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Supreme Court of Texas.
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION, Petitioner,
v.
SIERRA CLUB and Downwinders at Risk, Respondents.
No. 00-1145.

November 6, 2001.

Appearances:
Idolina Garcia McCullough, Office of Atty. Gen., Austin, TX, for
Petitioner.
Stuart N. Henry, Henry & Levin, Austin, TX, for Respondent.

Before:

Thomas R. Phillips, Chief Justice, Priscilla R. Owen, Harriet
O'Neill, Wallace B. Jefferson, Xavier Rodriguez, Nathan L. Hecht,
Deborah Hankinson, James A. Baker, Craig Enoch, Justices.

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PETITIONER

JUDGE: Thank you. Be seated. The Court is ready to hear argument from petitioner in Texas Natural Resource Commission v. Sierra Club.

SPEAKER: May it please the Court. Idolina Garcia McCullough will present argument for petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF IDOLINA GARCIA MCCULLOUGH ON BEHALF OF THE PETITIONER

MS. MCCULLOUGH: May it please the Court. The rule established in Dubai is that a district court subject matter jurisdiction is derived from the Constitution and not dependent upon whether the plaintiff complies with the statutory prerequisite. In a statutory cause of action against the State, the Court's jurisdiction is not derived from the Constitution but rather legislative enactment. The Court of Appeals overlooked the distinction between a court's power to hear a suit against the State and the legislature's power to allow to --

JUDGE: Miss McCullough, before you get to that argument, I need to ask you a couple of questions to clarify the record, if we could. The record -- I can't seem to find, does not include the TNRCC's order or its findings of fact and conclusions of law. But it looked like they were intended to be attached to various documents that are not part of the record that we have. Were those documents part of the record in the

trial court?

MS. MCCULLOUGH: No, your Honor. They were not. It's my understanding -- there's a footnote in one of our -- in the Third Court of Appeals, [inaudible] brief that references that information. And it says that plaintiff's burden to bring that record --

JUDGE: You know, it's the agency's burden --

MS. MCCULLOUGH: -- State's burden to introduce that into the -- well, the patient's burden to introduce that into record --

JUDGE: Well, but -- but what I'm saying is that in the record that we do have, there are several filings, motions, responses to motions, and they're referenced as exhibits, the TNRCC's order and the findings of fact and conclusions of law. Were those, at any point in time, filed even as attachments to anything in the trial record and that -- that we could get that from the trial court?

MS. MCCULLOUGH: I believe so, your Honor. I do believe so. The record that I have --

JUDGE: So, it may be part of the record in that light --

MS. MCCULLOUGH: -- is the same record that the Court has. And it just includes the petition, the answer --

JUDGE: Then help me so that we can ascertain the applicable statute here since I wasn't able to locate those documents. The permitting application that was made in this case was made pursuant to the Solid Waste Disposal Act.

MS. MCCULLOUGH: That's correct, your Honor --

JUDGE: Is that correct?

MS. MCCULLOUGH: That's correct --

JUDGE: And so, any appeal taken from the Commission's decision would also be taken under that Act.

MS. MCCULLOUGH: That is correct, your Honor --

JUDGE: And any reference to the Clean Air Act or the Water Code or anything else that relate to various findings and conclusions of law made by the Commission in connection with ruling on the permit under the Solid Waste Disposal Act.

MS. MCCULLOUGH: Correct, your Honor.

JUDGE: Okay. So, that's the statute we should be looking to.

MS. MCCULLOUGH: The Health and Safety Code chapter 361, your Honor

--

JUDGE: Correct. Under a proceeding against -- in -- in a permitting procedure under that particular statute, once the Commission has concluded its work and an appeal is taken, who is the defendant?

MS. MCCULLOUGH: You're with the defendant?

JUDGE: Yes, ma'am.

MS. MCCULLOUGH: Well, your Honor, we would argue that the procedural requirement in the APA which require that the Commission and the parties before the agency be served that that means that the parties and the petitioner would be the defendant.

JUDGE: Well, but we're talking at who -- who is, under the Solid Waste Disposal Act, who is a defendant in the trial court proceeding? Isn't it just the Commission?

MS. MCCULLOUGH: The Solid Waste Disposal Act doesn't specifically say that the Commission would be the defendant.

JUDGE: Well, if -- if the plaintiff in a lawsuit chose not to sue the Commission, they really wouldn't be able to move forward. Isn't that the usual procedure of a permitting proceeding in an administrative agency for the --

MS. MCCULLOUGH: Definitely, your Honor --

JUDGE: -- agency to be the defendant?

MS. MCCULLOUGH: Definitely. The Commission would be a defendant because the Commission has to protect the reasonableness of its order -

JUDGE: Okay. And there is no place else that I can find that would indicate that anyone else is actually a defendant as opposed to just a party to the proceeding.

MS. MCCULLOUGH: Well, your Honor, in the trial court, because the APA requires that the agency and each party of record before the agency be served with --

JUDGE: Well, it doesn't say service of citation and that's why I'm trying -- that's what I'm trying to get to is I'm trying to ascertain who, under the Solid Waste Disposal Act, is the defendant in a proceeding when the agency or the Commission's decision has been challenged. And wouldn't that be -- wouldn't that be the Commission itself?

MS. MCCULLOUGH: We would agree that the Commission would be a defendant. But we would also argue that the parties before the agency proceedings would also commit to the lawsuit as defendants --

JUDGE: So, that would --

MS. MCCULLOUGH: -- they must be served with citation.

JUDGE: Well, but that means that if there are other people who participated in the proceedings in the agency and they were protesting. They intervened to protest. Do you have to make those people defendants to the trial court proceeding?

MS. MCCULLOUGH: We believe that the Organic Act section 361.321 specifically says, "Search and citation must be accomplished within 30 days after the petition is filed." And construing that statute in harmony with the procedural requirement in the APA, we believe that each party at record before the agency proceeding must also be serve with citation --

JUDGE: So if a hundred people have participated in the administrative proceeding as protesters that they don't want the permit issued. They were not trying to get the permit issued. And the permit had issued -- then, if I want to sue, I have to then -- when I go to district court include them as defendants and I have to serve them with citation.

MS. MCCULLOUGH: We believe that that's what the legislature intended when it enacted this Organic Act that allowed the suit judicial review --

JUDGE: Okay. So -- so you think that all these people actually are indispensable parties to litigation. They have to be named as defendant. But we don't' -- we don't have anything in the statute that indicates that.

MS. MCCULLOUGH: The statute [inaudible] -- this Organic Act [inaudible] as to who must be served --

JUDGE: Okay.

MS. MCCULLOUGH: [inaudible]

JUDGE: No, I'm not talking about service. I'm talking about naming who the party is in terms of a defendant.

MS. MCCULLOUGH: Well, your Honor, it doesn't speak in terms of the defendant --

JUDGE: I know. That's why I'm asking.

MS. MCCULLOUGH: That would be a reasonable interpretation but if you bring the other party [inaudible] --

JUDGE: Okay. Then, my next question is, looking at the Administrative Procedure Act section 2001.176, part B says, "Unless provided by statute," why wouldn't the -- why wouldn't section

361.321(c), which is the service provision under the Solid Waste Disposal Act, be a statutory provision that would control in this case with respect to how and when service has to be accomplished.

MS. MCCULLOUGH: It does control, your Honor. But 361.321(c) does not speak to who must be served by citation. But it only speaks as to the manner of service --

JUDGE: Well, but service of citation is a term of art that means serving the defendant. Correct?

MS. MCCULLOUGH: Well --

JUDGE: You don't serve citation on anyone who's not going to be a defendant.

MS. MCCULLOUGH: Well, your Honor --

JUDGE: Correct?

MS. MCCULLOUGH: That is correct.

JUDGE: Okay.

MS. MCCULLOUGH: But we also think that the APA procedural requirement has always been construed in harmony with organic expert. They don't conflict with the Organic Act. And there is no conflict here. It just takes to who must be served by citation --

JUDGE: Well, but Austin Court of Appeals have said that its decision in McKillip is no longer the law and we've never interpreted 2001.176. And it uses the term service as opposed to service of citation. So, aren't those -- isn't that different language that would obviously -- the legislature had a different intent?

MS. MCCULLOUGH: The term service in McKillip, your Honor -- the term service in McKillip was specifically determined APA section 2001.176(b)(2). And that was construed to mean service by citation and afford us with the Texas Rules of Civil Procedure 99 through 107. Now, that their Court of Appeals has said that McKillip has been overruled in its entirety by Dubai. But specific statutory provision was not at issue in Dubai. So, whether McKillip --

JUDGE: Explain to me how we reconcile the legislature's use of different language in 361.321 that says service of citation and the APA section 2001.176 that says a copy of the petition must be served. That sounds to me like that's two different things.

MS. MCCULLOUGH: I don't believe it would be two different things.

JUDGE: Why not?

MS. MCCULLOUGH: Must be served means service.

JUDGE: Copy of the petition, not citation -- service of citation. Well, I mean, I just need to reconcile -- I understand you want us to read them together. But I'm having a hard time understanding why they don't conflict and actually make a different provision and if that's the case, I need help reconciling it.

MS. MCCULLOUGH: Well, I think that in the APA provision where it says "must be served," I think that's a term of art which means service of process. And I believe that service of citation in the Organic Act is the service of process required in this.

JUDGE: Well, but it says, "a copy of the petition must be served," which is different than "a copy of a citation with the petition attached."

MS. MCCULLOUGH: Right. But if they did a copy of the petition must be served, must be served in what manner? And if the Texas Rules of Civil Procedure required service of citation, then it would be a copy of the petition attached to service of citation -- with citation --

JUDGE: Let me -- I know -- I apologize for monopolizing this. But these are preliminary questions that I needed to have answers. Let me ask you one more question then. The Model Code APA 1981 interprets this

exact provision in the -- in our APA to mean that there is service of citation on the agency but only notice given to all other parties to the administrative proceeding below. Why wouldn't that be a reasonable interpretation if, in fact, only the Commission or the agency is the defendant and the others are merely interested persons who would need to have notice of the proceeding?

MS. MCCULLOUGH: Well, we believe that when the legislature, of course, enacted the State APA that they intended that Commission and the parties before the agency proceeding be part of the suit for judicial review. And the reason for that would be because participation of interest in protecting the reasonableness of its order is distinct from the party's interest in the outcome of the agency order. So, therefore, we believe that the State APA -- a reasonable interpretation is the interpretation that their Court of Appeals adopted in McKillip. And that must be served is a term of art that means service of citation. And in this case, we believe that it's even more clear because you have to combine these two statutes together and the Organic Act, specifically requires service by citation. So, we ask this court to reaffirm that sovereign immunity from suit is a jurisdictional bar that can only be overcome when the plaintiff complies with the statutory prerequisites necessary to maintain the suit against the State.

In this case, when the legislature expressly created this cause of action in the Solid Waste Disposal Act, it intended that service of citation be the method and manner of service. It is undisputed that Sierra Club and Downwinders at Risk failed to serve the other parties before the agency proceeding with service of citation. Therefore, the trial court lacked the jurisdiction. And the Court of Appeals erred when they stated that Dubai overruled that statutory prerequisites or jurisdiction.

JUDGE: When the Court of Appeals made back decision whether it's right or wrong, once they'd made that, why didn't they then go ahead and consider whether statute had been complied with in order for the respondent to be entitled to recovery under the law?

MS. MCCULLOUGH: Exactly as this Court's stated in Dubai. The necessary [inaudible] whether the plaintiff has maintained its right to go forward with [inaudible], the Court of Appeals erred in not doing that. And even if this Court were to decide that Dubai applied the statutory causes of action against the State, then we contend that it would need to look at whether the plaintiffs had satisfied the requirement enough to go forward with their suit --

JUDGE: Does it make any difference to you or to the State whether -- if you were to win, would you win on jurisdictional grounds or statutory grounds? Would the results still [inaudible].

MS. MCCULLOUGH: We believe, your Honor, that the Court must decide the jurisdictional question first because the Court of Appeals holding is based on its finding that Dubai changed the jurisdictional landscape and applied the statutory causes of action against the State. So, therefore, we believed that before this Court may decide the merits of whether that statutory provisions at issue in this case are jurisdictional mandatory or where found the line that the Court should decide the jurisdictional question of whether Dubai applies to statutory causes of action against the State because --

JUDGE: Your argument if there were a thousand people that appeared, you'd say that service has to be [inaudible] on each one of the [inaudible]. So, if you only get 999 then you can't complain. Is that right?

MS. MCCULLOUGH: I'm sorry, your Honor. I didn't hear all of your question.

JUDGE: Okay. Let's say there are a thousand people who appear in the Commission and the party trying to get relief from the Commission decides to appeal that to the Court. Do they have to get out 1000 citations timely to all those people and if possible, they serve 999 of them then there's no appeal. Is that your position?

MS. MCCULLOUGH: That would be one interpretation of what we believed --

JUDGE: Well --

MS. MCCULLOUGH: -- that the legislature intended.

JUDGE: What's the other one? What's the other interpretation? Because that's what I heard you make in response to Justice Hankinson?

MS. MCCULLOUGH: Yes, that is our position, your Honor, that that in this situation that the legislature intended. That if you bring a suit for judicial review under the Solid Waste Disposal Act, that you must serve each party of record before the agency proceedings with citation.

JUDGE: Does it make any difference in your argument if it were impossible? They left and gone some place you can't find them. You'd still the same --

MS. MCCULLOUGH: Yes, we would still take the same position, your Honor. But even if this Court decides that the statutory provision at issue in this case cannot be reasonably construed to be jurisdictional, we still believe that the Court must decide first whether Dubai applies to statutory causes of action against the State. And we believe that it cannot, that Dubai is still is simply unworkable.

JUDGE: But don't we have to first decide whether or not the applicable statute was applied with because if it was there are no other issues to be [inaudible] because jurisdiction has attached.

MS. MCCULLOUGH: Well, your Honor, the Court of Appeals holding is primarily based on the fact that, first of all, the Dubai overruled the McKillip

JUDGE: Okay. I understand but we never get to that issue if, in fact, the applicable statute has been complied with. There's no reason to reach that issue if all statutory requirements have been met.

MS. MCCULLOUGH: Well, that would be one approach, your Honor. We would think that the better approach is to decide the jurisdictional question of whether a trial court -- a district court even possesses jurisdiction over statutory cause of action against the State when a plaintiff has not complied with the statutory prerequisites.

JUDGE: Let me ask you one more statutory question. You say that the two -- the Solid Waste Disposal Act and the APA have to be read together but the introductory language to section B of the applicable APA provision says unless, otherwise, provided by statute which does not read to me as if we put two things together but that we only go to the APA as a default in the event no other statute contains similar or the applicable procedural requirements.

MS. MCCULLOUGH: Yes, your Honor, that has been construed in cases as if -- if Organic Act in this case specifically sent out the entire requirements for service and who must be served and all that, then you would only look at the Organic Act [inaudible] specific controls over the general but where there is no conflict, then you do construe them together.

JUDGE: Thank you.

JUDGE: Any other questions? Thank you, Counsel. The Court is ready to hear argument for respondent.

SPEAKER: May it please the Court. Stuart Henry will present argument for respondent.

ORAL ARGUMENT OF STUART HENRY ON BEHALF OF THE RESPONDENT

MR. HENRY: Respondent's petition has been since the trial court has [inaudible] to the Court of Appeals that they, indeed -- they did comply with the statutory provisions -- of the provisions of both the Texas Water Code, the Texas Clean Air Act, and the Texas Solid Waste Disposal Act. And, in addition, did comply to the extent that it was necessary [inaudible] the procedural act as Justice Owen has been asking. We, quite frankly, don't even understand why we're here. We --

JUDGE: Why would -- why would we be looking to all of those statutes if this is a permanent issue than the Solid Waste Disposal Act? Why isn't that just the applicable statute. Your appealing from that decision by the Commission.

MR. HENRY: Because the [inaudible] decision not only involved the Solid Waste Act, it involves the Clean Air Act under Health and Safety Code [inaudible] which they hadn't complied with, excuse me, as well as Texas Water Code provision 51351.

JUDGE: But that is in connection with findings and conclusions that were made during the course of deciding whether or not to issue the waste disposal permanent.

MR. HENRY: The application was under the Solid Waste Act. But the findings and the conclusion were under the Clean Air Act as well as the Texas Water Code and --

JUDGE: Who is a defendant. Who is a defendant and where do we look in the statutes to determine who he is the defendant in an appeal from the decision of the Commission under a permanent application for Solid Waste Disposal Act.

MR. HENRY: Well, the Solid Waste Disposal Act only says in 361.321, you must serve the commission with citation. That's all. It doesn't say you must serve anybody else. In fact --

JUDGE: It actually says service of citation must be accomplished. It doesn't even say service of citation on whom. Where we find out who the defendant is?

MR. HENRY: Well, you know, sort of like if you're going to sue the Texas -- the TNRCC for the decision, I assume that half of the defendant and I can't think of anybody else [inaudible] unnecessary. I mean, I don't know that in any of those statutes setting forth the service of citation for the service, if you will, the defendant is pointed out at all. And, in fact, I would suggest to the Court that there is no requirement in all of those statutes or any of those statutes for the requirement that you serve all the other parties with citation which, in fact, says they have been sued and they may need to hire a defendant, I mean, hire an attorney.

And that's the issue. I mean, the issue is that in order to get jurisdiction over the Commission -- as a defendant, in order to get relief; you have to serve with citation all the parties in the proceeding. I don't think a reasonable construction of the Solid Waste Act as well as the Administrative Procedures Act will lead to that result. I think that's a big leap.

In addition, you [inaudible] --

JUDGE: Is it necessary, though, to read the two statutes together

so that you have to, at least, give notice to the other parties of record as the APA requires, do you think?

MR. HENRY: Well, your Honor, that's in fact what we did. All the other parties received -- what we consider to be were served through the mails with notice of the petition including the public interest of the advocate of the TNRCC as well as the executive director of the TNRCC. Pursuant to what we understood the APA to mean which was they received service of the petitions but not accompanied by citation. Excuse me.

And, in fact, all of the parties in the proceedings except for the TNRCC and TXI were aligned with the petitioners, excuse me, with the respondents in this case. And they -- I can't believe there would be pleadings to receive a citation that they had been sued with -- in the mail with the petition.

JUDGE: Let me ask you and just for the record, I'm Judge Owen. This is Justice Hankinson.

MR. HENRY: Oh, I'm sorry.

JUDGE: That's fine.

MR. HENRY: [inaudible].

JUDGE: I was reading CA briefs and you didn't cite Dubai, did you? Where did the Court of Appeals [inaudible] suggested to or --

MR. HENRY: No.

JUDGE: [inaudible]

MR. HENRY: The Court came out [inaudible]. In addition, I mean, what we're seeking --

JUDGE: Would you think they went down the rabbit trail or you think this was a brilliant addition?

MR. HENRY: No. I, quite frankly, as a practical matter, I think Dubai stands for reasonable proposition that there are clearly some statutory prerequisites that don't go to subject-matter jurisdiction, period. And I think this is a classic example of one that doesn't.

JUDGE: Do you see any difference between a state and a private litigant?

MR. HENRY: I'm sorry, your Honor.

JUDGE: You think a distinction between state and private litigants makes any sense?

MR. HENRY: No, I don't. In fact, most of the cases cited by the Attorney General, in fact, or dealing with court claims act and cases against the State for damages and not for other acts which may be granted by a statute or could be by common law or Constitution.

JUDGE: Well, in fact, [inaudible] an entirely different stand. This is an appellate process and you've got jurisdictional prerequisites to invoke the trial court's sort of appeal jurisdiction which is entirely different from the sovereign immunity context where you're suing the State damages.

MR. HENRY: Well, I would agree with you, Justice. I don't see that -- how that compare and, in this case, we sue the TNRCC, we believe that the suit -- the TNRCC was the natural defendant. In fact, we think that they were the only defendant we had to be -- that had to actually be in the suit to grant for relief --

JUDGE: Well --

MR. HENRY: -- you requested.

JUDGE: But the reason I'm asking is because I would like to ask your opposing counsel, when she gets back from [inaudible] what possible reason would the legislature have to put such an onerous requirement of serving 70 people with citation and that presuming [inaudible] because we don't want suits against the State. That's a very narrow and there

are State hurdles to get there. But that is in the sovereign immunity context. That is in the context of why the immunity for damages as opposed to trial court acting in an appeal mode. Would you agree with that?

JUDGE: Yes, your Honor, I would. I think what the Attorney General wants you to do is, in fact, set in motion a trend where if you're invoking, for example, common law remedies or if you're invoking constitutional principles in an appeal of a State action, for example, on the agency and there's somehow an overlap in the private and public aspects of that, that you are shepherded into your appeal by virtue of the statute without regard for your fundamental rights under either the Constitution or under general jurisdiction of principles that district courts generally have.

JUDGE: But in the administrative context, our case law has relied upon Mingus to say that meeting statutory requirements is necessary to -- for jurisdiction to attach in the judicial system from an agency decision which is the case that the Court hit on square on in Dubai. So, why shouldn't having overruled that part of Mingus and Dubai the Court not apply the same principle that meeting prerequisites is not jurisdictional in this context?

MR. HENRY: I can't disagree with what you've stated there. I think --

JUDGE: Is there any reason to distinguish the two circumstances?

MR. HENRY: I can see other -- I can't visualize other circumstances that might occur but in this circumstance I can. In --

JUDGE: So, if you had failed to timely serve in this case under the applicable statute the appropriate people whatever that may be, then it would not be a jurisdictional problem? Jurisdiction, still, would have attached.

MR. HENRY: Well, if, for example, they were serviced within 31 days -- 32 days, I'm not sure where you draw that line. I do think, though, the failure to serve in a timely fashion, for example, the opinion might go to the lack of subject-matter jurisdiction. On the other hand, the lack of service of an individual who was not necessary for you to get full relief is what I would call a sort of a statutory prerequisite that didn't go to the subject-matter jurisdiction.

JUDGE: So, you think that some aspects of the statutory requirements would be in Dubai and some aspects would not?

MR. HENRY: It would seem to me that is so. In addition to our statutory provisions, one other things -- I think one of the controlling cases that this Court has just recently decided is the Casualty Insurance Company case. In our petition, we not only raised statutory causes of action, we raised constitutional causes of action and in our brief -- in our reply brief, we point those out.

We requested in a timely fashion for Judge Garcia to, in fact, give us relief to amend our petition to a [inaudible] inherent jurisdiction. We think in our petition, in four different places, there was an allegation that the TNRCC have raised the constitutional rights of the respondents in this case. Judge Garcia did not allow that to be done and we think that the Casualty Insurance case decided by this Court and put in the brief by the Attorney General stand for the proposition both pointed out in the majority opinion as well as in the dissent opinion that we should have had the -- that Judge Garcia should have given us the opportunity if he felt it was necessary to, in fact, respond to what we consider to be the special exceptions of the TNRCC and be able to plead, if you will, that we're invoking the Court's inherent jurisdiction under the Constitution as well as under the

general powers of the district court for review of an agency's action that might [inaudible].

The Court did not allow us to do that. Further, and what really gives the respondents some concern is contained in the Attorney General's brief on page 9 and I would like to quote it so I don't misinterpret it. And this gives the respondents a good deal of concern. "When [inaudible] statute specifically authorizes judicial review of an administrative agency's actions, that statutory scheme provides the vehicle for constitutional challenges and the statute requirements must be satisfied as a prerequisite to judicial consideration of any constitutional claims." What that appears to me to be saying is in circumstances where you have an administrative agency that has some jurisdiction over private or constitutional causes of action, and the legislature has deemed the agency dealing with some of those in a contested case fashion, that the statute has the exclusive ability to raise your constitutional or common law claims.

I know of no cases that, in fact, stands on that proposition and I think that's what the Attorney General in this case is trying to get this Court to tread into. Thank you.

JUDGE: Any other questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF IDOLINA GARCIA MCCULLOUGH ON BEHALF OF THE
PETITIONER

JUDGE: Miss McCullough, let me ask you the same question. Why would the legislature put such an onerous requirement that a hundred, perhaps a thousand people be served with citation that could be impossible to meet. Why would they do that?

MS. MCCULLOUGH: Well, your Honor, I mean, how do these parties become part of this suit to begin with? They became parties because the legislature requires the Commission when considering a permit application to give interested parties in the area notice --

JUDGE: Notice but not citation.

MS. MCCULLOUGH: I'm sorry, your Honor --

JUDGE: Notice is different from citation.

MS. MCCULLOUGH: That is true, your Honor. It is notice --

JUDGE: -- is a significant burden.

MS. MCCULLOUGH: Yes, your Honor. It is -- I guess, it's a burden on the plaintiff bringing the suit for judicial review. I don't think that the reason that we should say that it's not -- should not be serviced by citation because the parties might not be pleased. Because, certainly, they can get out of the lawsuit if they so choose. And in this case, the permittee is certainly an interested party and a party that should be part of this suit for judicial review. And we believe that that's what the legislature intended. And in this case, there was only 11 parties before the --

JUDGE: Yeah, but this case will stand for a proposition that those -- have a situation where there are a thousand parties and that could very well, in the lawsuit, is about the sheer expense and burden of having to issue citations on that many people; and I was trying to figure out why the legislature would impose that sort of expensive and onerous burden as a judicial prerequisite.

MS. MCCULLOUGH: Well, your Honor, only because we think that the legislature intended for the interested parties to also have their day

in court and to litigate these issues that they have chosen to appear in a commission action and protest. And, certainly, the Commission's interest is only to protect the reasonableness of its decision and not to protect the State that the interested parties might have in the final outcome.

JUDGE: But is it not satisfied with just mere notice as opposed to actual service of citation?

MS. MCCULLOUGH: Well, as far as that would allow the parties to have the right to intervene if they so chose but that would be a discretionary right and it would not be mandatory that they would be part of the lawsuit.

JUDGE: If citation were served on one of these parties and no answer was filed, would a default judgment be appropriate?

MS. MCCULLOUGH: I believe so, your Honor.

JUDGE: Against that party who's not really a defendant? And what's the relief that you would get them a default judgment?

MS. MCCULLOUGH: Well, your Honor, I mean, the Commission also has an interest in the finality of the orders just like this Court was talking about in finality of judgment. And so, I mean, basically, any issue that a party chose to bring upon collateral attack to the Commission would be barred by collateral estoppel. They could not have showed -- the Commission will have a very real interest in getting that relief from that party --

JUDGE: But this is just an interested party. It is not the defendant so what relief do you really -- I'm just -- I guess I'm, along with everyone else, trying to understand what the purpose of citation on those parties would be.

MS. MCCULLOUGH: Simply put, your Honor, we believe that it was the legislature's attempt that they be made a party to the suit for judicial review. We believe that that's what the common language of the statutory provisions here speaks to. But what I would like to --

JUDGE: What kind of pleading do you file if you're an interested party and not a defendant when Rule 99 contemplates in the citation that you be told that you must file an answer before a certain date? What are you going to do when you're not someone who's in a position of being a defendant? What do you file?

MS. MCCULLOUGH: Well, if you were served by citation, your Honor, that would make you technically a defendant and so you would file an answer or --

JUDGE: Saying what since you're not the person whose actions are being complained about?

MS. MCCULLOUGH: I'm not sure, your Honor. I don't know the answer to that question.

JUDGE: Thank you.

MS. MCCULLOUGH: I do wanna address Justice Phillip's question regarding the distinction between private litigants and the State. This Court has consistently recognized that the State is not like any other litigant and sovereign immunity from suit is the compelling policy reason to treat the State differently.

JUDGE: [inaudible]

JUDGE: Thank you, Counsel.

JUDGE: I'd like to close today's arguments. The marshall will adjourn the Court.

SPEAKER: All rise. O yes. O yes. O yes. The Honorable Supreme Court of Texas now stands adjourned.

Westlaw.

2001 WL 36160445 (Tex.)