ORAL ARGUMENT - 08/06/95
95-0003
WICHITA COUNTY V. HART & WILLIAMS

SNELL: May it please the Court. With me today is co-counsel Valerie P. Kirk, and also from Wichita County Judge Nip Gipson, and Commissioner Wyatt and Sheriff Callahan.

Wichita County was the defendant in this whistle-blower case. Allen Hart and Ernie Williams, two former deputies of the sheriff were plaintiffs. And they are the respondents and the conditional petitioners in this proceeding. We come before you to present significant unresolved legal issues under the Whistle-blower Act. This important statute has often been interpreted as though it existed in a vacuum rather than as a part of a body of law. We believe that the guidance of other law existing at the time of the Act's passage, and developed in this court to the present, are essential aids to understanding and implementing the Whistle-blower Act.

The facts are not addressed in our prepared remarks, but they are vigorously contested as our brief certainly shows. Our points of error are: venue; good faith; whether the conduct of the officers was reasonable; mental anguish; and malice.

With regard to venue the Whistle-blower Act was passed in 1983 by the same session of the legislature that enacted a well publicized and long awaited revision of the venue statute. Commentators and practitioners alike for many years had criticized the confused and complex state of venue law in Texas. Plaintiffs and defendants bars were cooperating in 1983 on this effort, but they reached an impasse. Then Chief Justice Pope came in and helped them reach a resolution, which they did. Consequently the venue statute was completely reorganized in 1983. Subchapter A was the general venue provision. Subchapter B was the mandatory exceptions to the general provision. And subchapter C was the permissive exceptions to the general venue statute.

The legislature adopted some decisional venue law and rejected others. Venue exceptions contained an outside statute such as the Whistle-blower Act were incorporated into the revised general statute through provisions in subchapter B if they were mandatory, and a provision in subchapter C if they were permissive. The legislature enacted the Whistle-blower Act in the revised general venue statute within two days of each other in 1983. Both became effective Sept. 1, 1983.

Since 1846 the mandatory county venue statute has provided that an action against a county shall be brought in that county.

SPECTOR: Is there any instance where the county can be sued outside of its borders?

SNELL: I am not aware of any Justice Spector. It may be that for instance in the situation where you have let's say a judicial review of an administrative proceeding, and the statute makes it very clear that the only courts that can hear such matters are specifically specified in that instance. A county might have to participate in a proceeding there, it might be brought into it. But I am not aware of any situation in which a county may be sued outside of its county.

The venue provision of the Whistle-blower Act adopted 2 days after the venue statute provided: A public employee may bring suit in the district court of the county in which he resides, or in the district court of Travis County. The venue provision of the Whistle-blower Act as amended this year provides a public employee of a state governmental entity may sue in the district court of the county in which the cause of action arises or in the district court of Travis County. And a public employee of a

local government may sue in a district court of the county in which the cause of action arises or in a district court of any county in the same geographic area that is established of counsel of governments.

The legislature revised the venue law in 1983 demonstrating its intent that shall is to indicate mandatory, and may is to indicate permissive. And they were consistent in that. And yet the legislature has always to this day used "may" in the Whistle-blower Act's venue provision.

When construing a statute, the place to start of course is with the words of the statute itself. No language in the Whistle-blower Act indicates that its venue provision is to be read as mandatory. Furthermore statutes passed by the same legislature are presumed to have been enacted with complete knowledge of existing law and with reference to the other statute. This rule applies with particular course when statutes are passed at the very same session of the legislature. In fact such statutory provisions are construed as if they were one act. When more than one venue cite is authorized this court has held and others have followed it that determining proper venue requires classification of the venue provision as mandatory or permissive.

Recognizing that venue is an important concern in litigation while assisting plaintiffs and defendants bars in reaching accord in 1983 on venue, Chief Justice Pope offered to obtain and did obtain a provision lessening the burden on movants who are seeking to transfer venue because they are unable to get an impartial trial. In 1983 the rules of civil procedure specifically Rules 257 - 259 were revised in order to make that easier to do. And one may obtain a transfer if you cannot have an impartial trial in the venue where you are located by substantiating your motion with the affidavits of 3 credible citizens of that county.

HECHT: And after it was made in the past session of the legislature to try to get them to clarify this and they refused; what's the effect of that?

SNELL: Well your honor I think that whatever efforts were made with the legislature at this time to clarify issues I am not really just sure exactly what they were. I know that the legislature did take out punitive damages; did make some changes with regard to some of the provisions of the Act. I am not sure how much clearer it is.

HECHT: Didn't your law firm participate in asking for changes in the statute or not?

SNELL: No, your honor. I never represented and no one from my law firm did anybody seeking changes. I was asked by various people my opinion about things, and I did testify for myself, but I was not in any way advocating for any particular client. I wasn't a lobbyist or anything. I merely because of having worked on this venue article that was published in the Texas Tech Law Review, I was asked to come and talk about it in general.

Under the venue statute itself, the court on motion is required in mandatory terms it shall transfer an action if an impartial trial cannot be had in the county in which the action is pending. Prejudicial forums were therefore discussed in 1983, at the same time that the Whistle-blower Act was passed. The legislature expressed no intent to create a safe harbor provision in the Whistle-blower venue provision in 1983, and it didn't in 1995 insofar as I could tell.

Regarding mandatory venue provisions in the venue statute, and permissive venue provisions in other statutes, this court has stated: A permissive venue provision in a statute applicable to actions of a particular kind must always yield to the mandatory provision of the venue statute. Moreover, this court has also held that uncertainty regarding venue provisions is to be resolved in favor of the defendant.

Finally, plaintiffs and defendants bars along with Chief Justice Pope and the legislature in this instance all agreed that erroneous venue determinations require reversal and remanding of the case for a new trial.

CORNYN: So all of your other points of error would be mooted if we agree with you on this point?

SNELL: No, your honor I don't think they are mooted. I believe that if we retry this case we also need to have the jury have an instruction that is appropriate on good faith.

CORNYN: Well anything we might say would be dicta wouldn't it?

SNELL: I think you could rule on all of the points of error that have been raised your honor. I know that there are doctrines under which the court would say that it should decide the first issue or the issue that resolves the case and that would be it. We would get a new trial. But much like the case that was decided recently, the Hines case in which a new trial was granted, in that situation the court while not answering all of the questions did provide an instruction so that the jury in the new trial would be properly instructed regarding the causation requirements in the statute. We think we have similar concerns about other issues that would be really rather pointless or at least it would be a waste of time and resources to go down and have to come up again if the same kind of errors that we have pointed to in this proceeding were perpetuated in a future proceeding.

CORNYN: But writing on non-dispositive points of error would be a purely advisory opinion wouldn't it?

SNELL: Your honor I think it would be. Any of these issues that we have raised would make the decision with regard to that particular issue. I think that the case could be reversed and remanded on the good faith issue alone, or on the standard to apply to a law enforcement official regarding whether his conduct is reasonable. Any one of those points that the court might decide to render a decision on would have the same result as the venue provision would have in terms of subsequent litigation in this case. I don't think it would be moot your honor. It might not be necessary in order for the court to exercise its jurisdiction and make a decision that would relieve the support of further duty. I think it would be certainly appropriate and I think that it has been done in other cases to decide more than one issue.

SPECTOR: Turning then to the good faith issue does in your view any element of malice, or bad faith on their motive taint a whistle-blower?

SNELL: Yes, your honor I believe that it does. The last court, the Waco CA has stated that if the whistle-blower actually reports a violation of law, then whatever his venal attempt might be is irrelevant. I think that's a bad policy decision, and I would not agree with that your honor. It depends on the type of violation. That's another problem with this statute. The statute really does not directly address what whistle-blowing is. Whistle-blowing is not reporting that you saw somebody going 65 in a 55 mile zone. But that is a violation of law. Whistle-blowing is when a public employee puts his job on the line in order to protect the public's interest. So the Act still has many problems as Justice Hecht mentioned.

HECHT: Why should the employees venality or whatever bad motive he's got take away from the fact that the person he's reporting is a felon?

SNELL: Well that's one of the things we are talking about.

HECHT: Well I am asking you why is that? Why should he not receive the benefits of the

statute, whether he hates the guy or loves the guy?

SNELL: If it's a felony again I was trying to sort of say I think this is a complicated question. It would depend to me on the nature of the violation being reported. Let's say you reported a felony. And what you said was you thought somebody was stealing some money out of the cash drawer, and you actually saw something that appeared to you to be that kind of conduct. But in fact you could have easily inquired and found that the person was removing the money for some legitimate purpose and it was not in any way a theft. That's the kind of question that I think that some sort of standard that at least says let's look at both of these issues: Did you have reasonable cause to believe there had been a violation of law, and were you acting in a proper motive? I think that that's always been an issue, and we have had to deal with that over and over again in these kinds of public law questions.

HECHT: So the employee in your view has to have a pure heart? If he's doing it because he's always been mad at this guy and he's never going to change, even if the guy is stealing money out of a till, he is not going to get the benefits of the statute?

SNELL: Well your honor I don't know whether that employee's conduct should be protected. I think that's my problem. You see around us in this country today so much vindictive conduct. So much conduct that I think it is very bad public policy to condone or to encourage or protect. But that doesn't mean that the felon should not be punished for his felony. And that for the general society is enough. That's what our criminal law is about. It's not about somebody having a civil remedy and being able to obtain damages. It's about protecting the public's interest. So I think it is a complicated balance here your honor; and we do think that the motive of the reporter should be considered.

HECHT: But if the employee comes in what he needs to say is is that it breaks his heart to have to do this, and he loves the person to pieces, but the truth of the matter is he saw him take the money out of the till.

SNELL: Though that's sort of a self-serving statement doesn't have to be taken at face value your honor. In our situation...

HECHT: But you would certainly want to try to boaster that view if you were the employee?

SNELL: Yes, your honor, you certainly would.

* * * * * * * * * *

RESPONDENT

SPECTOR: Do you know of any instance where a county can be sued outside _____?

CULLAR: Besides the whistle-blower act and the amendments that have just been passed none come to mind immediately other than perhaps the ones where the state would be involved and there might be some mandatory...or some other statute that says that they can be sued in Travis County or somewhere else. But I think that in that respect Justice Spector what we've got to keep in mind as this court said in I think it was in Valeros, just recently, "Venue is a creature of the legislature, and counties in their mandatory venue provision exist solely because the legislature said that they could have the mandatory venue provision that can be taken away." It is not something that is sacred _____. It is not something that is unamendable. It is not something that is constitutional in nature. And so a county can be sued outside its borders anytime the legislature says that it may be sued outside of its borders.

And of course the question in this case is to determine the legislative intent. When

you look at the Whistle-blower Act, which was clearly an act set up to go beyond the parameters of employment at will, which was set up to provide a place for people who have acted to inform on someone who has violated the law to keep them from being terminated, when you look at that and realize that the legislature was creating a new cause of action, it is clear that within the 4 corners of this Act the legislature said that counties could be sued outside their boundaries.

PHILLIPS: Is there any other post-1983 examples of venue where the word "may" is used for a mandatory venue provision?

CULLAR: Your honor not that I am aware of. What I would point out about the 1983 amendments Ms. Snell suggests that this was all done at the same time and therefore because the general venue statute, Ch. 15 of the Civil Prac. & Rem. Code says that if the word "may" is used, then it is going to be permissive; and if the word "shall" is used it is mandatory. What we've got to keep in mind as the CA pointed out in its opinion in determining the venue provision in the Whistle-blower Act was mandatory is that when Justice Pope and the others came up with the agreement they rejected the notion of putting in Ch. 15, the idea that a lawsuit could be possible and permissible in the county of the plaintiff's residence. That was rejected. And the compromise that came about and that was implemented in Ch. 15 said that it can be in the county of the defendant's residence or in the county where a part of the cause of action accrued. They rejected this idea of allowing a plaintiff to put it in his home residence. But they did use that. They did come in in the Whistle-blower Act during the same session and say that a whistle-blower may put this cause of action within the boundaries of his home county.

HECHT: It's permissive?

CULLAR: No it's not permissive. As Justice Gonzalez in Grounds v. Tolar what that opinion said was you look at it and it says the decision as to whether or not to pursue litigation, that that's permissive, but the site of the trial is mandatory. This is an exclusively statutory cause of action just as in Grounds v. Tolar. And just as in Grounds v. Tolar you know we have got to comply with all aspects of it. If the legislature had said a cause of action shall be brought, well that puts on the burden of every person who has blown the whistle and have been retaliated against of having to and it shall be mandatory, they shall file the suit. Well that's not what may meant in this case. What may means as the Justices pointed out in Grounds v. Tolar it's a decision as to whether or not to bring the lawsuit, but if the lawsuit is brought it must be brought either in the county of the plaintiff's residence or in Travis County. That's why we think that it is properly characterized as jurisdictional. Although we don't have any problem with the CA's opinion saying it is mandatory. I just think that it doesn't fit under _____ Grounds v. Tolar and these other SC cases that say that an exclusively statutory cause of action has to be complied with exclusively. And even though the word "may" is used in terms of where the lawsuit can be filed it is still jurisdictional and it is mandatory that it be filed in one of those two locations.

The county would have you perpetuate what...they have asked for an anomaly since day one the Whistle-blower Act. The Whistle-blower Act defined counties as being subject to the whole Act. Every aspect of the Whistle-blower's Act says that every governmental entity in the state including counties is going to be subject to the provisions of the Whistle-blower Act. Yet, they want this anomaly so that county employees are required to litigate only within the boundaries of the county while people who are in a school district they've got the choice of doing it in their home county under the old Act or in Travis county, or under the new act in the county where the cause of action accrued.

PHILLIPS: Can an action be jurisdictional in more counties than venue is proper?

CULLAR: I think that it can. I think jurisdiction in this case where you have an exclusively statutory cause of action where the legislature has said these are the district courts that are going to have

jurisdiction or potential jurisdiction over this cause, that can certainly happen. Again, jurisdiction can be conferred by the legislature. So I think that it can happen, and I think that that's exactly what has happened with the 1995 amendments where the legislature has now said we are going to allow these causes of action to be tried either in the county where they accrued or in one of the council of government counties. Wichita County doesn't want you to allow that to happen even though that's clearly the intent of the legislature from this last session.

I think that to go beyond and say that a county even though everything within the Act says that the county is subject to the Act, that everything applies to it except for that venue provision and there we get trumped by Ch. 15 of the Civil Prac. & Rem. Code creates a huge anomaly an anomaly that was not ever envisioned or approved of by the legislature.

In looking at it the legislature, the 1995 amendments, the same sentence construction is used. It says a public employee may sue. That's what it said under the Act that we sued under, 62.52.16a. That's what it said in the codification in 1993. That's what it says in the 1995 amendments. So the mere fact that the word may is used is not dispositive in this case. That's the easy way out. That was certainly the argument that was made in Grounds v. Tolar back in 1986 and this court rejected it. This court said that that's not the way we are going to look at it. We are going to look at it and take note that the statute says that these are the locations where the case can be tried.

Our position is that whether it is mandatory, or whether it is jurisdictional, the intent of the legislature to put the counties to trial outside their boundaries is something which is very evident from the face of the statute. And so even though this question of venue is new for this court, it's a case of first impression, it is very clear that irrespective of mandatory or jurisdictional that we were allowed to try this case in Travis county. And we would ask the court to confirm that.

With respect to the good faith issues, the good faith language of the Whistle-blower Act has been the same since 1983. It was the same in 1991. It was left the same after the Waco court in Lasiter came out and said we are going to look at this in terms of whether or not the individual who reported the violation of law was acting in good faith, whether they believed that a violation of law was going to occur. The legislature left that language the same in 1991. More importantly in 1993 when they codified it with no substantive changes supposedly to have been taken they codified it and used the same exact good faith language. And in this year after Lasiter, after the Leech case, after the Green case, after our case which came out in Oct. 1994, they left the language the same again. So in every instance it appears to us and we would suggest to this court that the legislature has expressed its intent to acquiesce to the interpretations that have been given of good faith by the courts.

SPECTOR: Could you touch on the county's contention that the county has no liability to the sheriff's action?

CULLAR: Well that would be to suggest that the sheriff was not part of the county. And as we pointed out in our brief under the Texas Tort Claim's Act, that argument has been rejected and there is absolutely no reason not to do that here. I don't know if I was being overly cute or what in a footnote where I said it is _____ since the county is the people who reside within that county. And so everyone within that county their argument is the commissioner's court is the only appropriate...

SPECTOR: Get back to where your judgment it only can be paid by commissioner's court _____?

CULLAR: It will require, I think it's Ch. 81 of the Local Gov't Code says that if a judgment against a county becomes final that you cannot levy execution against it, that you must present it to the

commissioner's court and ask the commissioner's court to pay it as you would any other claim. If they fail to do that, then there are judicial remedies that may be pursued. But it's clearly going to take an act of the commissioner's court or a court forcing a commissioner's court to act to pay this judgment that has been rendered against the county by virtue of the actions of a county-wide elected official.

HECHT: Back on good faith. How can it be that an employee is protected just because he believes real sincerely, that really sincerely that this is a violation of the law when it just plain isn't?

CULLAR: Judge, the focus of this Act they didn't say we are going to give protection from some unknown source for employees who blow the whistle. They said we are going to protect people who in good faith who report violations of law from being suspended, from being terminated, for otherwise from being discriminated against in some way. Now the focus...we wouldn't be here today if my clients had been mistaken and the sheriff had said fellows if you had the facts you wouldn't have done this. I am not going to fire you. But the facts in this case are and it is appended to all of the briefs we have put in they wrote that the reason my clients were terminated was because they initiated an investigation against the sheriff. We've got a smoking gun that that's why it was done.

Now to answer the question here about why this should be protected, here's the question: "The county wants to say look here you have got to show that it was an actual violation of law." Now who makes that determination is the biggest problem that is ever going to exist in that type of analysis. Is it made by the district attorney who may be and was in this case a political ally and crony of the person who had the whistle blown on him? Is it going to be made by a grand jury which is under that district attorney's auspices? Is it going to be by a jury who is going to hear not only defenses raised and other things which may legally excuse the behavior, but they are going to hear all manner of facts which the whistle-blower didn't have." So the focus for the whistle-blower has to got to be did he act as our court instructed the jury he said, "that good faith means honesty and fact and conduct concern. A report of a violation of law may be in good faith even though it is incorrect as long as that belief is not unreasonable." Now within that definition the county could come in and had the burden, and did come in, and say it was unreasonable. Of course it was unreasonable. Of course it was unreasonable for these two deputies to think that this was a violation of law. They should have known something else. And in spite of that, having heard all of the evidence, the jury in our case rejected that argument and said we are going to look at what did these people believe at the time they did it. Did they believe that a violation of law occurred when they reported it and were they being retaliating against?

HECHT: One of the amicus suggests that the standard ought to be probable cause. Why isn't that a good standard?

CULLAR: Who makes that determination? Do we have two trials within one trial - our civil trial - where we prove probable cause. It is going to depend in so many instances on _____.

HECHT: Why is it any more of a burden to prove that than it is to prove good faith? You are going to have to prove something.

CULLAR: Yes, sir. And the point of the matter is that they are allowed under the definition that was used when they say that as long as the belief was not unreasonable or that the belief was reasonable is what those two negatives to tell us. Not unreasonable would be that the belief must be reasonable. And so they can argue the probable cause. They've got much more latitude here than otherwise. But what you are talking about is putting a burden on employees of government that they be correct, that they not make a mistake here, and run the risk even though they honestly believe that a violation of law is going on, they are going to say...

HECHT: But isn't it pretty important to be correct if you are going to charge a superior particularly an elected official for a crime?

CULLAR: I think clearly it is important to be correct. But what's more important according to what the legislature told us it's more important that that superior officer not retaliate where you had to make that report.

OWEN: Shouldn't we have a presumption that if there has been a violation of law that the whistle-blower was in good faith and that the fact issue on good faith only arises where the accuser was incorrect; wouldn't that be the best way to slice this?

CULLAR: Well it could be. And I haven't really thought that through Justice Owen. I am not sure I am prepared to answer that. We have a presumption within the Whistle-blower Act that if the retaliation occurs within 90 days, that it was...they were connected, that the act of retaliation was caused by the act of blowing the whistle.

OWEN: What about the issue of good faith, whether the whistle-blower if the whistle-blower was accurate and there was a violation of law, that we presume good faith, and we only get into a fact issue on what constitutes good faith, where the whistle-blower was incorrect and that there was no violation?

CULLAR: What I fear in an analysis along those lines is that we are going to end up with two sets - 2 types of whistle-blowers: those who are in jurisdictions where the district attorney or others are going to truly examine the facts and make a real live honest to goodness determination based on what the facts are about whether a crime occurred. Or if we are in a jurisdiction like Wichita County where they are not going to make that determination because the district attorney is good friends with the sheriff and for political purposes they are not going to do that. So I would be concerned that in going to and saying if a crime truly existed, the problem.

OWEN: Then you are just left with a fact issue if the presumption only would apply where there has been a determination - a lawful act?

CULLAR: And I think that would be a good presumption to put into place and would make it easier. I think though that as far as that fact issue goes and the burden at trial if you have had a determination made you don't need that presumption.

OWEN: Would you agree that the instruction that was actually given when it is all broken down equals or equates to reasonableness, a reasonable standard and not a true good faith standard?

CULLAR: Well in terms of whether or not it was an actual violation of law. I agree that the instruction that was given and it was not my instruction, it was a compromise instruction at trial. The judge added the words "as long as that belief was not unreasonable," and so it does get down to what was reasonable and it gives the defendant in whistle-blower cases great latitude to argue. And that's what trial lawyers ought to want to have is the ability to argue that.

OWEN: What was the instruction you asked for?

CULLAR: I think mine stopped with good faith means, "honesty and fact in the conduct concerned a report of a violation of law may be in good faith, even though it is incorrect." And the court went on to say, "as long as the belief is not unreasonable." So our trial court went to great lengths to give the county what they wanted to be able to argue and they did argue it, and the jury didn't buy their

arguments about what these guys should have believed, would have believed, and could have believed.

GONZALEZ: Counsel in your remaining time would you address the issue of mental anguish? The other appears to be rather slim to justify mental anguish damages? Would you give us your best shot in justifying mental anguish past and future?

CULLAR: Your honor on June 15 this court came out with Parkway Co. v. Woodruff, and what the court said was that an award of mental anguish will survive a legal sufficiency challenge when the plaintiffs have introduced direct evidence of the nature, duration and severity of their mental anguish, thus establishing a substantial disruption in the plaintiff's daily routine. When you look through at the public humiliation which we have cited and indicated to the court, when you look through at the disruption and these guys' lives, the fact that one of them is sitting here having to commute from Wichita Falls to Bryan College Station to work, when you look at what they testified to in total, we have direct evidence under Parkway Co. v. Woodruff. There was additional testimony from another attorney in Wichita County who said that he had gotten crossways with the county, and that he had had to practice law in Tarrant County for 10 years. So we not only had the direct evidence of my clients, but we had the direct evidence from an attorney in Wichita County who said that it does disrupt your life, it does validate it what my clients were saying. And indicated that when you cross the powers to be in Wichita County your life can be rather miserable.

I think that all of those references to the public humiliation, the direct evidence, we complied with the standard set out in Parkway, we would ask the court to affirm on all issues.

* * * * * * * * * *

REBUTTAL

SNELL: Respondents state that with regard to the county, the legislature can enact a change with regard to venue. We agree with that. The question though before this court is whether the legislature has repealed the mandatory venue provision with regard to county as it applies in the whistle-blower situation. We have here pointed to some sort of anomaly as though it was created in 1983. The different treatment of counties under venue law is nearly 150 years old. Every plaintiff in any cause of action has had to sue them in the county. This is not an anomaly created under the Whistle-blower Act. This is the way the counties have been treated for nearly 150 years. And it arises out of a historical point of view, the point of view that the county is not a municipal corporation that exist for the convenience of its citizens. But that it is in fact the state government's presence in a local geographical area. It doesn't for instance have the ability to expand its borders, the ability to annex territory, and so on. It has only the powers specifically granted to it by the State. It is quite different from other powers or other kinds of local powers that have a little piece of power from the government which they may exercise as they wish as with the city except with regard to the powers that are taken away from it by the legislature by affirmative action.

We would contend with regard to the jurisdictional arguments that the Whistle-blower Act is really not exclusively a statutory cause of action. There have been ways to sue governmental entities acting outside the scope of their authority for many years. The mandamus action is not an action against the state, or any other government, and yet it does allow one to sue the government to make it do what it should, to make it do what the law requires it to do. Similarly one may sue under such cases as Cobb v. Harrington, a very old case probably over 50 years old, I think it was in the 40s, you may sue when a trespass has occurred by the government, when some other wrongful act has occurred where the government is acting outside the scope of its authority, or without authorization by statute.

So we don't really have any unique situation here. And we would contend your honor that even if it were jurisdictional, that does not answer the venue question. So Travis County has

jurisdiction as does the county in which these plaintiffs resided. That was Wichita County. The venue question is still open. There is mandatory venue in Wichita County. We would therefore contend that regardless of whether this provision is jurisdictional, Wichita County had jurisdiction, and venue was mandatory in that site.

GONZALEZ: Counsel if that were so why would the legislature so recently as a few years ago say under the whistle-blower statute that a plaintiff must sue in their own county, or in Travis county. The Whistle-blower Act says very clearly that a plaintiff may bring a lawsuit in the county where they reside, or in Travis County. So if this body of law is as you say it is, why would the legislature say otherwise so recently as these past few years?

SNELL: Well your honor the way I read that provision, and there have been many instances in which I have had whistle-blower cases, that the county would prefer that the case were not tried in that county. It creates a whole lot of bad publicity. It might have been a situation which was very devisat in the community. Then the litigants could agree to try the case not under the mandatory venue provision that is applicable to counties, which may be waived, but in the county where the particular individual resided. I have had that happen also with regard to going ahead and trying it in Travis county. These situations are situations in which people for various reasons may want to decide to try the case in a county that is convenient and appropriate for their choices. I see no reason your honor, and nothing from the legislature that would indicate that that might not be done in this instance. It would seem to me that it would be reasonable and simple and consistent with most venue law that exist in the state.

Good faith in the whistle-blower act is certainly not resolved. There has been no decision by any court of last resort, by this court, which is the court of last resort on this issue with regard to good faith in the whistle-blower act.

HECHT: What do the federal courts do on good faith?

SNELL: On good faith your honor I think that it has been very interesting recently that this court has been looking at that. And in the City of Lancaster they certainly did. Also I really felt that Hines carefully looked at that. What they do on good faith and reasonability which I think are very closely connected is they look at what a reasonable law enforcement officer for instance in the same or similar circumstances would have done and if they could have done what was done, and it would have been reasonable for any other officer in that situation, it is going to essentially be privileged as being done in good faith. However, there is always the possibility of showing in any of these instances that one is acting outside the scope of their authority, or for purposes that are not purposes that are consistent with their duties, and defined that they are acting in bad faith.