ORAL ARGUMENT — 11/10/99
98-1238/94-0141
KERRVILLE STATE HOSPITAL V. HERNANDEZ
and
TEXAS PARKS & WILDLIFE V. GONZALEZ

PARSLEY: At the heart of this dispute is the doctrine of sovereign immunity and the erosion that it will undergo if the lower court's opinion is left unchecked. This court should stop that erosion by reaffirming the well-settled doctrine that sovereign immunity could only be waived by its clear and unambiguous express language or clear and express legislative intent.

GONZALES: Haven't we already eroded that doctrine?

PARSLEY: No, although *Barfield* said that the language did not have to be crystal clear. What *Barfield* did and what it found was so close to the actual language in the act being a waiver of sovereign immunity, that it compelled the finding that immunity had been waived. Which is far different than what the CA did here, which was decide that since they couldn't figure out really any other purpose for the language other than to waive immunity, then immunity had to be waived. It didn't look to find a clear and unambiguous legislative intent apparent on the face of the statute, which is what this court did in *Barfield*.

O'NEILL: What other purpose could there be for art. 8307(g)(c), where they say that the purposes of the anti-retaliation clause and _____ shall be considered the employer?

PARSLEY: There are two possible readings of that _____. First as this court said in *Barfield* citing its prior decision in *Duhart v. State*, that that language could be there in the event that a future legislature waived immunity. The fact that it was incorporated by reference is not sufficient to show that immunity had been waived. The definition of employer as the individual agency, this court held in *Barfield* doesn't also show an intent to waive because the word "employer" has no meaning under the anti-retaliation act. The word "person" is the word used in the anti-retaliation act. And person can be much broader than employer. It could be a coworker or...

O'NEILL: And how can we sense by case law sort of define that with a _____ employer is that the entity that you're looking at under that statute?

PARSLEY: That is what the CA did and that was really their error. Because in order to comply with *Barfield* and find clear and unambiguous legislative intent, you have to look at the face of the statute. The CA looked to the case law to see if the employer would be a person. And actually in doing so misconstrued the case law to some degree, but just the fact that they looked outside the statute to an outside source and had to find the necessary nexus to waive immunity shows that the statute is ambiguous on its face and that ambiguity is fatal to the claim of waiver.

The second possible reading besides the *Duhart* exceptions, which is the preservation of a claim for which immunity could be waived in the future, is the notion that the language could be there as a definition in the event a worker sought and secured permission to sue

from the legislature. So there are two other possible readings of this language that prevent a finding of waiver from the face of the statute.

It's also important to note that these alternative readings were not possible in *Barfield*. In *Barfield* this court was compelled by the election of remedies provision, which allowed a employee of a political subdivision to sue the political subdivision either under the whistleblower act or under the anti-retaliation act. The court rightly said, Under the whistleblower act immunity is clearly waived. It's waived by the statutory language of that act. The legislature could not have possibly intended to give an employee a choice that really wasn't a choice at all: a choice between a cause of action for which immunity has been waived and a cause of action for which immunity has not been waived.

When faced with that possibility, the court said, it's clear that the legislature waived immunity under the anti-retaliation act. There is no way that it would be even plausible that the legislature had given an employee those choices in the event it waived immunity in the future or in the...

PHILLIPS: Unless the employee wanted to go to the legislature.

PARSLEY: Or get permission to sue.

PHILLIPS: I don't understand why that argument could not have been applied in *Barfield*?

PARSLEY: It couldn't have applied in *Barfield* because on the face of that statute it said, an employee may sue either under this statute or that statute. And the reasoning applied by the court in *Barfield* was that that would remove the requirement that they would have to go get permission to sue. But the language in and of itself was so close to saying immunity is waived for anti-retaliation claims that immunity was waived. It was really unambiguous when you looked at the face of it or else that provision would have had no meaning in totality.

If you look at the spectrum of cases of waiver of sovereign immunity clear legislative language immunity is waived certainly on one side. What the CA did is further down the spectrum. They really did not approach the statute from the standpoint that immunity is preserved unless waived. *Barfield* is up next to - as close up to the absolute express waiver of sovereign immunity that you can get without the express language. But that's not what the CA did here.

There are two other facts that show the ambiguity in the statute. One of them I've already discussed, which is the fact that the court looked to the outside case law to find the necessary nexus for waiver. And that shows that the statute is ambiguous on its face.

HANKINSON: What about the language in the statute that talks about that there can be no suits beyond the causes of action and damages that are provided for under the tort claims act? That's the second part of the CA's analysis.

PARSLEY: It is. And to the extent that the CA held that this court found that that language

indicated a waiver of immunity in *Barfield*, the court was wrong. The court did not reach that conclusion in *Barfield*. It found the language to be troubling, but it did not find it to create an intent to waive immunity.

That language has been looked at more or less as just a limitation. The 1st CA in Houston has construed that language as meaning, In the event a worker should opt out of the worker's comp. system. What the legislature put that language in there for was to prevent them from being able to bring a cause of action for personal injuries that wasn't contemplated otherwise by the tort claims act. So that language is really a limitations as opposed to an express intent to waive sovereign immunity.

Another fact that shows the ambiguity in the statute is the fact that the SA CA has looked at this question and said, that this act waives immunity. Yet, three other CA's have looked at the exact same issue and the exact same question and have held that immunity is not waived.

GONZALES: Is there any evidence at all in either the committee hearings or the floor debate, any statements by any legislators that they understood or believed that in adopting the state applications act, that they were waiving immunity to sue?

PARSLEY: Let me preference my answer by saying, again going outside the statute, the express language of the statute indicates the ambiguity of it. So really looking at either case law or the legislative history is not appropriate.

GONZALES: But given that?

PARSLEY: No. The legislative history is inconclusive. There is really nothing in the 1981 amendment, and in 1989 is when they rewrote the entire worker's comp. act through the first regular session and two called sessions. And there is nothing that's conclusive on the matter.

HANKINSON: Let me take you back to that language we talked about just a minute ago. You said that *Barfield* really didn't base its decision on comparable language in the statute that was being interpreted there?

PARSLEY: No. What I meant to say was that *Barfield* didn't hold that the limitation of the tort claims language indicated an intent to waive immunity. The court did construe the language and applied it to the political subdivisions act. But it did not say that that particular provision indicated an intent to waive immunity like the election of remedies provision did. The court was persuaded in the final analysis by the election of remedies provision.

Three other CA's have looked at this issue and determined that waiver was not intended by the legislature. The San Antonio court stands alone and has misapplied this court's holding in *Barfield*.

There are important policy reasons underlying sovereign immunity that need

to be considered when looking at waivers. Sovereign immunity is not solely based on the notion that the king can do no wrong. What the legislature is doing when it waives sovereign immunity or allows for people to bring claims is it is creating a balance between allowing injured citizens to bring their claims against the state treasury for which there are limited resources. The legislature has to determine who should bear the burden and whether a particular burden should be spread.

In the absence of clear legislative intent to spread this burden that anti-retaliation act claims are the type of claims that in the balance the legislature has determined should be compensated, that immunity has been preserved.

The bright line test from *Barfield* is that it must be unambiguous language and unambiguous legislative intent apparent from the face of the statute. This court should reverse the lower court and hold again as it did in *Barfield*, that this is the test. For these reasons, petitioner respectfully pray that this court reverse the CA and render judgment in favor of the petitioners.

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RESPONDENT

HOWELL: I represent Rose Fernandez in *Kerrville v. Fernandez*. I would like to begin by addressing a letter brief that was filed by the State last week discussing several SC cases and suggesting that the SC cases readings of sovereign immunity and waiver would show the CA below in error.

GONZALES: Why isn't it a reasonable interpretation of the statute that the legislature may have intended. Well once we pass a resolution allowing someone to sue us, then we now have parameters in terms of cap on the damages, we now know who you can sue as an employer?

HOWELL: I think that is a reasonable interpretation that they've got the statute saying that this is the defendant in this type of lawsuit and these are what your damages in this type of lawsuit are going to be limited to.

GONZALES: But why can't we assume that the legislature put those in place with the understanding that they would still need to get permission to sue?

HOWELL: I think because of the language that the Fernandez court looked at, where it designates the state employer as the individual agency. I think that language raises the issue of waiver, and because of that there is no need to give permission to sue. I think it's express or as the Fernandez court, I think correctly held, there is no other reasonable construction that can be applied to that statute or any other purpose for it designating the state agency is the individual in a chapter 451 suit unless they intended for people to be able to sue them. I think that obviates a need for permission as the statute is written.

O'NEILL: But the legislature in other statutes has clearly expressed when it wants to waive sovereign immunity. So it knows how to do that. Why didn't it just take the extra steps here and put a waiver provision in it?

HOWELL: I don't know why it didn't take the extra step to expressly say, We are waiving immunity anymore in the state applications act than it did in the political subdivisions act except to say that perhaps in my opinion I think the language designating that state agency as a defendant is so clear they probably felt it wasn't necessary to also go one step further and say, And by the way because this is a defendant and this is the cap on damages, we are waiving immunity.

O'NEILL: Would you agree that if there is an alternative reasonable explanation for that provision, which your opposing counsel has offered, that that would create an ambiguity that would preclude a finding of waiver?

HOWELL: Well I would agree that there is an ambiguity. It don't know necessarily that that would still leave an interpretation that there wasn't a waiver. I think the reasons they gave, I guess the ones you are talking about would be the possible future cause of action, which I think is pretty much limited to the *Duhart* opinion, because the court in that case was just trying to think why was give an explanation for it. I think here again that language gives them the permission and the right to bring a suit under chapter 451. And I don't think there is any ambiguity. I don't think you need to start stretching to try to find reasons of why this might apply or this might apply in different contexts.

I think what we have to look at is the *Barfield* opinion and what we have to look at is how we are going to frame this issue. And going to this letter reply, the SC cases they cite, I think the US SC cases *Fernandez* and *Barfield* are entirely consistent for they say that an express waiver must be found in statutory language or "such overwhelming implication from the text as will leave no room for any other reasonable construction."

PHILLIPS: If the legislature was trying to make this so crystal clear why did they use the term "employer" when the anti-retaliation act uses the term "person?"

HOWELL: I think as the *Fernandez* court observed which person is the employer in a state employee case. The state or the state agency? It was to designate "this is the person who is the employer, who is the proper party defendant in this lawsuit" rather than the state itself. I also think one thing that needs to brought up here, which I think I mentioned in my response and certainly in my brief in the CA, is that if we look at the definitions of employer and state under each of these two acts, the political subdivisions act and the state applications act, there is different definitions. The state applications act adopts a definition of employer from the definitions set forth in the beginning of the Labor Code in 401.011, which defines an employer to include a person who has a contract to hire. So that same definition doesn't exist in the political subdivisions act which under *Barfield* might have raised a question as to whether or not using the word employer is the same as using person. But I think if you look at the state act it's different, it adopts a different definition of employer, a definition of employer that defines employer as a person. So I think the definition is there. Why they would use the word "employer" instead of "person", the legislature perhaps felt because of those definitions it was unnecessary, or perhaps it thought it was clear enough as it was.

I think again going back to the holding of *Barfield*, we need to look at how we frame these issues. The three CA's that found different than *Fernandez* and as the state argues -

frame the issue in terms of whether or not this is a express, clear and unambiguous waiver. But there's a second part of that equation, and the second part of that equation is what the *Barfield* court relied on, and that is that there is no other reasonable doubt as to what must have been intended. Which is just what these SC cases, the state was relying upon says: Such overwhelming implication from the text will leave no room for any other reasonable construction. I think *Barfield* almost tracks that language by saying, they look to see if there is no room for any reasonable doubt as to the purpose of the statute. I think if you look at 502.001(b), it points out: for purposes of this chapter, and I think this is important to, and chapter 451, the individual state agency shall be the employer. There's not a similar provision in the political subdivisions act, which I think addresses their argument that the definitional provisions of these alone don't rise to immunity. But this is something more. These cases where immunity is found is something more than what's in the political subdivisions act. It specifically says, for purposes of this chapter and chapter 451, the individual state agency shall be the defendant in the lawsuit. I think that's more than just a definitional provision. There is no counterpart in the political subdivisions law.

I think another argument that needs to be address, especially with regard to the other CA's opinion, the state seems to argue that the only way we can ever find a legislative waiver is if there's an election of remedies provision. I don't think the court in *Barfield* found that the language of the election of remedies provision is what expressly and clearly waived immunity. It was just that if its inclusion, the fact that it was included, there was no other reason for including that if a person didn't have a choice whether to sue under either statute; therefore, they must have the right to sue. And the same analysis applies in the state applications act. It doesn't have to be an election of remedies. It just has to be language that leaves no reasonable doubt as to its purpose. And I think the *Fernandez* court correctly held leaves no reasonable doubt as to its purpose: it's to designate the individual state agency as a defendant in such a suit, which leaves no other inescapable inference(?) of waiver. If there wasn't wavier why would it be in there? So the fact that there is an absence of an election of remedies provision in the state applications act doesn't mean that there's also not a waiver. I don't think the *Barfield* court found that an election of remedies is necessary to show waiver. It's just that it was there. Why else would it be there if there wasn't a waiver?

I think that's the key thing about *Barfield* is that it is addressing this kind of two ways of looking at a statute: Is it clear and express? Well if it's not, well does it leave any other reasonable construction or any reasonable doubt as to its purpose? And it doesn't.

In fact, I think when you look at the language of the state applications act there is really a much stronger argument for waiver _____ than there is in the political subdivisions act considered by *Barfield*. Because of this provision designating the individual as a state agent, as well as the cap on damages and the inclusion of the tort claims act, which I believe was included in the 1989 act.

HANKINSON: Well how do you explain, I know in *Barfield* the question was left open, the language in the state applications act, There shall be no suit beyond the actions authorized by the Texas Tort Claims Act? Do you remember in *Barfield* how that was left open?

HOWELL: Yes.

HANKINSON: What does that mean?

HOWELL: I think the *Barfield* court - I guess that is kind of troublesome language from the standpoint that an action under the tort claims act would necessarily have to require use of motor driven equipment and tangible personal property. And I think the *Barfield* court in a way did answer that question. They said, Surely the legislature didn't intend to limit worker's comp. benefits to just these types of actions, because obviously there is other ways employees could be injured on the job other than by the use of motor driven equipment or tangible personal or real property. It just did not make sense for the legislature to limit worker's comp benefits to just those...

HANKINSON: But this is a limitation on the anti-retaliation cause of action isn't it, so then it even makes even less sense?

HOWELL: I think the point of the *Barfield* court was on that is that we can't limit the meaning of this waiver to just those circumstances of the tort claims act when looking at all of the worker's comp act.

HANKINSON: So you don't know what this means then either? It doesn't make much sense?

HOWELL: I don't think it makes much sense. I did have one of these legislative intent services look up a lot of the legislative intent on this and the house floor debates, and there isn't much conclusive. But one thing I did notice and I could provide this to the court was that that was what they were concerned about when they were talking about all of these actions was the cap on damages. And they were concerned that governmental units were going to get hit with damages in excess of those caps in exemplary damages. And that's what the concerns that were voiced amongst the different congressmen discussing it showed. How conclusive that is in this particular case, I don't know. But maybe it would shed some light on that if I could provide that to the court.

I think when we get down to it and we talk about public policy, there is no reason why the legislature would extend the protection of this statute to municipal employees and not state employees.

BAKER: Maybe it depends on whose money it is that would be awarded as between a state defendant and a municipal defendant, and they might have less regard for the municipalities because it's not state money.

HOWELL: I guess that is a rather self-serving reason. I read that legislative history and I didn't give it to this court because it doesn't make much sense. I think a lot of these congressmen when they talk about - when they throw out terms like causes of action, they don't really know - they are not speaking of a specific cause, they don't really - I think what they are thinking of is just the cap on the damages. And if you read the debate on that, I think that's what's clear, that was the main concern was the cap on damages. I think it was assumed all along that these types of suits could be brought. I think by putting the language they did in there limiting damages and naming the defendant perhaps the legislature felt it went without saying, By the way, we are also waiving immunity. I think from the language there there was no other reason why it would be there, and

that's what they intended to do.

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REBUTTAL

PARSLEY: With all due respect to opposing counsel, the respondents have given this court no clear legislative intent and no clear statutory language by which immunity could be waived. But his argument does point out the confusion that both the lower court and the respondent has about the test. They're confusing the putative purpose test that there could be no other purpose for the statute with the *Barfield* test, which is there is no other reasonable construction for the language. That is really where the confusion lies in the CA's decision. The court looked at the language and said, Well it looks to us like they meant to waive immunity, so we're going to say that they did. But they didn't look to *Duhart* or to *Barfield* and the rejection of the putative purpose argument and say, Is there any other reasonable construction of this language even if it's not entirely satisfactory, but if they exist, then that is fatal to the waiver claim?

ENOCH: The legislature in a case I think this court recently decided gave permission for a lawsuit to be brought, but made a point that there were certain damages that the plaintiffs could not recover, and that was a part of the legislative permission to sue. If the legislature thinks it could do that, then what does that to your argument that, Well really this statute was not a waiver of immunity; this statute was just sort of a statement of what would happen if as and when some point in the future the legislature might permit some plaintiff to sue under these circumstances? I mean they could do that right in the permission language of their resolution.

PARSLEY: That's right. And actually the statute _____ remedies code provides that a waiver of suit under the permission to sue statute does not waive liability. But what it would mean to have the definitions and to have the cap is that the judgment that would be entered by the court would comply with that statutory language, which then they could take the judgment to the legislature and get the appropriation for it. It would really be there more for the court for the purposes of the judgment and the lower courts rendering the decision as opposed to what would actually be the waiver of liability.

HANKINSON: Is it really a reasonable construction to think that the legislature anticipated that individual worker's comp claimants would come to the legislature seeking a resolution of permission to sue?

PARSLEY: It is as reasonable a construction as the *Duhart* explanation that they placed the cause of action there.

HANKINSON: And that the legislature would make individual determinations based on individual claimants on whether or not they should be allowed to sue?

PARSLEY: Yes. It may not be the most...

HANKINSON: Why is that reasonable?

PARSLEY: It may not be a very satisfactory answer, but it is a construction of the statute, because that's the way...

HANKINSON: Well you said it has to be a reasonable construction of the statute. Why is it reasonable to think then if the legislature would make individual determinations that would result perhaps in non-uniform application of the anti-retaliation statute to persons making worker's comp. claims around the state?

PARSLEY: It is reasonable in the balance, because the legislature may have determined that it was not likewise reasonable to waive immunity for all claims. And that the legislature wanted to retain the control to determine which claims and which circumstances against which agencies would be viable or should be brought and compensated.

PHILLIPS: Don't you think there's a distinction in *Duhart* where its purely incorporating another statute and this scheme where there is an incorporation and then there's this express statement about what the terms may be?

PARSLEY: Actually that definition existed in *Duhart*. The dissent points out by Justice Campbell. He says, that the incorporation of the statute plus the definition of the employer as the department would compel him to believe that immunity had been waived. So *Duhart* was really very on point especially including the idea that it had the definitions as well.