ORAL ARGUMENT – 09/24/03
02-0479
TX DEPT OF CRIMINAL JUSTICE V. SIMONS

MILOS: In Cathey v. Booth this court held in no uncertain terms that an entity's mere knowledge of an accident, and the fact that injury resulted is insufficient to put the entity on actual notice of a claim under the tort claims act.

SCHNEIDER: Is the investigation report in the record here of the case?

MILOS: There are numerous reports in the record, but I can't recall if there is a separate investigation report other than the witness statements. My recollection of the record is that TDCJ gathered the witness statements, and, yes, those are in the record as is Mr. Simons's recorded oral statement given to TDCJ, as well as all of the disciplinary documentation. But I don't recall that there was any formal report written up after the oral investigation was concluded.

In Cathey v. Booth the court stated that notwithstanding that the entity might know about an accident and that injury occurred, the entity still had to have knowledge of its alleged fault in order to be on actual notice. In this case the Beaumont CA held that TDCJ was on actual notice of Mr. Simons' claim simply because it performed an investigation. Notwithstanding the fact that it was undisputed that TDCJ had no knowledge of its alleged fault and in fact Mr. Simons himself expressly stated that TDCJ was not at fault for his injuries.

The court should reverse the Beaumont CA's decision in this case and should hold that mere investigation of an accident will not put an entity on actual notice in the absence of knowledge of alleged fault.

HECHT: We pretty much did that in Cathey didn't we?

MILOS: I would agree with you.

HECHT: So what should we do different?

MILOS: It appears to me that the CA's are grappling with the issue of when an entity does an investigation is that somehow different than what happened in Cathey? We would argue no.

HECHT: What if the injured fellow here, the inmate had said yes, I think it was the state's fault. That would pretty clearly be actual knowledge.

MILOS: That would be alleged fault. Yes.

HECHT: What if somebody else said it?

MILOS: I think it would depend on the circumstances of the case. If someone said it on behalf of Mr. Simon, certainly the entity would be on actual notice. It would have alleged fault.

HECHT: If it was just a third party, the driver of the tractor or somebody, then where would we be?

MILOS: I think that gets us into a much more difficult case. It is our interpretation of the court's decision in Cathey and the actual notice provision that - the notice provision in and of itself contemplates not notice of a claim, but notice of accident. The notice provision speaks to notice of a claim. That's what is required. It's not enough for the entity to have knowledge that an accident happened. So in the case where an entity might by itself decide that it was at fault, we would still in that situation suggest that the actual notice provision still contemplates notice of a claim.

SCHNEIDER: Was there any recommendation from that investigation that the department take any corrective action?

MILOS: No. The investigation wholly concluded based on all of the witness statements and Mr. Simons' statement himself, that Mr. Simons' own negligence was to blame for the accident.

O'NEILL: It's your argument that if TDCJ did the investigation, found that it was at fault, it did something that caused the injury, you still don't meet the requirements because there is not notice of a claim - no notice that Simon is going to allege fault?

MILOS: That is our position. We think that is entirely consistent with the notice provision, because the notice provision speaks in terms of notice of a claim. The investigation that an entity might do as it did in this case, just because it is investigating an accident and may find that it is at fault is not necessarily, and we believe is likely not to be, the same investigation that an entity would do if it's attempting to gather and preserve evidence to defend against a claim. An investigation to determine the cause of an accident is looking for the cause and the cure. An investigation of a claim or when there is knowledge of alleged fault is to marshal the evidence to defend. This is a perfect example of the agency's inability to do that in this case. TDCJ didn't take pictures of the accident scene or the machinery. It didn't segregate the machinery for use's evidence. It didn't have the machinery tested to find out if had malfunctioned.

HECHT: Well you have 6 months to give notice. Is there any indication that the department could have done all of those things if it had gotten notice within 6 months?

MILOS: I think we can assume that the department very likely would have done those things. I think it's improper in retrospect to say that the entity would not have done any of those things because the legislature placed that decision in the first instance with the entity by virtue of giving it the notice protection. The entity is supposed to on its own make the decision of how to

allocate its scarce resources.

HECHT: You say that the government must have some indication that the injury was its fault. But here not even a claim was made within 6 months. Is that your position?

MILOS: That is correct.

HECHT: Because the inmate said I don't blame anybody for this. I'm not trying to get anything. But you say both claim and fault must be involved as per Cathey?

MILOS: Cathey clearly doesn't speak in terms of claim. I don't think the court ever used that phrase. The court was speaking in terms of knowledge of alleged fault. We believe that for there to be knowledge of an allegation that that necessarily implies that there is a claimant out there. And in fact the notice provision speaks in terms of claim and claimant. That's the backdrop on which the actual notice provision - where it's coming from.

In this case TDCJ did its initial investigation as we all know. It collected witness statements and it closed the book. Two years later Mr. Simons files his lawsuit. TDCJ's defense is at a significant disadvantage and this is exactly what the legislature was trying to prevent. So that is why we urge the court to hold that mere investigation simply cannot put an entity on actual notice.

OWEN: What if he had been killed? If you look at the words of the statute it says the notice requirements in (A) and that's the 6 month notice of a claim, do not apply if the governmental unit has actual notice that death has occurred. Doesn't that literally come within the statute?

MILOS: I think that would be a very literal interpretation of the statute. But I think that a more reasonable interpretation would be that it simply doesn't make linguistic sense for the legislature to have inserted the claimant before death. Certainly someone who is dead cannot make a claim. And even if the court wishes to parse the language of the statute, that finally and in that certain circumstance, the court may wish to make an exception. But in this case the court doesn't need to go there. The court only needs to look at what happened in this case, and that is, no allegation of fault. In fact clear allegation of no fault, clear statement of no fault. And nonetheless the CA finds actual notice simply because of an investigation. And that's really where we are going to have a problem if the court holds that mere investigation can be actual notice.

What is an investigation? Every time an accident happens on gov't property, I would submit an incident report is filled out. Is that actual notice? What about in City of San Angelo v. Smith where the plant manager was present when Mr. Smith falls into the vat of water and then reports the accident to the claim's manager? No other discussion in the CA's opinion about investigatory actions by the city. Nonetheless the Austin CA said that was sufficient investigation to put the entity on actual notice.

The same result in Brown v. City of Waco. In the words of the CA the airport conducted an on the spot investigation where it gathered the name of the injured party, the name of the person at fault, who by the way was not a city employee, a name of a witness, and the fact that the plaintiff was transported to the hospital to receive treatment. There is no discussion in Brown v. City of Houston about alleged fault or any other investigatory activity by the city, and yet, the Beaumont CA with no discussion of Cathey says that's enough for knowledge of actual notice..

To get back to your question J. Hecht, the courts are confused about what the court meant in Cathey. They are unclear about what Cathey said and the prong of knowledgeable alleged fault applies when an investigation happens. We would urge the court to hold that mere investigation will just not get you there, because that holding in and of itself would unleash a flood of litigation over the meaning of investigation.

JEFFERSON: Why is notice jurisdictional? Why shouldn't we as we've done in Duby(?) and a series of other cases say that it's subject to a plea in abatement of something like that?

MILOS: A plea in abatement would not suffice in this case. And we strongly urge the court to take this opportunity to address Duby(?) and the impact that it has on governmental defendants in the context of this case as well as other prerequisites to suit under the tort claims act. Duby(?) simply we believe does not apply in this case.

Let me back up and start with my primary reason for why I believe that the notice provision should be considered jurisdictional. It is mandatory. Failure to comply with it forever bars a suit. That is why I stated J. Jefferson that a plea in abatement won't save the suit. If you miss your 6 month notice your claim is barred.

HECHT: What do you make of Chavana's(?) argument that yes it's mandatory. Just as a technical matter it's not jurisdictional.

MILOS: We totally disagree. The court has long held that conditions and limitations on the wavier of sovereign immunity are jurisdictional facts. Going all the way back to State v. Isabel. We did not of course address this issue in our brief and we will submit a post-submission brief, fully developing our position on jurisdiction.

HECHT: Is there any practical significance to the argument except for how you get it adjudicate whether you use a plea to the jurisdiction or summary judgment?

MILOS: I don't think it matters what you call the pleading so long as the effect is to dismiss the case before it is continued on its merits. The point of the tort claims act is to only waive sovereign immunity and subject to the entity to suit for certain instances. Of course in a procedural context a plea to the jurisdiction, a denial of that plea to the jurisdiction allows the entity to immediately appeal. And so in that respect it does make a practical difference if the document is styled Plea to the Jurisdiction or Motion for Summary Judgment if its effect is going to be different

simply because it's styled the Motion for Summary judgment.

HECHT: But for the interlocutory appeal, you can't think of any difference it makes?

MILOS: As a practical matter perhaps not.

HECHT: And the other legal issue which seems to have arisen whether the adjudication is on the merits or not, that seems to be an issue in some cases.

MILOS: I think that is very much the issue. And that really does get to why the court's opinion in Dubie(?) simply can't control here and why we urge the court to hold that it does not. The underlying rationale for Dubie(?) was that TC are courts of general jurisdiction. And unless the legislature says otherwise, all claims can be brought in the TC in our state. But that is not the case with causes of action against governmental entities. Governmental entities can only be sued when and to the extent the legislature says they can and if the claim does not fall within the waiver of the tort claims act, the TC has no jurisdiction.

In Dubie(?) the court made the point that in the ordinary case the fact that a plaintiff has not complied with statutory requirements may go to the right of relief as opposed to the TC's jurisdiction. But again, that is not the case with respect to states or with respect to governmental entities. The failure to come within the tort claims act does go to the right of relief which in fact as this court held in Miller and in all the other sovereign immunity cases goes to the wavier of sovereign immunity. The court has long held that statutory prerequisites in the tort claims act were mandatory and jurisdictional, and we would encourage the court to clarify that it did not intend to abend(?) that with Duvie(?).

We do feel that the court has signaled that that actually was not its intent to upend sovereign immunity with Duvie with Wilmer Hutchins v. Sullivan. In that opinion the court addressed exhaustion of administrative remedies, which is a procedure which amicus claims in and of itself makes it not able to be jurisdictional because it's a procedural mechanism. But that can't be the case. Because exhaustion of administrative remedies is a procedure. It is mandatory. Failure to comply with it divest the TC of jurisdiction.

PHILLIPS: What about the Essenberg case?

MILOS: We don't believe Essenberg is helpful to the court either for the simple reason that it was an entirely different statute. It is a presentment statute. So in the sense that it may be cured by an abatement it is different. But most importantly it is not in a waiver of sovereign immunity like the notice provision is. It simply cannot be viewed the same. And the court's analysis in that case does not provide us with any guidance in this case. The court has to look at the notice provision in conjunction with its longstanding jurisprudence in sovereign immunity.

WAINWRIGHT: You were talking about subsection (c) of the relevant statute when there is

actual notice that death has occurred. The state is at the scene of an incident and knows that actual death has occurred. Is that sufficient for that portion of subsection (c) to see the actual death?

MILOS: Again, I am going to have to say no. But I recognize that that is a much more difficult case because of the lack of the word claimant in front of death. But we would argue that subsection (c) is designed to be the safety net for subsection (a). That is, if the claimant fails to comply with subsection (a), ordinarily his claim is barred. But he will be saved if subsection (c) can save him. In that respect we would argue that subsection (c) should not be interpreted to provide the entity with less information than subsection (a). Compliance with subsection (a) in and of itself provides the entity with knowledge of its alleged fault. A piece of paper coming into an entity that says notice of claim; hear all the facts about my injury, advises the entity of its fault.

WAINWRIGHT: So even for actual death that has been witnessed by the state, the notice provisions in 101.101 are not satisfied unless a piece of paper comes in the door that says we're making a claim on this incident.

MILOS: Under (c) it doesn't have to be a piece of paper. But the entity still has to get knowledge of its alleged fault in causing the death would be our position. That is a very difficult question and it is a very different question than the one that is presented by this case. And as I said in response to J. Owen's question, the court may choose to make an exception for extraordinary circumstances like that. But in formulating the general rule that we believe is applicable to this case, we believe that the court should hold that the actual notice provision is simply not satisfied by mere investigation.

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RESPONDENT

WHITE: In the clerk's record, pages 40-44, there are some minutes of the safety meeting that occurred after the witness statements were taken. The only conclusion that I think can arguably be included in that is the recommendation of the author of those documents that continued training be given to both employees and inmates in using this equipment. No other conclusion is drawn other than maybe we should train these guys one more time, or maybe colloquially send them back to class. We've had a problem. But that's the only thing that I would be able to characterize as a report of any type.

The Texas Tort Claims Act has a purpose in its notice provisions that I think no one disputes. And that is to allow governmental entities to gather information while facts are fresh, while conditions remain essentially the same, so that they can determine whether they should settle cases or should prepare a defense. When the legislature wrote subsections (a) and (c) it decided what information would be necessary to meet those purposes. And the rudimentary information that is required under subsection (a) these three things includes nothing about an assertion of fault. It says what you need to know as a governmental entity is that there was damage or injury, the time and place that the accident occurred, and what the incident was. Not that someone has asserted fault.

PHILLIPS: Did Cathey simply over-read the statute?

WHITE: It did not. This court was telling TC's that the determination of actual notice is fact intensive. You have to know the quality of the information obtained by the governmental entity to know whether the governmental entity obtained actual notice. In a hospital, you cannot have the quality of information that allows you to gather information while conditions are the same and while facts are fresh if what you are being directed to is the medical records that you simply keep as a matter of course.

PHILLIPS: So you think if a hospital or the prison leaves things the same for 6 months...

WHITE: I don't think that it's necessarily the same for 6 months for any governmental entity for any accident. But I think it's the best the legislature could do. Conditions substantially the same, facts relatively fresh. But I don't think that there is any assertion that after 6 months things are going to be the same enough for us to take a picture that would recreate the accident.

But hospitals are different because there is nothing in their medical records that would excite them to gather the information that they need to either determine whether to settle or to defend. It is not reasonable to conclude that hospitals routinely review their records with an eye toward whether they need to settle or defend claims, or whether they need to gather more information, or make more interviews or investigation. However, most other governmental entities are completely different. An accident that results in injury or damage is a disruption in their governmental mission. So much so that they do something they don't normally do. We go out and look at what happened with an eye toward finding out why it happened and what we can do to prevent it. And thank goodness that that's what they do because citizens expect that of their government. They wouldn't expect that governmental employees would simply say Yes, one of the citizens of our state has been hurt or injured, but we're not even going to look in to it because they haven't used the right words in writing a letter to us nor have they made a statement to us that indicates that they might be engaged in litigation.

JEFFERSON: At what point is the investigation sufficient for actual notice? In this case there is an investigation and the person who is injured says no fault of the government. It's not the state's fault. So why would that put the state on actual notice that it needs to defend or begin looking into settling a claim?

WHITE: The directed general answer to your question is, when is actual notice going to be sufficient? or when is the investigation sufficient? I leave that to trial courts to...

HECHT: This one?

WHITE: And this one especially. But the point is that the TC's are gathering evidence and making a fact intensive inquiry into the quality of information that the investigation disclosed.

HECHT: I don't understand the quality of information. If you went out - this is a serious injury. Something far less serious than this and you went to the injured person and you said now listen, we're going to go find out what happened and try to make the best of it and ensure that it doesn't happen anymore if you think somebody was at fault in this. But if you don't think so we're going to go on about our business. And he said no, let's not - I'm not making any claim; I don't want anything else to be done; I just tripped when I shouldn't have. Then is that - what is the quality of that information?

WHITE: I think a TC looks at that and says do they have the kinds of things that the legislature thought would allow them to investigate and gather information so that they could decide whether they needed to settle or defend that.

HECHT: Wouldn't we though if we want all of the TC's to decide this the same way? We don't want them guessing it off different ways. In that hypothetical how should the trial judge rule?

WHITE: A trial judge in that hypothetical would probably rule that when the claimant or whatever you want to call them has said I am not going to make a claim that the governmental unit has been taken aside from its mission of investigating, gathering information while facts are fresh, etc.

HECHT: And how is that different from this case?

WHITE: There are two things that make it different. First of all, it's a serious injury. And so much so that there is probably not a possibility that Mr. Simons was in a position three days post-accident to make a decision about whether this serious injury was anyone's fault. Secondly, we know from the record that Mr. Simons was both three-days post-operative on having a hole in his head. We know that he was on Vicodin when that happened, and we know that if he had been privy to what the other people were saying, which was there was a warning given, all of which would have gone to somebody's question upon inquiry as to whether some fault might lie with the department of Criminal Justice. And I would not pretend to make an assertion that 100% of fault would be asserted at that point, or any percentage nor would a trial judge be charged with the determination of saying what fault should be assigned to anyone.

His only determination as a trial judge, and all of them should rule the same in that circumstance is, was the department from what it gathered in its investigation able to get information while facts were relatively fresh and while conditions remained roughly the same as when the accident occurred, so that it could decide whether to settle or defend the case should a claim be made.

HECHT: That's the purpose of the statute. But surely its application doesn't turn on that.

WHITE: But it does turn on that in the sense that...

HECHT: Well if you had a dilatory agency that just said well we don't care, we're not going to go look, then you would say they are off the hook.

WHITE: No. I would say that they had the information from their investigation which should have led them to an ability to gather information while facts are fresh. But if as you say an investigation were done and they uncovered nothing other than the fact that well what we've learned from our investigation is that there is an inmate who is now missing an eye. We don't know why and we don't know what was going on, but that's all we've uncovered.

HECHT: No. They say perversely we've read the CA's opinion in this case and we think that if we go make an investigation it's going to impact our budget; and if we don't there's a chance it won't. So guess what we're going to do? We're not going to go look.

WHITE: And that is perverse especially to view it from the government standpoint. But if what you were doing - there's a worse side to it than what you've proposed J. Hecht. And that is, if you tell the agencies in this opinion that what they need to look for is an assertion of fault, then they are going to parse the assertion of fault into well that's not really what we mean by fault. You may have said I intend to make a claim, but you didn't tell us the degree of negligence that we had. You didn't tell us how what we did actually had a causal connection to your eventual injury. You didn't tell us what your damages might be so that we could ascertain the extent of investigation that we needed. So what we have then from that holding by the court is a decision that we're going to have satellite litigation in every case that involves actual notice over whether the notice was really sufficient enough to put them on notice of their fault.

HECHT: Aside from fault, should there be notice of a claim?

WHITE: It's unnecessary. And I say that because...

HECHT: It's in the statute.

WHITE: Notice of the claim is actual notice of the incident. And under subsection (a), the legislature does not say anything that there must be notice of a claim.

HECHT: Yes it does. It says a governmental unit is entitled to receive notice of a claim.

WHITE: But I mean the content, the substance of what is said to them in writing does not require that they say I intend to make a claim. I can satisfy subsection (a) merely by saying, Dear City of Waco, here is damage that I have incurred, or injury I have suffered. It occurred at this time and at this place and the incident was as follows.

HECHT: But if they add the sentence and you will be pleased to know I'm not making

a claim, surely that's not a notice.

WHITE: It satisfies subsection (a) regardless of what else is in there. Now it might be a different case had someone actually sent a letter to the City of Waco or to the Dept. of Criminal Justice that said, I wanted you to know about this, but I don't intend to make a claim. That might be a different case. I don't know why that letter would be written. That's more of a letter to the editor rather than a letter to the governmental unit.

Let me pose a hypothetical to kind of demonstrate why I think Cathey was correctly decided and why this case was correctly decided by the Beaumont court. If in Cathey the Wood County Hospital had looked in their records and for some reason had picked out a stillborn birth and said we need to look in to why this occurred, and had decided to gather information without anybody ever making an assertion of claim, and had resulted in some kind of written report of their investigation, which was completely internal and that then presented to a TC, a TC could have correctly said I'm going to examine what they did in their investigation to see whether they have gathered that kind of information, when the conditions were relatively the same, and while things were relatively fresh in people's mind so that they could make an evaluation to either settle or defend any potential claim. And that examination, that fact finding by the court would not have been reversed I don't think on the basis that there was not some magic language that we intend to assert fault on the part of Wood County Hospital.

OWEN: So you're saying there actually has to be an investigation. There should have been an investigation standard but there actually was an investigation?

WHITE: Of course, I'm doing that only because in our case there actually is an investigation. The general rule should be that a TC should examine what information is asserted to constitute actual notice and decide whether that information as a matter of fact has permitted the governmental unit to gather information when conditions were roughly the same, when facts are relatively fresh so that they can evaluate whether they need to settle or defend.

OWEN: It seems like you're going to get perverse results either way. In a hospital case, let's suppose a nurse had put in the notes that I called the doctor three times, this woman is in distress and a death results. The hospital did not investigate.

WHITE: And I think that in hospital cases the mere existence of medical records does not excite the inquiry which allows the gathering...

OWEN: What about a death? Should a death incite an inquiry? Shouldn't a hospital investigate? You see where I'm going with this.

WHITE: Yes. I do. I think that death almost always excites the type of inquiry that allows people to gather information while facts are fresh and so on. In Cathey there really is a stillbirth, so I don't know if I would classify that as a death or not. That's hard. But if there is a

death, I think that everybody is put on notice regardless of what investigation they actually performed. But when there is simply an injury, the mere existence of medical records in a hospital doesn't excite the type of inquiry that would allow them to gather information while facts are fresh.

OWEN: Let's say it's a serious injury. The person is totally incapacitated.

WHITE: I still think Cathey is correct in saying that in a hospital actual notice cannot be obtained merely from medical records. And I will point out that in a per curiam case -in Cathey it was a per curiam case, the court started its opinion by saying in this cause we consider whether a hospital may receive notice from its own record. And a hospital cannot receive actual notice merely from knowledge that a patient received treatment. For a hospital, an interpretation like that would be equivalent to no notice at all. And so I think without knowing that the court must have been saying in Cathey that this is a hospital case, not a general overall view of governmental units.

OWEN: What if in your case the foreman had simply gone back to his superior and said well it was the inmate's own fault and no one ever investigated?

WHITE: No one ever investigating is of course they key because then a TC would look at that and say, you know Mr. Simons, they don't have actual notice if they don't have the type of facts that are gathered at the time when things are relatively the same and when facts are fresh to allow them to evaluate to settle or defend. They don't have the things that the statute was designed to give to them. So if we have an agency that is lax in their intent to investigate things, then people that would rely on actual notice will not be able to prove actual notice because there is no facts gathered.

JEFFERSON: Unless the injured person comes forward and says this accident was caused by the state. As in Cathey they alleged the fault on behalf of the governmental unit.

WHITE: In Cathey they did not and that was their downfall...

JEFFERSON: Under the standard that we announced in Cathey, so here under J. Owen's hypothetical is if the injured person says I believe that the governmental unit was at fault in causing my injury, then it would satisfy the statute.

WHITE: Not that alone. Because even under the Cathey thing for hospitals you have to do more than say I think the hospital caused my injury. You have to tell them what happened and when it happened.

JEFFERSON: Well those sections aren't in dispute here. I'm just saying that most - if we were to say that the injured person needs to come forward, then even in the absence of an investigation, if they come forward and allege fault and satisfy the other prerequisites that we announced in Cathey, then there is notice. But here the injured person said the unit was not at fault.

WHITE: I guess what we come down to is whether we would prefer that the Texas Tort Claims Act notice provisions be a protection for the state governmental entities so that they can acquire the information they need in order to litigate, or whether we deem these notice provisions to be a barrier or trip wire to recovery. That is that we're going to, not in the statute, but by court decision put in things that claimants must do in order to recover. And failing that, they can't recover. Despite having complied with the strict language of the statute there's this other requirement over here. If that's what we want the notice provisions to do, then saying that everybody must include in their notice to the governmental units an assertion of fault would be precisely that. It would be a type of trip wire that each claimant must overcome.

JEFFERSON: Do you agree that it is jurisdictional in the sense that assuming no actual notice was given, then the TC has no jurisdiction to entertain the claim?

WHITE: I would simply say that we have no position on it because it doesn't matter to us. Jurisdictional or not, the Beaumont CA made the factual determination in favor of Mr. Simons that actual notice was received. If that is affirmed here, then Mr. Simons gets a trial. If that's not affirmed here, then Mr. Simons doesn't get a trial. So it matters not to him whether it's deemed to be jurisdictional or factual determination that he hasn't complied with the statute which is a procedural step or prerequisite to getting to trial. So to him it makes no difference. And so for me to opine about it doesn't help my client.

SMITH: What about the context of the claimant's statement where there was a pending rules violation against him. Do you make any argument about that impacting the statement that he made?

WHITE: And the reason that I haven't even mentioned it here is because I have some conflicting information about that. There is certainly things in the record which would seem to indicate that disciplinary writeups were made against Mr. Simons. But when Mr. Simons got all of this paperwork, he wrote me back and said I never got written up. So I hesitate now to be telling the court that he did get written up and trying to rely on that when my own client is telling me no he didn't get written up. He has no disciplinary record. It is in the record that he did. It's in one of those safety review things that he was written up, but apparently maybe that's not exactly right.

SMITH: And what about the sentence in his statement that he said is probably just as much my fault. To me that brings some ambiguity as much my fault in that he's splitting blame between himself and others at the scene.

WHITE: I would suggest...

SMITH: Do you concede that he blames nobody but himself?

WHITE: No. I don't mean to concede that. I would simply say that especially taking Mr. Simons' statement and cutting little pieces out of it to ascertain what he meant is not the right

way to view it. Because sometimes he would say the boy operating the tractor must have hit the PTO while I had the wrench on it...

SMITH: Which would be negligence.

WHITE: Which would to me be an assertion of fault on the part of the boy who was operating the tractor. At another point it wasn't my fault; it wasn't nobody else's fault. At another point, somebody must have made a mistake. That's all there was to it. I don't want anybody to get in trouble. At another point, I remember putting the wrench on and that's the last thing I remember before I got into the operating room. So that along with he's on Vicodin three days post-op at the time he made the statement tells me that the statement and especially cutting little pieces out of it is not the be all, end all to the merits of this case. It's significant, but it's not the end of it.

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REBUTTAL

MILOS: A motion for summary judgment is likely not to occur and particularly not to be granted until after significant discovery has taken place. And we would argue that that is added expense to the state the legislature would have intended to have avoided. And also if the court holds that it should be presented in a motion for summary judgment, then the potential impact of that holding would be that the notice provision could be waived. In other words that it would not be jurisdictional because it might be construed as going to the waiver of immunity from liability as opposed to the wavier of immunity from suit. We believe notice goes to the waiver of immunity from suit...

OWEN: How is this different from a presentment statute?

MILOS: It is very different from a presentment statute in that as the court noted in Essenberg failure to comply with the presentment statute doesn't bar the claim. It merely requires an abatement so presentment can be made and then the entity can perform whatever investigation it will prior to the lawsuit proceeding it...

OWEN: Why shouldn't we view this as a presentment statute? As a practical matter what's the difference?

MILOS: The difference is that if notice is not received within 6 months, no abatement can cure. The lawsuit is forever barred. So it does...

OWEN: If you view this as a presentment statute that's not necessarily true.

MILOS: The notice provision speaks in terms of entitlement. An entity is entitled to notice of a claim. And the courts have long held that failure to comply with it results in the...

OWEN: How is that different from a presentment statute that says you must present your claim within 6 months?

MILOS: I suppose the difference is in the way this court has interpreted it. In the Loc. Gov't code presentment statute the court said - or in Essenberg the court held the cure to that is abatement. It doesn't go to the court's power to hear the case.

OWEN: But why are they different? Why should we treat them differently?

MILOS: We should treat them differently because the notice provision is part of the waiver of sovereign immunity. The court has long held the conditions and limitations on the waiver of immunity are jurisdictional facts. They are jurisdictional in nature. They are to be strictly construed. The legislature is presumed to only allow suit against the state when and to the extent that it says so in the tort claims act. And one of the requirements we believe the legislature has put in place is the notice provision.

Some of the language that I heard banded about during Mr. Simons' argument were phrases like possible culpability, some fault. I even heard something that sounded like constructive knowledge. That should have led the agency to believe that they were at fault. None of those formulations of the rule are what the court said in Cathey. The court said knowledge of alleged fault. Not possible fault. Certainly not constructive knowledge. In any case where there is an accident, whether it involves a sanity or not, the parties to the accident are going to be possibly culpable. Possible culpability, potential liability is simply not the same thing as alleged fault. That you might be potentially liable because you ran into somebody when you were on your way to work is not the same as knowing that they might sue you over it, or that you were possibly at fault, that you have alleged faults. That's the key.

We would urge the court to cutoff the inquiry that I think was _____ demonstrated by Mr. Simons' argument. Where do you draw the line? How much information does the entity have to gather? In every instance where an entity does an investigation it's going to uncover some evidence that will indicate fault, and some evidence that will indicate no fault. How many pieces of fault evidence does the entity have to gather to put itself on actual notice? And if you decide that, which I would submit I don't think any court could decide for every single given case with one rule, once you decide that what's the standard? Is it beyond a reasonable doubt? Is it clear and convincing? Is it a reasonable entity could conclude? We would urge the court to cut that off before it starts and simply hold in this case - all it needs to hold is mere investigation of an accident will not put an entity on actual notice absent knowledge of alleged fault.