ORAL ARGUMENT – 09/10/03
02-0728
TDPRS V. MEGA CHILD CARE, INC.

LAWYER: This case presents a basic question of whether in the face of statutory ambiguity, a waiver of sovereign immunity should be inferred? Respondent has relied on cases focusing on lawsuits between private parties. And in doing so has inverted a presumption. Presuming jurisdiction rather than as this court's precedent looking to a legislature first for a clear and unambiguous waiver of sovereign immunity. And in the absence of such clear and unambiguous waiver finding no waiver.

The key argument that both amici and respondents focus is the language of Gov't Code §2001.171. And respondent's argument framed as a straightforward plain language argument is not without force. Their argument that the text is broad and that it indeed uses the words "is entitled", if that were all this court were looking at might well support their position. However, we would submit that when that provision is viewed in context, looking to the structure of the APA as a general, and to the structure of how that provision in the APA fits in with the remainder of the code in Texas that, that interpretation does not make sense and is not the best interpretation.

There are a number of reasons why the APA and §171 does not confer an independent right of judicial review beyond that right that might be conferred by an individual enabling it.

First of all, the very next section, §2001.172 says by its own terms that the scope of judicial review is as provided by the law under which review is sought. And so the APA itself is envisioning...

O'NEILL: But doesn't that refer to contested case proceedings? The arguments been made that it can be parsed through that way.

LAWYER: Except .172 says judicial review. And so it frames that the scope of the judicial review is keying off of the law under which review is sought.

SMITH: It does have a default though. Basically if there is no enabling statute, it doesn't have a standard of review, it defaults to the substantial evidence. The truth is there is no standard of review in the enabling statute. There is a provision made for the standard of review.

LAWYER: Yes. And in fact that's how the entire APA works: it's a set of defaults where procedurally how a challenge like this both contested a case and for judicial review thereof would ordinarily proceed. But those defaults are not establishing blanket subject matter jurisdiction across the board.

Really the key problem with the argument both respondents and amici raised, that if they are correct, if .171 is a blanket wavier of immunity for every contested case proceeding for every agency in the state, that an entire host of statutes are rendered irrelevant.

PHILLIPS: Is the legislature still putting judicial review language in statutes that _____ promulgated in recent years, or are we talking about a number of older statutes that may even pre-date the APA?

LAWYER: It is our understanding that it is both. In the principal amicus brief on pages 16 and 17, they cite a number of statutes that explicitly provide for judicial review over and over and over and over again. And if their reading is right everyone of those statutes is irrelevant. There is no reason for those statutes to provide for judicial review because if .171 does it, it's already there. You have judicial review.

O'NEILL: But that's how they explain your argument that by taking it out the legislature intended to leave it in elsewhere. I mean it works both ways.

LAWYER: On our argument they focus on - their justification is, they look to the revisor's notes and they look also to the Sunset Commission and the legislative history. And they say that the understanding was that even though you took it out, it didn't matter because .171 takes care of it anyway.

There are a number of problems with that. For one thing, those revisor's notes are - the amici cite a host of revisor's notes but not a single one with reference to 42.072, the relevant statute in this case. So they cite other statutes and other revisor's notes.

PHILLIPS: But that could still be relevant to show generally. If you're talking about us look at administrative law as a whole.

LAWYER: It certainly is a relevant factor to look at in ascertaining intent. But in those revisor's notes, if the revisors who drafted that believed that by removing that statute, they were still allowing judicial review, that was bad legal advice. Because it was contrary to over 20 years of third court precedent that was clear as day that the status quo was if the enabling statute didn't provide subject matter jurisdiction .171 didn't get there. And so the fact that the drafter of the revisor note may have believed that in error is not in and of itself sufficient to trump the import of the plain language of having a provision that allows for judicial review, deleting of that provision for judicial review and at the same time leaving in multiple other provisions of judicial review throughout the same statutory scheme. As this court said in Continental Casualty, when a statute provides for judicial review in some circumstances and doesn't provide for it in others, the natural inference is that that is for a reason, and that's deliberate.

O'NEILL: Can you think of a reason why the legislature would allow judicial review of a child care administrator's license but not of a child care facility's license?

LAWYER: The legislature did not articulate a reason. One might imagine that they could decide to ascribe a greater degree of protection to an individual license rather than to something by an entity. But there is no legislative intent to indicate that, but that is a plausible reason the legislature could have looked to.

We are left ultimately with a number of statutes and they don't fit together entirely, neatly. In fact in the 1997 amendments which deleted the provision for appeal, they added three section d's with slightly different phrasing to 42.072. So this was not a model of clarity. But the language that was passed can be given a natural reading. And that natural reading, just like in Continental Casualty, is that in the sections where they provide for judicial review, in 43.011 and in 42.078, both of which explicitly provide for judicial review, that there the legislature intended to waive sovereign immunity and allow for that review. But where they go in to the enabling statute and delete the provision allowing for a judicial review and where they furthermore do nothing to change or alter over 20 years of very clear, repeated precedent from the 3rd court, the strong inference for that is that they intended to do exactly what they did. In fact, I would note that Prof. Beall, who filed an amicus brief in this case, that largely quotes word for word from his treatise. And if you actually put his treatise next to the letter brief, you see it going word for word. And it's very notable where the second to last paragraph on the last page ends. Because he quotes all the way up into his treatise and then puts a period. In the very next sentence in his treatise that did not make it into the amicus brief reads as follows: The Austin CA may have correctly determined the legislative intent, where there has not been a legislative response to its initial holding that is more than 20 years old. So that was Prof. Beall's judgment when he was writing his treatise rather than the amicus brief.

Those 20 years of precedent, it would have been a very simple matter for the legislature in one sentence to say .171 waives sovereign immunity for all contested cases.

SMITH: Do you have any enabling statutes where it says sovereign immunity is waived for purposes of judicial review? Are you requiring more just because it's general. Where is the consistency?

LAWYER: You're right. There are a number of provisions in enabling statutes that read very similar to .171, and we don't dispute that those provisions in that context do waive sovereign immunity. There are other instances where the legislature has done so more explicitly and said we waive sovereign immunity from suit and/or liability.

SMITH: On judicial review?

LAWYER: I'm not aware of any on judicial review. With respect we're not seeking magic words or arguing that that's what's necessary. In other context, in the context of an enabling statute the only meaning that language can have reasonably is to waive sovereign immunity.

SMITH: What does it mean in the APA?

LAWYER: In the APA I think it can be reasonably read in the context of the entire rest of the APA and the rest of the code as a requirement for exhaustion and finality. It is not perfectly phrased to yield that. But I think you could read .171 as saying these are the requirements that are necessary for judicial review. They are not sufficient, but if you haven't exhausted or if you don't have a final judgment, you can't have judicial review under the APA. If that is incorrect, if .171 grants subject matter jurisdiction to every agency, to every contested proceeding to every agency, then there are scores of statutes that have been rendered irrelevant. And I would submit it does far less damage to the text to read .171 in the context of the APA and to read it as simply laying out another element of the procedures for how the APA process works rather than endeavoring to be a substantive grant of subject matter jurisdiction.

HECHT: Do you have a sense at this point how many contested cases would not be subject to judicial review without that reading of the APA?

LAWYER: We have not met with the many client agencies. That's one of the matter actually our lawyers have discussed trying to get a better assessment to aid this court in terms of the practical impact. But what we can say is there are a number of statutes that on their face have no other purpose if not to waive sovereign immunity in that specific context. And even within the framework of this statute in the Human Resources Code, you see some provisions doing it and some not. And the only way to draw sense for that is to assume that the legislature meant what it was doing.

O'NEILL: There's no real logical basis for which ones the legislature decided to grant judicial review on and which ones it decided not to. In fact there are a lot of anomalies and absurdities if you look at it that way aren't there?

LAWYER: I certainly would not suggest that this legislature or any legislature is ____ with perfect rationale. But that being said, I don't think within this statute it's anomalous. The two principal areas where judicial review is applied are 1) where an individual has his/her license revoked...

O'NEILL: But the amicus says that you get judicial review if there is a fine of less than $100. You would not get judicial review if business is just shut down.

LAWYER: The amicus omitted a critical element of that fine, which is it's $100 a day, and each day is an individual violation, so that that fine can very quickly add up to a substantial amount of money. And it would not have been irrational for the legislature to determine that a fine, taking money from someone is taking a vested property right from there. There's no dispute that if you make someone write you a check that's taking a vested property right. And it would not have been irrational for the legislature to determine in that circumstance they will allow for judicial review. But in the case of revoking a license, a license that was granted by statute and as a creature of statute, that it was less clear that that was a vested property right. And so ample protection would be provided by a full hearing with all of the protections the APA provides within SOAH. And I

would submit that's not an irrational judgment for the legislature to make distinguishing between those two.

PHILLIPS: What do you do with 2001.178 that references cumulative of other means of redress provided by statute?

LAWYER: I think it means precisely what it says. First of all, it is cumulatives of other means of redress, of other remedies. So once there is subject matter jurisdiction, this is a remedy in addition to other remedies. The remedies provided under the APA are there in addition to whatever other remedies are available in other ____ of law.

PHILLIPS: Which would be true without .178.

LAWYER: It might, but it is possible that a court would determine the two to be in conflict. We have a remedy in this statute, a remedy in that statute, which one do we apply? Section .178 says you apply both. They are cumulative. And secondly, it uses the word means. It is a mechanism of redress. It is not saying this is cumulative of granting subject matter jurisdiction. Section .178 doesn't speak to subject matter jurisdiction. It speaks purely to the means of redress.

SMITH: Prior to 1997, the legislature when they amended the human resources code, that section that you referenced provided for a trial de novo in the DC. Now I assume that - that's a real trial de novo. Is that your understanding?

LAWYER: Yes.

SMITH: Then there was a Sunset Law in 1997. The legislature came in and struck that provision, referred these child care administrative orders to an administrative law judge. That was new. You get a full hearing there. But they didn't say anything about judicial review. Could it be logical that basically they were saying oh we're not going to burden the DC with a trial de nov. We are going to send you to an administrative law judge for trial de novo, but leave it to the general APA statute for presumably a substantial evidence. In the plaintiff's petition in the TC they asked for a trial de novo in the DC and it went on appeal and it's been sent back for a trial. And if we affirm the CA's, I assume your position is going to be that Mega is just entitled to a substantial evidence review not a true trial de novo?

LAWYER: Our position would be that Mega is not entitled to any judicial review...

SMITH: But if we say they are entitled to some judicial review under 2001.171, what is the standard of review then?

LAWYER: By its terms if .171 were to grant subject matter jurisdiction, the only standard that would be there would be substantial evidence. And so if this court rules that is a grant of subject matter jurisdiction, I am not aware of any arguments, certainly that respondents have raised that they

would be entitled to de novo.

SMITH: Before 1997 they were entitled to de novo in DC. If we rule for them here today, they will be entitled to substantial evidence.

LAWYER: But 1997 was a big shift because they went from internal hearings within TDPRS to a full fledged APA contested hearing case with all the procedural protections, the rules of evidence, witnesses being sworn, a full record, all conducted before SOAH, independent of TDPRS. And so the legislature...

SMITH: And that's probably a standard Sunset provision. Transition being made in state government over time through the Sunset process.

LAWYER: Yes. And one of the things the amici point to is a snippet of legislative history where one Senator indicates that the sole purpose of doing so was to conform with the Sunset recommendations. But I would note as this court held in Flemings Foods that a stated intent not to make a substantive change cannot trump what the language in fact does. And the language before the 1997 amendment had an explicit provision granting subject matter jurisdiction to Travis County. And after 1997 that's gone.

JEFFERSON: Are you aware of any statutes pertaining to state agencies that say notwithstanding §.171 there is no judicial review or no right to judicial review in this instance?

LAWYER: I am not aware...

JEFFERSON: I'm trying to figure out what the legislature has in mind. If they believe that the APA creates judicial review in all of these agencies, but does not want review of some determinations by an administrative law judge, would the legislature say so somewhere?

LAWYER: I'm not aware of language like that, but I would expect that respondent and/or amici would raise that language. Because they would urge that that language shows the legislature believes the general presumption is .171 grants review. And they have not pointed to any such language. I'm not aware of any such language. And the fact that the legislature over and over again has inserted these provisions and has never once done anything to alter the 3rd court's consistent rulings for some 24 years now suggests that that is not the legislature's understanding, the particular understanding of an individual revisor notwithstanding.

To shift from no right of judicial review to a blanket authorization and waiver of sovereign immunity for every agency, I would suggest would take a clear and unambiguous waiver. And I don't believe that 171's language in context constitutes such a clear and unambiguous waiver.

The amici point to various academic commentators and there was certainly those who express viewpoints in the legal world to support and would like to see judicial review in

all contested cases. And have been arguing for that for a long time.

I will note that what they largely what they point to is academic commentary. That has not been the law up until now. It's not been the law in the 3rd court, which is the predominant court interpreting this, and it has not been the understanding of the legislature as evidenced by its repeated passage of different provisions and different enabling statutes granting judicial review. All of which would be superfluous if 171 did.

* * * * * * * * * *

RESPONDENT

MORRIS: There are over 8,000 daycare centers in Texas. The way they are licensed and the way they get contracts are no different than nursing homes, which in this state have long been found to be vested property rights.

The issue regarding daycares was never taken up before 1997, because as the court correctly stated, that right to appeal - you could just look at it de novo was contained in the statute. In 1997 it was deleted. But the reference to the APA was not deleted. And in an internal rulemaking with the TDPRS it also remained. Around 1995-1997 people said look, we need to take these administrative hearings and move them out of the internal agencies. Because people could not get a fair shot. They formed the legislation that formed SOAH, so it should at least go in front of some impartial administrative law judges. That's how it came about.

When they went back and took the protective regulatory statute and deleted that, they left in the APA because of one thing. They knew people would have to have to have the right to appeal from SOAH. I don't believe that the legislature intended, I don't believe that they believed that they were doing it, giving away to the State Office of Administrative Hearings the final choice on deciding daycare center contracts and licenses.

HECHT: Do you think though that they knew that the settled law at least from the 3rd court was that the APA does not confer jurisdiction?

MORRIS: I don't think they even thought about it at the time. I don't think that they thought that any industry of that size would without a battle decide to give away his right to appeal one of substantial interest. Substantial interest much like a lawyer or a doctor or a dentist or bank charter, insurance charter. And even though some of those are larger, some of these daycare centers have substantial financial interests tied up. They make a lot of money. They hire a lot of people. They have every right and interest that you would if you were in private practice and someone wanted to come back and say you would not have the right to appeal a recommendation that threatened to destroy your livelihood. They have that back in the administrative context without a doubt. Even though that section was deleted it was not eliminated.

HECHT: How can that be?

MORRIS: They could have simply when they took it out...

HECHT: You're arguing well they didn't mean to. Nobody realized they were. But it does look like they did it.

MORRIS: It looked like they were trying to clean up the statute. And they left in the reference to the APA in section 2001. And when you look at it and someone makes the argument that it's simply procedural, the motion for rehearing language is not procedural. It is mandatory. It's jurisdictional. If you don't file a motion for rehearing under SOAH, you do not get to court. Every court consistently has ruled that. So how come some portions of the APA are procedural and how come some are substantive and grant subject matter jurisdiction.

HECHT: If the APA provision does grant jurisdiction, that would be a big change wouldn't it, or not?

MORRIS: It would be consistent - it would be something this court would have to determine.

HECHT: But you said it means what it says.

MORRIS: It means what it says.

HECHT: In a contested case, you get judicial review. Period. Any agency or whatever.

MORRIS: Any agency - unless in a statute the legislature says you are not entitled to judicial review under this statute...

JEFFERSON: Are there any statutes that do that?

MORRIS: None that I know of. The right to judicial review does not involve every agency action. Under TDPRS a person could go back and apply for a license and it not be granted, I think you could limit their review administratively.

SMITH: You're saying they wouldn't be entitled to a contested case hearing?

MORRIS: Yes.

SMITH: And, therefore, they would not fall under 2001.171 when that was denied.

MORRIS: Yes. And there are a host of agencies that do a lot of things that don't result in contested hearing "finality" but are final as to the actual _____ regarded individuals or businesses.

OWEN: I haven't looked at this in a long time, but I seem to recall that when the Texas APA first came out it pretty much tracked the federal APA. Specifically with respect to judicial review section is it diverged at some point?

MORRIS: Pretty much on track with the _____.

OWEN: And the federal courts said it's not an independent grant haven't they?

MORRIS: The federal rules though are a little different because in the statutes, in each statute they treat them somewhat individually. Just like social security disability. And the language in each of those statutes is a little bit different; whereas in the Texas statutes they are pretty consistent. Back at one time when there was a lot of debate about it, I believe that people put in you have a right to judicial review because of the confusion between de novo and substantial evidence. As it progressed it became unnecessary. People kind of assumed that if you have a contested case hearing that was properly appealed and a motion for rehearing, you could take that case to the DC.

OWEN: It seems to me we've got two different questions here. One, what does the underlying health code provide? and independently does the APA? It seemed to me that the Texas Act was intended to track the federal APA, and the federal courts at least have said the APA is not independent grant. It's just a net. If a specific enabling statute doesn't provide for the judicial review or the administrative review, that's where the APA picks up. Did Texas make a conscious decision to diverge from that with respect to the APA?

MORRIS: I think that the decision that the court is struggling with is that different courts have looked at it and interpreted it different ways.

PHILLIPS: The third courts done it for 24 years one way and Waco and Houston have done it another way once.

MORRIS: One of the fundamental bases though for the finding under the 3rd court seems to be that it would overwhelm the judiciary. And I can't tell you whether that would or not. 8,000 daycare centers are a lot of daycare centers. But the truth of the matter is, is that the judiciary can't just advocate this jurisdiction to administrative agencies. And this state has never done so. And that is essentially what happened. If the interpretation recommended by the state is adopted, you would essentially have a significant portion of commerce that would not have a statutory right to review by the courts even if they followed all the conditions precedent.

HECHT: But that's the legislature's call isn't it unless it involves vested rights? We have that exception.

MORRIS: Yes. However, they didn't say that. They could have come back in this - when they did this revision and said you do not have a right to judicial review. What they did is they took a section out that dealt with de novo and just referred it to APA. When they refer it to the APA,

when you look at it the clear reading simply says you have a right to appeal as long as you comply with all of the procedural requirements.

HECHT: But if that's what they thought, then what's the answer to the state's argument they keep passing statutes that say you have a right to appeal, you have a right to appeal. Why would they put that in any statute if they thought it was covered by the APA?

MORRIS: It's just probably duplicative. I would say to you also that even though the courts do have - they have to be concerned about being overloaded with contested case appeals In a case like this, I don't think that you would have that. I think that you would probably make the administrative agency a lot more responsive, but right now the way it's set up they interpret it, the administrative agency essentially runs rough shod over a industry without judicial review.

HECHT: Is that happening? You said there were 8,000 daycare centers, but you don't say how many of them have had adverse licensing.

MORRIS: I can't tell you exactly. If the court does not address this issue in terms of the statutory right to appeal, at sometime it has to address the issue of whether or not they have a vested property right, which is a pleading issue, which popped up in part of the briefs. I do believe that a daycare center license is a vested property right. I understand the state argues that it's a grant and a privilege. At the same time there are many, many industries that involve money, that involve time, that involve livelihood where the courts have ruled that they are vested property rights. And it simply means that the pleadings may need to be changed initially from the appeal process. But it does not mean that you get less cases. What it means is, that they simply get reformatted from the appeal process. And the reason why it has not come up before is because you had a de novo trial that was written into the statute before. It doesn't mean that you didn't get the ability right to appeal. It just meant that its' changed and just automatically reverted to 2001.171.

SMITH: Say we rule against you on the 2001.171 and you have to rely on the property right inherent - the state has made an argument. It seems to be pretty solid that you didn't plead that sufficiently in the TC. What's your best answer to that?

MORRIS: The response is that they filed motions for special exceptions and a plea to the jurisdiction. The court then ruled on the special exceptions and allowed us to amend the petition to add the vested property right interest even though it was clear from the pleadings that we were appealing from a revocation of a daycare center license. If you look at that and you look at the rulings on special exceptions, which allow amendments before a final disposition, it would have allowed us to go back and amend those pleadings to allege violation of a vested property right, which automatically triggered a right to appeal.

I do think it does not make sense to argue that an administrator of a facility has a right to appeal to a DC. And out of those 8,000 daycare centers there is about 8,000 administrators. But a company that owns the business, that pays the bills, pays the utilities, pays the

taxes, hires the people, does not have a right to appeal. That the legislature intended such a result, I simply don't think that it's logical..

PHILLIPS: Why didn't they remove - I understand that, but if that's the case why didn't they remove the appellate language from both rather than just from one and not the other?

MORRIS: I can't explain that either. I can say that they left in the reference to the APA 2001. Because that automatically contained the language that gave you the right to appeal in contested hearings once they were filed.

* * * * * * * * * *

REBUTTAL

LAWYER: First of all the question J. Jefferson asked about if any statutes specifically say there should not be appellate review. One example from this case in particular is in the Human Resources Code §40.066 says that the ALJ's decision is the final decision. And I would emphasize the definite article the. It didn't say it's a final decision, which would suggest it may be an appealable final decision. It says it is the final decision. And a reasonable inference from that is that it means what it says.

A second point that was referenced just a moment ago by respondent and was also argued at great length by amici is the notion of incorporating the APA by reference. And there are several responses to that that I think are worth considering. First of all, when the Human Resources Code does that, for example in §42.024 or 42.072(b), it says proceedings for a disciplinary action are governed by the APA. It uses the word proceedings which I would suggest focuses on that that is the basic procedural mechanism whereby the hearings will be governed. It does not speak to jurisdiction. It does not say trial court jurisdiction shall be found as under the APA. It says proceedings are governed by the APA.

In addition to that, this court has said several times that one should not incorporate a waiver of sovereign immunity by reference. As recently as just this year in Wichita Falls v. Taylor and also long before that in Duhart v. State, this courts has said a reference doesn't automatically incorporate a waiver of sovereign immunity.

The third point is something amici have argued. They've said parts of the APA are substantive. And they focused in particular on 2001.038, which on its face does allow the lawsuit there. The APA generally is a procedural mechanism. And procedural constraints by their nature can be necessary for subject matter jurisdiction. Particularly in the case of a waiver of sovereign immunity. For example a notice of appeal is a procedural step, but if a party fails to file a notice of appeal, it can defeat jurisdiction for that appeal going on. That's a very different thing from saying a procedural mechanism can grant subject matter jurisdiction particularly if it doesn't purport to do so. Now .038 on its face purports to grant jurisdiction and has been interpreted to allow declaratory relief on the validity or application of a rule. But that's one specific section that is on its face

granting jurisdiction. The APA as a whole is a procedural code and particularly with waivers of sovereign immunity before those waivers should be inferred, there should be as this court has said express and unambiguous language to that effect.

SMITH: But there's no express waiver in .038. That's just what you got through saying. It says you can file declaratory judgment. The last sentence doesn't say in addition we waive sovereign immunity to make sure this provision means something.

LAWYERS: That's right. But there we are not aware of an interpretation of that provision that makes any sense other than to understand that as allowing subject matter jurisdiction. Conferring subject matter jurisdiction for that very limited purpose. In this context it's possible to understand .171 as an exhaustion requirement. And in addition there is the fact that there are all the other statutes both at issue in this case and more broadly that are rendered superfluous. And under Continental Casualty reasoning referencing one and omission in the other is very strong indication the legislature intended not to allow judicial review where it omitted. Continental Casualty said where there was no mention of "inherent right to review" or "due process" then it is waived on appeal. And I would note the amici implicitly concede that Continental Casualty forecloses this because the principal cite they rely on for this is the dissent in Continental Casualty. But even on the face of the Chief's dissent in that case, in footnote 1 that dissent makes clear that that dissent was predicated on the fact that the parties there had argued in the DC. They just did not formally amend their complaint. And both the majority that explicitly adopted the 3rd circuits _____ opinion and the dissent in footnote 1, both agree that if it's not raised until appeal it's gone. And so I would suggest that that opinion unanimously agrees that if the don't raise it until they get to the CA, they can't go back and raise a brand new claim then.