ORAL ARGUMENT – 2/11/04
03-0204
THOMAS V. LONG

HULL: This case brings to you two issues. Both are jurisdictional. The first jurisdictional issue was whether the CA properly denied its own jurisdiction when it said that Sheriff Thomas couldn't appeal under 51.014(a)(8), which allows an interlocutory appeal. The second jurisdictional question under which we have three arguments basically asks whether the TC had jurisdiction to enter the orders? It did basically under the respondent's declaratory judgment claim.

With regard to the first issue. As I said an interlocutory appeal is available when the TC grants or denies a plea to the jurisdiction by a governmental unit. That's 51.014(a)(8) of the Civ. Pract. & Rem. Code. There's no dispute here that Sheriff Thomas did in fact raise jurisdictional issues in his motion for partial summary judgment. As a matter of fact, it dominated the motion for partial summary judgment. And there's no dispute that the TC granted declaratory relief to the respondent and also denied Sheriff Thomas's partial motion for summary judgment as it pertained to the jurisdictional issue.

BRISTER: Is there a difference between plea in bar and plea to the jurisdiction?

HULL: Not that I am capable of telling you.

BRISTER: Well the CA says that a plea in bar results in a take nothing judgment, whereas a plea to the jurisdiction results in dismissal. And your answer was a plea in bar. I'm just wondering if that makes any difference here.

HULL: The plea in bar asserted a primary jurisdiction argument. The exclusive jurisdiction argument was raised in the partial motion for summary judgment. So in fact that was an error in the brief.

As I pointed out in the brief, there are four CA's that have held that an appeal under (a)(8) is permissible if it's brought in another form other than an actual plea to the jurisdiction. The courts basically hold look to the substance, not to the title or the form of the motion or the plea.

As well there are three courts that go off in the other direction. This court has said often, many times to look to substance not form. For example in the case of Speer v. Stover(?), which I've cited in the brief, the defendant filed a plea in abatement claiming that the TC didn't have jurisdiction. The TC entered an order dismissing the case saying, yes. You're right. I don't have jurisdiction. The plaintiff took it up on appeal and the CA said Wait, that was a plea in abatement. A plea in abatement only results in abatement as opposed to a dismissal. And therefore it's not a final order.

This court said No. Look at the relief that was sought. What was sought was a plea to the jurisdiction, not a plea in abatement. Therefore, the order was final, and therefore the CA should have addressed the issues.

O'NEILL: Presuming that we agree with you on that point, as to the substantive jurisdictional question the CA would consider, do you agree with the CA's opinion that the only substantive issue relating to jurisdiction would be the exhaustion of remedies piece?

HULL: No. We have three arguments total with regard to...

O'NEILL: But the CA said those don't relate to jurisdiction.

HULL: I don't agree with that. In particularly, the CA said that the declaratory judgment act if it were misapplied was merely error. It's not a jurisdictional problem. My contention is that Tommy Thomas was sued in his official capacity. A case brought against an official in his official capacity, the case against a governmental unit, therefore, the defendant still has his sovereign immunity. Sovereign immunity consists of two components: immunity from suit, and immunity from liability. Tommy Thomas still has immunity from the suit, and under the declaratory judgment act, if somebody tries to backdoor into something that's normally barred by sovereign immunity or immunity from suit, the declaratory judgment act cannot provide relief, and assume the jurisdiction is proper.

O'NEILL: Now the CA said the sheriff's brief has not established that it's immune from suit. What does it mean by that?

HULL: I'm not sure. Again, Tommy Thomas was sued in his official capacity and he represents the governmental unit. A governmental unit - sovereign immunity is the rule.

O'NEILL: And that was pled and alleged. So you don't know why the CA made that statement?

HULL: I do not know why.

WAINWRIGHT: In fact your client has raised the same issue as to whether the interpretation of the commission's order could include that the claimant go back to work without any testing. And that's been decided by the 1st CA in 2003. In a case that's almost directly on point. Shepherd v. Thomas, decided in a footnote but doesn't say a whole lot about it.

HULL: Shepherd was a case where the employee actually went back to the commission and asked for relief, which is one of our arguments that the relief should have been granted in the commission. In Shepherd, the commission signed an order and that order can be found at record 223, 224. Also Van Pelt in 1994, where someone was exempted from testing. That's at page 299. Essentially if people go back to the civil service commission and they've asked for

relief, at certain times the commission has given them relief from these testing requirements. And it's our contention that that's what should have happened in this case.

WAINWRIGHT: In Shepherd the court cites the commission's order that "Shepherd should be reinstated to his former rank as a deputy with seniority and benefits, but no reimbursement of back wages." Was there a modification of that order by the commission? Otherwise that's the same order as in this case.

HULL: No. There is a subsequent order. And that's what you will find at the record references.

WAINWRIGHT: Let me ask you about section 51.014(a). You say that we should look at the substance of that statute rather than the specific vehicles or motions that are cited. The statute is fairly specific in different places. It cites specifically temporary injunctions and what you can do with those, motions for summary judgments and what you can do with those, motion to vacate an order, appointing a receiver, or trustee, what can happen with those. And then in (a)(8), the relevant one here, it says plea to the jurisdiction. Why shouldn't we look at that whole section and say the legislature specifically pinpointed the motions it wanted to handle in certain ways, and just rely on the strict language in (a)(8). It says plea to the jurisdiction.

HULL: Under (a)(3) which allows an interlocutory appeal, when a TC refuses to certify a class this court has held in the past in the McAllen Medical Center case that a preliminary certification of a class isn't an interlocutory appealable order in order to protect the rights of the class. This court has also held in the De los Santos case that when a class type has changed significantly so as to alter the fundamental nature that is basically creating a new class and thus you can take another interlocutory appeal. Under (a)(4), which allows...

WAINWRIGHT: Those examples under (a)(3) are different in nature than what we're talking about under (a)(8) aren't they? They're still talking about certifying or refusing to certify a class. From what I understand you've cited the opinions as saying they talk about at what point you can address that, not whether it's an actual class certification or not.

HULL: In McAllen that was a preliminary certification. The certification had never taken place before the appeal. To give another example, under (a)(4) grants or refuses or grants a temporary injunction or grants or refuses to dissolve a temporary injunction. Despite a temporary injunction probably being void this court held that the interlocutory appeal could be taken by the enjoined person. That was in the Quest Communications case. Also in Brown v. Todd, this court held that a denial of standing is essentially a denial of temporary injunction. Again looking to what was intended in the statute and allowing an interlocutory appeal. And finally under (a)(5) which allows an interlocutory appeal from a denial of a motion for summary judgment that's based on an assertion of immunity by an individual. This court has allowed three different cases: the City of Beverly Hills v. _____, 904 S.W.2d 655, DeWitt v. Harris County, 904 S.W.2d 650, and the City of Houston v. Kilbern, 849 S.W.2d 810 allowed the governmental immunity to take interlocutory

appeal when it's asserting the individual's immunity despite the plain language of the statute.

The point is the court has in the past looked at what the intent of the interlocutory statutes were. And while the interpretations don't necessarily follow the literal language of the statute, they certainly follow the _____. Since these interpretations by the court have come up - somewhat nonliteral interpretations, the legislature has amended 51.014 twice in the last two sessions alone, and they've not monkeyed with any of those provisions. So apparently the legislature is happy with the court's interpretation as intended, not as specifically written.

Regarding the jurisdictional problems in the TC. Tommy Thomas asserts that there are three reasons why the TC lacked jurisdiction to enter the orders as it did. The first reason is, Tommy Thomas asserts that the civil service commission had exclusive jurisdiction. Under the exclusive jurisdiction doctrine all relief should have been handled through the civil service commission rather than going through a collateral proceeding.

PHILLIPS: Whose burden was it - if you assume with me for a moment that the civil service order was silent on this question, then who had the burden to go clarify that if that question is within their exclusive jurisdiction?

HULL: The respondent did.

PHILLIPS: And why is that?

HULL: Because the regulations which Sheriff Thomas was trying to enforce were regulations that were in the employment manual that was issued to Ms. Long. These regulations had been in place since at least 1994. There is record evidence that the affidavit by Major Henderson at 209 and 210, since at least 1996 the Sheriff's department has required this of every employee who has gone on leave for military leave, FMLA, you name it. If they are gone for more than 1 year they have to come back and take that testing. They've applied it to everyone.

More importantly of the testing requirements all but one are required by state law. So Tommy Thomas didn't make those regulations and most of those regulations the state did.

JEFFERSON: Which order came first, the order in Shepherd or the order in this case from the commission?

HULL: Shepherd. The employees are charged with knowing what's in the manual. And again it's applied to everybody. Ms. Long had a pretty colorful disciplinary history in the sheriff's department and she should have been aware of those provisions.

JEFFERSON: But this is a full adversarial hearing and there is no question about whether or not she was qualified that was put in evidence. So why wouldn't Thomas knowing what happened in the Shepherd case, the same procedurally, it happened the same way except that Long didn't ask

to go back down to the commission. But why wouldn't the sheriff have asked the commissioners to modify their order or clarify their order so that she would have to go through this testing?

HULL: At the time we were fighting Shepherd. We lost. But it's our contention that - well Shepherd did the right thing. He went and requested relief. He put the burden on himself and he did it the right way, and he got the relief that way. Thomas didn't do that. And the commission didn't go out of their way to give him that relief.

WAINWRIGHT: But Sheriff Thomas sent a letter to the commission after the first order saying simply reinstate. And said I'm not going to follow it because he has to submit to these tests. It's at that point that the employee went back to the commission. So again following J. Jefferson's question, Sheriff Thomas knew this was an issue with the commission with orders that simply said reinstate, but no reimbursement of employee's wages. Couldn't the sheriff have raised it when it got the same order that it initially got in Shepherd?

HULL: I suppose he could before the commission, but the commission was well aware of this regulation. And Jeanne Long is charged with being aware of this regulation.

WAINWRIGHT: As is the sheriff.

HULL: Yes. He promulgated it. But there is thousands of regulations and he can't go around and warning everybody before they do something. And we probably hear dozens, probably 50 - 100 civil service hearings a year.

WAINWRIGHT: If the commission ordered the person to go back to work, but then the testing indicated that the person couldn't get their job back, then you have an inability to follow the commission's order?

HULL: It depends I guess on the circumstances of why they couldn't complete the testing. If they couldn't comply with the state testing requirements they are going to lose their license. They can't be a peace officer anyway. The only test remaining that Tommy Thomas has is the physical ability test. And while it's not in evidence there are provisions where somebody who can't pass it can make it up at a later date. They will give them some time to work at it.

WAINWRIGHT: There is the potential that the testing could be used as a means of frustrating the commission's order.

HULL: Testing is applied across the board whether somebody is being reinstated from a termination or somebody is coming back from guard duty. Everybody does it. Everybody always has.

WAINWRIGHT: My question is, testing could be used as a method of frustrating the commission's order?

HULL: Since Shepherd if the commission were to order that...

WAINWRIGHT: Assume the commission didn't order that. I'm not assuming it happened here. I'm saying conceptually, hypothetically testing could be used as a way to frustrate the commission's order.

HULL: I can't concede to that. That assumes that somebody in the sheriff's department wants to frustrate the commission. I don't see that happening here.

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RESPONDENT

CHOUDHARY: In preparing for oral argument, I realized that there's an important point that has not been addressed by either side in any of the briefs. And that's this. How is this interlocutory appeal affected by the fact that the sheriff has never challenged the TC's jurisdiction over Jeanne Long's retaliation claim.

Now three CA's have came to the same conclusion on this issue. Harris County Flood Control District v. TG&E, 35 S.W.3d 772, 2002 Houston 1st Dist. In that case the court held " when the TC has jurisdiction over any claim against a governmental entity, the court should deny that entity's plea to the jurisdiction. And the reasoning for this is two fold. One is that a plea to the jurisdiction is a plea designed to dismiss all the claims. So if a party is not trying to dismiss all the claims, you're not surely making a plea to the jurisdiction. So here the sheriff never tried to dismiss Jeanne Long's retaliation claim. So the sheriff has truly never made a plea to the jurisdiction.

The second point is for policy reason. The policy reason for allowing the party to pursue an interlocutory appeal is that if the party was not allowed to pursue an interlocutory appeal, then if it turns out that the party is immuned from liability, the party will waste resources on a trial needlessly. That's the policy reason for allowing an interlocutory appeal. But that policy reason doesn't apply if there's going to be a trial anyways on another claim against that party, which is the case we have here. In other words, the retaliation claim is set for trial. There's going to be a trial on that claim anyways regardless of what happens on this interlocutory appeal. So there's no policy reason for allowing this interlocutory appeal because they are going to have to spend their resources on the trial anyways. And so these three courts came to the same conclusion that interlocutory appeals should not be allowed in this type of case where the TC has jurisdiction over at least one claim against a governmental entity.

I've cited the Houston case. There's a Waco CA decision, Alledo Independent School District v. Choctaw(?) Properties, 17 S.W.3d 260 (2000); then an El Paso CA case, 2003 Tex App Lexis 10419, Life Management Center v. Christiana Crews.

BRISTER: I understood the back pay was not for the back pay while she was off the first

time. But for the back pay after she refused to test. Is that wrong? What is still left for trial?

CHOUDHARY: Jeanne Long filed a charge of discrimination with the Texas Commission of Human Rights saying that she was discriminated based on her gender because she's not being allowed to return to work. That claim is set for trial still. It's a retaliation claim. It's a discrimination claim basically saying that she's being retaliated against for filing a charge of discrimination.

BRISTER: But it stands or falls with the testing issue. Right? I mean if the sheriff has the right to make people regardless of their gender test after being gone for 1 year, then that claim goes away.

CHOUDHARY: Yes. But the sheriff has never tried to dismiss the retaliation claim. And has never challenged the TC's jurisdiction over the retaliation claim.

BRISTER: But if the TC doesn't have jurisdiction to decide the testing claim, how are they going to decide the other one?

CHOUDHARY: Well the jury is really the one who - the TC does have jurisdiction over the retaliation claim. That's clear. It's under the Texas Commission Human Rights.

BRISTER: I see. So you try that to a jury and get a verdict, and then if we affirm and say that the sheriff has power to dismiss her because she didn't test, then it disappears without an appeal?

CHOUDHARY: In that case we would have to come up with - if it's ruled that the sheriff's testing is appropriate, we would have to come up with other evidence of sex discrimination against our client. Maybe some kind of sexiest comments, or so forth, or some other evidence of sex discrimination that maybe they do uniformly apply that...

BRISTER: You're her lawyer. You know what it was. Was it testing or was it something else?

CHOUDHARY: Our main argument is the testing. But nevertheless we haven't fully put on our evidence on a retaliation claim. And we could argue that they are just using the testing as an excuse because they are really discriminating against her based on her sex. So I'm saying it's not completely the same claim. And a retaliation claim is a separate claim that can stand on its own regardless of how this testing issue is resolved in any event.

Just to kind of summarize the issue. There has been no plea to the jurisdiction because the sheriff has never tried to dismiss all of the claims. Since there's been no plea to the jurisdiction this interlocutory appeal is improper because the sheriff can only pursue an interlocutory appeal from an order denying a plea to the jurisdiction.

WAINWRIGHT: The House Research Organization's bill analysis for this change to 51.014 says that these interlocutory orders can be appealed, include orders that grant or deny "a claim that the court lacks jurisdiction". So that language in the bill analysis doesn't say a summary judgment motion. It doesn't say a plea to the jurisdiction. It says a claim from the house side. Are you familiar with any other legislative history on the background of (a)(8)?

CHOUDHARY: I'm not familiar with any other legislative history. I will cite you to a case decided by this court. But this court in Steery v. DeVord 967, S.W.2d 352, 1998, the plaintiffs had filed a shareholder derivative claim. And the TC struck the claim, and the plaintiffs tried to pursue an interlocutory appeal on the ground that the TC refused to certify a class. And the plaintiff's argument was that a derivative claim is equivalent of a class action. In other words they were trying to make similar argument that the sheriff is arguing that a plea to the jurisdiction is equivalent to a motion for summary judgment. And in this court in Starry(?) said - they rejected the plaintiff's claims and said that appellate jurisdiction over interlocutory appeals is allowed only if the statute explicitly provides for that jurisdiction. And explicitly is the key word. The court narrowly construed that provision and said basically since the plain language just talks about class actions and doesn't talk about class actions and derivative claims, derivative claims cannot be pursued on interlocutory appeals. Similarly here since the plain language says plea to the jurisdiction, that means plea to the jurisdiction, not plea to the jurisdiction and motion for summary judgment.

I've already explained why there is a significant difference between their motion for partial summary judgment and a plea to the jurisdiction. In that a plea to the jurisdiction seeks to dismiss all the claims, whereas a motion for partial summary judgment like they filed doesn't seek to dismiss all the claims. So the policy reasons for allowing interlocutory appeal is significant. The policy reason for allowing interlocutory appeal is because you don't want the state to have to waste its resources needlessly on trial. Whereas, that policy reason doesn't exist here since there's going to be a trial anyways on the retaliation claim. Or in any case where the governmental entity doesn't seek to dismiss all the claims in the case.

WAINWRIGHT: Could plea to the jurisdiction in the statute refer generally to that method of raising subject matter jurisdiction, because we all kind of know that pleas to the jurisdiction involve subject matter jurisdiction claims?

CHOUDHARY: When Mr. Hull was up here, those 8 provisions in the interlocutory appeal provision are very specific. And the legislature could have easily put in there "and motion for summary judgment" by saying specifically a plea to the jurisdiction, the plain language controls. And this court in Starry said unless the statute explicitly provides for appellate jurisdiction over interlocutory appeals there is no appellate jurisdiction over interlocutory appeals.

So you've just got to go back to the plain language. Unless there is some clear evidence of the legislative intent saying the legislature didn't intend to allow interlocutory appeals from denial of summary judgment. In the absence of that, the plain language controls, and the plain language says plea to the jurisdiction.

WAINWRIGHT: The petitioner's brief says that the TC expressly denied defendant's challenge to the jurisdiction. And the order was under Tab C as cited in the briefing. It's the order signed March 4, 2002. It says after considering the evidence and the legal arguments this court grants defendant's motion in _____. There was a part there that says and denies part of it. But that's marked out by the TC. So there's no language in this order that says any part of defendant's motion was denied. Is this March 4, 2002 the order that you all are basing your assertion that the TC denied the challenge to jurisdiction, or is there another order?

CHOUDHARY: There's another order. I believe the sheriff was relying on Tab B of the sheriff's brief on the merits.

WAINWRIGHT: Well it says he's relying on Tab C. Tab B seems to relate to the interpretation of the order. Tab C does seem to be the, at least in its proposed original form and in the marked up form, the order that relates to the jurisdiction challenge. Do you know which one directly goes to the jurisdiction challenge? Which order expressly denied the challenge to the jurisdiction?

CHOUDHARY: I guess Mr. Hull's point would be that by awarding us relief the TC implicitly stated it has jurisdiction and denied their challenge to the jurisdiction. So by Tab B, which grants us relief, implicitly denies their challenge to the jurisdiction.

I think this case can be resolved just on the rule that the TC has jurisdiction over any claim against a governmental immunity, then interlocutory appeal should not be allowed. But turning on to the next issue, which is regardless of whether or not the CA erred on the plea to the jurisdiction issue, and I don't think they did from what I just said, but regardless of whether they did, the CA correctly held that the civil service commission did not have exclusive jurisdiction over this claim in this case. And there's really two reasons for that. One is that the local gov't code doesn't say that the commission has exclusive jurisdiction over this type of claim. And the second point is that the civil service commission has in essence already ruled that Jeanne Long does not need to take any physical test before returning to work because there is nothing in the order that says she needs to.

HECHT: When it already ruled did it have exclusive jurisdiction then?

CHOUDHARY: Yes.

HECHT: But now it doesn't have exclusive jurisdiction any more?

CHOUDHARY: Because it's already ruled. If a purported requirement is not in the order, then Ms. Long does not need to satisfy that purported requirement in order to...

HECHT: So if it hadn't ruled, it would have exclusive jurisdiction?

CHOUDHARY: Yes.

BRISTER: So when she returns to work she doesn't have to clock in, she doesn't have to check in with her supervisor or anything, because they ordered her back to work. She doesn't have to do any of the normal requirements that people have to do when they go back to work.

CHOUDHARY: The Tab B to the sheriff's brief, which is the TC's order, says "once returned to work this order does not govern the employer/employee relationship."

OWEN: So why didn't she go immediately - why didn't she show up at work and say I want to work, and then if they wouldn't let her then she goes and files another grievance with the commission saying they want let me work without tests?

CHOUDHARY: Attached to our plaintiff's first amended petition is a letter from the sheriff saying that she is not allowed to return to work unless she first completes the physical tests.

OWEN: Then why didn't she go to the commission to get that resolved?

CHOUDHARY: My argument is, it's not her burden to do that. The plain language of the commission's order favors her.

PHILLIPS: What if we disagree with that and we decide that this is truly ambiguous, that the order is silent on that, then who should have done what?

CHOUDHARY: I would argue that's a primary jurisdiction issue, which means that maybe this court could say okay, well maybe she should have, maybe the commission should have had an opportunity to rule on this issue. But primary jurisdiction is not a jurisdictional issue as this court explained in...

OWEN: Then what should have happened? Shouldn't the TC have abated and told her to go back to the commission?

CHOUDHARY: If it's a primary jurisdiction issue, then that would be like a discretionary thing for the trial judge to say, well yes, I think you should have gone to the commission first instead of coming straight to me. But that's not really an issue for this court, because this court on this interlocutory appeal can only rule on jurisdictional issues. Because they can only appeal from the order denying a plea to the jurisdiction.

HECHT: Then I don't understand your answers to me. I thought I asked you if the commission originally had exclusive jurisdiction over this issue, and you said yes.

CHOUDHARY: Yes.

HECHT: And I said, and if the commission didn't rule, therefore, it had exclusive jurisdiction. And I thought you said yes.

CHOUDHARY: Yes. And I'm saying they did rule in our favor.

HECHT: And then I said but what if they didn't? And you said then the commission would have exclusive jurisdiction, or did I misunderstand you?

CHOUDHARY: I guess I'm wondering what you mean by what if they didn't rule? As I read the order they did rule that she does need to take the physical tests.

HECHT: But they didn't rule. It didn't come, they didn't rule. If you went back in there and said motion to clarify, Did you rule on this or not? They say no. Do they have exclusive jurisdiction or not? And I thought that is what I asked you and I thought you said yes. And now I think you say they only have primary jurisdiction. And I don't understand what started our exclusive jurisdiction becomes primary jurisdiction.

CHOUDHARY: Once they make a ruling like in this case, then both the commission and the TC presumably have concurrent jurisdiction to enforce that order. In other words that's what the issue is in this case that resulted in this lawsuit. We're trying to enforce the commission's order.

HECHT: Back to CJ's question. If we think the commission did not rule on this issue, then what?

CHOUDHARY: I guess I will amend my answer then to say that that's really a primary jurisdiction point. That's a more of a prudential issue. In other words the TC possibly could have said well as a matter of discretion I'm going to order that you go back to the commission and talk to them first, but that's not really a jurisdictional issue. That's a primary jurisdictional issue.

OWEN: Where did the commission get the exclusive jurisdiction in the first place that you say it had? Is there a statute or rule?

CHOUDHARY: The local gov't code says that the commission has the authority to implement rules regarding discipline and so forth. So that is the procedure. Initially if an employee of the sheriff's department wants to challenge a disciplinary action, the only place to go is the commission. They can't go straight to the DC.

BRISTER: Is that under a union contract or is that under the statutes?

CHOUDHARY: It's under the statute, the local gov't code.

BRISTER: Where is the part that says you have to go? I was assuming that was a union contract.

CHOUDHARY: I believe it's in the commission's rules. It must be under the regulations issued by the commission. Under Rule 12 it says that if an employee wants to challenge a

disciplinary action, the employee must take steps and with a hearing at the commission.

The only way for an employee to initially challenge a disciplinary action is through the commission. Then once the commission makes their ruling, as it did in this case, then to enforce that ruling, which is what we did here, the DC has jurisdiction to enforce the ruling.

Just to argue again in case the court is thinking about ruling that the commission does not rule on the physical testing issue, my point on that is that we would all agree that Jeanne Long does not need to run a marathon before returning to work. Now why do we all agree with that? Because it's not in the order. It's not in the commission's order. The commission's order does not say...

OWEN: Assume that we disagree with you. What should we do? Assume we say that the order is silent. What should happen next?

CHOUDHARY: I agree. The plain language of the order is silent. But I'm saying silence means she does not need to take the test.

OWEN: What if we disagree with you and say testing, we don't know.

CHOUDHARY: Of course the first argument I was making is this case should still be dismissed because interlocutory appeals are not allowed.

OWEN: Assume we disagree with you on that.

CHOUDHARY: The local gov't code does not say that the commission has exclusive jurisdiction over this type of claim. And that's what the CA ruled. And they are relying on this court's decision in Subaru which basically was interpreting motor vehicle code and relied on the word exclusive in that statute as giving that entity...

OWEN: But you're saying they did have exclusive jurisdiction over disciplinary matters.

CHOUDHARY: Initially. And Jeanne Long fulfilled that by getting an order from the commission. Once the commission made their ruling, the commission no longer had exclusive...

OWEN: Let's assume she was reinstated in ____ when the commission order came out. Then the department says you still have to take the test. Then what jurisdiction does the commission have at that point to say yes/no?

CHOUDHARY: So you're saying after the commission orders that she be returned to work, and then she goes back to work, and then on her first day at the job they tell her she has to take a test? Okay. Then the commission's order has been satisfied at that point. It's out of the picture. She's

just like any other employee. If she refuses to follow an order they could discipline her or fire her. And if she wants to challenge that as being they are treating her differently than other employees, she will have to go through the whole commission process again and challenge it through the commission rather than going to a court or anything. She would have to receive another hearing before the commission. The point is in that situation, the commission's order hasn't been complied with because she's been returned to work. She was never allowed to return to work in this case so the court was never complied with.

WAINWRIGHT: The sheriff's policy is that if you are off more than 12 months, then to return you have to take the test. Correct?

CHOUDHARY: Yes.

WAINWRIGHT: The sheriff presumably didn't know what type of physical condition she was in after 12 months. Could she still perform the requirements of the job physically? So if we follow your analysis then testing is not required. She's hired. And after 1 day everyone says she just can't handle the job. Test her the second day back and she fails the test, then she's back in the same boat as if she had been tested on day one. Does that make sense that anyone employed by the sheriff should be able to fulfill the physical requirements of doing the job?

CHOUDHARY: Yes. And there is a provision that says you can be disciplined for lack of physical fitness or something along those lines.

WAINWRIGHT: But under my example, she gets to come back for the two days?

CHOUDARY: And that makes all the difference, because in that sense the commission's order has been complied with. She could return to work and we have no right then to ask the DC to enforce the order, because the order has been complied with. In this case she was not ever allowed to return to work, so the commission's order was never complied with and that's why we went to the DC in the first place.

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REBUTTAL

WAINWRIGHT: The express denial by the TC in its order, which order is that and where is the language?

HULL: That was B and C. It should be implied.

WAINWRIGHT: Implied. The order under Tab C.

HULL: C and B. You have to read them together. They were signed on the same day. The trial judge considered both party's motions on the same day.

O'NEILL: How do you respond to the argument that the retaliatory discharge claim is still at the TC and no one has contested jurisdiction over that? Do you agree with his assessment that no challenge has been made or no motion made as to that claim? It is still pending in the TC.

HULL: I do agree with that. Those cases that he cite, cited back to a case called Speer v. Stoger(?). It's a case I talked about earlier with the plea in abatement and plea to the jurisdiction. That's a case from this case 685 S.W.2d 22. The entire opinion in contained in page 23. It's cited in the brief. But what this court was doing in that case this court was explaining the difference between the result of a plea in abatement and a plea to the jurisdiction. This court simply said sustaining a plea to the jurisdiction requires dismissal. Sustaining a plea in abatement requires that the claim be abated until removal of the same impediment - or some impediment. This court didn't say all claims have to go, or some claims can't go. It didn't say anything like that. And I followed up on this and I looked at these cases you cited, and this court has never addressed that issue.

To me you can talk about policy reasons, but I think it's kind of silly for a court to deny an interlocutory appeal right. And instead say TC even though you probably don't have jurisdiction over these claims, you do have jurisdiction over one claim, therefore, we want you to go ahead and try them all. Now you could say well it's more efficient. But the problem is you're asking the TC to try a claim that you know is without jurisdiction to try, and, therefore, it's like an advisory opinion that this court can't issue. I can't see any reason why a TC should be able to try a case when it doesn't have jurisdiction over it. And that's the point of the interlocutory appeal statute.

The point I'm trying to make is this court never held that. Those cases cite back to Speer v. Stoffer from this court and it does not hold that. It doesn't address that issue. It's not part of the case.

OWEN: What if we were to conclude that the commission's order entitled Ms. Long to go back to work the very next day. It was silent as to testing so that was something you could require of her and if she didn't like it she could go back and go through the grievance process. But we nevertheless concluded that she was entitled to be returned to work the day after the commission's order. Where does that leave your case?

HULL: She was entitled to go right back to work.

OWEN: Did you start paying her paycheck?

HULL: Yes. The first duty assignment was start taking the test.

OWEN: That was more than 20 days later.

HULL: I guess that's true. Ironically though with the 20 day notice, she didn't respond. The point is, I don't think the equities are on her.

OWEN: Well your letter said don't show up until this day, and when you show up have this packet and you will take a physical test. If we construe the commission's order as allowing her to return to work the very next day, and you didn't allow her to return the next day, and that the testing issue could be resolved by the commission at a later date, where does that leave your case today?

HULL: I don't think it changes anything. She never asked to go back to work on the 8th. The letter went out on the 7th. She never asked to go back. She never responded to any of the letters that we sent her asking her to come back. She didn't call and say reschedule my appointment. She didn't do anything. She just didn't show up and all of a sudden she filed suit Nov. 13, two and one half months later saying I'm suing you.

Her first assignment back to work was to take the test. And she is paid for those tests while she's taking those tests. She gets paid as a employee.

OWEN: Did y'all cut her a check?

HULL: Yes.

OWEN: Is that in the record?

HULL: No.

OWEN: But she was paid after this order came in? For how long?

HULL: Yes. None of that's in the record, but she started the testing process and didn't finish it. I don't know how much the check was.

BRISTER: She started the testing process?

HULL: Yes. After these orders came out.

PHILLIPS: Is that in the record, or is that not in the record either?

HULL: That's not in the record. All this happened after these orders came out and the interlocutory appeal was taken.

WAINWRIGHT: 158.037 says an employee who on a final decision by the commission may appeal by filing a petition in the DC. It further says the DC may order reinstatement, payment of back pay or other appropriate relief. How do you square that statute with your exclusive jurisdiction argument?

HULL: Under the other appellate, which I think starts with 158.038, the review of the

commission's decision is substantial evidence. And it tracks the administrative procedural act with the six or seven different grounds. So actually the DC's relief is very limited and is defined under those circumstances just as it would under the administrative procedure act. So actually it tracks the typical state commission.

WAINWRIGHT: So from your standpoint if the DC follows those requirements it does have jurisdiction to consider the relief the commission ordered?

HULL: As far as exempting her from the testing?

WAINWRIGHT: Modifying the order, entering a different order or other appropriate relief.

HULL: I don't believe that statute has ever been interpreted. There's an argument to be made for that.

WAINWRIGHT: It says the court may order reinstatement, payment of back pay or other appropriate relief. If we agree with you that the CA had jurisdiction under 51.014(a)(8) is there appropriate judgment to remand this to the CA to consider the other issues?

HULL: I believe because you have jurisdiction over one issue you can take jurisdiction over the rest. It's up to the court. The court can remand it and ask the CA to consider it in the first instance.

O'NEILL: In order to take something on interlocutory appeal there has to be a substantive conflict. You're not claiming there's a conflict in the laws on the other pieces. You're just - all we're doing in this case is reviewing the CA's jurisdiction to decide those issues right?

HULL: No. There is a conflict as well as reviewing the CA's decision. There are 7 cases that say an appeal under (a)(8) is permissible if it's filed on something other than a plea to the jurisdiction.

O'NEILL I understand on that point that we would have jurisdiction to review that point anyway because it would fall within our ability to review whether the CA had jurisdiction. What I'm saying is on the other points that the CA declined to address because it found it did not have jurisdiction, we would need a conflict on those issues to be able to take those up wouldn't we?

HULL: No. If you have jurisdiction over one issue in a case, you can take jurisdiction over all. I do cite that in the brief.