

ORAL ARGUMENT – 12-04-02
02-299
CATALINA DEVELOPMENT V. EL PASO COUNTY

TAPE IS HARD TO HEAR AT TIMES

SKIPWORTH: This case is a prime example of why the court should rule that El Paso county has waived its immunity from suit because of its conduct in this case. The case is distinguishable from Federal Sign. And the open question that I maintain is still open as a result of the Federal Sign decision is also distinguishable from Travis County v. Pebble, and TNRCC v. IT-DAVY that were recently decided by this court. And also one unique thing in this case that I have not seen in the record or referred to in the other cases is that _____ backdrop of this case is unique because of what went on to prevent the transfer of this land to my client.

The Federal Sign case is distinguishable because this case is a suit against a county. The legislature in its recent enactments has not included a county within the definition of a unit of government under ch. 2260 of the administrative procedures for breach of contract cases. The legislature in defining state agencies for the purposes of the Civ. Pract. & Rem Code §107 and 109 in the definitions and 2151.002 excluded, not specifically expressly excluded, but did not include counties in the definition of a state agency.

The claim is also distinguishable from Federal Sign because the claim was for specific performance for damages which brings it within the discussions in Federal Sign of a mutuality of obligation, a mutuality of remedy.

Also distinguishable from Federal Sign because the claim is for the purchase of land and not for the sale of goods and services. In this instance my client would have been paying to the county a substantial sum of money for the land that he wanted to purchase and for which he won the bid.

Lastly, this case is distinguishable from Federal Sign because my client was willing, able and ready to close this sale and he had performed all he could do. He fully performed under the contract, and had deposited with the title company enough money to pay for the land for his bid and for the closing costs.

The case is also distinguishable from Travis County v. Pelzel and the IT-DAVY case because in each of those cases both parties to the contract have totally performed on the original contract itself. In the Federal case there was a dispute over the 21-day delay and of what had caused that delay. That was within the confines of the contract. Likewise, in the IT-DAVY case there was a dispute concerning the amount of money that was due to IT-DAVY for a change in the conditions. But TNRCC had offered a great sum of money to try to resolve that. In both of those

cases the governmental entities were not trying to avoid their responsibilities under the contract that they had with a private party. And I think that's what distinguishes this case from those cases.

O'NEILL: But that's just a matter of semantics. The parties in those cases would have said they were trying to get out of their obligations under the contract.

SKIPWORTH: I understand. But what I'm saying is is that in those cases both governmental entities had paid pretty good sums of money under each of their respective contracts. And in the IT-DAVY case at least was offering to pay even more. There was a contractual dispute that arose out of the contract itself.

O'NEILL: Well those were service contracts which are a little bit different than what we have here. It strikes me that this is just a straight breach of contract case. Whether somebody's performed or not doesn't seem to fit the scenario.

SKIPWORTH: You are correct. It is a straight breach of contract case. A little bit different because it's involved with a governmental entity that of course is immuned from suit unless in this instance the county just waives its immunity from suit by its conduct.

O'NEILL: What conduct do you say waives the immunity in this case?

SKIPWORTH: The conduct has to do with the backdrop of the case, and that involves the county commissioners in their meetings of Dec. 1994 where there were political maneuverings that was going on at this time. There was an outgoing county judge...

O'NEILL: I understand the factual backdrop. But it seems to me that the actions that you are relying on for wavier are the very actions that form the basis of the contract.

SKIPWORTH: I would disagree with that. I think the contract had been formed. The contract was formed when the county commissioners accepted my client's bid.

PHILLIPS: What about this vote to allow the county judge to sign. Are you alleging that that was an unnecessary step, an illegal requirement imposed, or was it a step that had to be done, that there was no discretion about it. They had to do it, or was it actually a real vote. If it's a real vote then how can the contract be...

SKIPWORTH: I wouldn't characterize it as illegal. I would characterize it as unnecessary. The county judge had a ministerial act to sign the deed. In the first appeal of this case in the El Paso CA, that was one of the discussions in that case. In fact that was a very important discussion. Under §263.07 of the Loc. Gov't Code it adopts procedures that a governmental entity is to follow in order to sell land. In the first appeal the CA, which incidentally this court denied review on, in that case the court discusses that 263.07 of the Loc. Gov't Code allows the county to adopt more stringent, more expansive, more broad types of rules and regulations and procedures for the sale of land. But

in this instance the county had failed to do that. There is no evidence of any type of procedure adopted by the county of El Paso to sell real estate.

PHILLIPS: Well why wasn't this _____ illegal?

SKIPWORTH: I guess you could call it illegal. My thought of illegal is that it violates the statute. I'm just saying this procedure just comes out of nowhere.

If the county commission had voted no, of course I think we would be in the same boat we are right now. But my position is that under the law, and in that first appeal the CA held that §272.01 of the Loc. Gov't Code was a default provision. It had looser requirements for the transfer of land.

ENOCH: The question is, is there a law that requires the commissioners to vote to authorize the county judge to sign the deed?

SKIPWORTH: No. And there was no procedure adopted by El Paso county that required the commission to authorize the county judge to transfer the land.

ENOCH: So the statute had been fully complied with for the purposes of transferring title of the land.

SKIPWORTH: It had. And I believe that was the conclusion of the El Paso court in the first appeal.

Not to be forgotten is that the new incoming county judge, and this is all in the record, got two of his allies on the commissioner's court to file a suit for an injunction and a TRO to stop the county commission from voting to authorize this transfer of the land.

O'NEILL: But you have not argued that is the basis for waiver have you?

SKIPWORTH: I believe that's in my brief. These actions that took place have prevented these votes to authorize the transfer of the land. The TRO was granted on Dec. 20 which cancelled the meeting scheduled for Dec. 23; the temporary injunction hearing takes place, and is taking place on Dec. 28 when another meeting was to be held. And what's important here is that on Dec. 30, the district judge ordered a temporary injunction from the bench. That was reduced to writing shortly after the new year and then the new county judge and his allies on the commission dismissed or nonsuited their case. The new court obviously didn't transfer the land, and that's why we are here. And it's because of these actions that I think that caused this case to be much different than any other this court has looked at and would justify this court in ruling that El Paso County waived its immunity from suit because of its conduct.

ENOCH: You're argued throughout that the earnest money was deposited by the county

and kept by the county, but now you concede that they didn't keep that earnest money.

SKIPWORTH: They kept it for 5-6 years until I pointed out to the TC that the county still had the money. And of course the reason I did that is to try to establish the waiver by conduct with the trial judge. And the trial judge initially thought well that was a pretty good point. After that hearing on a motion for summary judgment we are here on today, the county did return the money with interest.

ENOCH: The lawsuit _____ had been started?

SKIPWORTH: The first appeal had been completed.

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RESPONDENT

HUGHES: We believe the CA's decision should be affirmed for four reasons. The first is, is that cashing the earnest money was simply part of the contract for omission. The second is, they accepted some benefits under a contract was not waiver by conduct. Third, the ruling in this case or the result in this case is consistent with Travis County V. Pelzel. And fourth, the bid statute that applies in this case did not require the county to complete the sale.

Earnest money is a little different because of it is money paid up front to essentially seal the deal and bind the seller to the contract for sale. So we believe because it was an earnest money that was cashed, this \$5,000 check, is that that was simply part of the contract formation, that is the formation of the contract for sale and binding the parties to the contract for sale. So if that is true, then this case falls under the Federal Sign rule that mere contracting is not waiver by conduct.

Also what this court said in Little-Tex also was that acceptance of benefits under the contract would not be considered waiver by conduct also.

HECHT: But you can't just confiscate somebody's money and then _____ the deal altogether. And we've had cases where somebody who's arguing about how much was done, did they do it right, and so on, I don't recall a case where a governmental unit just took the money and nothing happened.

HUGHES: Right. That's a good point. This court has pointed out in its prior cases that one reason to leave legislative control of sovereign immunity or leave that to the legislature is it allows the governmental unit to reconsider prior policy that may be ill advised obligation. And I think that is essentially what happened in this case.

HECHT: But they still can't keep the money.

HUGHES: Correct. And that is the main reason that the money was repaid with interest albeit years later. The result in this case is very consistent with Travis County v. Pelzel.

JEFFERSON: Let's say they had kept the money until today and forever more. You just take the position we're never getting it back, and you can't sue us for it. Do you think that would be waiver by conduct?

HUGHES: I don't believe so. If we look at the Pelzel case, essentially what happened there is Travis county got the building, occupied the building and yet didn't pay \$5,500 of the agreed purchase price. So essentially what this court said in Pelzel is you do not have a cause of action for that \$5,500 plus the \$130,000 in alleged _____ damages. It could have been proved that they were wrong. In essence there was no relief for Travis county keeping \$5,500...

JEFFERSON: Why shouldn't we reconsider this whole document. If you're saying that a state or a county can simply keep earnest money no matter what the amount for services and walk away, why shouldn't we reconsider this whole document? That seems fundamentally unfair. It may be unconstitutional.

HUGHES: I think what we have to look at is this. That by allowing governmental control over this, letting the government decide when the suit can be brought, it's allowing new officers that come in to reconsider these obligations.

JEFFERSON: Why would a new officer reconsider if financially it makes much greater sense to keep billions of dollars that you sort of stole from contracting _____?

HUGHES: It would be essentially protection of the taxpayers. The value of the property was originally determined by an old GLO appraisal. In the first case there is evidence that there was a subsequent appraisal showing that the property was actually increased in value, or was worth 11% more than the \$2.5 million that was bid. So in essence what was happening here was the protection of the taxpayers because this was taxpayer property. And so that was a good reason to have the legislature or the governmental body deal with these issues. And the other limiting factor that we come up with is these are politicians that have to be re-elected and I think that could be a real limiting factor on what these politicians do.

JUDGE: Did Catalina ever make any formal demand for the county to return their \$5,000?

HUGHES: I believe how it developed was the demand did not come until 5 years down the line in the litigation when it was pointed out to the court that the county had cashed the check and still held the funds. And at that time is when the money was returned.

O'NEILL: What's the status of the property now?

HUGHES: The property is still held by the county. It's not been developed. In actuality, there have been some highway improvements beside it, so it's probably substantially increased in value at this point. It has become more valuable possibly to the county to keep it for themselves.

In the first appeal of this case what the El Paso CA determined was that the bidding statute §272.001 applied to this case because 263, which was mentioned earlier, the county had not adopted any specific procedure on bidding out for the sale of land. 272.001 is rather unusual because like some bidding statutes says you don't have to accept any bids that come in. But it goes further and says this statute does not require a county to complete the sale. And I think that makes a big difference in this case. In Pelzel there was a liquidating damages clause. So at least there was a colorable argument that Travis County had some colorable right to withhold this \$5,500 in delay damages.

In this case, because 272.001 the bidding statute applied and said that the county did not complete the sale there was a colorable right for El Paso county to refuse to complete the sale. So I think that brings this case within Travis County v. Pelzel because both Travis county and El Paso county had some right upon which they could do what they did. This court has said in prior cases that...

HUGHES: This court has noted that legislative control I think essentially allows - it's a protection of the public first type of argument allowing legislative control in these cases. And I think this reflects on this bidding statute that says you don't have to complete the sale. I think what the legislature was doing with that bidding statute was saying we're imposing these obligations when you are going to bid out the land for sale, but we're not saying that you have to complete the sale. That is we're giving you this flexibility even though we're imposing these procedural obligations in the bidding.

I think what the legislature has done in enacting this statute it has done the balancing. It has said we're going to give you the flexibility not to complete the sale and thereby protect the public first, and we're looking at there may be possible downsides, but we have come down on the side that we're going to say you don't have to complete the sale and we're going to give you this flexibility.

HECHT: By completing the sale the only thing left here was to sign the deed?

HUGHES: That's correct.

HECHT: So sign the deed, cash the check that was all that was left?

HUGHES: Exactly.

PHILLIPS: Under what authority does the commissioner's court have the right to make the decision not to _____?

HUGHES: The record doesn't show that. I haven't found a statute that requires that, that the county judge has to be specifically authorized by the vote of the commissioners to do that. Although it was customary in El Paso county to do that.

O'NEILL: Your argument is a breach is a breach regardless of how the breach occurred.

HUGHES: Exactly. That this is a breach of contract case. There was a breach and under this court's prior decisions this fits well within those decisions. And in this court in the numerous post-Federal Sign cases, the state cases that this court has done, this court has continually deferred to the statutory administrative process that was set up. I would suggest that this court should defer to the legislative decision in this bidding statute that there was no statutory requirement to complete the sale.

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REBUTTAL

O'NEILL: There's a fundamental difference between when the government acts as the buyer versus when the government acts as a seller. In this situation which is unique among our sovereign immunity cases where the sovereign entity is the seller of sovereign land that this is the particular area where immunity should apply. In other words if you have officials who agree to sell a piece of property that's for less than it may be worth, isn't that the whole purpose of the entity to allow administrations to show contracts that do not benefit the public. Is there any testimony by any detrimental groups that this plaintiff was injured in anyway or out of pocket anything other than earnest money?

SKIPWORTH: There probably is. What's unusual in this record is that there is a stipulated set of facts. It's several pages. All various facts are laid out. All the meetings of the commissioners were laid out.

In this case this land was not sold for less than fair market value. It's very clear from the first appeal that there was...

O'NEILL: But that's not a fact driven question as to whether the governmental entity's decision is _____ what the policy was behind it to premise that a new administration should be able to show contracts that are no longer fair for the public. Why does this not fit that policy?

SKIPWORTH: I guess there has to be a determination that what's good for the public is not good for the public. The county commission decided that they wanted to sell this land that they had received in a trade from the GLO. They had an appraisal from the GLO as to what this property should be worth, and they sold it for that, but they didn't complete the sale. That was the old administration. The new administration comes in and this particular county judge had ulterior motives as to why he wanted that land. It wasn't for the public good. It was for his good.

O'NEILL: Let's presume it was for the public good. Let's presume that the newly elected official thought that it was being undersold. Isn't that the perfect situation for sovereign immunity to apply?

SKIPWORTH: I would have to adopt J. Enoch's philosophy. A contract is a contract. That's the way I feel about it. I don't think that this governmental entity because of what went on before the end of the _____ should be allowed to get out of the contract. I think they would have waived their immunity to sue.

O'NEILL: The arguments been made that the bidding statute did not require the county to complete the sale.

SKIPWORTH: I disagree with that. Now that particular provision in the statute in 71 is advisory. That doesn't necessarily get them off the hook. It doesn't say county you can breach your contract and you don't have to sale anything if you don't want to. I don't believe that's what the purpose of that is. The purpose of it I believe would be that if a procedure had been adopted pursuant to one of those two bidding _____ not been _____, then I think that the entity would be within its rights not to complete the sale. Not just to simply breach the contract.