

**ORAL ARGUMENT — 9/9/98**  
**98-0598**  
**IN RE CONTINENTAL AIRLINES, ETC.**

LAWYER: A great deal of ink has been spilled over the years of Texas jurisprudence over the question of venue. Why is that? Because everybody realizes that where the case is tried can be outcome determinative. Stories are legion about being hometown in the wrong venue. Venue is a very important question to the City of Dallas. Dallas is deeply concerned that a Fort Worth court is being asked to impose pervasive controls over who can and who cannot fly out of Dallas, or Dallas' use of its own land and its own airport, and even to require Dallas to close down Love Field.

GONZALEZ: You have made no claim that you could not get a fair trial in Fort Worth?

LAWYER: The issue of venue relates to the mandatory right to make your choice about - and venue is all about having the choice without going into the reasons why they should be given that choice. It is all founded on the defendant without questioning the fairness of the current form having the choice nonetheless to switch it somewhere else. But it is also a reality of this and why there is a great deal of concern and urgent to these issues.

GONZALEZ: But yet, you made no allegations with regards to a fairness?

LAWYER: That is not a direct issue for this court to determine today. That is correct. Why is venue proper in Dallas? There are many reasons, many of which will not be presented to the court today, but on appeal. Before the court today is the question of mandatory venue because injunctive relief is being sought. It is Dallas' position that because Fort Worth has sought injunctive relief in the case, that therefore, venue is mandatory elsewhere than in Fort Worth.

Fort Worth and American both say either, "That there is no injunctive relief being sought in this case, or that it is merely ancillary and therefore can be disregarded." Their analysis is wrong because they have the wrong rules and they've mixed up the rules.

What are the proper rules in which we can analyze this case? The proper rules are set out in Ch. 15 of the Civil Prac. & Rem. Code, specifically §§15.001 and 15.004. 15.004 provides that whether a multiple claim, and one of them is a mandatory venue provision that the suit shall be brought in the county required by mandatory venue provision. That provision arises from a codification in 1985. It was first codified at that time. In 1985, the legislature made explicit what the courts had been developing through the case law up until that time; and that is an explicit hierarchy for choosing venue. The top choice went to mandatory venue; second to regular venue; and third, to permissive.

And what explicitly made as part of our statutory law in 1985 was the basic rule that mandatory will trump permissive and regular venue. The only test, however, that they

announced in the statute for determining whether you had a mandatory venue verses a regular ancillary was whether or not there were multiple causes of action. The test that they announced in 1985 in the statute was not whether one was ancillary to another, or one was dominant to another, rather the test as it is currently in place is on your multiple claims. If so, is one of them mandatory? If that's the answer, then there is \_\_\_\_\_ to venue transfer.

So why is there a discussion in the cases about dominant verses ancillary? If you look at the cases cited by American and Fort Worth, they are all pre-1985 cases. Those are old cases under the old plea of privilege scheme where the court was using the test of dominant verses ancillary as a means of primarily sorting out the choice between two mandatory venue provisions. Thus, in the *Jones* case, you had two mandatory venue provisions at stake. One was the title of real estate; and the other was an injunction. The court held that because the real estate title question was a more specific mandatory venue provision and as opposed to the injunctive, which was more general, that in fact the real estate would trump over the other. And basically they used language of dominant verses ancillary. Likewise, in the *Carly* case, you had a plaintiff seeking an injunction against two defendants, one of whom had the absolute mandatory right to be sued in Travis County as a government agency. Given that other mandatory venue provision was so \_\_\_\_\_ as specific, they said that that would be the one that would be dominant to the injunctive relief that was ancillary.

There is no case since 1985 that specifically talks about how you sort out two mandatory venue provisions today. It is possible, therefore, that some of the old case law has some limited application or vitality today. But the important thing for this court to recognize is that's not a question you need to answer in this case. Because in this case, we have a clear choice between what is at best a regular venue choice, which was a dec(?) action, and a mandatory choice, which is an injunction.

Because Fort Worth and American have mixed up the rules they spend their brief answering the wrong question. The question they want this court to ask is, "Is it a dec action or is an injunctive action?" And they say you can only choose one answer. This is a false choice. It is akin to a car salesman who says, "Would you like to buy the Buick or the Chevrolet?" "Would you like to buy today or tomorrow?" The sadly customer knows what's going on and says, "Neither, I've got additional options and I'm going to choose from all of my options."

The question here is, if injunctive relief is at least one claim sought, whether or not there is also dec relief sought, then Dallas must prevail.

HECHT: And that's true in your view whenever it comes in the case. If you are pretty far along in the prosecution of the declaratory judgment case, and suddenly you decide to seek injunctive relief, at that point venue would be a question?

LAWYER: I think the likely answer is that that would be so, although I don't think that

question is required in this case. I say that simply because of the clear-cut language of 15.004. But looking at this case it is clear-cut that there is a request for injunctive relief for two separate reasons. One is, there is clearly a temporary injunction against Continental. The way that Fort Worth and American tried to get around that is by saying, "oh that's just ancillary, so we can disregard it."

BAKER: Can you piggyback on Continental's \_\_\_\_\_?

LAWYER: I believe so.

BAKER: And how can you do that?

LAWYER: Because I believe the venue statute says that where it's mandatory venue as to one defendant, then it is proper as to the other defendants. They basically try to write out the temporary injunction as not being a claim within the meaning of the venue statutes. But in so doing they rely on the old pre-1985 cases. They once again mix up this whole ancillary versus dominant distinction. If you look at the *Michalski* case, and the *KJ Eastwood* case, both of which are cited in the briefs, you also realize that the mere fact it is a temporary injunction does not mean that it is not worthy of invoking mandatory venue. In the *Michalski* case, you had a dec action to construe the terms of a deed of trust, you also had a request for temporary injunction to stop a foreclosure.

The court held that it was in fact mandatory venue because the temporary injunction had been sought despite the fact that there was also dec actions sought. The same thing is true in the *KJ Eastwood* case. But apart from the temporary injunction that has been sought against Continental, there is also clearly an injunction being sought against Dallas. While this court looks to the plaintiff's pleadings to determine venue, this court is not bound by the labels used by the plaintiff. As Judge Pollock said, "If it walks, talks and quacks like a duck - it is a duck - even though you protest it as really a chicken." Labels are not what bind this court.

Fort Worth airport cannot say, "I am not seeking injunction." What I am only seeking is a ruling that there is irreparable harm, that there is the need to maintain the status quo, that there is no adequate remedy of law, and that Dallas cannot do X and must be required to do Y, particularly when what they are asking Dallas to do or not to do is pervasive regulation of Dallas' conduct as to Love Field for the foregoing/ongoing future.

HECHT: Even if the injunction action claim were transferred to Harris county, Dallas county or both, the declaratory judgment action could remain in Tarrant county, is that true?

LAWYER: No, because I would believe that what the courts are saying is where there is multiple claims, the mandatory venue provision would govern, and would carry the others along.

HECHT: But plaintiffs could simply nonsuit the claim and refile it again in Tarrant county?

LAWYER: What I am submitting is that the very heart and soul of their case is injunction; therefore, no matter how many times we try to cover-up by saying it's a dec action, it is an injunctive action. And that becomes apparent as you see how over and over and over they try to get away from calling it a chicken when in fact that's what it is.

HECHT: But if they disagree with that, persist in that disagreement, they could refile their declaratory judgment action in Tarrant county? They could find a way to continue to prosecute that there?

LAWYER: I would strongly question whether they could. I would have to look at how they do that. But so far they have not succeeded.

If you look at the request they seek and were to drop it into an order, it absolutely is an injunction. Reading from the relief they request they pray for this request: "Dallas is prohibited from permitting any scheduled interstate passenger service from Love Field." If that were in an order, that would be an injunction.

GONZALEZ: You could just as easily put the label declaration of rights to that statement, could you not?

LAWYER: In that regard, let me go into the *Billings* case. Because the dec action as this court knows is a very fluid cause of action and courts have repeatedly have had to demonstrate vigilance to keep it within proper bounds. For example: In the *Morales* case, which was the anti-sodomy case, the plaintiffs sought to declare a law unconstitutional. The court said, "Even though you have a clear uncertainty as the scope of the law, even though you very much like having a declaration of the law, we're going to say that's an advisory opinion. We are going to put that boundary on it." Likewise, when defendants have sought deck actions in response to say a car wreck case in order to try to get attorney's fees, the court has said, "No, even though it is a dec action, we're not going to allow you to use it to turn other rules on their heads." And there's a whole variety of those instances in which the court did not allow a dec action to basically turn other rules on their heads.

OWEN: What about our decision in *Leeper*? If the courts were to construe the contract in the joint bond ordinance and say these are your rights and obligations, doesn't *Leeper* say that you will be presumed to comply with those rights and obligations unless it is shown otherwise, and then injunctive relief might be appropriate?

LAWYER: First of all, *Leeper* was not dealing with a temporary injunction case, which is what this is. But secondly, it was not a venue case. The court spent a paragraph dealing with the typical rule of courtesy that applies for example in mandamus cases, where out of courtesy to the judge for example in mandamus, the court will first conditionally issue the writ but hold back the actual issuance until the judge fails to comply. It was a similar situation where that rule of courtesy

was being followed. But had it been a venue case, I submit, the mandatory venue provisions would apply, because the plaintiff in the *Leeper* case had sought a permanent injunction. And on a venue question, the court does not get into the merits of whether they should or should not get a permanent injunction. And even though in that case, the court ultimately decided that under those particular circumstances they would not in fact grant that remedy does not change the fact that the plaintiff was in fact seeking it.

If you were to allow them to plead this case as a dec action, you might as well take a red pen and strike out the mandatory venue provision for injunctions. Because any plaintiff's lawyer worth their salt can write in such a way that any injunction reads like a dec action. And that's true of virtually any cause of action.

HANKINSON: What if at the end of this action the court entered a judgment that declared the rights and obligations under the bond agreement, and it said: "Here's how Love Field is to be operated with no enforcement provision whatsoever." And at that point in time if in fact Dallas did not do what the judge said and they brought a subsequent injunction action, isn't that what they are trying to say here, that we're going to give Dallas the chance to do the right thing if in fact they lose the lawsuit?

LAWYER: I don't believe so, because they had specifically prayed for declarations that Dallas is prohibited from permitting flights and has an obligation to take all lawful action. More importantly, I don't think it turns on whether you have a hardheaded defendant. The rule on whether you have an injunctive action is never turned on whether you have a defendant who's a rogue who will flagrantly disregard the court's rulings. And if they could simply say, "We're going to presume that we have a good defendant on the other side, and we're going to hold off on permanent injunction, and we're going to say that the temporary injunction is ancillary, then you could never have a mandatory venue provision under the injunctive provisions. Any plaintiff's lawyer could write that out of the books. You can't do that and you can't reasonably construe the law so that that is now meaningless in light of how broad and flexible the dec action pleading rights are.

\* \* \* \* \*

RESPONDENT

KELLEY: Relief which relators are asking you to give them in this case is truly extraordinary. They are asking you to hold a lawsuit filed under the declaratory judgment act in which it seeks no injunctive relief at all, has injunctive relief as its sole and primary purpose.

They are further requesting what really amounts to a de nova review by this court on venue on declaratory judgments. There is not a line in Fort Worth's third amended petition, which is our live pleading, that even mentions injunctive relief except in our prayer, we ask for such further relief including injunctive relief as may be necessary to effectuate our declaratory judgments.

GONZALEZ: That's not true Mr. Kelley. You also used the word "irreparable harm," and you want to preserve the status quo.

KELLEY: I don't mention the word "injunction." I used the term "irreparable harm" twice because we're trying to show that the declaratory judgment act is ripe and mature for adjudication. But it was not used in the injunctive sense. It was used in a declaratory judgment sense.

GONZALEZ: This is language typically used in injunctives.

KELLEY: But in this case they were used to support the \_\_\_\_\_ of declaratory judgment action. They were not used for injunctive relief. They were used in scriptive terms trying to show we had a mature declaratory judgment.

ENOCH: Following up on Judge Hankinson's question. Assume you get all the relief you pray for, then I'm assuming you expect Dallas to comply with the order, which results in what?

KELLEY: Which wouldn't require any further action by us.

ENOCH: I'm just asking. You would assume that Dallas would obey the TC order, which would make Dallas do what or not do what?

KELLEY: It depends on the declarations. But the declaration we're asking for is that Dallas has proprietary power, preserved under the Airline Deregulation Act and the Wright amendment to impose \_\_\_\_\_ restrictions at Love Field, including the existing perimeter at Love Field which restricts interstate traffic to Texas before adjacent states.

ENOCH: So if I as a city council person walked in after this judgment's been entered, and I walk into a city council and say, "You know, I think we ought to permit interstate traffic from Love Field," what happens? And the city council says, "Okay, we're going to discuss this and we are going to bring it on the table?"

KELLEY: If they refuse to abide by the declaratory relief, which the court declares, if it's upheld by this court on appeal, then we would have the right to go in like any other judgment and ask it to be enforced, either by ancillary injunctive relief damages or \_\_\_\_\_.

ENOCH: And enforced in what court?

KELLEY: Enforced in the court in Fort Worth.

ENOCH: But since that's now for an injunction, I'm assuming you will agree that the mandatory venue requires it to be transferred to Dallas ?

KELLEY: No, that's ancillary. That's an ancillary relief. That's ancillary to our declaratory judgment relief. We are certainly entitled to go in in any judgment and get it enforced if the other side refuses to comply with it. That would be totally ancillary. We would be trying to get ancillary relief to get a declaratory judgment enforced if we have to do it. We shouldn't have to do it.

ENOCH: Let's assume that you get complete relief. Under this cause of action, just this dec action, you get complete relief, what relief do you get other than relief that you would ultimately have the authority to have enforced by injunction?

KELLEY: We get declarations. That's what gives us the right to ask for.

ENOCH: Results in what?

KELLEY: Fort Worth is only requesting what it believes the contract declares.

HANKINSON: Doesn't it go beyond a declaration and requests coercive relief in terms of requiring Dallas to do something or to stop doing something? Doesn't it go beyond just a declaration of rights?

KELLEY: No, it does not.

HANKINSON: Why not?

KELLEY: In the first place, the difference between injunctions and declaratory judgments is one is mandatory and one is permissive. We can't hold Dallas in contempt if they don't abide with the declaratory judgments. We would have to have some further proceeding to enforce it if they refused to abide by it. But the mere fact we get a declaration doesn't make it enforceable. It would take some further action to get it enforced if we had to enforce it. Just because we get a declaratory judgment doesn't mean that that's automatically enforced against Dallas. We would have to take further action to do it.

HECHT: But in \_\_\_\_\_ of fact, you're trying to get an injunction against Continental?

KELLEY: That was ancillary. That happened 6 months after the lawsuit was filed. They came in here after we tried the lawsuit and they go to Dallas and they announce they are going to fly to Cleveland, Ohio from Love Field beginning July 1. They filed their own declaratory judgment action at Dallas in federal court asking for the same kind of relief we are asking for in Fort Worth, and we had to draw them as a party and make them a party because they destroyed the subject matter of our lawsuit. That as an ancillary injunction suit.

OWEN: What other relief other than injunctive relief are you asking for against Continental or Legend?

KELLEY: We are asking for no direct relief against Continental. We don't have to. Under the declaratory judgment act. In your case, *Board of Water Engineers v. San Antonio*, we don't have to ask for direct relief against Continental to make our declaratory judgments enforce them against them. They are bound by a declaratory judgment. We don't have to have a direct case against them to enforce our declaratory judgment.

OWEN: What contract or written agreement do you have with Continental or Legend that you are seeking declaratory relief?

KELLEY: We have a municipal ordinance, which Dallas and Fort Worth signed in 1968 to build the DFW airport and to prohibit competition with that airport, and to the multi-development of that airport, and did not abuse our airport on there for these two cities to compete with DFW. That's our contract. That's the municipal contract we filed as declaratory judgment action.

OWEN: Could you have brought a declaratory judgment action just directly against Continental without joining the City of Dallas?

KELLEY: We didn't join Continental originally. We didn't need to join them because they weren't trying to alter the status quo in Love Field.

OWEN: That's not my question. Could you bring a declaratory judgment action solely against Continental without joining the City of Dallas?

KELLEY: Well no. Our lawsuit is against the City of Dallas. That's who we have a contract with. But we had to bring in after Continental jumped in the lawsuit 6 months after - I guess Continental could come in here after we tried the case and they announce they are going to fly to Cleveland, Ohio, and then I guess we would have to transfer venue to Houston under their theory.

HANKINSON: Would you respond to Ms. Whitaker's argument that in fact we should be looking at §§15.004 and .005 of the Civil Pract. & Rem. Code, that if venue is mandatory as to one defendant with respect to in this instance getting injunctive relief that that then governs the case with respect to multiple defendants?

KELLEY: The whole question. All the cases hold and this court has forever held that if the primary purpose of our lawsuit is for injunctive relief, then it's governed by the mandatory venue statute. But how can anybody look at our pleadings - how could a TC even grant an injunction on our current pleadings. Our pleadings don't even plead a good case for injunction relief right now. The TC couldn't even grant an injunction right now. How can anyone say that our pleadings right now are primarily for injunctive relief.



HANKINSON: Ms. Whitaker is obviously posing a different question than you are, which is often that happens, the parties look at the question differently. Can you respond to her argument, those specifically that if we look to 15.004 and .005, then the effect of a mandatory venue provision in a case involving multiple defendants dictates the \_\_\_\_\_?

KELLEY: The only injunction in this case that's been granted by the court in this case is an ancillary injunction granted by Judge \_\_\_\_\_ to prohibit Continental Airlines from flying from Dallas to Cleveland, Ohio.

HANKINSON: So under 15.004 and .005, why doesn't the request for injunctive relief as to one of the defendants then invoke mandatory venue as to all the defendants?

KELLEY: It simply doesn't do it. If you file a suit for declaratory judgment, the Act says you must join the proper parties that are affected by the declarations. If that were the case, then every time you file a suit under the general venue statute for declaratory judgment and a third party intervenes in the lawsuit, and you had to join them, that third party can come in and control venue. That just doesn't make any sense. You would have third parties who have to be named under the declaratory judgment act and they would be the one controlling venue in the case. And that's a complete response to her argument.

ENOCH: How do you respond to Ms. Whitaker's argument that if there is — I own a house and I am being foreclosed on, and I get the notice that it is going to be foreclosed on, and I go to court and I ask for a declaratory judgment to declare my rights and the rights I want to declare - I guess I've got to reverse this. I am the mortgage company, and I want to foreclose, so I go and I want to have my rights declared before the court. Now I don't ask for an injunction, I don't want to stop the foreclosure, I don't want to do any of that, I just want to have my rights declared that there won't be a foreclosure and not ask for an injunction. Does that avoid the mandatory venue on injunction?

KELLEY: Every case that they have cited in their briefs, every single one of them without exception, had basic injunctive relief as the relief requested. Every case they cite ask for basic injunctive relief. The foreclosure cases, they are asking for permanent injunctive relief. Practically every case they cite to you ask for permanent injunction relief. No such relief is requested in this case.

ENOCH: But the hypothetical that was set up, the hypothet is I don't ask for injunctive relief. I simply want to declare the rights that once that's declared in effect we'll say that foreclosure is not available to you.

KELLEY: If the primary purpose of the lawsuit is to have a contract declared or have an instrument declared it's a declaratory judgment suit. If the primary purpose of that lawsuit is to enjoin a foreclosure sale, which is the case she's talking about is an injunction case. But we don't

have anything like that in this case.

Judge Gonzalez mentioned in our contract about status quo and irreparable harm. We only mention that in connection with our trying to make our declaratory judgment relief mature and effective, and the status quo we talk about is the status quo at Love Field. We're trying to maintain it. What we're trying to do with this lawsuit is maintain the status quo at Love field. We are not trying to close Love Field down. Two federal judges have already looked at our pleadings and determined that question. But we are trying to maintain the status quo. Dallas and Ft. Worth entered in in 1968 in this bond agreement, and we agreed we would build an airport and we agreed that we wouldn't use Love Field and Greater Southwest to compete with the airport so it could be built and kept private. And we've succeeded. And all we're asking Dallas to do is in this case - we're not trying to micro-manage Love Field.

GONZALEZ:           Wouldn't Love Field be thriving even more?

KELLEY:             The problem is, once you start that ...

GONZALEZ:           You're afraid of the effect it would have on Dallas/Fort Worth?

KELLEY:             That's what happened when American Airlines started flying in intrastate in Texas last week from Dallas to Austin - 4 of those flights came from DFW. And the more you put over there, the more flights are going to come out of DFW. Fort Worth owns billions of dollars worth of those bonds as is Dallas. We're just asking Dallas to keep its end of the deal - it's part of the bargain. We've done it - they should do it too, and that's what our lawsuit is all about.

HECHT:              Do you share opposing counsel's view that venue may be outcome determinative?

KELLEY:             I think Fort Worth is just as fine a place to try lawsuits than Dallas or Houston. I think they can get just as good a fair trial over there as they can anywhere in the State. We're not some maverick county in South Texas. We're a pretty decent place over there and the judges over there are good judges.

I know the court knows the consequences of this court injecting itself in venue in this case at this late date. This case is a year old. We've had enormous amount of activity in this case already. And we would hope the court would see, as I know it will see, that if you change venue at this late stage in this case it's going to delay this case and it's going to be more than delay the case, it's going to double the expense. We have fought hard, Fort Worth has, to keep this case in the state court system, where we believe it belongs, because this is basically a contract dispute between these two cities. And we want this court to have the final say, but on the merits and not on some interlocutory matter like venue.

\* \* \*

POWELL: I am representing American Airlines. I would like to address Justice Owen's questions about the argument that Legend and Continental make that they are not parties to the City's contractor bond ordinance, therefore, Fort Worth really can't seek a declaratory judgment against them. And taking it one step further, Continental and Legend argue that since they are not seeking anything except a declaratory judgment or as they put it in their brief, they are not seeking any relief against them. They must ipso facto be seeking an injunction, which I don't understand how that logically follows.

I think both of the propositions on which that argument is based are wrong. The first issue is, that the test for whether they are proper parties to a declaratory judgment action is not a privity test. The test as found in the declaratory judgment statute, §37.006. And the test is whether they claim or have an interest that would be affected by the declaration. That's the test that must be met before they are proper parties to a declaratory judgment action. And they clearly meet that test. If the court declares that the contract and the municipal ordinance remain valid, and that under the contract and the ordinance, Dallas is obligated to restrict interstate traffic at Love Field, then Continental and Legend are clearly affected by that declaration even though they are not parties to the contract and they are not parties to the municipal ordinance.

ENOCH: Suppose Dallas breaches the contract and allows Continental to do it. What authority does Fort Worth have to sue Continental to enjoin them?

POWELL: In two ways. First, temporary injunction, which is what is at issue here.

ENOCH: Well I'm not sure it's at issue here. Temporary injunction has to be based on something. And the something is, that Continental more than likely is not by some claim have authority to fly out of Love Field that Fort Worth is asserting. And so I'm looking for the basis of that.

POWELL: The basis of the temporary injunction was that all three governmental entities in this case, the Dallas/Fort Worth Airport Board, Fort Worth and Dallas joined in request for temporary injunctions against Continental and Continental Express to preserve the situation at Love Field pending this case until a decision can be made on whether there is federal preemption, and whether these 1968 contracts and municipal ordinances bar exactly what Continental is going to do.

ENOCH: And it's predicated on the notion that you will get an injunction against the City prohibiting flights out of Love Field?

POWELL: No, I don't think that's at all correct. I think it's predicated on the notion that once the court declares what Dallas' obligations are under its own contract - we're not trying to impose any obligations that are not already agreed to in the contract - we're simply asking the court

to declare what those obligations are that Dallas agreed to in the contract and in the ordinance. Once the court declares what Dallas' rights are, and very importantly, once the court declares whether those rights and obligations are preempted by federal law, which is the defense in the case, that is the 900 lb. gorilla defense in the case, then we think Dallas will do right. Dallas has said it will do right. And at that point in time Dallas will do what it has done for the past 20 years. It will impose controls on Love Field and keep it to be within what it agreed it would do, and it does that in a number of ways. It does that through lease agreements where it reserves the right to do these things. I don't know exactly how Dallas will go about enforcing its obligations that it freely undertook in the contract and the ordinance once those obligations are declared. But it has many ways to do that, and it's not really up to Fort Worth to tell Dallas how to do them. If Dallas refuses to do it, then we've got another problem. That's a problem down the road, but nobody really foresees that problem. Dallas has said, "We're between a rock and a hard spot. We know we've got a contract with Fort Worth, we have a joint venture with Ft. Worth, we have fiduciary duties to Ft. Worth, we know we have an ordinance that both of us signed, and it's pretty clear about what we agreed to do. But we have people telling us that the federal government has come in here and preempted all that and we can't enforce that \_\_\_\_\_ . We just want to know can we or can we not?" That's Dallas' bottom position.

So I think this is a perfect declaratory judgment case.

GONZALEZ: If that was the case, Dallas would have filed suit instead of Ft. Worth for declaratory judgment?

POWELL: Dallas did file suit in federal court in Dallas. Dallas did do that. There is no question, Ft. Worth filed first.

ENOCH: But the question is, can Ft. Worth bring a suit against Dallas in Ft. Worth to require Dallas to do that?

POWELL: Right. And the only question there is whether there is a mandatory venue provision that requires the case to be transferred out of Ft. Worth? And I think the question that you asked Justice Hankinson, I think the answer is this: You look at that first section 15.004 and it says in a suit in which there is a mandatory venue provision, you have to answer the question as to whether there is a mandatory venue provision. The only one that's at issue is 65.023(a), which is the injunction statute. And so you look to that statute to see whether it applies. And that's what this case is about: Does 65.023(a) apply to this lawsuit? And we say it doesn't because that statute which has been on the books of the state for 100 years or more has been construed by this court and by other courts to say that it applies. It's over in the section of the Civil Pract. & Rem. Code to talk about injunction suits. And this court has said in the *ex parte Coffee* case, the *Mound Television* case, and a number of other cases, *The Weather* case, that that statute applies only when the principle and primary purpose of the suit as determined from the pleadings of the plaintiff is to seek an injunction. A permanent injunction. Lots of cases say it has nothing to do with preliminary injunctions, temporary injunctions. The purpose of the suit and the cases are legion, and that has not been

changed here. You look through this statute to see if a mandatory venue statute applies and then you go there and look at that.

HANKINSON: Did I hear you answer Justice Enoch's question to say that there is really no dispute between Dallas and Ft. Worth over what the agreement and the ordinances require of both cities, and the airport board?

POWELL: I think the Airport Board is sort of in-between the two cities.

HANKINSON: Did I hear you say as between the two cities there is really no dispute as to what the agreement means or what the Brison obligations are underneath it?

POWELL: There is first a dispute as to whether it remains effective, which is a specific question that the declaratory judgment act gives you the pattern.

HANKINSON: Which goes to the federal preemption question?

POWELL: That goes to federal preemption. Then there is another question about the language of the bond ordinance covenants as to what is meant in there by some language about "if legally permissible, and what are reasonable steps and what does phase-out mean." There are some questions that one would have to have construed...

HANKINSON: And the cities are in disagreement over what those terms mean?

POWELL: I think there probably are, but we haven't gotten to that because the defense that the City of Dallas has made and the defense that Legend and Continental have made is federal preemption. Right now their argument is: All of that's totally irrelevant because all of this has been preempted. And they filed lawsuits in Dallas to try to get that declared. They've raised all that as a defense in this case. And I think that is before this court, before the TC at this point in time, the question of federal preemption.

HECHT: What is the status of things at the TC level?

POWELL: There are motions for summary judgment on that point pending. Several of the courts have established a schedule, and one of the questions, the outcome determinative question I think most of the questions in this case especially from the defendant's point of view are questions of law, the question of federal preemption.

HECHT: And there's an outstanding injunction against Continental?

POWELL: Temporary injunction pending against Continental - two actual: one in favor of the Dallas/Ft Worth Airport board, which was joined in by Dallas; and the other one in favor of

Ft. Worth. Those are on appeal to the Ft. Worth CA. I haven't seen the briefs yet. I suspect that Point of Error No. 1 will be that the trial judge erred in doing this because it was preempted by federal law. So that will be evolving in the CA fairly quickly. The records have been filed - about 20 days have run. And in the TC the trial judge sometime ago set a schedule and he said anybody who wants to file a motion for summary judgment on some of these dispositive legal issues should do so by some date last month. And I know responses are due the 18<sup>th</sup> of this month. And so things are moving along orderly and a lot of work has been done in that proceeding. But it seems to me - the gist of all that is everything that's pending before that court by the pleadings or by what's really going on there is a pure let's declare the effectiveness of contracts, let's declare the effectiveness of this municipal ordinance and decide what the meaning of it is and what it requires.

ENOCH: As I understand the argument of the petitioners they say, "If you say mandatory venue does not apply to this declaratory judgment action, then mandatory venue would never apply to any cause of action where the artful drafter simply wants a declaration of rights that everybody knows ultimately results in an injunction as long as they carefully avoid the word "injunction." How could the court here declare that mandatory venue does not apply in the state of these facts where taken your facts the way you understand this case to be, and ever have it apply again as long as a person says, "hey, I'm not enjoining that airplane from flying out of that field, I'm simply wanting a declaration of a contract over here that prohibits that airplane from flying out of that field."

POWELL: If that declaratory judgment is entered, the order is just like Ft. Worth requested on pages 24 and 25 here, a declaration that the contract and agreement that that party signed requires that party to do this or forbids that party from doing that. That is a declaratory judgment. And I would agree with you that those kinds of cases in which you asked for that do not fit within 65.023(a). If the legislature wants to enact a mandatory venue statute for declaratory judgments, construing contracts and construing instruments of various kinds, then they can do so. But they have not done so.

HECHT: Well what do you do with the case where the debtor asks for a declaratory judgment, but he doesn't owe the debt, and the next day he applies for a temporary injunction against the foreclosure?

POWELL: I think you have a case. You can start a year before for example. He could ask for that declaratory judgment.

HECHT: He just does it one day after declaratory judgment application for a temporary injunction?

POWELL: I think all he's asking for is a declaratory judgment in his case, and then he seeks a preliminary injunction, which I do not think triggers 65.023(a). If he then has to get a permanent injunction to prohibit the lender from foreclosing on the property - you can get a

temporary injunction, there are a lot of cases like that that we've cited in our briefs that doesn't trigger 65.023(a). But if you then seek, I've got a declaratory judgment that I don't owe the debt, but the lender is still after me and he's going to do something and I need him permanently enjoined, then I think you're in 65.023(a).

ENOCH: But maybe the lender will do it. The lender will follow the law. All I have to do is declare this and the lender will not foreclose?

POWELL: That isn't that good. I think that's what this court said in *Leeper* that we should plead in anticipation of it. And I think there's a great quote, we put it on brief from the US SC in *Steffel v. Thompson* case, which was a case sort of like this. They were questioning whether a federal court could issue a declaratory judgment about a state statute when it could not issue an injunction about the state statute. And they said, yes, they can. It says, "what is clear, however, that even though a declaratory judgment has the force and effect of a final judgment, it is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive, noncompliance with it may be inappropriate, but it is not contempt." And we're right there. That's all we've got. There is no mandatory venue statute for that type of thing. And this court it seems to me is faced with the question, if you decide that that type of thing right there triggers 65.023(a), then you can't ever have a declaratory judgment that's not an injunction suit under that statute, and that's not what the legislature said.

\* \* \* \* \*

#### REBUTTAL

WILSON: I am Randy Wilson for Continental Airlines. Let me expand for just a moment on Justice Enoch's question about the foreclosure, and take another similar example. What's the classic injunctive action that TC's are faced with: Covenant not to compete cases. An employer comes in and seeks an injunction to prohibit a former employee from competing against him. Suppose he does not want to sue that employee where he lives, but rather he wants to sue him in his county. He doesn't want to sue him over there where he lives, but wants to sue him in his county. How does he do that? "Your honor, I seek a declaratory judgment declaring that he is precluded from competing against me. I seek a declaration that he must abide by his contract. I seek a declaration that requires him not to compete against me, and I'm not seeking an injunction because I am going to presume that he's going to do the right thing and he will obey it, and if he subsequently disobeys my declaratory judgment, then I will seek ancillary relief to enforce my declaration." Anybody can recast anything as a declaratory judgment. It can always be done. So, we're faced with a conflict. The conflict then is, how do we resolve a venue provision - a permissive venue provision for a declaratory judgment with a mandatory venue provision for an injunction if somebody artfully pleads. The legislature resolved that in 15.004. And it said, "If there is a mandatory venue provision then the permissive must yield to the mandatory." In the case of Continental, Continental finds itself in yet even a stronger position. Continental had no contract. Continental is not a party to the contract that they are seeking a declaration of. Continental was brought in to the suit subsequently and

Legend was brought in the suit at the very beginning of the case, and Legends is in the same position as Continental being not a party to the contracts. Legend and Continental were brought in to this suit seeking purely and only seek the only relief that can be sought against those parties would be an injunction.

GONZALEZ: Wasn't that defensive action after you file a lawsuit in federal court?

LAWYER: In Legend's case it would not be. Legend was sued from the very beginning of the case...

GONZALEZ: But it is correct as to Continental?

LAWYER: Continental was sued. The sequence of events were: After we announced we were going to commence flying to Cleveland, we filed our declaration seeking that we had the right to do something. Not a coercive claim. We weren't seeking to coerce anybody to do something. Not an injunction. Just a declaration of our rights.

OWEN: Rights under what?

LAWYER: Rights under the *Wright* amendment and the *Shelby* amendment, federal law that seemed to at least to us to give us the right to be able to do exactly what we wanted to do.

OWEN: And what parties precisely did you sue?

LAWYER: We sued DFW, City of Ft. Worth, City of Dallas, we sued everybody that had anything to do.

ABBOTT: What is that not just the opposite side of the same coin that they are dealing with?

LAWYER: Because ours is seeking a declaration of our rights, not seeking to compel anybody to do anything. That is, I want a declaration that I can do this.

ABBOTT: And they want a declaration that you can't do it.

LAWYER: A little more than that. Their declaration: I want a declaration that Dallas is prohibited from doing something.

GONZALEZ: By contract and ordinance?

LAWYER: Correct. I want a declaration that Dallas is obliged to do these things.



GONZALEZ: By contract and ordinance?

LAWYER: Correct. They are seeking a declaration to compel, compelling third-party to do something. They are seeking a declaration - a third-party must do something. They are seeking a declaration that third party cannot do something. That is, when somebody does that, when somebody seeks a declaration to compel or to prohibit it is coercive. And at that point, a declaratory judgment becomes an injunctive action. And it therefore triggers the mandatory venue provision. But we now have this conflict here of can you recraft something in order to avoid the mandatory venue provisions? We submit you should not be able to. That would write that provision out. And the provision's simple statutory construction is, is that a statute must be construed in a way that it makes sense.

OWEN: If they had not sought a temporary injunction and were simply asking for a declaration of rights, and you were flying today, would your argument be the same?

LAWYER: Yes, for two reasons: 1) from the very beginning the release sought against Dallas we submit is injunctive - just a fox cast in different clothing. But second, when we were brought in to it as the Ft. Worth CA in its mandamus points out, they seek no relief against us. Therefore, the cases they cite, the old plea of privilege cases, set up the proposition that you must look to see what the dominant relief is by virtue of the relief being sought. That's what the cases have all said. Look at the relief, see what relief they are seeking, and therefore, see what the dominant relief is.

Now I submit that under the new statute 15.004, you no longer need to do that. So long as there is injunctive relief, the statute is very clear. It doesn't require this court or the TC to look and go in to the minds as what the dominant relief is, or is a relief. It just says if it's mandatory, mandatory wins.

HANKINSON: The way the pleadings are postured right now, if the case ended tomorrow, the TC ruled on the summary judgments and Ft. Worth won, you wouldn't have an injunction issuing out of the court, you would have a judgment reciting the declaratory relief they request. They would not approve irreparable harm and all the requirements of a permanent injunction, correct?

LAWYER: That's correct.

HANKINSON: So under those circumstances why doesn't their failure to specifically ask that a permanent injunction be entered control whether or not this is an action for a writ of injunction?

LAWYER: Because they seek mandatory relief. It's a two-fold problem. One, they try to avoid the venue; but, second, they try to avoid a lot of the irreparable injury requirements that are required in order to get an injunction. They seek a compulsion. They seek an order that Dallas is prohibited. A declaration that Dallas is obliged to do these things. That's compulsion. And no

matter how you cast it, it's still injunctive.

ENOCH: Let me reverse the issue. I see the problem of careful crafting gets away from the injunction issue and not the mandatory venue. But the reverse also applies. Continental airlines comes in and says, "I just want a declaration of my rights; and suppose Dallas comes in, and this is down in Houston, and Continental says, "I want a declaration of my rights." Dallas comes in and says, "Wait a minute. We have some contractual obligations here. We think we have the right under our leasing of those gates to determine where Continental is going to fly." So this really is in effect an injunction. The declaration of their rights really results in enjoining the Dallas from exercising its rights under the lease; therefore, it's an injunction mandatory venue in Dallas. How come that argument isn't just as applicable when I want to declare my rights as opposed to Ft. Worth wanting to declare its rights vis-a-vis Dallas and continental?

LAWYER: As it turns out in your hypothetical, both the mandatory and the permissive rules could both send it to Dallas in that case. But I understand your question. The test ought to be is action being sought to compel a third-party to do something, a declaration to compel or a declaration to prohibit. If I am seeking a declaration to compel or a declaration that they are prohibited, then that is still a wolf in a sheep's clothing. It's an injunction. The hypothetical you pose, I would not be seeking a compulsion unless it depends on what the declaration is. If I sought a declaration saying Dallas could be compelled to let us fly, that's an injunction. I could call it an injunction. I seek an injunction that Dallas must order us to fly. It depends on what you ask for. It depends on how pervasive you want to be and how broad in your relief you want to be.

HANKINSON: Under these circumstances, how much deference is the TC's decision on this venue matter entitled to?

LAWYER: Under the mandamus rules it's whether it's an erroneous conclusion of law.

HANKINSON: Dealing with a de nova standard of review here?

LAWYER: Yes.

HECHT: Is it true that Dallas joined in the request for injunctive relief against Continental?

LAWYER: They didn't. They filed no papers to it. What happened at the TC was Dallas at the day of the temporary injunction stood up and said, and I can't remember if they said they had no opposition to it, or whether they were in favor of it, that's essentially what they said.

HECHT: Is that of significance?

LAWYER: I don't believe so. Whether Dallas seeks it or doesn't seek it, the venue rules



action is preclusive, and whether it's covered by primary jurisdiction doctrine. And that frankly is an issue that Legends filed a motion in the TC, which will be heard on this Friday, asking that the Ft. Worth suit be abated from the primary jurisdiction ground. The DOT has weighed in and in the next 6 weeks is going to issue a ruling that says what the rights are to fly in and out of Love Field. Meanwhile, the Ft. Worth judge has indicated he is going to hold a summary judgment hearing on Oct. 1. So things are moving at a rather rapid pace.