

ORAL ARGUMENT – 01/22/03
02-0260
CITY OF TERRELL HILLS ET AL. V. CHAMPION BUILDERS ET AL.

THIS TAPE WAS VERY HARD TO HEAR WHEN THE JUDGES ASKED THEIR QUESTIONS, SO THERE ARE A LOT OF BLANKS

FRIGERIO: Petitioners are citizens of the City of Terrell Hills and members of the Terrell Hills Board of Adjustment. They are the petitioners in this case, and they are the ones individually subjected to nearly a \$1 million verdict in this case for casting on June 7, 1994, a legal vote at a legal meeting.

I can't emphasize that enough to this court. Despite respondent's incantations to the contrary the TC, the CA, the panel decision and even the en banc decision of the 4th Court held this was a legal vote and it was at a legal meeting. For this vote that this members undertook on that day, they have been subjected to a negligence cause of action and a verdict of nearly \$1 million.

They have affirmatively pled at the time of trial the defense of official immunity. One of the first allegations and issues brought before this court was although the TC granted our jnov, Jude Littlejohn granted a jnov based on immunity. The panel of the 4th CA, Justice Stone affirmed the jnov with regard to the immunity claim of the individual members.

The en banc decision affirmed the decision as to the City of Terrell Hills. That issue is final in that there was no taking on the part of the City of Terrell Hills with regard to this vote.

Keep in mind that the issue with regard to the City was the very actions by this board of adjustment. That their actions, as far as a cause of action against the City, was a taking and the cause of action against the individual board of adjustment members was negligence. The courts have held, including the en banc decision which is now final as to the City of Terrell Hills, that there was no taking by the very action of these board of adjustment members and their vote.

O'NEILL: Can't hear question from J. O'Neill.

FRIGERIO: From the first case that this court has decided on Chambers v. Lancaster and the progeny that followed, which trailed the federal statutes and the Graham v. Conner which is the leading case federally, the element of official immunity is only to be judged from an objective reasonable standard without regard to subjective intent.

An objective in this case - a voter. What an objective board of adjustment member looking at the facts before that person irregardless of how that person voted that we're looking at, but an objective board of adjustment member would they act in good faith? Objectively

could they vote the way they voted?

O'NEILL: Can't hear question by judge.

FRIGERIO: The evidence, what occurred in the executive session there is no probative value on the issue before the case. It is bearing no relevance to the official immunity. The only issue is whether or not they had the legal right to vote as they did.

HECHT: How does that deal with official immunity? If you have a legal right to vote as you do, then what difference does it make - what good faith has to do with that?

FRIGERIO: That's why I think - and this is a case of first impression as you know with this court. We are going down a _____ pass sort to speak when we start looking - typically we look at law enforcement officers and what action they took, and whether or not an objective officer could look at that and say it was reasonable. Official to me, I claim it should be absolute immunity, and I believe it is encompassed in the defense of official immunity. Because I feel if this court should decide that if a person, an official, has a legal right to make a vote in a legal meeting, not that they are acting outside their course and scope of their jurisdiction, but if they have the right to make a vote, then this court or any other court should not look until there is subjective intent.

HECHT: Can't hear all of question.

FRIGERIO: As this court has held in *San Antonio v. Wallace* back in 1960, the deliberate thought process is not something that we allow discovered process or even the delving into. It's not something we should be delving in to.

HECHT: Can't hear all of question.

FRIGERIO: I feel that we can never look in to the subjective mind of a voter, whether it be a legislator. And that's really what the cases hold. Legislative right. The court should not usurp that branch of government. If they are a legislature, they have the right to vote, we can't start giving them a litmus test so to speak as to what their thought processes are if they have the right to vote yes or no. But if they have that right to vote yes or no, then the courts don't have the right to look in to their subjective intent in their mind as to why they are voting yes or no. The issue is do they have the right to vote that way?

WAINWRIGHT: Then how do the courts determine whether the board of adjustment is acting in good faith? In fact, the CA in this case acknowledged that it was looking outside of the reasonable objective standard in this case didn't it?

FRIGERIO: Yes. I believe the good faith in this case was shown by Charles Berry, who is the uncle of federal judge _____ in San Antonio, who has been the city attorney for Terrell Hills for over 40 years. He told the board of adjustment members in executive session "this is my legal

opinion. My opinion is based on law, I think you should vote to affirm it. But you have the right to vote either way. And either way you vote, unfortunately we are going to be subject to a lawsuit. Either the builder is going to be suing us, or these citizens on this citizens group is going to sue us. And unfortunately we are going to have a lawsuit one way or the other. But you have the right to vote either way.”

JUDGE: Can't hear.

FRIGERIO: The letter to Cal Johnson, the city manager, he said in that letter to him that that was in his opinion if Mr. Champion, the builders, met all their legal requirements of the building permit, then, yes, you had to issue the permit.

SMITH: And that letter was distributed to all the board members?

FRIGERIO: Yes. Pursuant to the ordinance of Terrell Hills they had to look and see whether or not issuance of the permit was right or wrong. And the issue at that point was whether or not the split zoning - it needed 80 ft frontage of semi-commercial land to have this apartment complex.

SMITH: Can't hear question.

FRIGERIO: In all due deference to Mr. Berry, I believe he mentioned that if he has met all the requirements, then you have to issue the permit. But the question is, did he meet all the requirements? And that's what the citizens raised, that he did not meet all the requirements because there was not 80 ft frontage of semi commercial land on the lot in question. And that raised a legal issue. And then when they had the executive session, Mr. Berry said, You know this is my legal opinion, but it could go either way. You have the right to vote either way.

I think from a negligence standpoint there would be other issues on a §1983 potentially. I think, however, as far as the setting of a vote that if they had the legal right to vote in a legal meeting, that the court should not look into the subjective mind. The Winograd case that is brought up is a §1983 case, but that is where the board did not have the right to cutoff the sewer lines. See they went outside their jurisdiction and they were held liable in §1983, because they intentionally went beyond their scope. If you look at Baker v. Storey, which is one of the fundamental cases that started off official immunity, Justice _____ was trying to distinguish in the opinion the difference between sovereign immunity and official immunity. Of course sovereign immunity being the governmental entity. And then when he was defining official immunity, he stated that official immunity also encompasses two things. It encompasses absolute immunity as judicial immunity, and it encompasses also qualified immunity. So that is why we have not waived that argument because official immunity was pled and it has two components.

I think for the precedent for this court and for precedent of this state for a voting official in this state they should be entitled to have absolute immunity if they are voting in a

legal meeting and a legal vote without being subjected even to discovery as this court held in re Perry, without being held subject to discovery of why you voted a certain way. We don't want our legislatures, whether it be appointed or whatever...

O'NEILL: Can't hear.

FRIGERIO: In Winograd they voted to disconnect the sewer lines. That was outside the scope of that authority to do. They did something that they didn't have authority to do, and they subjected themselves to individual liability. In this case, the board of adjustment had a simple yes or no as to revoking the permit or not revoking the permit. They had before them two legal arguments. They asked for the city attorney's advice. He said you could vote either one way or the other. This is my advice. But there is merit to the other as well. And they chose to vote one way. It happened to be to revoke the permit.

And why? Quite frankly I believe that the record would show they knew they were going to be subjected to a lawsuit, that they were going to have to pay Mr. Berry one way or another to fight the lawsuit, and they would rather be backing their own citizens as opposed to backing a builder. But that is a permissible inquiry I believe. When faced with a legal dispute which could go either way, they asked for their advice from their attorney who had been their attorney for 40 years. He said you could vote either way. They voted a certain way, and then they were subjected to liability. Keep in mind Chairman Shimp didn't even vote, and yet was subjected to liability.

WAINWRIGHT: In Winograd the 1st CA looked to the US SC case of Harlow v. Fitzgerald. And as you know in the federal context qualified immunity has both an objective and a subjective component. Has this court ever held in this context outside of a police chase circumstance that objective standard is the test?

FRIGERIO: Yes it has. As late as Wadowitz v. Montgomery case, which was the offshoot of Lancaster v. Chambers that you cannot have...

WAINWRIGHT: That was a police chase again wasn't it?

FRIGERIO: Yes.

WAINWRIGHT: Has this court ever held outside of that context?

FRIGERIO: It never had a voting case per se. There are three voting cases. The Sunnyvale case which the court held that a zoning vote, that the board members were entitled to absolute immunity. That was out of Dallas. A no writ case. And there are two cases out of San Antonio - Medina County Commissioners and in Lopez v. Trevino, both of which held that they were entitled to official immunity but not absolute immunity in that particular case.

I would urge the court under Bolgan v. Harris, the latest US SC case with

regard to absolute immunity in a voting context. That's a Massachusetts case that we talked about the termination of a particular employee. Absolute immunity was denied all the way through to the US SC because it affected one individual. But the SC held you do not look at if it affects one individual or five individuals. It's what is the function of that vote? And the function of the vote in terminating a line item even though it affected only one person and terminated that position, in Bogan v. Harris the US SC held that yes they were entitled to absolute immunity.

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RESPONDENT

LEA: I want to begin by focusing the court on what I think is the critical procedural posture of this case. And I think it really creates a situation that we are not accustomed to looking at in analyzing evidence.

The official immunity defense is a defense. The burden of proof at trial is to plead and prove and to carry the burden of persuasion at trial. The jury answered the question no. So for this court, the question now is not whether there is some evidence of subjective bad faith? The question is not whether there is any evidence of good faith? The question for this court is is there conclusive evidence of nothing but objective good faith.

If the room has anything in it other than conclusive evidence of objective good faith, we win.

HECHT: Cant' hear question.

LEA: The objective standard is a standard that must apply, should apply at the summary judgment stage, but can't apply once trial begins. And the federal cases have said this. Pressley, and Swint(?) and the Malear(?) from the 11th and 5th circuit. This is where the burden of persuasion becomes critical. The jury can disbelieve any evidence it wants.

O'NEILL: Can't hear.

LEA: Two things. There is only two pieces of evidence of good faith here. The historical actual comments of the city attorney in the executive session. And with all due respect to Mr. Frigerio, I disagree about what he said there. You have the transcript. You will see for yourselves what he said. I believe what happened was, he told them three times you can't revoke this permit.

OWEN: Can't hear.

LEA: If you said this is absolute immunity, I suppose that would end the story. For two reasons, I suggest the court can't. First, absolute immunity was never pleaded in this case. IT was not pleaded in the TC. It was not presented as an alternative basis for affirming the n.o.v. on

appeal in the CA. And so under Rule 38 is waived. Procedurally absolute immunity is not before the court. But neither is it before the court substantively. These are not legislative facts. Absolute immunity applies to a legislative function. The courts have said that a legislative function is shown in both of two ways. If the person making the decision makes the decision based on legislative fact finding, the kind of fact finding that applies to the population generally, then that may be a legislative function. Or if the decision made is a decision that affects the citizenry in general, then that may be a legislative function.

We've cited a number of cases that have held rightly, that a zoning body isn't legislative to begin with. We don't elect members of a zoning board. They are not legislators. They do not make policies for us, and they didn't serve a legislative function here. So they don't have a legislative function. And absolute immunity has no application here.

HECHT: Can't hear.

LEA: You might sue them every time. You wouldn't get their depositions every time. Because as you have in the federal practice, early on you would have motion for summary judgment where you would test the evidence at the objective level. Is there any objective basis...

HECHT: Can't hear full question.

LEA: No. The test is could a reasonable government actor have done what he or she did? And at the summary judgment stage the government actor either presents evidence of that in support of the affirmative defense or doesn't. At the summary judgment stage if the government actor presents evidence that what was done here was a reasonable government actor could have done, then it's incumbent on the respondent, the nonmovant to present controverting evidence. Not a subjective good faith but...

HECHT: How hard is it to get somebody to come in and file an affidavit that said no reasonable board member would have done this.

LEA: Could. That's the difference. The affidavit has to say no reasonable board member could have done this. And I suggest to you that's a hard affidavit to get.

HECHT: In this case the board's decision was appealed and overturned. Writ certiorari.

LEA: Writ certiorari was granted. The writ of certiorari was appealed.

HECHT: What if it had been affirmed?

LEA: If it had been affirmed, then I think we wouldn't be here because the standard on appeal in the certiorari proceedings is, there can only be one lawful result here. It's binary. It's either black or white. And so on appeal if the courts have held this was the correct thing to do, then

we wouldn't have a case.

HECHT: Now that they've ruled the other way do you win as a matter of law?

LEA: We may well given the rules as they stand. I suggest because the courts on appeal ultimately concluded they acted illegally, that is the standard in the certiorari proceedings. Did they act illegally in revoking it? And the TC said yes they did. The CA affirmed, and this court denied review. And so the three elements of good faith are: discretionary function; good faith; and outside scope of authority. And I think that finding actually does go a long way towards taking away from them the discretionary function and scope of authority elements...

O'NEILL: Can't hear whole question.

LEA: In this case there were two relevant ordinances: the zoning ordinance and the building code ordinance.

O'NEILL: But he did tell them it was going to go up on appeal.

LEA: And still they took an oath to uphold the law.

O'NEILL: How could we qualify without having to weigh the merits of different witness positions in hindsight on the liability?

LEA: Ridiculous is a good place to start, and here they lose on that. But I really think that if the court reverses here, the court will be saying the procedural affect will be this is conclusively good faith as a matter of law. That will be the result. Because this is an affirmative defense, the jury answered no. And that's just the standard now. For you to reverse what the CA has done, the court must say as a matter of law this is conclusive evidence of good faith. And if the court is to do that, I hope the court will attach as an appendix to its opinion the transcript of this hearing. Because if this is conclusive evidence of good faith in Texas, it's a sad day for all of us. This can't be good faith.

It was more than just a negligent vote and it was more than negligence. The standard at the time was the old pre-1995 standard. As I recall we submitted this with a conscious disregard standard for punitives and the jury found not only negligence as a predicate, but went beyond that and found that they acted with conscious disregard.

I think they were negligent in more than casting their vote. I think the entire set of events was illegal. I don't believe they had authority under the ordinance on which they staged the whole affair to do anything that they did. They based what they did on the zoning ordinance, which says something about allowing the board of adjustment to hear appeals when there is a claim of error in a decision of the city manager acting under the zoning ordinance.

The issuance of a building permit didn't occur under the zoning ordinance. A separate ordinance, the building code ordinance created the procedure for the issuance and the revocation of the building permit, and it put that procedure only exclusively in the office of the city manager. The board of adjustment had no business from the beginning in this building permit.

HECHT: What's troubling is this board, adjustment and other political governmental bodies make wrong decisions all the time. But we don't subject their members to personal liability. I mean every time we reverse a case up here for a city council or a board of adjustment made the wrong decision, and we thought we were going to expose them to personal liability, that would be a very different kind of law than what we understand.

LEA: And I don't think you will after this. Not one of these people testified at trial. The only evidence of their supposed good faith was Mr. Berry, and I really believe if you look at the historical - Mr. Berry was saying...

HECHT: Let me ask you about that. What if Mr. Berry clearly told them they could do this.

LEA: I think we would have a whole different kettle of fish. But he didn't.

HECHT: Couldn't hear question.

LEA: Because then I believe they could have had a reasonable belief. I still think in a jury trial it's troublesome. Because a jury could still have disregarded that. But those aren't the facts. I think what he said here was after three times of telling them don't do this, what he said was, and if you will look at the transcript you will see "you folks do whatever you want." As I sometimes tell my daughter when she won't listen to me after I tell her 14 times not to do things. Okay. Do whatever you want. Learn it yourself. I don't think he was telling them that they had any authority to do this. I think he was exasperated.

O'NEILL: Can't hear question.

LEA: Several ways. No evidence that any of the required notices were posted.

O'NEILL: Is it correct as long as they don't take a vote at that meeting it's okay?

LEA: No. They can't deliberate in there. And they openly deliberated in that meeting. In fact they said we're not supposed to be deliberating in here. And after they said that...

O'NEILL: I thought they said we're not supposed to be voting in there.

LEA: My memory of it is, and I believe the law is they are not supposed to be deliberating in there. And I believe that is indeed the standard.

O'NEILL: Is there a way they could reasonably be having an executive session?

LEA: There's a variety of reasons for which they can go in to executive session to receive legal advice. But after the legal advice ends, after Mr. Berry says don't do this, Mr. Sandidge, a lawyer, says well I'm going to vote to revoke it anyway and not because it's legal.

O'NEILL: And they said we can't do that in here. There seems to be a real effort to make this meeting lawful.

LEA: I respectfully disagree. The chairman, Mr. Shimp said, no I've checked on this and we can. And then he goes on to say when we go out there to revoke we're going to need four affirmative votes. And Mr. Plank says I don't think we're supposed to be doing this in here. And the chairman says again, No. I've checked and we can. And he was wrong. And they had no business doing that. Certainly no business doing that in the context of equating this with a whorehouse.

WAINWRIGHT: Assume that there was one legitimate basis for the board of adjustment revocation of the permit, and one illegitimate reason. Would there be immunity for that decision?

LEA: At the summary judgment stage if there are competing...

WAINWRIGHT: Under the circumstances we're at now.

LEA: Here if the jury answered no, then I suggest the court could not reverse that jury finding because it's the province of the jury to assess the credibility and determine which evidence it will accept or reject. So assuming there was evidence going both ways at the trial level, I don't believe the appellate courts can disturb the jury verdict.

WAINWRIGHT: So then if there were one legitimate basis for the vote and ten illegitimate bases for the vote your answer would be the same?

LEA: It would.

O'NEILL: If we're trying to craft a test if you have one legitimate reason and one illegitimate reason, doesn't that satisfy the test that was set out in Chambers in terms of immunity?

LEA: It probably does at the summary judgment stage. At the summary judgment stage I believe it does. And in an interlocutory appeal the TC got it wrong and there was an interlocutory appeal...

O'NEILL: Can't hear question.

LEA: Oh absolutely. And that's why I believe in Chambers and in Wadewotiz and

in a host of federal cases, this court and the federal courts have said immunity is to be an objective standard and it's designed to protect all but those who knowingly violate the law. So in this court's own writings, I think this court has left open a place to remove immunity for those who knowingly violate the law.

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REBUTTAL

ENOCH: Can't hear question

LAWYER: I was not the trial counsel, but I do not believe the record other than the raising of official immunity which was raised they did not. It was submitted. And again where was the breach of the duty and where was the duty owed.

Getting back to one question that is in the record on vol. 6, page 165. Mr. Berry, and I think this is conclusive, he testifies we had a couple of legal decisions to pass on. I mean I had one theory of what the law was, and Mr. Boulder had another, which was the other attorney. And the board apparently decided to side with Mr. Boulder. I have no problem with that. Lawyers disagree all the time. But I felt it was in their discretion and they had the right to make whatever decision they wanted to make.

HECHT: Couldn't hear question.

LAWYER: As far as absolute immunity, again, I think they should be entitled to that. And again when the question was whether or not is there an animus? If you have the requirements of the permit and you need A, B, and C, and you just arbitrarily, capriciously deny it, then you as a voting member are acting outside the course and scope of your jurisdiction. But as in this case where there is an argument that there was no 80 feet, there wasn't that 80 foot frontage.

HECHT: Can't hear question.

LAWYER: No. There's a difference between as the council was saying there's a difference between abuse of discretion from a legal standpoint and saying something is acting illegally. Otherwise every TC would be said to have acted illegally because they've abused their discretion. They had a legal theory and the CA held for Mr. Champion.

HECHT: Can't hear question.

LAWYER: That is was an abuse of discretion. But that does not make it illegal. That makes it just as when the CA will reverse a TC based on an abuse of discretion, it doesn't make it an illegal act. It makes it wrong judgment. And that's what we try to point out in the brief. There's a difference between logically judging something and saying you did wrong. You could logically be wrong in a legal argument, but that doesn't make your judgment illegal.

HECHT: If the court in that case had held that the board's decision was arbitrary and capricious would there then be personal liability of the board?

LAWYER: No. It would be not only arbitrary and capricious but if you voted - it would be an illegal vote. But that's not an illegal vote if indeed you have an arguable premise which they did in this case. A split zoning decision. And in fact if you look at the CA's decision they had to cite a Massachusetts case, not a Texas case, the law was not clear cut in the State of Texas and they cited a Massachusetts case regarding split zoning as to why they were going to allow the building permit to issue.

O'NEILL: If the executive session violated the open meetings act, would the case be different?

LAWYER: Yes. That would be a violation of the law.

O'NEILL: And they put forth a reason why this session was illegal.

LAWYER: The CA has held consistently as well as the TC level that it was not an illegal meeting. There was no vote taken. They had the right to meet with their attorney. In fact when you look at that executive session, they were talking about the options as to who was going to sue us or is anybody going to sue us. And that's why Mr. Berry said you can go either way.

And one other point I would like to bring out is §101.106. We're looking at the city of a taking. There's no longer been a taking. The very actions that these individuals did, the city has been cleared off as far as §101.106. And that should be a bar in and of itself as to these individual members.

OWEN: Couldn't hear question.

LAWYER: Yes. As in Judge Littlejohn's order, the word official immunity, because there is a motion to strike some of the pleading. And in the final analysis the city did plea official immunity. And as I mentioned in J. ____ opinion in Baker v. Storey, official immunity encompasses absolute immunity as well as qualified. So this is not a case like Davis v. City of San Antonio where sovereign immunity was just not pled at all, where official immunity was pled and it has two components. So yes it was pled.

WAINWRIGHT: Once again what was it about Judge Littlejohn's order that made absolute or sovereign immunity applicable here?

LAWYER: There was a motion to strike some of the pleadings they amended late within the 7 days. And the final order that she issued, the other issues that were stricken out of the first amended answer accept for sovereign immunity, official immunity and condition precedent. Now our argument is that official immunity encompasses both legislative and qualified as J. ____ stated

in Baker v. Storey.

WAINWRIGHT: I understand J. Littlejohn's order. Were the words absolute or sovereign immunity ever used in your client's pleadings?

LAWYER: No.

OWEN: Can't hear.

LAWYER: As far as the argument in the jnov when I became involved in the case, that is what was argued, prior to her granting the jnov.