2002. The -- this pleading that we're talking about a year and, you know, six months later that has or actually, I think, it was a discovery answer a year and six months later or has -- has a different number in it, but it's an issue of, do you put a number out there and say it could be as much as this or not put a number out there and then have USAA go, well, you never disclosed that this was a possibility, you're out of luck.

JUSTICE MEDINA: What happens if you do put a number out there and say it's \$99,999.99 and the jury comes with something greater than that, are you limited to what you plead or [inaudible]?

MR. SMALL: There -- there have -- there have been cases particularly in -- in county court where -- where that has -- has been -- has been the finding.

JUSTICE O'NEILL: But that was not the case here?

MR. SMALL: No.

JUSTICE O'NEILL: I mean from the petition, if you look at front pay, it's over \$100,000 by anybody's account.

MR. SMALL: Well, it's -- it's -- it's over -- over \$100,000, but that's presuming that Mr. Brite's not reinstated. That's presuming that

Mr. Brite doesn't have a job, because if he's got a job, there is no front pay.

JUSTICE HECHT: But why take a chance? You've got the district court and you've got the Federal District Court, why not file some place else that's got jurisdiction?

MR. SMALL: That's --

JUSTICE HECHT: And why do it over and over and over again?

MR. SMALL: Well, that -- I don't -- I don't know the answer to that one. But the -- I -- I can tell you that in -- in discussing the matter with the trial counsel that the judgment was made in good faith to file it in -- in county court at law in the best interest of his client. This was not a -- a -- a decision that was -- was made to -- to skirt anything or to intentionally disregard what -- what the limits were because, you know, here we are; seven and a half years later -- and -- and he has nothing.

JUSTICE HECHT: The petitioner, the Relator says that it matters whether the statute's jurisdictional; the amicus state says it doesn't. What's your view?

MR. SMALL: Well, I -- I -- my view is that you have to back off and take a -- a look at the bigger picture --

JUSTICE HECHT: And I want you to do that, but I just want to know, does it matter whether it's jurisdictional or not or just mandatory? I mean or don't you lose on that issue either way?

MR. SMALL: No. No. Is it jurisdictional? I think if -- if you look at the big picture, you look at Title 7 and you -- you have to look at Title 7, you have to look at the ADEA in this circumstance because Chapter 21 was modeled on Title 7 and taken virtually verbatim for the expressed purpose of effectuating Title 7. And when you -- when you go back and look at what the trend is and where these issues are going in terms of jurisdictional or just mandatory, the courts are relatively uniformly moving away from holding that it's jurisdictional, and -- and finding that these are treated instead as statutes of limitation where tolling, waiver, estoppel apply. It -- it gets in to the whole issue that -- that you were discussing with Counsel earlier, and -- and the reason that we don't think we lose, Justice Hecht, is because we think that taking the policy considerations behind Title 7 and the policy considerations behind 16.064, that they fit together. And there was some discussion in the briefing and -- and some discussion here that there's some presumption to be made by the legislature not including tolling specifically in Chapter 21, and my response to that is there wasn't any reason to include tolling in there. It was already out there and the legislature knew that.

JUSTICE HECHT: Do you agree that the legislature could impose a hard and fast deadline, and the only question is did they in this case?

MR. SMALL: I don't think they did.

JUSTICE HECHT: But I mean you agree they could?

MR. SMALL: They could. They could, but -- but I don't think they did because if -- if you look at Chapter 21, there's no -- language -- specific language that says, these time lines, you meet them or you're dead. And I think that when -- when you look at the overall purpose of Chapter 21 to eliminate the twin evils of -- of discrimination and retaliation, that the state's focus is -- is too narrow. Its -- the -- the time and the efficiency certainly are part of the picture, but they're not the focus of Chapter 21. And by using the tolling provisions, you -- you get over the hump of the incompetence, the wrong court. You know, if Mr. Brite had filed, you know, 25 miles up the road in Kendall County, he wouldn't have any problem because county court up

there has -- has unlimited jurisdiction. But the -- when you -- when you go back and look at 5539(a) which is the predecessor to 16.064, it was enacted under the title, "An act to extend the period of limitation of any action in the wrong court". Clearly, directed at -- at fairness and equity. Now, Texas is --

JUSTICE HECHT: And that was the bill title in the --

MR. SMALL: That was the bill title in 1931 when the predecessor to 16.064 was enacted, and there's -- there's not much explanation between 1931 and -- and Gutierrez v. Lee in 1991. The cases just say 16.064 doesn't -- doesn't apply to a statutory cause of action. But what you find and -- and I've taken to calling 16.064 the "oh, and besides that rule" because when you look at the cases like Heart and -- and some of these others -- Heart Hospital, for instance, the case wasn't dismissed, the plaintiff voluntarily nonsuited it. Oh, and besides that, 16.064 doesn't apply to save it. Gutierrez v. Lee, the first court hadn't dismissed the case yet before the second case was filed. Oh, and besides that, 16.064 doesn't apply statutory rules, but they -- they never explained why. So when you go back and look at it, the -- the bill title said it applies to any cause of action, and I would suggest that tolling should -- should apply to -- to Chapter 21 here so that the complainants get the -- the full benefit of the maximum benefit under the law.

JUSTICE HECHT: And does your argument extend to all statutory cause of action that aren't explicit the other way and to all tolling provisions?

MR. SMALL: I -- I can't answer that, except to say that it would apply to statutes that don't have explicit jurisdictional language in them -- you know, such as the -- the statute that was enacted after, what's that, Loutzenhiser or whatever the name of that one was. But the -- the -- the whole point of 16.064 is -- is remedial in nature and it's designed to get people out from under the -- the penal limits of a -- of a statute of -- or -- of a -- of a statute of limitation where -- where they're -- they're gonna get -- get dismissed. So, it -- it --

JUSTICE MEDINA: So if -- if you're correct [inaudible], then that case would go back down and then the whole issue of whether or not it was intentionally misfiled, that would have to be decided by I guess the trial judge or perhaps a jury on that issue?

MR. SMALL: I -- I don't know how that would fall between a judge and a jury, but --

JUSTICE MEDINA: [Inaudible] A trier of fact.

MR. SMALL: Exactly.

JUSTICE MEDINA: It's not something we can decide here, right?

MR. SMALL: Somebody -- somebody would -- would have to -- have to look at -- at the -- the issues, the factual issues underlying who knew what and when they knew it.

JUSTICE MEDINA: That's something we can't decide here, correct?

MR. SMALL: I -- I don't think -- I don't think you can -- you can get there, Justice Medina. It's -- it's a -- a -- you know, typically something that -- that this Court avoids, and you if you see the record, you'd -- you'd make sure that you wanted to avoid that. But the -- the -- the trend has been with this jurisdictional and mandatory that the federal courts starting with -- with Zipes, well actually not starting with Zipes, but Zipes in 1982 was one that -- that got away from the finding these time requirements jurisdictional. The -- the Coke case out of the Fifth Circuit in -- in 19 -- 1981 or '82 also moved in that direction. And among the federal circuits, the Seventh Circuit was the -- the last hold out, but even there, Judge Posner took

to heart the application of tolling and -- and while the language that he used was -- was somewhat restrictive, he -- he too agreed that in the interest of fairness, that tolling should apply in a -- a Title 7 circumstance. Now, interestingly, the -- the Seventh Circuit, before they even came to that conclusion regarding Title 7, they had already found that the time limitations in the ADEA were -- were not jurisdictional. So, with -- with all of that said, I don't think that the Court even has to go to the merits of this. I don't think USAA qualifies for -- for mandamus relief here, but if you do, I think that the Court should find that -- that these time limits in Chapter 21 are -- are not jurisdictional and that tolling does in fact apply.

CHIEF JUSTICE JEFFERSON: Any questions? Thank you, Mr. Small.

REBUTTAL ARGUMENT OF PAMELA STANTON BARON ON BEHALF OF THE PETITIONER

JUSTICE WILLETT: Ms. Baron, what about Mr. Small's opening and I guess closing comment that you don't even qualify for mandamus relief? I mean where does mandamus review go to end if we start granting mandamus every time somebody pleads an affirmative defense like limitations?

MS. BARON: Well, I don't think you have to do it every time somebody pleads an affirmative defense. It's a selected remedy. It's a balancing remedy. You balance the benefits versus the cost of issuing mandamus relief. Here where you have an issue that's been percolating, where there's uncertainty in an area where employers and employees alike both need a certain rules, where these cases need to be filed and when they need to be filed by. It's a big issue. It's dispositive of this case, and really, it's going to be a waste of --

CHIEF JUSTICE JEFFERSON: So you're -- you're in favor of -- of mandamus review in general when the court knows as a matter of law the answer and can prevent a needless trial, is that your stance?

MS. BARON: I don't think that's always gonna be the case. It's the balancing issue because as the Court noted in the McAllen case, there is a benefit of having justice or the appearance of justice in going and having full trials. And often in these kind of cases, there will be benefit from expanding the factual analysis and exploring more the record. But in this case, we can go back. We can have a trial that will last a year, and the two dates aren't going to change. And I think the Court has noticed in -- in like in the Koseoglu case, that we don't send cases back for unnecessary trials that aren't going to advance at all.

CHIEF JUSTICE JEFFERSON: But there will be many cases when -- when the court is -- when the summary judgment record won't change either, and a trial court refuses to grant a summary judgment. And everyone knows as a matter of law the trial court should've granted it. So, under that standard, when it's very clear what the answer is, should we be granting mandamus relief and like a no evidence summary judgment case or summary judgment where the evidence is --

MS. BARON: Right.

CHIEF JUSTICE JEFFERSON: -- conclusively established?

MS. BARON: Well, I think that goes back to the same question whether you need it for the appearance of justice. And, I think, in McAllen what the court recognizes is that if you have to go through one trial, maybe the balance comes out one way. But if you go to a second trial, then we're starting to make our system look like it doesn't know what it's doing. And we don't go there. The balance changes when you

start going back for second trials or third trials. And this is a case where USAA has been submitted now, first to one, completely unnecessary trial in a court that lacked jurisdiction when the plaintiff could easily have filed this case in district court. And all the numbers, this wasn't rocket science, \$85,000 for the rest of his natural life, he could've filed this case in district court. It clearly exceeded \$100,000 at the time it was filed. And there -- I don't think the Court needs to get to the intentional disregard issue because the other two are dispositive, but if you do, there is not a fact question. Brite submitted no affidavits, no testimony, no record whatsoever in response to the combined plead to the jurisdiction and motion for summary judgment.

JUSTICE WILLETT: But you're not -- you're not arguing that mandamus relief is available every time a trial court rejects a defendant's pre-trial motion asserting limitation?

MS. BARON: Absolutely not.

JUSTICE BRISTER: And if the two year limit is enforceable by plea to the jurisdiction so would be the 60 day?

MS. BARON: The 60-day -- I think we would have to analyze separately because it does have different language. It does have the fact that it has previously been interpreted by the court to be a jurisdictional limit. And just on jurisdiction, can I briefly say that the U.S. Supreme Court has addressed a statutory time limit issue twice in the last year in the Bowles v. Russell case and the John R. Sand & Gravel case. And there the court recognized that jurisdictional treatment of statutory time limits makes good sense. And in both those cases, the court said, we have issued a controlling interpretation of the statute as having jurisdictional impact and despite the modern approach, we're going to continue under the doctrine of stare decisis to continue to give those statutes jurisdictional effect. And the court recognized that stare decisis of statutory construction cases makes particularly good sense because the legislature's always free to go back and fix it. And here we've had 17 years under Schroeder and virtually every legislative session the legislature has come back and tinkered with the Commission on Human Rights Act. It has revised it. It has recodified it. It has even altered the time for filing the suit expanding it from one year to two years.

JUSTICE O'NEILL: Is your argument that if it is jurisdictional, you don't address the tolling question?

MS. BARON: Correct. Unless it were within the jurisdictional restriction itself, you would not look elsewhere to restrictions that apply only to traditional statutes of limitations.

JUSTICE O'NEILL: I -- I'm just trying to see how in the world you'd ever avoid addressing the tolling argument.

MS. BARON: Right.

JUSTICE O'NEILL: And I don't understand how -- I think you agree that however you decide it, even if you said it's jurisdictional, you've still got to address the point that the tolling provision saves it.

MS. BARON: Well, the tolling provision by its own term only applies to statutes of limitations. A jurisdictional statutory time limit is not the statute of limitation.

JUSTICE O'NEILL: [Inaudible] I'm not arguing the substance of that point --

MS. BARON: Right.

JUSTICE O'NEILL: -- but -- but, so you -- you acknowledge you've got to reach the tolling point.

MS. BARON: Right. But the jurisdictional -- if it's jurisdictional it resolves the tolling point, I guess is my point. Correct?

JUSTICE O'NEILL: I hear you [inaudible].

MS. BARON: If it is jurisdictional, it's game over because this -- the tolling provision on its face doesn't purport to impact or expand jurisdiction, is the point.

JUSTICE O'NEILL: You still got to deal with it though --

MS. BARON: Yes, yes.

JUSTICE O'NEILL: -- you've got address tolling.

MS. BARON: Correct.

JUSTICE O'NEILL: So if tolling saves it, okay we've been there.

MS. BARON: Okay. Thank you.

CHIEF JUSTICE JEFFERSON: Any further questions. Thank you. The cause is submitted. That concludes arguments for this morning. The marshal will adjourn the Court.

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