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Supreme Court of Texas.
Ben Bolt-Palito Blanco Consolidated Independent School District,
Petitioner,
v.
Texas Political Subdivisions Property/Casualty Joint Self-Insurance
Fund,
Respondent.
No. 05-0340.

March 22, 2006

Appearances:
Not present for argument, for petitioner.
Judith R. Blakeway (argued), Strasburger & Price, LLP, San
Antonio, TX, for respondent.

Before:

Don R. Willett, Wallace B. Jefferson, Nathan L. Hecht, Harriet
O'Neill, Dale Wainwright, David M. Medina, Phil Johnson, Scott A.
Brister

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ORAL ARGUMENT OF JUDITH R. BLAKEWAY ON BEHALF OF THE RESPONDENT

COURT ATTENDANT: Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas, are admonished to draw near and give their attention, for the Court is now sitting. God save the Texas and this Honorable Court.

JUSTICE: Thank you. Please be seated. Good morning. The Court has two matters on its oral submission docket and the order of there appearance they are, docket no. 05-0340 Ben Bolt-Palito Blanco Consolidated Independent School District versus Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund from Jimwell's Canning and the Fourth Court of Appeals District, Justice Greenblatt seating in this cause. And docket no. 05-0511 Henry Southwest Question Belt Telephone Company LP an original proceedings. The court has allotted 20 minutes per side in each of this argument. The court will take a brief recess between the arguments. We should complete all arguments within two hours. These proceedings are being recorded and link the argument should be posted on the court's website by the end of the day today. The Court is ready to hear argument in 05-0340 Ben Bolt-Palito Blanco Consolidated ISD versus Texas Political Subdivisions Joint Self-Insurance Fund.

COURT ATTENDANT: May it please the Court. The petitioner's counsel is not present.

JUSTICE: The Court would heard-- hear argument from the respondent.

COURT ATTENDANT: May it please the Court, Ms. Judith Blakeway will present to us the claimant to respondent. Now, sit down.

ORAL ARGUMENT OF JUDITH R. BLAKEWAY ON BEHALF OF THE RESPONDENT

MS. BLAKEWAY: May it please the Court. My name is Judith Blakeway of the law firm of Strasburger and Price and I represent Texas Political Subdivisions Property/Casualty Joint Self-Insurance Fund. The fund was defended in the trial court and then appellate in the Court of Appeals, this is a interlocutory appeal, from a trial court's denial of a motion to dismiss for lack of jurisdiction based upon sovereign immunity. Ben Bolt-Palito Independent Consolidated Independent School District filed a petition for picking a declaratory judgment. That a loss that it suffered was a result of water in low damage was covered under a self insurance of this school that was established by number of public entities under the Interlocal Cooperation Act.

JUSTICE: Does that mean a power purpose of a called it TPS, was it a self insurance fund?

MS. BLAKEWAY: Yes, it's the self insurance business.

JUSTICE: That's all it did.

MS. BLAKEWAY: That's all it did. The ...

JUSTICE: Has, has it denied in the record about water, to denied the claims before?

MS. BLAKEWAY: It is not in the record, there was not the, the evidence was not developed, the case was basically decided on the pleadings.

JUSTICE: So what did you suppose to do?

MS. BLAKEWAY: I'm sorry.

JUSTICE: What did you suppose to do when they deny claims?

MS. BLAKEWAY: What did you suppose-- Oh, what is the person whose claim is denied suppose to do?

JUSTICE: Right.

MS. BLAKEWAY: Well, actually there are couple of things, that person can do that weren't done in this Case, although I'm not sure if this is in the record, but what you, what you are suppose to do is there is an administrative proceeding which you can go to the first and set committee of the board, the governing board, the TPS. The TPS is made up of member entities, those member entities elect a governing board, so they have a representation on the board. The board has created a subcommittee in a, through which you can appeal the denial of your claim to that subcommittee.

JUSTICE: Is this in the record?

MS. BLAKEWAY: No, this is not. But in response to your question there are things you can do but it's not on record. Could I-- I don't represent that it is in the record.

JUSTICE: Isn't it-- in any sort of administrative, I mean, can we, can we find it in the statute or in the code of administration?

MS. BLAKEWAY: No, no because it's, it is merely a procedures set up was in the bylaws of the TPS.

JUSTICE: Which is no-- is there any defense in this case that failure exhausted with administrative remedies.

MS. BLAKEWAY: I think there was a pleading in this case of failure to exhausted the administrative remedies. Yes, that is in the record.

JUSTICE: But that's not, what's, what CA reversed?

JUSTICE: You would still say even if there were exhaustion you'd still say immunity, right?

MS. BLAKEWAY: Yes.

JUSTICE: And actually go through this process let's assume that as matter of law there is coverage and yet coverage for if it denied, then where the insured goes?

MS. BLAKEWAY: The insured goes to the legislature. It's not the danger it doesn't not have a place to go. And doesn't have the remedy, it's that until there's been a waiver for sovereign immunity the place you have to go is the legislature, because it is the legislature that decides what remedies should have, because in this Case wasn't every case involve in sovereign immunity it deals with allocations of scarce resources, there wasn't enough money to pay all.

JUSTICE: If this was the private sector.

MS. BLAKEWAY: Yes.

JUSTICE: And I'm bought a policy and paid my premiums.

MS. BLAKEWAY: Yes.

JUSTICE: And the insured denied it. And when I sue them they said, oh by the way you waived any right to sue us. What would we say about that?

MS. BLAKEWAY: Well, it depends on that contract says. But if the contract where have a content of arbitration clause isn't it, you would say ...

JUSTICE: We would throw, we would throw the deceptive trade practices act after what we not. I say you bought a policy, paid the premium and if they don't pay you, there's nothing you can do. We would throw the whole Insurance Code and would we not?

MS. BLAKEWAY: Well, and I think you would not, if -

JUSTICE: Well,

MS. BLAKEWAY: - if ...

JUSTICE: Why reasonable person, why a reasonable consumer ever buy a policy? And which it was up to the insurance whether to pay or not, and nothing you can do with that, it was just the discretion or imposition.

MS. BLAKEWAY: I think they would and I'll tell you why, this is the frustrated expectations argument that the plaintiff has relied on both and that is why would anyone ever buying insurance from you if you don't pay claims. It seems like the silly thing to do. And the reason why, because the reason that most people enter into contracts I would say, because most people do not enter into contracts because by gallery if this person doesn't do what they promise to do, I'm going to sue him. That's not why most people are into contracts, and that's not why people are entering into insurance contracts either. And that's why people probably don't re-contracts, they give up their rights for example to go to court, to resolve disputes. Because when people entered to contracts they entering to in the expectation that the people on the other side, are going to do what they promise to do. And 98 content of a 100 of what else ...

JUSTICE: Right. The people, the people in Latin America do that too, but the reason it's hard to invest in Latin America, it is the people on the other side change their mind, there's sometimes nothing you can do. -

MS. BLAKEWAY: Well, ...

JUSTICE: The reason people invest in the United States, is it people who change their mind. You can higher value, you can sue him.

MS. BLAKEWAY: You have a legal request. That maybe one of the reasons, but I would suggest that probably there isn't much empirical

evidence for that being a highly motivating factor in entering into a contracts. Because if in the market, TPS never face question, they just collect the premiums, and they never pay a claim. What's going to happen in the market, no one is going to buy an insurance from me and they will not seize to exist because they would be out of these business. So all the incentives are set up, that they will pay claims, and I think of those not in the record if you look empirically, because the claim in this Case is made up of member entities and the claim you deny will be your own, the incentives are to overpay claims and not to underpay claims because it's my claims I'm ensuring myself it's a self insurance. So all the marketing settings are set up in this case, so that you will pay claims and I would suggests that end because of the cross benefits of doing it. It is you would enter into these contracts even though you knew that you didn't have right to legally enforce it in court. And in fact that is exactly I would submit that what happened in this Case because number one, none of these entities are required to enter into this self insurance funds, it's optional, you don't have to, if you didn't want to. Secondly, if you enter into one, you could buy the insurance or not, that's also your choice. Thirdly, all of these entities are represented by counsel. All of them know about following immunities, so you don't enter into it, thinking, oh I have an expectation I'm going to be able to sue in this contract, you enter into it thinking I'm not going to be able to sue in this contract so they don't have the frustrated expectation. And finally, in this Case, said it is our position, it is not a covered claim, if you read the policy and read the exclusion the first thing you would see is water damage is excluded you would not be entering into this contract for paying any money under this contract, under the expectation that you will going to get water damage claim covered. So in this Case you have no frustrated expectations to the contrary. If in this Case you told TPS: Number 1, you're going to defend us in court, then TPS expectation would be frustrated, because it was their expectation that they had sovereign immunity and would not incur the expense of defending claims in court and because of that they could provide insurance at a cheaper cost. Then, they would ahead of fact therein cost of defending claims in court. And secondly, TPS expectation is, we're not going to be paying out money for water claims because they are excluded. So in this Case, if you would force the claimants prejudice expectations, you would be frustrating the expectations of the TPS.

JUSTICE: Yeah we're.

JUSTICE: We been very -

JUSTICE: Yeah.

JUSTICE: We been very strict of contracts, at you know, on sovereign immunity, we feel why waiver could be very limited, you know, it has to be extremely clear. And it appears legislatures trying to loosen that up on contract claims. In 271.152, when it seems like the intend that we can, we can argue that the words and the definitions and break it down. But it seems like that the legislature's intend is that when local entities like this enter into a contract with one would be able to sue on the contracts.

MS. BLAKEWAY: I would agree with you, it does appear that the legislature is passing on and specifically reject 271. That appears to be loosening up the very strict rules this Court has in impose on sovereign immunity in the context of contracts. However, in our case we are sort of neither fiction or fact and what the 271 says specifically, is that it with sovereign immunity in contracts for certain types of local government entities excluding other types of government entities

specifically county or a subdivisions of the state government and including for example municipalities, school districts, special purpose districts. Now, TPS is made up of entities some of which are expressly excluded under 271.

JUSTICE: Well, but this pool is not -

MS. BLAKEWAY: And some of which are included -

JUSTICE: But these pools are different then. I mean it's a group of business ...

MS. BLAKEWAY: It is a coefficient of facts. It's a kind of a strange beast.

JUSTICE: But what policy reason would there be with the legislature who want to open up claims on contracts but then keep, keep this pool meaningful then, I can't hear you, I can't see what it would be any different.

MS. BLAKEWAY: Well, I guess I will have two answers to your question. My first answer is, the policy reason is the same policy reason that underlies all sovereign immunity.

JUSTICE: Which they're trying to loosen up here when there's a contracts involves.

MS. BLAKEWAY: Which is cultivation of a, a scarce resources, and we'll have to decide all those resources should be allocated. And that might be particularly significant in phases insurance although and that would be a decision we think for the legislatures. So then the second response to your question is, well it does look-- suppose you say well it does look like the legislature is sort ahead of that way, there, there look, looks like loosening up sovereign immunities in case of contractual obligations for local government entities. But did they say it in this Case, because but this Court is charged of doing this is not making a guess. Still it's up to the legislature might do if they were confronted with this in the future, but determining what the legislature has decided. And under the government code the legislature has told you that unless there is a clear and unambiguous waiver of immunity So is there a clear and our defendant unambiguous waiver of immunity in, in chapter 271? I say no there isn't. And it maybe because it's an odd thing, and the legislature wasn't thinking about it at the time they did this. And it maybe that when the legislature gets around to thinking about it, they may decide as it's a policy choice to do. But the haven't done it yet and we can't anticipate what they might do if they were competitive with this question.

JUSTICE: And Wichita Falls versus Taylor in 2003 who set there three ways to aggravate immunity; Constitution, statutes or the courts are Common Law. You repeatedly say that there's is only one way in your brief, and that's that clear and unambiguous legislative enactment. Distinguish or explain Taylor and by the end of that issue.

MS. BLAKEWAY: Well, I would say under the Common Law there is no Common Law basis, if this Court could do it under the Common Law. There is no Common Law basis for doing it in this Case, because this particular entity this self insurance fund forces the creature statute. It doesn't have a Common Law counterpart and there is no Common Law President for doing it in this Case, so where you would look would be the legislature. I don't think to say that you can create legislative immunity from the Common Law, means that this Court could decide, that it would, decide for itself when in ethic policy manner is a good idea to have waiver of sovereign immunity.

JUSTICE: In other word, we're not talking of legislative immunity here. And does the immunity, isn't it, immunity itself is kind of creature of the Common Law. There is no enactment that says, that there

is now a sovereign immunity that exist this Constitution that provide for it's there, we recognize it. We'll nobly back to the kings of Great Britain. Isn't a distinction perhaps that Taylor involve sovereign immunity in cases, in some of the cases which say that legislative enactment is required to waive immunity those cases involve governmental immunity. Have you looked to that?

MS. BLAKEWAY: I have not looked to that specifically, but I would think that, there are more considerations to determine waivers of immunity than just preserving a public fist specially if it is done by this Court as suppose to the legislatures there considerations of separation of powers, and delegation of legislative authority and so because there are innumerate of other concerns, I would think that it would be an area that this Court would want to thread carefully but I have not look specifically that issue and I would think that this Case probably is not particularly good a fact scenario upon which to create a judicial club, exceptions to sovereign immunity.

JUSTICE: What it, what is the orange enough TPS is it derivative, is it derivative, is derivative of the members of TPS or that can stand alone? Bringing forth from the statute that created TPS in the first place?

MS. BLAKEWAY: I would say that it's, I hate to use the derivative of the immunity of what about the City of Galveston case but I would say it is not derivative. I mean, it is an entity, like any other emanate it is an entity that has to be propose of other entities which also have sovereign immunity.

JUSTICE: Some of which.

MS. BLAKEWAY: Some of which also have sovereign immunity but I would say it is an entity that has sovereign immunity by virtue of the, staying way any other government entity has something to do. It is a creation of the Interlocal Cooperation Act, but I don't think it's to its immunity is derived from its mentors if that's the future basis [inaudible].

JUSTICE: So you don't think our resolution of the City of Galveston case would have an effect on this?

MS. BLAKEWAY: It might.

JUSTICE: About what?

MS. BLAKEWAY: Depended on how it's resolved because one of the arguments that petitioner on this Case makes is that, there is no immunity because the immunity of all of the entities in TPS is derivative. And under the City of Galveston none of them had any immunity against each other, which would mean there would be no immunity because all of the members would be the ones to make a claim here. So he does rely upon the City of Galveston case now of course even under City of Galveston even if this Court should adopt the reasoning of the Court in the City of Galveston case, that case says under this Case it wouldn't be derivative because it requires the immunity to be derived from an entity or the entity asserting there is no immunity against it, it has to be the State. And here the plaintiff is a school district and under that decision the state has a, has a state law jurisdiction, it has to be have state wide election or appointment and it has to not have tax conservatory. Well, under that definition of the state in that decision, the Ben Bolt-Palito Consolidated Independent School District is not a state. So even if this Court should adopt the reasoning of that Case, this Case will not fall under because the plaintiff is not a state, it's a school district.

JUSTICE: But your training with pool as governmental entity?

MS. BLAKEWAY: Yes.

JUSTICE: But the same tackle, you're saying it's not a governmental entity for purposes of the 271.152.

MS. BLAKEWAY: Yes it must because of the great deed statutory definition as sooner, there I mean, there are various in the Government Code and, and for example the Extension Codes there are various definitions of governmental entities And they are not all the same. And, and in 271, the definition includes some entities which are participants of TPS and some entities that are not. And so when you have a statute that says, okay under this law, this group of entities are local governance and this group of entities are not local governance. Now we have an entity that has some this and some of this, where does it fall? Well, it can't fall under the statute, because the statute says well some of the members are excluded so it is not clear and unambiguous that, that statute with government entity is made up of constituent parts, some of which are, some of which are not. And on the Government Code for way to resolve immunity must be clear and unambiguous this because you can't looked out, it is not clear and unambiguous. And that's why because of this specific definition in the statute check the 271 doesn't apply.

JUSTICE: And the entities that are in TPS that are not define to be a local government entities under the 271 include counties and what else?

MS. BLAKEWAY: It would include counties, and then there some I believe I don't [inaudible].

JUSTICE: I thought committee on aging, is that not included in the definition?

MS. BLAKEWAY: I am not sure of the exact, what can make it an aging is, whether it is a fake agency or whether it's a, a legal. What- - and what was that ...

JUSTICE: It was hot hot county committee on ageing.

MS. BLAKEWAY: But there was probably at the time When then it was probably out of county [inaudible].

JUSTICE: And there any further questions? ...

JUSTICE: Thank you Counsel. The Court is would then its rights of course, to declare that the petitioner has waive argument in this Case since he-- we receive no notice that he would not be here at the appointed hour, but the Court desires to hear from the petitioner nonetheless and the marshal will give the petitioner 10 minutes and Counsel will complete his argument when the red light comes out.

MR.: Thank you and I apologize too. This is a very important case and then it is important for two reasons, first of all this issue has never come before the Court as far as I can tell from researching the Case Law. And second of all, as the justices have pointed out to the Court today of the court has very closely monitored in deciding the cases involving sovereign immunity. I'd like ...

JUSTICE: You think the school district case immunity from sued, I'd take it.

MR.: Yes, your Honor.

JUSTICE: So hardly, I suppose of defends say due because you weren't paying your premiums or whatever, you've attained immunity.

MR.: No.

JUSTICE: You wouldn't?

MR.: No.

JUSTICE: As-- But you could.

MR.: No, I don't believe that the fund could-- I don't believe that school district could claim immunity on a contract with another

governmental entity that is it with prefer both State of Texas.

JUSTICE: And it's not because of 271.152?

MR.: No, I don't believe that 271 needs to be applied. I do not believe there's any immunity in this case started. And the reason for that, is that if you go back to this Court's first decision on the immunity decision 1884 'cause Nanski decision. And he track that case all the way until today, the Court I believe has been clear first of all that, this is a creature of a Common Law I mean. And secondly that all immunity derives from the state. So in other words, if the state were an apple, the state can be slice up in many different ways and any slice of that state derives as immunity because it has that apple quality, and its immunity from oranges third parties, sue it. But when the state either sues itself, slice up the apple. Or there's a slice against the slice since the state is one there cannot be. And because immunity is a derivative concept there cannot be an immunity that applies from one branch of the state to another branch of the state. Or as put it in Case Law from one political subdivision or agency of the state as against another political subdivision or agency of the state. This is clearly tracked to the logic of the Case Law since 1884 and it is also tracked in the most, the two more recent decision that are cited in the City of Galveston case and the case that this Court denied writ on, which is the Texas Workers' Compensation Committee versus City of Legal Pass there you have the Texas Workers' Compensation Commission against the City of Legal Pass it's not a state to look as compensation commission and agency to state. And that Court held, do not have immunity here we have an entity that derives immunity from the state and work confirmation and another entity that derives immunity from the state the City of Galveston they cannot interpolls immunity against each other because we cannot fracture immunity that way and have multiple immunity. There is only one state, there is only one immunity and we cannot re apply it to itself.

JUSTICE: How do you explain Chapter 2259, section in particular 2259.002 establishment and maintenance of the self insurance program by governmental union is not a waiver of immunity. And then the definition specifically, local government is define to include combination created by Interlocal Agreement. -

MR.: Yes.

JUSTICE: - Since rather clear ...

MR.: I think any immunity that exist and you find it in, in many statutes that create the power of the state agencies institutions had the section that says, this is not waive that any immunity does exist, another words whether to be a suit to a third party in that entity there is nothing going to be a waiver of immunity. That does not mean that there is the wa--, there can be a waiver with no immunity existing enclose [inaudible] ...

JUSTICE: But in this Case in the Interlocal Governmental Agreement, the only parties to where the government of units. So we're not talking about a private entity trying to sue a governmental unit. So the statute says, that immunities should not be waived as between this governmental units. And then it seems cleverly implied that there is some immunity that exist, among them, doesn't it?

MR.: I don't think so because the third party could sue the Texas Political Subdivision Self Insurance Fund, Texas Association School Boards and in these other entities that are created under the Interlocal Cooperation Act -

JUSTICE: You say third party? You mean a private one? -

MR.: Right.

JUSTICE: Again, talking about an Interlocal Government agreement, the only party are the governmental units.

MR.: Obviously, I believe that section just not create immunity, and again it cannot create immunity ...

JUSTICE: So the section says immunity shall not be waived but the legislature knew full well there was no immunity existing.

MR.: I don't believe any immunity could exist ...

JUSTICE: That's not your argument isn't it?

MR.: My argument is that any immunity that was not waived would only be immunity as against third party. And there would be twelve actions, employee actions, and the other actions against one of these entities. This is not a small matter because I was here before the 40 year ago, in the Benevides versus Texas Association School Board case when the court decided then you wish now there you have the City of the, the school of, the Benevides School District bringing suit against Texas Associations School Board are another contract of insurance under the Interlocal Cooperation Act the contract for venue and this Court then the-- makes the venue determination. And there are hundreds if not thousands of cases in which these entities are selling insurance and now are asking this Court to say that we have no accountability for claims, that we have no accountability for we can hold the insurance accounted premium, we have no accountability for claims ...

JUSTICE: Oh, the respondent says you do, there is the accountability because the members can walk, they can get insurance from somebody else.

MR.: But that doesn't help the party has already entered into the contract. It can't walk. It's already got the claim, it's already got the damage, and it's already relied upon the representations of the contract regarding coverage. This is not for the future it's for today. These entities that are in, in the legislature if that waiver statute were comply, thus looking at the cases that our, that our before the Court [inaudible] ...

JUSTICE: But certainly it's the matter of contract, you could decide even though I can't sue the fund, this is a good deal and I want to be a part of it, you could make that decision.

MR.: If you could make the decision to be the part of it but have no right to received any coverage.

JUSTICE: No, no right to suit.

MR.: No right to suit for any coverage. But again, this was found in the Corporate Judgment Act, you know -

JUSTICE: But you, you could have arbitration clause if you want to be.

MR.: You could have an arbitration clause -

JUSTICE: And then again you can sue. -

MR.: - I assume that these -

JUSTICE: You could have an arbitration clause with arbitrator is the board of the association.

MR.: As suppose you could have an arbitration clause -

JUSTICE: And now you know what that mean that it differ from what they are saying.

MR.: Because that doesn't exist in this Case.

JUSTICE: I know, but it takes carried the argument that no reasonable person could do this, if you do that, that this seem to exist.

MR.: I do not believe that entities are entering into this insurance contract believe in they have no rights to, to, to insist that they received coverage entities contract.

JUSTICE: Well, enough if she's right people don't sign in contract taken this would be different to sue later but they sign into contract that in this Court differs in contract.

MR.: But I think the reason of the expectation in the contract is that it's two party contract, involving rights and obligation as going to the that direction.

JUSTICE: Oh it's a little hard to hear that argument from an entity that is used to claiming sovereign immunity isn't it? That, that argument has a lot more force from a private citizen, who never heard of immunity before than it does from school district that claims immunity all the time.

MR.: Yes, in that entity, I believe does not believe that it has immunity were enters into contracts.

JUSTICE: Immunity is good for some things -

MR.: It's not good for contract. And in fact the legislature if immunity was found to applied which do not believe it does under the writ denied case the City of Legal Pass case and the City of Galveston case but if it worked to apply that it is clearly been laid by the legislature. And, and the legislation history make its clear that the legislature is looking at this case. And another eleven cases pending before this Court when they entered into, deliberation on Chapter 271 and the language is clear on for the legislature and sponsored that bill stating at least 12 cases involving the issue of the statutory waiver of immunity from suit are before the Texas Supreme Court. And then went on to state that all local governmental entities that are given the statutory authority to enter into a contracts that legislate language, waive, immunity when they enter into those contracts and it uses the language in that statute of all local government entities and either TPS is to ...

JUSTICE: Rather it has doesn't do that, I mean, it is limited to some kind of entities, some kind of contracts and some kind of languages, right?

MR.: It does not exclude any entities, if there's a long orders ...

JUSTICE: Is it exclude some state.

MR.: It exclude state counties, yes. All right. But this we do not have ...

JUSTICE: Or playing and introduce?

MR.: Yes.

JUSTICE: All right. So they exclude some of the exclusion are made.

MR.: But it do not exclude ...

JUSTICE: The time has expired Counselor, the files have submitted and the Court will take a brief recess.