ORAL ARGUMENT – 4-3-92
01-0491
WICHITA FALLS STATE HOSPITAL V. TAYLOR

LAWYER: The legislature did not and could not intend to waive sovereign immunity in the Health & Safety Code §321.003, because there is no express waiver and any inference of waiver would mean the legislature behaved irrationally in at least two respects. First, in attempting waive federal facilities immunity; and second, in delegating its exclusive power to waive sovereign immunity to an executive agency like MHMR.

In addition construing the statute as a waiver would eviscerate the limits on negligence liability imposed by the tort claims act opening the floodgates to negligent suits against state mental health facilities.

Because there is no clear and unambiguous legislative intent to create such an unprecedented waiver, the court should reverse the judgment of the Waco CA and hold that sovereign immunity bars Taylor's §321 claims.

HANKINSON: Do you have any dispute that the language "may be sued" in the statute could constitute a waiver if in fact it was clear that the state or a subdivision of the state or a state agency was subject to the act?

LAWYER: If it was clear, yes, that could constitute a waiver if there was express language linking that to a state agency.

HANKINSON: "May be sued" is sufficient under the law that this court has promulgated as well as the case law as well as the recent statutory amendment on clear and unambiguous language?

LAWYER: Yes. If the statute said that the state may be sued for example under §321.003, or included language comparable to for example what was at issue in the Kerrville State Hosp. v. Fernandez case where there was a statute that said for purposes of the act, being the antiretaliation law, the state's agency should be considered the employer. Here if there were something saying for purposes of §321.003, a state mental hospital shall be considered a mental health facility who may be sued, then yes that would be sufficient.

Here we have no express language comparable to that nor comparable to for example the express waiver seen in the tort claims act or the whistleblower act. In the absence of any such language, the Waco majority looked to an incorporated definition of mental health facility that comes from a distinct chapter of the health and safety code. Ch. 571. And based on this definition determined that there was a waiver of sovereign immunity merely because the incorporated definition includes state facilities among various facilities that are deemed a mental health facility.

But waiver could not have been intended by the legislature solely based on this definition. Because the definition also includes federal facilities for whom the legislature clearly has no authority to waive sovereign immunity. Therefore, the legislature could not have intended this incorporated definition alone to define and to control who may be sued under 321.003.

HANKINSON: I take it then your argument is a Kerrville argument that you are claiming that the test in Kerrville is what should be applied here?

LAWYER: Yes. We believe that under the Kerrville decision there are only two ways a statute can waive sovereign immunity, and that's by having express language, or by otherwise lacking any other purpose or meaning. And here certainly this statute does not lack any other purpose or meaning if it were not construed as a waiver. To the contrary it retains meaning and purpose by creating a private right of action against private mental health facilities. And those facilities were the clear targets of the legislation that created ch. 321 in 1993.

ENOCH: Absent the incorporation of the definition of a mental health facility in the statute that says may we sued, would there be a cause of action against any mental health facility under the statute that says they may be sued?

LAWYER: Without any definition of the term mental health facility?

ENOCH: If the definition of mental health facility was not included in the statute that says for which you may be sued could mental health facilities be sued under the patients bill of rights?

LAWYER: Under that circumstance there would be an ambiguity because you would have a term "mental health facility" with no definition for that term and there might be some debate. Certainly it could never include on that basis alone a governmental facility. There may be arguments about whether it encompassed a private mental...

ENOCH: So the question that we might run into if we say that the statute must stand on its own and can't rely on incorporated definitions, would we not then create an opposite effect which is to raise a question of whether or not mental health facilities can be sued under the - I mean do we create an ambiguity going the other way by arguing that well you just can't incorporate this definition in here because that would produce a problem.

LAWYER: No. I don't believe it would produce a problem at all. The problem with the incorporated definition is not just that it's impermissible to incorporate definitions, but that sovereign immunity cannot be premised on an incorporated definition. There would be no problem with incorporating the definition with respect to the private mental health facilities. So the statute would retain meaning in that purpose. The problem with incorporating the definition as a basis for defining a waiver against the state is that 1) it would be inconsistent with the legislature's most recent addition to the code construction act, §311.034 that was created in the last session, and

expressly reaffirms the stringent standard for construing a statute as a waiver of sovereign immunity. The state said that waiver must be clear and unambiguous and expressly says that it should not be based on an incorporated definition.

JEFFERSON: Was that in place at the time of the suicide?

LAWYER: No it was not in place at the time of the suicide.

JEFFERSON: Does it apply here then?

LAWYER: Yes, we do believe it applies for two reasons. First, it didn't create any new rule but just merely reaffirmed existing sovereign immunity principles as articulated by this court and amplified their application to incorporate a definition. In addition were the court to deem that a new law it would still be a rule that has developed in the course of this appeal while the case is pending. And under Blair v. Fletcher from this court in 1993 and other decisions, that would be the operative law to apply. And really all the legislature is doing in 311.034 is giving some guidance to courts on when and when it does not intend to waive sovereign immunity.

O'NEILL: I thought the governor vetoed that.

LAWYER: The governor vetoed a provision that contains similar language, but that language also was included in another bill that passed and went into effect. And as of June 15 of this year, that language is in there. It was via a rider to the appropriations bill rather than the bill that also included an amendment pertaining to this court's decision in Fleming Foods. So the legislature apparently deemed this important enough to include it in two separate bills: one that was vetoed and one that was not. And indeed two days after we filed our brief on the merits in this case discussing the vetoed bill we supplemented that with a citation letter for the second bill that did in fact pass and become law. And that is now in the code construction act.

And specifically the prohibition against an incorporated definition that's evidenced by 311.034, and that statute is specifically directed to the use of the term "person" in the code construction act. And we don't have a question of the term "person" here, but we believe the same reasoning and the same prohibition would apply because you are talking about an incorporated definition that includes both private and public entities as does the definition of person. And really what the legislature is signaling is that merely because it relies on a term somewhere in a statute and elsewhere that term is defined to include governmental entities that that is just not sufficient alone to be the basis for an inferred waiver of sovereign immunity.

ENOCH: Then your rule would be that it should be just a bright line test that the legislature cannot waive sovereign immunity if it attempts to do so by simply creating a statute that creates a cause of action and then relying on identifying who is subject to that cause of action by referring to definitions in other statutes. You would say just as a blanket rule the legislature could not waive sovereign immunity by relying on the incorporation of definitions from another statute

to identify the parties who could be sued?

LAWYER: Yes. We believe that's correct. And indeed there's been no instance in which this court has ever inferred waiver under those circumstances. Again for example, in the state applications act that was at issue in the Kerrville case, there was a statute that standing alone expressly served no purpose other than to designate that the state as the defendant in an anti-retaliation law suit, and therefore, was construed to waive immunity. Here you have no statute designating the state as a defendant. All you have is a reference to a term "mental health facility" in §321.003, that then brings you over to §321.001, which in turn takes you out of that chapter into §571.003.12. And there you encounter a definition that does include state mental health facilities, but again also includes federal facilities for whom the legislature could not have intended to waive.

HANKINSON: If this definition did not include the federal facilities, then would you be making the same argument?

LAWYER: Absolutely.

HANKINSON: Why is that?

LAWYER: We believe it is commanded directly by the legislature in 311.034, and that this type of _____ reasoning that forces you to shuttle between several different sections and out of different chapters of a code in order to reach a waiver is not permissible and does not evidence the type of clear and unambiguous language that this court has always required to create a waiver in a statute.

PHILLIPS: Can you distinguish your position from the court's opinion in Kerrville?

LAWYER: We believe that it's absolutely consistent with the court's opinion in Kerrville, because in that instance, the court was confronted with a statute that did not have purpose or meaning in the absence of waiver. And again here this statute creates a very meaningful cause of action against private facilities, which were expressly the targets of the patients bill of rights legislation. Indeed, then Lt. Gov. Bob Bullock in 1991 created a senate interim committee outside the legislative session to travel across the state and directed that committee for its specific mission to investigate abuses at private facilities.

O'NEILL: Why then in the respondent's brief did they pose the question, why would the legislature require a public mental health facility to adopt the patients bill of rights?

LAWYER: I think that that makes perfect sense, because the legislature would have naturally wanted these rights to exist. And they do exist, and will exist independent of whether there's a private right of action at public facilities. All patients should receive the same protections and the same level of care, the same rights. It's just a question of what remedy exists when there's a violation of those rights? And when you're in a state facility or a community center that is also

considered a governmental entity there is a rights protection officer on site at every facility. And there is an administrative rights protection mechanism that exist for those facilities, but not for private facilities.

HECHT: Well surely you don't claim that that's the same as a lawsuit.

LAWYER: Absolutely not. It's not the same. It wouldn't offer monetary redress. But we don't believe the legislature...

HECHT: It wouldn't even give you the same enforcement it doesn't seem to me.

LAWYER: It would give you a right to report your grievance, to have it investigated, to be brought to the attention of regulatory authorities who have a responsibility to remedy that. All you would not have is a private right of action to get money for...

HECHT: Why didn't the legislature just create the same thing in the private sector? Just say you have a person on site that will report to the dept. of insurance or somebody if you have any problems.

LAWYER: They certainly could of. That was a policy call for the legislature to make, and certainly the failure to choose some other alternative means could not be construed as evidence to waive sovereign immunity, because that would essentially be drawing the waiver of sovereign immunity by negative inference. And that would really flip sovereign immunity principles on their head. Because there must be a clear and unambiguous affirmative evidence of intent to waive, and that can't be drawn negatively from the failure to take what they might have done in some other cause of action. Certainly they could have done that. Certainly they could have chosen to expressly include a waiver of sovereign immunity in 321.003. Or they could have included for example a limitation in 321.003 to the causes of action in the tort claims act, which is something that Sen. Moncrief proposed in a little debate that ensued this past legislative session on SB 801, which was a bill that would have confirmed that there never was a waiver of sovereign immunity in the statute. And he opposed that.

He expressed his views during a discussion in preparation for taking the vote to suspend the rules for discussion of the bill. And he said that he believed the statute was always intended to waive immunity, but would offer as a compromise something limiting it to both the cause of action and damages limits in the tort claims act. And Sen. Duncan, who also was a member of the legislature in 1993 when the patients bill of rights was enacted, took the contrary view which was that the statute was never intended to be a waiver of sovereign immunity and that the decision as to whether funds should go to paying plaintiffs monetary judgments in lawsuits or should be going to patient care and services at facilities was an important question given the limited resources and certainly one that caused debate on the floor this past legislation session and it's simply implausible that this dramatic waiver of sovereign immunity that would erase all the limits on the tort claims act, not only with respect to causes of action, but also with respect to any caps on damages and would

permit recovery of exemplary damages and attorneys fees. It's simply not believable.

HECHT: I don't understand why the state's resources are more precious than the private sectors.

LAWYER: Everybody's resources certainly are precious, but because the legislature has the direct fiscal responsibility for managing the state's budget and assigning a limited amount of money that's going to go to MHMR facilities, it would have a responsibility to determine whether it wanted those funds to go to damages or to go to care in the facilities.

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RESPONDENT

LAWYER: The respondent in this case, Deborah Taylor embraces Kerrville, and embraces Dewhart. She embraces the cases that we have cited in our brief. I will not be redundant in saying that there is a clear and ambiguous waiver. Waiver means that. That's what Kerrville holds. But Kerrville also holds that it would be easy if the legislature said we waive sovereign immunity, or as you said J. Hecht in one of the cases, or if they left it alone. But what we generally get is something in-between.

And here's what we have. Not a five-finger tortuous kind of interpretation having to reach for things in other statutes. But definitions that are found in the same Texas Health & Safety code.

O'NEILL: Why would the legislature do that? Why would they in this instance for mental health facilities want to remove damage caps, take it out of the tort claims act and subject the state to exemplary damages and attorneys fees? Is there any indication in the legislative history that they would pick out this area and tend to do that?

LAWYER: Well in both the private and the public legislative history if we jar and gimble on that way, then that's what the vice is in the Lee court. The evidence would be that exemplary damages are something that do help to keep mental health providers from continuing the same way.

O'NEILL: But they do for hospitals and everything else. Why would we just single out a mental health care facility for this sort of unlimited liability?

LAWYER: Because that was the topic at the time when these laws were being passed in the Texas Health Code. Those were the abuses that you see in all the tabs that are filed by the amicus briefs.

O'NEILL: So you're saying the legislature intended to elevate mental health abuse over any sort of medical abuse?

LAWYER: That's what the plain reading of the statute is. That's what they wrote.

PHILLIPS: They could have said it a little clearer like they did for whistleblowers.

LAWYER: They can always say it clearer, but this court consistently says that we're not here to try to fix statutes. What we do is see if there's a clear waiver of sovereign immunity. We're not the case that we had in the case that you had in Dewhart. We're a better case than you had in Kerrville State Hosp. We've got a statute contemporaneously enacted for whatever reasons that says that you may sue, that a mental health provider is liable and goes to §571 of the same code, not a different act as was the case in...

O'NEILL: Unlike in Kerrville this makes sense without inferring waiver. And wasn't that the test we laid down in Kerrville that if it makes sense without inferring waiver, then we don't infer waiver? In Kerrville it didn't make sense unless we did.

LAWYER: Well that's one of your holdings in Kerrville, but I don't think you have to infer waiver here. We have the words "may be sued". We have "is liable". We have the definition of a mental health facility, which clearly includes Wichita Falls. So we're not relying upon inferred waiver. You can infer waiver too. But we have an express waiver here.

HANKINSON: How does the recent amendment to the code construction act inform our _____?

LAWYER: We think it has no abrogation whatsoever of this decision.

HANKINSON: And why is that?

LAWYER: We thought it was vetoed. Because we're not depending upon the definition of a person to go ahead and bootstrap the Wichita Falls State Hospital into this is a defendant. The legislature told us who may be sued when it referred us to a mental health facility.

HANKINSON: So you think that the use of the word "person" in the amendment to the code construction act means that it should be strictly applied to just those statutes in which the word "person" is used?

LAWYER: Yes I do.

JEFFERSON: The legislature explicitly decided to waive federal facilities sovereign immunity?

LAWYER: That's of course a problem. I don't know why they did it. I know that this court nor any state court will ever hear a case on it. It's not anything you need to decide to decide this case.

JEFFERSON: But if they waived it intentionally for mental health, and you're saying that by this language we can say it was explicitly done, it was unambiguous, then we can also say that they did that explicitly for federal facilities, that they knew what they were doing and did it with that language?

LAWYER: In what context, I don't know. But they knew what they were doing. They used that language. But it doesn't affect this case that they may have purported to waive in some context sovereign immunity for federal facilities. No one has argued that they can do that. But what I do know is that the court doesn't need to decide that to decide the Deborah Taylor case.

OWEN: The court's trying to get at their intent. And you say they expressed a clear intent to waive it as to thestate. What was their intent with regard to federal facilities?

LAWYER: I don't know. That hasn't been briefed. It hasn't been argued. There's no citation. It's been argued of course in the petitioner's brief before this court, but there's no citation to anything except to say they can't do it. We agree with that.

PHILLIPS: But to accept your argument that this was clear, we would have to believe that the legislature was thumbing its nose at the idea of federal supremacy?

LAWYER: Well you get to phrase it that way, and I don't. But I don't think that you have to go that far to say that the legislature was trying to assume powers. I don't know what federal facilities might be operated and that is the name, that's the word that's used "federal facility" something operated by a federal facility. I don't think you have to believe that to believe one way or the other to believe that the legislature clearly said that where it can waive sovereign immunity to a mental health hospital it did and intended to do so.

HECHT: Do you know of another instance under current state law that you can recover punitive damages against the state?

LAWYER: I don't.

HECHT: I don't either. But there was one: the whistleblower act. And in 1995 after they had a little taste of punitive damages, they amended that act to prevent their recovery. It seems a little odd that then they would resurrect that idea in this statute. What's your view on that?

LAWYER: My response to that is legislatures change. Things are topical to one legislature that they are not to another legislature. And just as the legislature that created this right of action against public health facilities decided to put in exemplary damages in it the next legislature can take it away if they want to.

O'NEILL: But you would agree it doesn't make sense to incorporate this provision wholesale for all purposes. Wouldn't you agree with that?

LAWYER: Which provision?

O'NEILL: The definitional provision. The mental health provider. The definitional provision that you are relying on for waiver. If we incorporated that wholesale wouldn't it be sort of nonsensical because that definition includes outpatient services, and that's clearly not within the patients bill of rights in this context?

LAWYER: I don't see that it makes it nonsensical at all. You and I are in disagreement on that if that is your position.

O'NEILL: But outpatient services are not covered right?

LAWYER: I believe that both inpatient and outpatients services are covered by a bill of rights. And then the remedy is given to the inpatient services.

O'NEILL: There's only a remedy for inpatient, but if you incorporated wholesale this definitional piece it would equally apply to outpatient?

LAWYER: Yes.

O'NEILL: And isn't there some conflict there?

LAWYER: There may be some conflict, but it doesn't affect Deborah Taylor's case, because Terry Taylor was an inpatient hospital.

O'NEILL: But the whole argument being that they fully intended to incorporate everything from the definitional piece. These two pieces of it: the federal immunity part; and all of a sudden it covers outpatient services sort of belies that argument doesn't it?

LAWYER: I don't see that it does. And I know that as it applies to the Taylor case, the Taylor case stands on its own insofar as treatment as an inpatient facility. It seems to me that otherwise we do what was the vice in my opinion of the dissent in the Waco court and that is to try to find everything that is possibly wrong with the statute...

O'NEILL: No. But your premise is that the legislature knew exactly what it was doing by allowing exemplary damages and attorneys fees in this context. And you're saying it also knew what it was doing, even though it didn't allow a remedy for outpatient services, it knew what it was doing by incorporating the definitional piece to allow a remedy for outpatient services.

LAWYER: Yes.

O'NEILL: So it was doing both at the same time?

LAWYER: The legislature may well have thought as we try to divine what is in their minds, that the remedy needed to start out being in the inpatient facilities. That's the problem with getting into the legislative history as the hospital would have us to do. If we have clear and unambiguous language, which we have in these statutes, then we don't need to go there as to what the legislature may or may not have been thinking.

HANKINSON: Can you say it's clear and unambiguous if there are pieces of the definition that don't work when you incorporate them in?

LAWYER: Yes. I think that you can say it is on the facts of a particular case. And that's what our argument has been on this case.

HANKINSON: Are you saying then that there is a waiver of sovereign immunity under this statute for certain cases but not for others that might be brought underneath it?

LAWYER: I believe that's the way that the statute reads.

HANKINSON: Not everyone who sues the state for a violation of the patients bill of rights can say that sovereign immunity has been waived. Only certain people.

LAWYER: Everyone that has been treated in an inpatient facility can certainly say that.

O'NEILL: So you're conceding that the outpatient to that definitional piece has no meaning?

LAWYER: Well it has a limited meaning. There the outpatients have had to under a prior portion of the administrative code adopt the patients bills of rights, but the legislature if they wish to can exculpate them and keep them out of the defendants cycle.

ENOCH: It seems to me the argument is that the position that the dissent was taking is that you have to an express waiver of sovereign immunity, but that only gets you to the point of having a clear demonstration of the legislative intent. Now in the statute as I understand how the dissent was going on this, you have these words that are used "you may be sued." They incorporate a definition that as one of the identified groups in the definition are public mental health facilities, but you also have within that definition a couple of other elements that are inconsistent with the statute they are being incorporated in. And the position is, well what starts out to be some express words that are used that indicate what the intent is, there are these other words that they use that are inconsistent with the intent that sovereign immunity has been waived. You argue, well I just want to look at express words. I want to look at "may be sued." I want to look at the public health facilities. And that's all we look at in this express waiver. But as I understand the dissent, we're not to take an exacto knife to the statute and just cut those words and fit them together to determine this. We're supposed to look at the whole statute to determine this. And when you do that it becomes less than clear what the legislative intent was. Your argument comes back and says, Oh no, I just want

you to look at the public health facility. I just want you to look at the words "may be sued." But don't we have to look at the whole statute to determine what this intent is as opposed to kind of the individual references here and doesn't that then cloud what really the intent was by the legislature?

LAWYER: The reason I don't think so is that I do think you have to look to see what the statute is as applied to the facts of this case. Then I think that if you like the dissent in the Waco case, you try to find everything that might possibly cause the writing justice some confusion. Although it didn't call confusion to others that wrote similar opinions. So I think you get to look at the whole statute, but I don't think you get to say that if the legislature purported to waive federal immunity, then the whole statute falls. That to me would be similar to the question that was posed during the opening argument in this case. If we have no definition of mental health facility at all who gets sued? And here what the legislature has done is to say who gets sued.

I want to respond to the legislative history. I think that I repeat my original argument that if it's clear and unambiguous there is no need to look to it. I think that in the cases that we've had we dispute and rebut what has been said by the hospital in its brief, that there is no indication that public health facilities were even considered by the legislature. That is a misstatement and that's an omission in the Lee opinion out of the Ft. Worth Court in Lee 2.

In that case, for example, it was interesting in that the oral argument in the CA, the lawyer for the hospital who then argued it mentioned that SB 801 that was then pending before the legislature. To its credit, the Waco court came out with its decision in May before the legislature ended its session. As we know SB 801, which would have said, here's what the intent of the legislature was, did not pass. I don't think legislative history is helpful to this court one way or the other in construing this statute. And I don't think that Florida Bates and who is the better senator, Senator Duncan or Senator Moncrief has anything to do with the issues that this court has to decide.

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REBUTTAL

LAWYER: As indicated by several questions and points raised by several of the justices this afternoon, clearly there is no unambiguous and clear intent to waive immunity if it must be premised on a definition that contains numerous problematic aspects, not only by the inclusion of federal facilities, but also as J. O'Neill observed, by the inclusion of outpatient facilities.

HECHT: But nobody can be thinking very thoroughly when they adopt a definition that has state hospital in it as big as life, and they don't mean state hospital. It stretches _____ to think that the legislature would reach for that definition and not mean at least some of those words.

LAWYER: We would respectfully disagree. We would agree that the legislature meant some of the words in that statute, namely private facilites. But we believe that because there are so many other facilities in there for whom it could not have reasonably intended to waive immunity,

that that definition would have to be in effect judicially rewritten in order to become a permissible basis for inferring a waiver. And a judicially rewritten definition surely cannot signal clear and unambiguous legislative intent.

HECHT: We've got to rewrite it no matter what. The question is are we going to cut out three words, or six?

LAWYER: We're not arguing for the court to rewrite the statute in any manner. What we're arguing is that if the operative inquiry is clear and unambiguous legislative intent, that certainly that can't be found based on a statute that causes this many problems when you go to it, that that raises questions. And once you have a question about what the statute meant or didn't mean or what the legislature intended or didn't intend, and there are two conceivable constructions: one waiving immunity, and one not waiving immunity. The court must decide in favor of preserving sovereign immunity.

ENOCH: The statute says, here's the patients bill of rights for which there's a cause of action "you may be sued". Now who may go be sued? Well you go look to this definition of who may be sued. And in that definition is public health facilities. Do you agree if the only word defined in mental health facility was public health facility, that that would be an express waiver of sovereign immunity? Who may be sued - go look at the definition of mental health facility and right there it says public health facility. Would that be an express waiver of sovereign immunity?

LAWYER: No. We believe that once you have to go outside of the statute to another statute, which in turns sends you to a third statute, an incorporated definition, that that's not clear enough. And certainly...

HANKINSON: Even if as under Kerrville that's its only purpose?

LAWYER: The Kerrville situation is distinguishable because here you have a definition that is used in numerous provisions throughout the health and safety code in a variety of contexts.

HANKINSON: That's my point. My point is is that I thought that earlier you had said that the rule against incorporation was not absolute. And in fact there could be an incorporation under some circumstances.

LAWYER: That's correct. It's when it comes to premising a waiver of sovereign immunity on incorporation and nothing more that there is a problem. Whereas for example in the Kerrville statute, that did not involve incorporation. What it did was specifically identify the state as a defendant in an anti-retaliation lawsuit. You did not have to go to another definition. You did not have to move outside the statute. It was right there. And indeed that was the totality of what the statute said, such that if that wasn't the purpose it would have had no meaning, and therefore, it must have been the legislature's intent to use that statute.

ENOCH: What did the legislature intend by incorporating the mental health facility definition into the statute?

LAWYER: I think that we can't be sure what they intended. That there is an ambiguity there. I think certainly they intended to have private facilities be sued, because again that was the impetus for this legislation. There was a special committee set up to investigate private facilities. They produced an over 80 page report that we've included in our appendix that is called "abuses in private facilities". And when you look throughout it it is replete with references to those abuses and not one mention of public facilities.

ENOCH: So the statute imposing liability has no purpose but for it incorporates a definition that identifies who it is that can be sued?

LAWYER: Yes. It has a term in it that is defined elsewhere...

ENOCH: You have to look at that definition to find out who it is who can be sued under the statute?

LAWYER: Yes. And we believe that incorporation is not a problem except where what the inquiry is is waiver of sovereign immunity.

ENOCH: On the issue of it had no other purpose you're arguing that it does have to be incorporated to give the "may be sued" purpose, but because it identifies three defendants as opposed to only one public defendant it still has a purpose and we just ignore the fact they included public defendant?

LAWYER: In part. Yes it has a purpose. It could also have a purpose even if it didn't incorporate that definition. There would be a greater ambiguity about what the term "mental health facility" meant. But it does incorporate that definition and that clearly does create the cause of action against private facilities that would retain meaning in the statute, and we just believe that it is not a sufficient basis to evidence the clear and unambiguous legislative intent necessary to waive sovereign immunity.