

ORAL ARGUMENT - 2/25/97
96-0967
MITCHELL V. ASHWORTH

O'NEILL: Good Morning! I am Jack O'Neill. Mr. Luce and I represent the relator Mitchell Energy Corp. The case that we are here on this morning is one of 53 alleged groundwater contamination cases pending against Mitchell Energy Corp. in Wise County.

Last year in February, one of those cases was tried. Actually it was 7 of those cases that were consolidated in a widely publicized verdict against Mitchell that became known as the Bartlett case. That case in February of last year resulted in a \$4 million judgment against Mitchell for actual damages and a \$200 million judgment against Mitchell for punitive damages. It was after that verdict came down that I and Mr. Luce were asked to become involved in this litigation on behalf of Mitchell Energy.

The issue that we are here on this morning in this case affects not only this case, but affects at least in my judgment 28 of the remaining 53 cases. Because 28 of those 53 cases have yet to be assigned to a visiting judge or judges. The plaintiffs in this case have taken the position that those 28 cases ought to be split among as many as 4-5 additional judges even though there's a single defendant, Mitchell Energy Corp. in the cases, and the facts of the cases are substantially similar to the rest of them.

We have taken the position that those 28 cases ought to be assigned to a single judge. Judge Sidney Farrar who is presiding over 17 of those cases known as the Bailey cases, which are currently set for trial March 17, just 3 weeks away.

GONZALEZ: None of those issues are before us? You're giving us that information as background, but none of these issues are before us here. We can't do anything about the assignments of those cases?

O'NEILL: That is correct. Purely by way of background because in my view the decision of this court in this matter does not relate specifically to this case. It has broader ramifications. And that's the purpose of giving the background.

The reason it has broader ramifications is that even though those other 28 cases have been waiting assignment for some time no assignment has been made in them. And I believe that Judge Ashworth, the presiding judge of the 2nd Admin. Judicial District, is probably waiting on the decision of this court before he decides to whom to assign those cases. In short Justice Gonzalez, in my opinion, the decision of the court in this matter is not necessarily confined in terms of its ramifications to this case, but will probably affect the number of judges assigned to the remaining 28 cases as well as to whom those cases are assigned.

I do not intend unless the court prefers otherwise by questioning to talk to the court necessarily about who's done what to whom in this litigation. And I don't intend to respond to the plaintiff's allegations made in their brief that Mitchell has filed a barrage of objections to various judges as a delay tactic. In my judgment the record speaks for itself.

If I can now turn my attention to the specifics of this case, I regard the following facts as pertinent to the case we are here on today. First of all, the judge of the 271st DC is Judge John Fostel. It is in his court that all of these 53 cases are pending with the exception of the 7 already tried. They are now up on appeal in front of the Ft. Worth CA and scheduled for argument on March 12.

We are here on the Nelon case. In the Nelon case there are simply 2 plaintiffs: a husband and a wife. Mitchell filed a motion to recuse Judge John Fostel from the Nelon case. Judge Fostel refused to step down in that case. Judge Ashworth the presiding judge of the 2nd Admin. Region assigned Judge John Street to hear the motion to recuse. Mitchell objected to the assignment of Judge John Street to hear the motion to recuse. Judge Ashworth then assigned Judge Steven Harrod of Eastland, a DC judge, to hear the motion to recuse. No objections were filed of Judge Herrod. A day long evidentiary hearing was held in front of Judge Herrod, and at the conclusion of that hearing some 5 days later, Judge Herrod ordered the recusal of Judge Fostel. Following Judge Fostel's recusal, Judge Ashworth appointed Judge Catherine Gant to hear the merits of this case. We objected to the assignment of Judge Catherine Gant. Judge Ashworth refused to honor our objection to Judge Catherine Gant. The basis of the dishonoring of the objection according to Judge Ashworth is that under the applicable statute, which is 74.053 of the Texas Gov't Code, the way Judge Ashworth reads and implements that statute is that it allows one objection to a so called senior judge. And in Judge Ashworth's view a senior judge, and I don't disagree with his view of what a senior judge is (a senior judge is someone who has served on the bench a certain number of years; in the case of Judge Gant after serving on the bench went through the necessary prerequisites to notify this court that she wanted to become a judicial officer of the State, and she was a senior judge). According to Judge Ashworth Judge Street was also a senior judge. When we exercised an objection to Judge Street we used our single objection under 74.053 of the Gov't Code. And because Judge Street was a senior judge and because Judge Gant is a senior judge, and because under Judge Ashworth's reading of the statute we are only entitled to one objection to a senior judge, the second objection to Judge Gant was dishonored.

PHILLIPS: Have you ever taken the position that your strike of Judge Street did not count under the statute because that one strike rule only applies to assignments for trial?

O'NEILL: Believe it or not Justice Phillips that was the point I was fixing to make. What I was going to say before leading into the primary argument that we are here on, the primary briefing in this case is done with how do you interpret §74.053(d) of the Tex. Gov't Code, which allows unlimited strikes to a former judge who was not a retired judge.

CORNYN: That would also apply to judges who chose not to run for reelection?

O'NEILL: That is correct.

CORNYN: If that's the case that it would apply to judges who were defeated as well as judges who chose not to run again who were former judges how would that serve the legislative purpose that I believe you argued that it was passed to accommodate public concern about defeated judges serving?

O'NEILL: I am going to answer your question, then I am going to come back if I can and deal with Justice Phillips' question. It is our position that the legislative history of this statute is clear. This statute was amended in 1991. Up until 1991, this statute unquestionably allowed only 1 strike against a judge. No matter whether the judge was defeated, retired, whatever you only got one strike. In 1991, this statute was amended with the addition of subdivision (d). 74.053(d) was added. What that did was that allowed unlimited objections to certain types of judges.

I am going to get into the legislative history in just a minute. But specifically to answer your question, it is our position that the legislative history of this statute is clear, and that under that legislative history you determine whether a judge is a subsection (d) judge, ie whether the judge is a former judge who was not a retired judge at the time the judge becomes a former judge. And that is at the time the judge leaves the bench. Under the legislative history of the statute we think it's clear that in order for a judge to be the kind of judge that you have...we maintain Judge Gant is the kind of judge as to which you have unlimited objections. In other words she is a former judge who was not a retired judge. Under the legislative history of this statute we believe that you look at the time a judge has served as an elected judge. And if the judge has served 10 years when the judge either steps down, or is defeated, then under the current state judicial retirement system that judge would have vested after 10 years of service, and that judge would be a judge as to whom you have only one strike.

CORNYN: How would it serve the legislative purpose if in fact it was a judge who chose not to run for reelection?

O'NEILL: The legislative purpose of this statute is in front of the court in the record Vol. 3, tab 15. In front of the senate jurisprudence committee there was a discussion about why amend this statute. Because remember in 1991, this statute allowed only one objection to any kind of judge. And the key to understanding why the statute was amended by the insertion of a provision that allowed unlimited objections to certain types of judges is contained in a discussion between various senators. And one of the senators, Senator Glasgow, said the issue is that some members of the senate don't want any defeated judge to have a right to serve as a visiting judge. That if you look at the legislative history is clearly what motivated the addition of (d). Various state senators were getting complaints that judges who had been defeated by the electorate were coming back particularly in Harris county and were serving as judges.

The section we are concerned with here today, 74.053(d), was added as a result of a floor amendment by Senator Gene Green. And also in vol. 3, at tab 15, there is a discussion of what does

subdivision (d) mean, and what was it intended to accomplish? And I would respectfully submit that any legislative analysis by this court statute ought to focus on 3 questions: What was the statute like before it was amended? why was the statute amended to add (d)? what does (d) mean; what was it intended to accomplish? And if the court will look in the record the full senate session on May 21, 1991, there is considerable discussion about what (d) means. I'm not going to go all the way through it. But let me just say that Senator Carriker posed a question to Senator Green about (d). And keep in mind (d) is the subdivision that allows unlimited strikes to a former judge who was not a retired judge. And Senator Carriker says:

Senator Green, what would be the case under (d) where a judge was appointed to fill out 1 year of a term, was reelected to that term for a 4 year term, was reelected one more time, and served as 4 years, that makes him 9 years? Would that judge be a (d) judge?

And let me stop here and stay that is Judge Gant. Judge Gant and the record is undisputed on this served on the 360th DC for 4 years from 1984-1988. She was defeated in 1988. Between 1988 and 1990 apparently she accrued 2 years of service as a visiting judge. She was elected again in 1990 and served a 4 year term from 1990 until 1994. She was defeated again in 1994. From 1994-1996 she apparently served as a visiting judge, then in the Summer of 1996 she processed her papers to become a senior judge, was then assigned to this case and we then objected to her. In short, when she was defeated the second time, she had 8 years of elected service on the bench. Not enough time for her retirement to vest.

ENOCH: You said elected service. My reading of the brief said she was appointed and then lost an election, and then appointed and then lost an election. But she did win some elections in the process?

O'NEILL: She won two elections and she was defeated twice. And the legislative colloquy that we are looking at here indicates very clearly to me that when you have a situation where a judge is an elected judge, and has not served time as an elected judge for 10 years (enough time to vest) that that judge is not a judge against whom you have only one strike. That judge clearly falls within (d).

The question that Justice Phillips was asking I think is an important one because if the court were to decide this case based upon the issue raised by Justice Phillips, the court would not need to reach the question of interpreting (d) and what the words "a former judge or justice" means for this reason. Judge Street who was assigned to this case first he was assigned to hear the motion to recuse. He was not assigned to hear the entire case. If the intent of 74.053 is to give a litigant (and I'm talking now not about the multiple objection part of 74.053(d), I am talking about the single objection part in 74.053(d)), if the intent of that single strike provision is to give a party a single strike against a judge who is assigned to hear the case, if that means assigned to hear the merits of the case, then Judge Street was not assigned to hear the merits of this case. He was assigned to hear the motion to recuse. And then that would make Judge Gant the first judge assigned to hear the merits of this case. Consequently, our objection against Judge Gant would be a valid objection

because it would be the first exercise of a single strike against Judge Gant. I believe the intent of the statute has to be that you are allowed a single strike against a judge assigned to hear the merits of the case. Not a judge who is assigned merely to hear a motion to recuse.

PHILLIPS: You didn't brief that point?

O'NEILL: No, sir.

PHILLIPS: What was Judge Street's status? Had he served enough elected term that he was a retired judge by virtue of that?

O'NEILL: Yes.

PHILLIPS: If he had been in a situation where he was still a former judge, he's under 60 and has not served for 10 years, then you could make that strike and you would still have one clean strike against _____?

O'NEILL: Correct.

PHILLIPS: But there's no question Judge Street was a retired judge by anybody's definition?

O'NEILL: By anyone's definition Judge Street had served enough time as an elected judge to be a one strike judge rather than a 74.053(d) judge.

ABBOTT: Did you say just a second ago that a party should have unlimited strikes with regard to a judge who has been assigned to hear a recusal motion?

O'NEILL: Well I did not address that. And in all candor, I have not thought about the answer to that question.

PHILLIPS: But that is the necessary conclusion?

O'NEILL: It's the logical conclusion that would follow from my answer to Justice Phillips' question

ABBOTT: If that is the case then, what would prevent say a party involved in a case in Houston to go through 25 strikes of all the civil judges there, or however many judges they want to put up?

O'NEILL: You have to keep in mind that you still have, in Houston I am familiar with the situation there. It would be hard to exercise that many strikes because sooner or later you are going to get to a judge who is a one strike judge. Of the sitting judges in Houston, some of them are under my reading of this statute, and I'm familiar with one in particular, who under my definition of the statute would be a judge against whom multiple strikes would be...

PHILLIPS: But you said that system shouldn't apply in this is what you said. I don't want to belabor a point, but you said assigned to hear the case means assigned to hear to merits of the case so that any judge cannot be assigned pursuant to rule 330, exchange of benches or not even exchange, just one judge acting for another in an urban county would be subject to the strike. So that if you were in a county that only has one district judge under your reading a party could exercise strikes forever until we exhausted the entire sitting and former judiciary?

O'NEILL: Under my reading of the statute there are multiple objections that are allowed to a judge who does not have 10 years of elected service at the time the judge is either defeated or steps down.

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RESPONDENT

KIRKMAN: I, along with Miss Hollingsworth, represent the real parties in interest in this case, Mr. & Mrs. A.H. Nelon. We firmly believe that this court should deny this petition, dissolve this stay order, and allow this case to be tried before the judge who is assigned to this court. Judge Ashworth did not clearly abuse his discretion when he overruled the latest objection of Mitchell to the latest assigned judge in the case, Judge Gant.

Judge Phillips to answer your question, there is a case that is exactly on point called Holmes v. Langford which is cited on pg. 13 of our brief, which says: You get one strike per case regardless of whether it's on a motion to recuse, whether it's on the merits of the case, you get one strike per case. This point was not briefed. It was never brought forward to this court, but that case along with 74.053(b) clearly says that when you lodge an objection you get one per case.

Now there are certain undisputed facts in this case that nobody can contest. Number 1) before Judge Gant was appointed or assigned to this case she had left the bench. She had left the 141st Jud. District court in Tarrant county. She was defeated. And we readily acknowledge that. But it is not relevant to the court's consideration of this issue. After she left the bench she served time throughout the state on the bench. And then on June 20, 1996, she became a retiree under the system. 74.041(3) defines what that retirement was. She accumulated enough time on the bench. She had obtained the age that was necessary. And then on July 2, 1996, she made an appropriate election under 75.001 to become what the Code is called a "senior judge." Now it is critical that the court understand that 75.001 is critical in this case. It's a procedure that allows judges who have taken retirement to make an election with this court to become a senior judge to sit and hear cases. That statute is not without consequences. It allows a judge who is retired to actually obtain the status of a senior judge and be appointed to hear a case. Now why is that important? Because it is that status that insulates a judge from an unlimited objection which is provided for in the Code to former judges.

CORNYN: Do you agree the legislature intended to give unlimited strikes against judges who were defeated?

KIRKMAN: Provided they are not a retired judge at the time of assignment, yes.

CORNYN: So if they serve by assignment then they become rejuvenated or reconstituted to eliminate that concern?

KIRKMAN: I don't know if it's rejuvenated. But whether they leave the bench of their own volition or whether they become ill, whether they are defeated, if they accumulate time subsequent to that such that they become a retiree and then make the election and become a senior judge, they are a retired judge. Nowhere in the statutes of this state or any law is there any hybrid sort of judge that talks about well you're a real retired judge if you retain retirement before you leave the bench. But if you obtain retirement and become a senior judge after you leave the bench you are not a real judge. There is no distinction in the law whatsoever for that category. And that is the distinction that Mitchell has manufactured in this case.

ABBOTT: But why does that not skirt around the intent that the legislature wanted to achieve?

KIRKMAN: Well I believe that it does skirt the intent. Mitchell's position does skirt the intent.

ABBOTT: No what I am talking about is the fact that the judge in this case, Judge Gant, is reconstituted as stated by now accumulating her 10th year after she had been defeated.

KIRKMAN: Because the intent of the 1991 amendment in my view and in my client's view was to exact out of the category of former judges and therefore be subject to unlimited strikes, a retired judge. One must remember that 75.001, which provides for the election whereby Judge Gant became a senior judge was law in 1989. It was on the books 2 years before the 1991 amendment. The legislature knew when it passed that amendment and made a retired judge a 1-strike judge, that a judge could become retired after they left the bench. Whether they were defeated, whether it was an intentional retirement they knew that that law existed. The intent of the 1991 amendment in my view was to exact out of this former judge unlimited strike's category a judge who had become a retired judge. The way the statute read before the amendment is that you had one strike regardless of whether you're a retired judge, an active judge, or whether you obtained retirement after you left the bench. The amendment came in and said: No, for active judges and retired judges you get 1-strike only. Now that is for true former judges. That is a judge who's not retired you have unlimited strikes. If one reads the senate debate you will discover that the senate went to great lengths to exact out of this former judge unlimited strike's category to retired judges. And when one realizes that on the books at the time of this amendment was 75.001, which clearly provided that a judge could obtain retirement and senior status after that judge left the bench, one must presume the legislature knew what it was doing by exacting retired judges out of that unlimited strike category. So it is our view that when you read the legislative intent it supports our position that a retired judge such as Judge Gant does fit the definition of 74.053.

ABBOTT: Looking at (d), what do you think is the significance of the word "was"?

KIRKMAN: Just what I was going to say. There are two views before you. Our view is that “was” refers to the time when the assignment was made. Now Mitchell wants “was” to refer to when the judge left the bench. The more logical interpretation in our view is “was” refers to when the time the assignment was made. A former judge or justice who was not a retired judge at the time of the assignment, that means you have an unlimited strike. If when the presiding judge appoints the judge to hear the case if that judge is not an active or retired judge, then you have unlimited strikes.

PHILLIPS: Why if you’re right 74.054(a)(2) talking about assignments use “is” is a retiree. And it clearly is reputable back to the date of assignment?

KIRKMAN: Well 74.053 is the statute that I believe is the one we are discussing.

PHILLIPS: I understand that. But I am talking about other language in the same chapter.

KIRKMAN: Because I think it refers to a different situation. We are talking about an objection under 74.053. They address objections. So when you are talking about “was” it presumes a past tense, that’s when the assignment was made. That’s what differs those two statutes. 74.053 specifically is entitled and specifically deals with objections to judges.

BAKER: On the Cannons of Construction can a court add a phrase as you suggest to a statute to achieve a result?

KIRKMAN: I think this court can make a reasonable interpretation based on what believes the legislative intent was.

BAKER: Isn’t there case law that says the court may not add language to an existing statute to achieve a result?

KIRKMAN: Absolutely.

BAKER: So how can we add “at the time of the assignment”?

KIRKMAN: Because I don’t think you’re adding language. We are asking that you interpret “was” to mean at the time of the assignment. Unfortunately, both parties are asking this court to interpret “was” based on the legislative intent.

BAKER: So your answer would be that relator is asking us to add a phrase “at the time that you left the bench?”

KIRKMAN: That’s what Mitchell is asking this court to do. We are simply asking this court to construe “was” to mean at the time of assignment, which is after all what the subject of the statute is. The subject of this statute is assignment and objections. Having “was” refer to that period of time is an absolutely logical step for this court to do when it is interpreting what 74.053(d) actually

means.

ENOCH: In your interpretation would it not be possible for every former judge to ultimately become a retired judge under the statute under your interpretation? I mean Judge Gant won some elections. When the statute was originally passed I guess it was possible for a judge to have never won an election. And sit as a former judge or not would they have to have at least won one election to sit as a former judge?

KIRKMAN: No. Winning an election has absolutely nothing to do with the interpretation of this ...

ENOCH: So it's possible that anybody who is appointed a district judge and then loses the election can get assigned as a judge and then serve for another 10 years under assignment and become retired?

KIRKMAN: That's what the code provides. Let's assume that a judge is appointed for 3 days and loses an election, and then sits for 10-15 years by assignment such that they put in the appropriate time. Under the Code they become a retiree. Under 75.001 if that judge makes an election and certifies to this court that they've served the numbers of years and taken the CLE and have sat by assignment for X number of years, then they become a senior judge entitled to retired status under that particular statute.

ENOCH: What would be the purpose then for the legislature saying that a former judge is subject to unlimited strikes, but retired judges are not if in fact over a period of time all former judges become retired judges?

KIRKMAN: It's not a pointed fact that they do. They have the right to it. I think the reason is there is nothing to suggest that a judge who happened to obtain retirement status after they leave the bench by sitting by hearing cases has any less ability to run a court than one who takes retirement before they leave the bench. A former judge is a judge who hasn't by definition had enough experience on the bench, has had 1-2 years whether they were elected or not, but haven't had the experience to judge cases. And I think that is the type of judge that the legislature was pointing at when they said we want to give some litigants unlimited objections to that kind of judge. If you put in the time and you sit on the bench it is presumed that you're going to gain the experience and have that ability to make decisions. There has to be a line of demarcation somewhere. There is nothing in the legislative history that convinces me that the legislature believed that a person who took retirement and put in the time on the bench was any less qualified to judge a case than a true judge who retired before they left the bench.

GONZALEZ: What do you make of the exchange between Senator Carriker and Senator Green during the floor debate of this bill that's cited in the briefs?

KIRKMAN: Well I make of them exactly what is said. In my view the first exchange, if I've got

my notes correct, where Senator Carriker asked:

What would the case be where a judge was appointed to fill out a 1 year term was reelected to that term for a 4 year term, and reelected one more time as a judge for a 4 year term, that makes 9 years. And then one of these big party sweeps in a national election comes along and that judge is swept out of office simply on the basis of partisan votes that had nothing to do with his service.

Green then said:

That judge could still sit as a visiting judge, but under the language that we put in there, that party to the case can't object to that judge.

There is nothing that I read into that because anybody can object to an active judge or a retired judge that had had one objection. So I don't read anything into that to support Mitchell's position. I mean again I think what these senators were trying to was exact out of these unlimited objections those judges who retired. And there's nothing to suggest that they had to retire before they left the bench.

Another very important point for this court to consider is if Mitchell's position is to be followed by this court, think about the burden that it will put upon the heads of the administrative regions throughout the state when they are forced to appoint judges to cases where disqualifications and recusals are _____. It is my experience that the process of disqualifying and recusing judges has proliferated tremendously in the last 2 years. If the presiding judge of the region is burdened with this unlimited strike rule for retired judges, think about the small pool that it would give them to appoint what I would call a bullet-proof judge. Those judges who retire from the bench and take their retirement before they leave the bench in all candor are judges who really don't want to serve. I mean they had lawyers all their lives, they tried a lot of cases. I'm not sure that they are the kind of judges that would take a Mitchell Energy case. And if these judges are subject to unlimited objections, the pool of judges that the administrative judge has to assign to the cases has dwindled substantially. You know what that does, that fosters judge shopping for a particular litigant. It fosters this continual objections to judges time after time after time, which doesn't serve the administration of justice. When a judge has an ability to appoint a judge that he knows will not be subject to being stricken, then I think he's got some confidence that he can appoint a judge and the case will go on. The point being that if Mitchell's position is bought, the pool of judges that are so called one objection of bullet proof judges and available to sit is really small.

PHILLIPS: Now on what do you base that? I saw it in your brief, and I hear it here, but I just don't see it in the numbers. The presiding judges issued a report yesterday on who's around to assign.

KIRKWOOD: I'm a prisoner of my own experience. I mean I know that within my judicial region...

PHILLIPS: Go up to the 6th floor of the Office of Court Administration and pick up their data on who's assigned.

KIRKWOOD: I have and it is my belief and understanding that true one objection judges, that is judges who were willing to sit, and who were retired at the time they left the bench are few and far between to appoint to this case. In other words, the judges who retired after they left the bench there is a number of those judges who are available to sit in my particular region who Judge Ashworth court appoint, and then only have that one objection rule apply.

ABBOTT: But the consequence of limiting the pool of judges who can preside over a case because of the unlimited strikes results in litigants being forced to go before most likely the elected judge for the area where the case is pending, which is one of the things the legislature wanted to achieve. And then secondly, the alternative would be that the litigants would most likely have to go before the type of judge who had qualified for 10 years at the time the appointment was made.

KIRKWOOD: I would disagree with that because I don't think this situation comes up until you have some question raised as to the elected judge. Usually if the elected judges had some recusal motion filed or disqualification so the judge has to step in and make some appointment of some judge, and my point is if the judge hasn't got very many one objection or bullet proof judges and he has to keep appointing people where there is unlimited objections it just fosters continual overturn. And if a judge who simply took retirement after they left the bench, sat the number of years, made the election and is in fact a one objection judge, then the presiding judge has more pool available which he can make an appointment that he knows will stick. Because otherwise he's just appointing former judges strike, former judges strike. And because of the fact that you have this unlimited objections to former judges, it just never ends.

GONZALEZ: You're assuming that every former judge is going to be stricken. This does not follow that there's going to be objection to every judge.

KIRKWOOD: Of course as long as it's provided and you have the ability I must presume that one would exercise that right. I think the legislature says we can't have these unlimited objections and that's why they kept in the one objection limitation to active judges and retired judges. And there is nothing that persuades me to show that the one objection to retired judges shouldn't apply to a judge just because they took retirement after they left the bench regardless of whether they resigned, or they lost the election.

We would respectfully pray that this court deny this petition, and dissolve this stay.

HECHT: How is the stay impacting the litigation?

KIRKWOOD: We've got a case that's over 6 years old. We've been stayed since Aug. 1996, before the CA who briefed the entire case had oral argument, they dismissed it, they came up here. We haven't been able to get the lawsuit to trial.

HECHT: Is it currently set?

KIRKWOOD: Well it was. It was set and then the latest stay by this court wiped that setting out. It would be my hope that if this court dissolves this stay that we would get an immediate setting and get to trial asap.

HECHT: In your view pretrial work to be done before the case can be tried?

KIRKWOOD: From the plaintiff's viewpoint there is very little pretrial work.

GONZALEZ: How do you respond to the allegation "this is not a 6 year old case, but this is actually a few months old case because of the numerous new allegations that have been made, new facts and new experts that have been outlined?" So it is a relatively young case as a result of the amendment of the pleadings and the new experts and fact witnesses that have been disclosed?

KIRKWOOD: Judge I could probably go on for days about this. This litigation has been hotly contested for over 3 years. These people's ground water has been polluted by the gas transportation of Mitchell Energy. This is one of 52 cases. These people have conducted discovery nonstop for 2-2-1/2 years. They know everything there is to know about gas and its migration. They know everything there is to know about how gas migrates into these peoples' water. This particular lawsuit can be tried in two months if this court will dissolve this stay order. These people have experts coming out the whazoo. They have spent tons, thousands, millions of dollars defending this case and other cases that are similar. They are prepared and ready to go.

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REBUTTAL

LUCE: I think what's involved here today is respect for the judicial system in this respect. I think what you're presented with is a as you look at the legislative history here of this statute a clear understanding that what the legislature was trying to do was deal with the issue of public respect for the judicial system.

Now my personal preference would have been that the legislature deal with that by dealing with the issue of how we elect our judges. But that's not where the legislature was in 1991. Instead they were dealing with an issue where there was arising course of discontent about the use of visiting judges in particular who had been defeated in elections. And I would submit it is beyond dispute and I think that's exactly the question that you were raising Justice Cornyn, that the legislative history here was very clearly to deal with that issue. They considered several extremes. They considered the extreme of saying that you could not use a former judge who had been defeated and they rejected that absolute view. Instead as often legislatures do, they struck a compromise. Dealing with the issue they struck a compromise. And that is exactly what they did in the statute that they passed. They increased the circumstances under which you could have unlimited objections. Now I realize sitting in your shoes you're dealing with the issues of administration of justice, the fact that we need

more courts, the fact we need more judges. But I think an overriding concern of everyone justices, officers of the court is respect for the judicial system. And I think that's what the legislature was trying to deal with here in this situation.

I had a very unique experience 7-8 years ago. I happened to attend a seminar on Thomas Jefferson. Just about the time that the Berlin wall was falling. And there was a professor there, a constitutional expert by the name of Dick Howard, who I'd gotten to know many years before, who at that time was serving as a consultant to Eastern European countries as they struggled to write new constitutions to embrace democracy. And over lunch one day he said you know they don't have any difficulty understanding the role of the executive branch, they don't have any difficulty understanding the role of the house of representatives, the senate. But they sure have a problem in understanding the judicial branch. They have difficulty understanding how in a democracy you can have elected representatives pass statutes and then have judges look at those statutes and decide what the legislature meant. But he said you know I think if they embrace everything but respect for the independent of the judiciary, those countries will never really have the form of government that we have. And I think that's what the legislature was struggling with because underpinning the independence of the judiciary is respect for the judiciary.

Without public respect for the judiciary, that independence inevitably declines. And we are in a funny situation in this state where we say on the one hand to voters "you should elect your judges, that's important," and then we turn right around and say: "But if a judge is defeated it's okay if they hear your case." Now again I would rather deal with the core issue which is the way we select our judges, but until we come to grips with that we are going to have situations like the legislature dealt with in 1991. And I think it is very clear, that they were trying to deal with public respect for the judiciary. What they were dealing with was perception of the use of defeated judges no matter what the qualifications.

ENOCH: If a judge has otherwise served and eligible to retire, and then just chooses not to run, but doesn't make the election to retire and leaves office, would your interpretation subject them to unlimited strikes if after they left office they decide to sit as a visiting judge?

LUCE: It would depend on the amount of time they had served because of the compromise by the legislature.

ENOCH: I'm assuming that they are eligible to retire. On Dec. 31 of the end of their term they could retire. But they chose not to exercise the election to retire and sit as a visiting judge. They just left office to go do something else. And then they would come back and decide they want to sit as a visiting judge, would they be subjected to unlimited strikes under your interpretation?

LUCE: I think if they have served the requisite 10 year period, and therefore, they had passed the test of time as the legislature phrased it, then they can be used in that category.

ENOCH: So your view would be the was would apply eligible for retirement at the time they

left office, and if they were eligible for retirement at the time they left office, then they would be subject to one strike?

LUCE: Yes. And I think clear the use of the word “was” and the use of the word “is”, it’s very clear that if the interpretation that the plaintiffs want in this case was what the legislature was intending they very clearly would have used the word “is”. It would have been a very simple word to use and would have been very clear. But here the use of the word “was” was there very clearly because of the legislative history. And I would simply read and Justice Gonzalez was getting to that point in the dialog with opposing counsel. Here was Senator Carriker’s response in the rebuttal. He said: Okay, so under the original bill and also with the amendment you’re placing on the bill a person who was defeated without having reached vested retirement would be able to serve as judge so long as no party objected.

I would urge this court that the overriding concern is respect for the judiciary. The legislature chose to deal with that subject in the compromise they reached and that compromise should be honored.