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Supreme Court of Texas.
Larry Roccaforte
v.
Jefferson County.
No. 09-0326.

October 14, 2010.

Appearances:

Laurence Watts of Watts and Associates, for petitioner.
Steven L. Wiggins from the Jefferson County District Attorneys Office, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first case, 09-0326, Larry Roccaforte v. Jefferson County.

MARSHALL: May it please the Court, Mr. Watts will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF LAURENCE WATTS ON BEHALF OF THE PETITIONER

ATTORNEY LAURENCE WATTS: Mr. Chief Justice Jefferson and members of the Court, my name's Larry Watts. I represent Larry Roccaforte. The case as it's presented from the District Court and the Ninth Court of Appeals should be reversed and remanded for trial. The reason it should be reversed is that number one, the case is preempted of the decision by the Trial Court and the Ninth Court that 89.0041 is applicable. It's preempted by federal law, Felder v. Casey. And number two, because if the federal law issue aside, the Court should find that the notice provisions do apply, there was substantial compliance. By that I have the opportunity to stand today with the Court of Appeals in Dallas, in Corpus Christi, and in Amarillo and the various opinions that they've written, which find that circumstances substantially the same as in this case provided substantial compliance. The issues that the Court of Appeals found that mandated against preemption were that there was no outcome determinative to a statute, state statute involved and we say that there was. In the 43 years that I've

been doing civil rights cases and in the 23 years that I've been litigating against Jefferson County on civil rights matters, this is the first case that I've ever seen a notice statute implemented by Jefferson County.

CHIEF JUSTICE WALLACE B. JEFFERSON: I just want to be clear. Would we reach the preemption issue if we were to agree with your substantial compliance argument or would that preemption void?

ATTORNEY LAURENCE WATTS: Well, the general rule is as I understand it historically that you avoid constitutional issues or constitutional conflicts if it can be determined on other basis. I'm not sure that this is sort of like a movie that I'm reminded of with Alfred Hitchcock where he had the same body that kept showing up. This is sort of what you have here; a constitutional issue that's in the middle of the room and how do you ignore it? The fact is that the state statute does provide an impediment to the prosecution of 1983 cases. It provides an impediment that you don't see in any type of litigation in Federal Court. In fact, in the current case, cases that I have against Jefferson County in 1983 actions in Federal Court and in those in the past reaching as far back as '83, I've never seen any type of time notice statue invoked. To say that this is not an outcome determinative case ignores that fact that the only entities or persons protected by the statute are counties and county officials and county and official names. So in short answer to the question, Your Honor, I think that you probably can decide the case without reaching the constitutional issue.

JUSTICE DEBRA LEHRMANN: Can I ask you, excuse me. Can I ask you, please, the statute seems to mandate dismissal if it isn't complied with and it imposes very specific requirements for delivery of notice. Can you address the argument about whether there's a textual basis for saying, for dealing with a substantial compliance actual notice aspect of it? What is your response to that?

ATTORNEY LAURENCE WATTS: Well, I don't think that I could address it or do any better job of commenting on it than has been done by most recently, Justice Quinn, Judge Quinn in the Seventh Court. The point is that the statute is historically designed to make sure that the county has notice so they can manage its affairs and file an answer. In the Koske case, the Autry case, the Ballesteros case, I'm not telling you anything new. The Turnbull case, the Courts have all found that substantial compliance following the lead of this Court in Arco and in the Austin Independent School District case that followed that sets the guide. You just don't do frivolous acts and you don't impose barriers or obstacles on parties to litigation. After all, it's not about really in principle and in logic and it's not about trying to thwart litigation; it's about trying to make sure that everybody has a fair shot at defending themselves. In this case, we within 30 days served as the County Judge, Carl Griffith. We had an answer filed, and on the 15th day, I think, within the 30-day period and they waited past the statute of limitations by eight months to file a motion plea to the jurisdiction, but to file a motion and then 10 months after the statute of limitations and 20 days or 21 days, the Court entered a final order, having told us on the eighth that he was going to rule in their favor. Substantial notice, I think, was, there's no difference between this case and Koske and there's no difference between this case and the others, as Turnbull. In Koske, the Ninth Court seemed to want to distinguish the two cases, Koske from this case by saying that the actual notice to the, by service to the County Judge, which addressed all the elements of 89.0041 was somehow inadequate. The Court of Appeals said that Mr. Roccaforte never did anything to comply with 89.0041. Well, in fact, he did the same thing, the minimal amount that was done by Ms. Koske when she filed her suit. He did the same thing that she did there and that was to have the County Judge served and the County attorney filed the answer, the County filed the answer. In addressing and I'm trying to figure out, Judge Lehrmann, Justice Lehrmann, how do I address the textual issues. And I can read and it doesn't say substantial compliance. The Courts say substantial compliance and the Courts are there to make sure that something that's meaningful, not frustrating, and just is done. Why the legislature said that she needed to use a key that was shaped like this to get into a hole that was shaped like that and turn it a right way and say hocus pocus, I don't know. But I do know that, and I don't mean any disrespect for the legislature, but I do know that what we have here is a case where these folks knew they were being sued because they got the petition. They knew that it was a 1983 action that started out as a constitutional claim under the State of Texas Constitution, but it quickly became a 1983 action. Quickly is a relative term sometimes with lawyers, but it became that and they knew that and they filed their answers. And yet they waited, they

waited past the statute of limitations. When the Ninth Court of Appeals took a little shot at me and said well, it was a.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, you can't blame them for taking advantage of what looks to be a potential out in the statute. I mean if there wasn't literal compliance, it says if a person doesn't give notice as required, the Court in which suit has been [inaudible] shall dismiss the suit on a motion to dismiss. So we can't blame them for looking at this and developing a litigation strategy that would get them out of the case.

ATTORNEY LAURENCE WATTS: Well, and I'm certainly, after all these years, I know Mr. Rugg and Mr. Wiggins well and I seldom criticize them in public, but.

JUSTICE DAVID M. MEDINA: But you'll make an exception.

ATTORNEY LAURENCE WATTS: Well, and I won't make that exception today. We'll just have to see what he says and then I'll come back and address it. But the point is that.

CHIEF JUSTICE WALLACE B. JEFFERSON: I mean the statute is pretty clear is all I'm saying.

ATTORNEY LAURENCE WATTS: But the statute doesn't apply.

CHIEF JUSTICE WALLACE B. JEFFERSON: It's duplicative. The county, yes, the county has notice, but this says you've got to do a couple more things, dotting t's. You've got to do a few more things, subject to dismissal if you fail to do so. So why were those not done?

ATTORNEY LAURENCE WATTS: Well, 89004 has nothing in there about how service or notice will be given. It's only in 00411. The ground statute, the base statute has nothing in there. Secondly, there is no reason to believe, and that goes back to your constitutional question, Mr. Chief Justice. There is no reason to believe that suddenly in Roccaforte that the preemption doctrine is going to go by the by and that impedimenta to processing a federal cause of action in state court should suddenly be susceptible to having to be dismissed within 30 days or whenever they get ready to dismiss it or to file their motion because of this particular statute. And that's what makes this, by the way, I think, something different than was construed by the Ninth Court of Appeals. This is an outcome determinative statute and specifically the way they speak apparently approvingly of Koske. The Court never takes Koske on. It says, in fact, that apparently Koske's okay, but that I just didn't do the right thing. I didn't send a request for disclosure or I didn't provide some unknown evidence, but none of that's required even by the statute. I'm required to tell them the name of the parties suing them, the Court where it's filed. I'm required to tell them the essential data set out that if I tell them anything at all that is what I told them when they were served with the summons, when the County Judge was served with a summons.

JUSTICE PAUL W. GREEN: So presumably, if you had attached a letter saying the same things, of course, it would have to be by registered or certified mail according to the statute, it would have cured the problem.

ATTORNEY LAURENCE WATTS: Well.

JUSTICE PAUL W. GREEN: Or something like that.

ATTORNEY LAURENCE WATTS: Well, if that had been done, presumably that would have cured the problem, but that's what makes this so particularly confounding. And back to Chief Justice Jefferson's question, am I required to do those extra things that the state legislature said that I must do when I'm presenting a question that is a federal question and unique to the area? I mean even this Court in a case, City of Beaumont v. Guillon back in 1995, this Court recognized that 1983 in the federal context occupies the field. It literally controls and the reason you can't enforce the state constitution is because the legislature hasn't given it any enforceability. But nevertheless, the point that I'm trying to make is that 1983 does occupy the field. It is a case where Congress,

obviously, in 1871 said that this is what Americans have the right, or it didn't even say Americans, persons have the right to do when they're liberties or properties or fundamental rights have been transgressed by state actor. A letter would have done it, I suppose. Obviously, if I had gone out and bought the County Judge lunch, that wouldn't have done it. If I had taken him my file and let him look at it, that wouldn't have done it. If I had invited the Roccaforte's to go there and meet with him, that would have been insufficient. The only thing would have been registered or certified and I don't know exactly if they mean registered through the United States Post Office like registered mail.

JUSTICE PAUL W. GREEN: Hand delivering the qualifying letter wouldn't have cut it either.

ATTORNEY LAURENCE WATTS: I don't think so. I mean I think the legislature just felt like, I feel a little bit like the old Peanuts cartoon, you know Lucy says oh, come on, Charlie, I'm not going to take it away this time. And I think that's basically what happened. I think that, and when the Court said that it was a dismissal without prejudice, he was terminated on January the sixth, 2006. The lawsuit was filed January the seventh, 2006. The service was accomplished, the answer was filed on the 22nd and it was in 2008. Now, I did ask my friend, Tom Rugg and Steve Wiggins, why now? But that's extraneous and that's beyond the record. The point is that it was with prejudice and that very prejudicial status that was imposed upon Larry Roccaforte in his action trying to implement the Constitution of the United States is demonstrated by what happened.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Watts. Your time has expired.

ATTORNEY LAURENCE WATTS: It has and I apologize for trespassing on that.

CHIEF JUSTICE WALLACE B. JEFFERSON: That's just fine. We'll hear back from you on the rebuttal.

ATTORNEY LAURENCE WATTS: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now from the respondent.

MARSHALL: May it please the Court, Mr. Wiggins will present the argument for the respondents.

ORAL ARGUMENT OF STEVEN L. WIGGINS ON BEHALF OF THE RESPONDENT

ATTORNEY STEVEN L. WIGGINS: May it please the Court, good morning. My name is Steve Wiggins. I represent the respondent in this case, Jefferson County, Texas. And it is my first time before such an honorable Court and I am privileged and honored to be here this morning. I'll go through briefly, hopefully, an outline of those issues that Mr. Watts has raised just beforehand. And I start by saying that, addressing his issue of the fact that 89.0041 of the local government code preempts a federal 1983 claim. We obviously do take exception. The Felder case if you've had an opportunity, Your Honors, to look at that, it will set out what Mr. Watts has described as an outcome determinative issues and I would just like to briefly cover those. Number one, just to backtrack, 89.0041 of the local government code is not a prerequisite to filing a lawsuit. It is not an imposition. It does not prevent anybody from filing anything or anyone from filing anything.

JUSTICE PHIL JOHNSON: What is it that it does? I mean if you get the County Judge served, what is it that 89.0041 accomplishes?

ATTORNEY STEVEN L. WIGGINS: Mr. Justice, I know 89.0041 appears to be redundant and duplicative, but we thought about this long and hard in trying to interpret this ourselves. Jefferson County looks at this statute and I've been with the DA's office for more than 20 years and I've spent 15 years practicing in the civil arena. And I can see the purpose of this statute clearly after working in the area, after dealing with these cases. And the most relevant and pertinent point of that statute is, it says county officials in their official capacity or the county.

It's very, very relevant and the reason why is because when we get served, it says John Jones, Constable, individually and in his official capacity, or it may say John Jones, Deputy Sheriff in his official capacity. And then in the body of the pleading just as an individual he did this. And they're trying to sue the individual and in his official capacity also, so the county needs time. This gives the county, and I think the 30-day period gives us an opportunity when these individuals are served only, they don't serve the county necessarily. So we want notice.

JUSTICE PAUL W. GREEN: So the argument that you need what, 30 days initial notice time for the county to consider this?

ATTORNEY STEVEN L. WIGGINS: Well, precisely, Your Honor. This gives.

JUSTICE PAUL W. GREEN: If that's what it is, why wouldn't you go, I mean if you've been served with the citation and you say well now we got an answer day and so forth and you're going to go ask the Court for relief? I mean maybe stay the case for 30 days.

ATTORNEY STEVEN L. WIGGINS: Well the point being is the county may not be served. County officials only may be served.

JUSTICE DAVID M. MEDINA: Well, what does the employees make? What's the internal procedure? I mean a county official gets a lawsuit and he sits on it or does he hire his own personal counsel?

ATTORNEY STEVEN L. WIGGINS: Precisely. This may be an issue, hiring own personal counsel and there's been disputes over that, whether we are entitled to represent the county officials, each and every one of them, whether they take it to their private attorney as well.

JUSTICE DAVID M. MEDINA: What's the internal procedure there in Jefferson County?

ATTORNEY STEVEN L. WIGGINS: Ordinarily, Mr. Justice, we get served, the County Judge is served, and if the County Judge is served then representing the county, the County Judge is not necessarily served if they serve an individual in his official capacity. But if the County Judge is served, then obviously it helps us as the legal counsel for the county to go through and see who is actually going to be made a party to this and why.

CHIEF JUSTICE WALLACE B. JEFFERSON: If this were purely a federal suit, if it were brought into Federal Court under Section 1983 and the 89.0041 notice was not presented in the context of that case, the case would not have been dismissed, is that correct? So why is this not outcome, why is the impact of this statute not outcome determinative under Felder v. Casey?

ATTORNEY STEVEN L. WIGGINS: Well, the Court, the Ninth Court of Appeals put certain issues in their opinion that I think, Your Honor, is very relevant. Number one, it's not a prerequisite to filing the suit. Number two is it doesn't discriminate against any specific claim, none at all, the language of the statute is quite clear and it places no conditions.

CHIEF JUSTICE WALLACE B. JEFFERSON: But I'm just saying if it were brought in Federal Court and this 89.0041 notice was not given, that would not dispose of the case. It wouldn't be subject to dismissal for failure to comply with 89.0041. So why is the application of that statute not outcome determinative under Felder v. Casey? It seems like it is.

ATTORNEY STEVEN L. WIGGINS: Well, potentially it could be, but they have the right, Your Honor, to re-file. They have a right, if they don't comply with the law, if they don't comply with a simple couple of letters, registered or certified mail. That's really all the statute is trying to achieve, in my opinion. If they fail to do two simple letters and the case is dismissed upon motion by the defense, then they can re-file it.

JUSTICE PHIL JOHNSON: But in this case, can they re-file it?

ATTORNEY STEVEN L. WIGGINS: In my opinion, no. And in the opinion of the Ninth Court of Appeals, no, Your Honor.

JUSTICE DAVID M. MEDINA: It seems like the statute provides for gamesmanship as opposed to good lawyering.

ATTORNEY STEVEN L. WIGGINS: Gamesmanship?

JUSTICE DAVID M. MEDINA: Yeah.

ATTORNEY STEVEN L. WIGGINS: This statute has been the object of debate for several years and to use it, it may seem like we're sneaking in through the backdoor, but it's the law. And most Honorable Justices, we're just trying to seek some clarity as well. We want clarity and we want simplicity if we can get it. We'll follow the law.

JUSTICE PAUL W. GREEN: What happened in the case in the two years before that a motion dismiss was filed?

ATTORNEY STEVEN L. WIGGINS: I'm sorry?

JUSTICE PAUL W. GREEN: What happened in the case during that two-year period?

ATTORNEY STEVEN L. WIGGINS: What happened in the case?

JUSTICE PAUL W. GREEN: Right. I mean discovery undertaken and so forth?

ATTORNEY STEVEN L. WIGGINS: Yes. Yes, there was.

JUSTICE PAUL W. GREEN: Knowing that your position is going to be that the Court lacks subject matter jurisdiction, you know the last one they had with working on the case.

ATTORNEY STEVEN L. WIGGINS: I'm a little hard of hearing and I apologize.

JUSTICE PAUL W. GREEN: Knowing that from your position you say that the Court lacks subject matter jurisdiction from the get-go because there was no notice.

ATTORNEY STEVEN L. WIGGINS: That was our original motion, yes, sir. It was a plea to the jurisdiction.

JUSTICE PAUL W. GREEN: That was filed two years after the suit was filed?

ATTORNEY STEVEN L. WIGGINS: I don't recall exactly when it was filed, Your Honor, but jurisdiction can be raised at anytime.

JUSTICE PAUL W. GREEN: Right.

ATTORNEY STEVEN L. WIGGINS: Even on appeal.

JUSTICE DAVID M. MEDINA: Well, did you substantially invoke the resources of the Court? Did you go to the Court for hearings and deposition or a trial schedule?

ATTORNEY STEVEN L. WIGGINS: I'm sorry, Your Honor.

JUSTICE DAVID M. MEDINA: Did you get, how involved did you get the Court?

ATTORNEY STEVEN L. WIGGINS: How involved did we get the Court?

JUSTICE DAVID M. MEDINA: Right, from the time the lawsuit was filed to the time you filed your motion to have your plea reversed?

ATTORNEY STEVEN L. WIGGINS: Both myself and Mr. Rugg, who is the first assistant, are the only two that handled this case, the only two that worked on this case. There was some discovery, there was some depositions. We proceeded with the case as we normally would in any defense. And my expectation I thought because in the Ballesteros case, they had also said the plea to the jurisdiction was granted because it's a jurisdictional issue. This is the thing that started the whole landslide; is it jurisdictional? Jefferson County's position from the very beginning. That's why it's not like we were hiding behind a rock to ambush anybody, but when other Court cases started to appear like Ballesteros, it said well maybe it is jurisdictional; maybe we need to find out.

JUSTICE PHIL JOHNSON: But even if you were hiding behind a rock, isn't it what lawyers do? I mean you're supposed to represent your client. I mean I don't know that anyone's going to criticize you for representing your client properly and waiting till the statute runs and then bringing it up. I mean that's what a lawyer is supposed to do.

ATTORNEY STEVEN L. WIGGINS: Your Honor, that's the whole purpose behind limitations too as well.

JUSTICE PHIL JOHNSON: Sure.

ATTORNEY STEVEN L. WIGGINS: And we don't.

JUSTICE PHIL JOHNSON: But this statute permits that to happen. When you've been in there litigating everybody's had notice; there's no question of whether you're going to have individual lawyers or county and I think that's what, I mean that's what we're here about is not your tactics, but what does this statue do. If you get served on this and you have the county official served, whatever capacity the official is in, individual or official capacity, and a default judgment is rendered, then it's a default judgment I take it. This statute doesn't protect against that, does it? You said because you have to answer and move to be dismissed for this statute to be effective.

ATTORNEY STEVEN L. WIGGINS: Precisely. You must do something affirmative.

JUSTICE PHIL JOHNSON: So it really, it looks like it doesn't really afford much protection against anyone, but rather is just a hoop that the legislature has required somebody to jump through. Because if your county official doesn't bring it to any lawyer, you're going to get a default judgment, maybe a motion for new trial, maybe granted, maybe not granted.

ATTORNEY STEVEN L. WIGGINS: And part of it, to carry your thought a little further, part of it is for us to be able as a county entity to mount a unified defense, to find out exactly who's being blamed for what and in what capacity they're being blamed.

JUSTICE PHIL JOHNSON: Well, that's in the lawsuit when it's served, isn't it? They serve the lawsuit on the County Judge?

ATTORNEY STEVEN L. WIGGINS: Yes, sir, but they don't always serve the county when they're suing indi-

viduals, even in their official capacity.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY STEVEN L. WIGGINS: So we may not even get a copy of it.

JUSTICE PHIL JOHNSON: But whoever gets it, it's going to specifically say in there what capacity they're being sued in as a general rule.

ATTORNEY STEVEN L. WIGGINS: As a general rule, yes, Your Honor, that's precisely correct. But continue with the notion that this is outcome determinative in a federal case; again, the Ninth District Court of Appeals has set out the elements which I think are very pertinent and they don't obstruct anyone or prevent them from proceeding. All they have to do is just follow the law, follow the law. And it's moreover, this statute is more of a procedural mechanism and Felder recognizes that. In the case that we cited, Johnson, in the Johnson case, is that it is procedural. It does nothing more than allows the state, the State Courts to conduct their own business and not necessarily set up a tribunal that specifically would cater to Federal Courts. As I say in the brief, the federal government pretty much has to take the State Court as it finds it and this is our position. It doesn't impede on anybody filing anything. All it's asking for is a couple letters under state procedural rule for notice, for notice.

JUSTICE NATHAN L. HECHT: You indicate that a purpose of the statute is to ensure that the county gets notice if the official is served. But if the County Judge and the County Attorney are served with summons, is the purpose that's trying to be served by the statute fully protected?

ATTORNEY STEVEN L. WIGGINS: Yes, Your Honor, I agree. If the District Attorney's office is served and the District Attorney as all these cases pretty much refer, if the District Attorney is served, they're ordinarily the counsel who does the defense work. And it puts on notice, gives us notice because we're usually the legal arm of the county government. And it gives us notice and what we need to do not just as defense counsel, but what the county needs to do. So this benefits us. If they were to serve us with notice just like they serve the County Judge, that would satisfy in my opinion giving us proper ability to prepare a defense.

JUSTICE NATHAN L. HECHT: But I just want to be clear. If you get the summons itself, if the County Judge and the attorney get the summons itself, the notice would serve no additional purpose.

ATTORNEY STEVEN L. WIGGINS: If we get the summons.

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY STEVEN L. WIGGINS: But we only get a summons.

JUSTICE NATHAN L. HECHT: Sometimes you don't.

ATTORNEY STEVEN L. WIGGINS: Sometimes we don't, right.

JUSTICE NATHAN L. HECHT: But if you do, then there's noting to [inaudible].

ATTORNEY STEVEN L. WIGGINS: Yes, in that situation I agree completely. Yes.

JUSTICE PHIL JOHNSON: So would it be your position then that if you actually get it then the statue has been complied with?

ATTORNEY STEVEN L. WIGGINS: If under, ideally, Your Honor, under every circumstance, if an individual

who's sued in his official capacity is served with process, if he brings that to us, if he or she advises the DA's office, if they're being sued in their official capacity, yes, it would meet that criteria.

JUSTICE PHIL JOHNSON: That would fulfill the statute?

ATTORNEY STEVEN L. WIGGINS: For an official being sued in their official capacity. But if they're suing the county, we ordinarily, and I say ordinarily, we get the citation, the summons from the County Judge because that's the one that is appointed as agent for service for the county.

JUSTICE PHIL JOHNSON: So if the County Judge gets it and the county's being sued and then brings it to you so that you both have the citation there, does that fulfill the statute's purpose in your view?

ATTORNEY STEVEN L. WIGGINS: If there's no individual sued in his official capacity.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY STEVEN L. WIGGINS: Yes. If it's just the Jefferson County, if it just says John Doe v. Jefferson County, if we get it, Your Honor, yes, that would satisfy us and I think it would satisfy the statute as well.

JUSTICE PHIL JOHNSON: Well, would a motion to dismiss then be appropriate in those cases? Should it be granted?

ATTORNEY STEVEN L. WIGGINS: Well, should it be dismissed? If they don't comply with the notice, yes. I think like now, my position is.

JUSTICE PHIL JOHNSON: It has to be.

ATTORNEY STEVEN L. WIGGINS: It would help us out. It's still, it's not duplicative or superfluous. It does, this kind of notice would indeed help the county government form its defense and get all of the parties and it's, the information straight. It would certainly assist us.

JUSTICE DALE WAINWRIGHT: The same day that county official is sued in his individual capacity is served, and that same day you get a call from the plaintiff's lawyer saying I sued X in his official capacity and here's the file of the case, here's the case number, here's the date, here's the person filing and tells you that over the phone, does that satisfy the purpose of 89.0041?

ATTORNEY STEVEN L. WIGGINS: I would say no, Your Honor and the reason why, it would not.

JUSTICE DALE WAINWRIGHT: You get the same information.

ATTORNEY STEVEN L. WIGGINS: Well, the information's not set out as we need it. We need the case number; we need all that stuff to make sure. If indeed it is conveyed to us in that matter completely and accurately, then we would get the information. Now whether or not it would comply with the law? No, clearly it doesn't.

JUSTICE DAVID M. MEDINA: So substantial compliance never works in your scenario, correct? I mean the.

ATTORNEY STEVEN L. WIGGINS: I'm sorry?

JUSTICE DAVID M. MEDINA: Substantial compliance never works under any scenario in your view? The letter of the statute crossed the I's, dotted the T's, and all those good things are.

ATTORNEY STEVEN L. WIGGINS: With all due respect, Your Honor, substantial compliance and so-called

actual notice, even if it's statutory like it is under the Tort Claims Act, we know that's created problems. Haven't we seen those time and time again? If you send a written notice under the Tort Claims Act you've satisfied that responsibility. But then there's this thing called actual notice and we're still litigating that today after decades. It's not clear and to say substantially he complied or actual notice, he received actual notice because somebody picked up a phone and called him, this creates a, this opens up a whole new Pandora's Box of actual notice litigation.

JUSTICE DALE WAINWRIGHT: I'm just trying to figure out what the parameters of your position are. I think you told Justice Johnson that if a county official is sued in his official capacity and gets served and you get the service papers, including the summons, then that satisfies the statute. I think that's what you said. I'm asking you if you get that same information by phone, does that satisfy the statute and at the same time?

ATTORNEY STEVEN L. WIGGINS: Your Honor, briefly I don't think it satisfies the statute. I don't believe in this partial compliance or actual notice. Does it satisfy the statute? Not according to the way it's written.

JUSTICE DALE WAINWRIGHT: So maybe the legislature just wanted a particular way to do it, laid out with all the T's crossed and I's dotted, and then we don't have to worry about how far down the road do you go and where do you slice this cantaloupe.

ATTORNEY STEVEN L. WIGGINS: Perhaps they did. Yes, sir.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

ATTORNEY STEVEN L. WIGGINS: Thank you.

JUSTICE PHIL JOHNSON: And also, do we really want to draft an actual notice of substantial compliance requirement on here and then litigate it? As opposing counsel says, we continue litigating the actual notice part of the Tort Claims Act. Would you address that?

REBUTTAL ARGUMENT OF LAURENCE WATTS ON BEHALF OF PETITIONER

ATTORNEY LAURENCE WATTS: That statute requires that when you sue the county as we did here, you serve the County Judge. He's one of the, he's who you serve. We did that. He was the, the county was the only defendant in this case. Do you want to have that extra debate? I don't know. I think frankly that.

JUSTICE PHIL JOHNSON: And the reason I ask that, we go beyond this one case.

ATTORNEY LAURENCE WATTS: I understand that.

JUSTICE PHIL JOHNSON: We're talking about counties and county officials.

ATTORNEY LAURENCE WATTS: Right. But I think that the debate is resolved in the constitutional issue by saying that you can't impose in State Court a condition on a 1983 litigation that's not existent and isn't imposed by the federal. The counties have never done badly in Federal Court under 1983. In fact, they do pretty well.

JUSTICE DALE WAINWRIGHT: Counsel, let me ask you.

ATTORNEY LAURENCE WATTS: I didn't answer your question. I'll come back.

JUSTICE PHIL JOHNSON: Justice Wainwright's got a good question.

JUSTICE DALE WAINWRIGHT: I'll let you finish your answer to Justice Johnson's good question too here. But let me ask you, outcome determinative at point; is that about substance or is it about procedure or is it about both. And to answer that, let me ask you to address this question. Assume that state service of process is required in Texas and Jefferson County is harder than federal service of process. And you have the Section 1983 claim, you could file it in State Court or you could file it in Federal Court. It's easier in Federal Court. You file it in State Court and don't cross all the T's and your case gets bounced out. Is that preempted?

ATTORNEY LAURENCE WATTS: Well, I think we.

JUSTICE DALE WAINWRIGHT: And is that like a notice provision that may be procedural rather than substantive?

ATTORNEY LAURENCE WATTS: I don't think this is a procedural notice provision. By the way, Felder pretty well takes a shot at that. Felder sweeps with a very broad broom, by they way, and has some very noble language. I think that if they give you different rules in Jefferson County, which I think I'm getting right now, by the way, in Jefferson County on how to go forward. I mean from now on I'll file all my suits against the county in Federal Court until we get some sort of disposition that helps Mr. Wiggins to be clear that this anomaly out of all the 16 or 17 cases I've had, won't occur again to me. But I think that if service is harder in Jefferson County than it is in State Court than it is in Federal Court, when I sue the county under 1983 I think that's a due process issue, I think it's an equal protection issue.

JUSTICE DALE WAINWRIGHT: Well, it's not just harder for 1983 claims or in Jefferson County. It's harder in State Court generally just presume for any civil lawsuits.

ATTORNEY LAURENCE WATTS: Well I think that creates a real issue about uniformity of application. One of the things about procedural rules is that the rule applies to everybody in the same way and this particular statute only favors the county and only favors county officials. And what it does is he said well because it's not a pre, am I coming, I'm not hitting your question though, am I?

JUSTICE DALE WAINWRIGHT: No, I think you pretty much are. Now, are we on the same page in assuming that if the service is a little more difficult in State Court, I'm not saying it's arbitrary or unreasonable; it just requires a couple more hoops to jump through.

ATTORNEY LAURENCE WATTS: Well, then you'd want to go to Harris County or maybe you'll never want to go to Jefferson County at all.

JUSTICE DALE WAINWRIGHT: But my question is, is that outcome determinative? Does that mean it's preemptive?

ATTORNEY LAURENCE WATTS: I think so.

JUSTICE DALE WAINWRIGHT: Because service may be a little harder under State Court.

ATTORNEY LAURENCE WATTS: I think so. And I think Felder says that. Felder doesn't simply say by the way, that preemption deals with procedural versus substantive. It shows a part of my age to say you're a child of anything, but I'm a child of 1983. When I graduated from Baylor Law School in 1967, I got into 1983. In those days, it wasn't a very popular issue, but we've been in it and the point is that you don't have the hoops of prenotice and you don't have the notice provisions coming after the fact in 1983 actions. I'm not going to trespass this time. Thank you very much for the opportunity.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The cause is submitted, and the Court will take a brief recess.

MARSHALL: All rise.

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