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Supreme Court of Texas.  
Theresa MARSHALL, Petitioner,  
v.  
HOUSING AUTHORITY OF THE CITY OF SAN ANTONIO, Respondent.  
No. 04-0147.

April 12, 2005.

Appearances:  
Fred Fuchs, Texas RioGrande Legal Aid, Inc., Austin, TX, for  
Petitioner.  
R. David Fritsche, Law Offices of R. David Fritsche, San Antonio,  
TX, for Respondent.

Before:

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

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JUDGE: The Court is ready to hear argument in 04-0147, Theresa  
Marshall v. Housing Authority of the City of San Antonio.

SPEAKER: May it please the Court. Mr. Fred Fuchs will present  
argument for the petitioner. Petitioner has reserved three minutes for  
rebuttal.

ORAL ARGUMENT OF FRED FUCHS ON BEHALF OF THE PETITIONER

MR. FUCHS: May it please the Court.

The principal issue before this Court in Theresa Marshall's isn't  
-- Theresa Marshall right to obtain appellate review of the judgment of  
possession in an eviction case. Although, she gave up possession  
because she was unable to post the supersedeas bond, but the judgment  
has continue in effects for her beyond the mere loss of the apartment.

I will first give the procedural posture of the case. Second,  
identify the four issues that I will address. And third, express each  
issue in turn.

Turning first to the procedural posture of the case, Ms. Marshall  
--

JUDGE: May I ask a factual background question. How much was --  
was she paying per month?

MR. FUCHS: The contract rent on the unit, your Honor, was \$655 per

share of the rent based on her income, and the calculation under the section 8 program was zero. She was responsible for paying her own electricity for the unit.

JUDGE: So, she -- she paid nothing for the rent?

MR. FUCHS: Yeah. She paid nothing to the landlord of San Antonio Housing Authority. She paid for her own electricity bill.

Turning back to the procedural posture, Ms. Marshall had a section 8 voucher issued through the San Antonio Housing Authority. Following a serious incident at her apartment in which there was a shooting, the San Antonio Housing Authority filed an eviction against her in justice court. She lost in justice court, appealed to the county court at law. The county court at law --

JUDGE: Counsel, excuse me, Counsel. Does the eviction prevented from getting a future federal subsidies for housing?

MR. FUCHS: Yes, it will, your Honor. If one holds a voucher, and one is evicted from housing lease with the help of that voucher, then one can be denied any another federal housing assistance for a period of five years, not only another voucher but public housing project-based section 8 housing.

JUDGE: Is that automatic or is there -- is there a hearing to -- to make that eviction?

MR. FUCHS: If there -- if -- if -- it depends on the type of housing she applies for, your Honor. If she would apply, for example, for another voucher with the housing authority and she would deny on the basis that she had been evicted, then she would be entitled to a hearing on the basis of that denial --

JUDGE: Did she make that application?

MR. FUCHS: Your Honor --

JUDGE: Did she make that application for other housing?

MR. FUCHS: No, no, your Honor. She has not applied for other housing. If she applies it on the other hand from project-based section 8 housing, which is managed by -- privately owned, federally subsidized landlords, and she is denied. She is entitled to a meeting, not a hearing but a meeting with the supervisor.

In this case, the trial court in her judgment against her not only for possession but for court policy and post judgment interest --

JUDGE O'NEILL: What are those -- what were the court costs?

MR. FUCHS: The court cost in -- in this case as best as I can tell, your Honor, were I believe \$307.

The court of appeals dismissed the appeal from want of jurisdiction. Ruling the case was moot because Ms. Marshall had vacated the premises. That judgment is erroneous. Here is the background with respect to the supersedeas. The trial court set the supersedeas in the amount of \$8,800. Ms. Marshall was financially --

JUDGE: What is -- what is the basis for that?

MR. FUCHS: The trial court based that, as my understanding, your Honor, on grants likely decreed at the fair market value of the premises for a period of one year. I think the trial court assumed that the fair market grant would actually be about \$755, and assume that appeal would take about 12 months.

Ms. Marshall who had an income of \$270 a month in temporary aid to needy families was unable to post the \$8,800 supersedeas payment bond. She asked the Court of Appeals to review whether the bond was excessive. It denied her motion and then, she moved before the writ was executed. She -- she moved for several reasons. She did not want to have herself and her children forcefully removed from the premises. She did not want to have her property set out into the street. She wanted

to avoid the humiliation and the embarrassment of being forcibly removed from the apartment. I intend --

JUDGE: If -- if the appeal weren't moot, would Ms. Marshall have a remedy? Could she sue for wrongful eviction or -- or appeal in any other way?

MR. FUCHS: It -- there -- you -- the judgment in an eviction case on possession is not *res judicata* or collateral estoppel. But it's not sufficient to say that she could sue for wrongful eviction for a -- for a number of reasons. One, it changes the burden of proof. That in the burden she has from the landlord proven a violation, to the tenant haven't approved that their -- that their eviction was wrongful.

Two, this Court in *R.R. Communications v. Shark* was -- was confronted with the similar argument by the state, where the state argued that the tax payer had another remedy available. In addition, to suing for declaratory relief and that -- that remedy in that case was simply to weight from a collection suit. And this Court, in -- in the *Shark* case held that -- that wasn't sufficient to overcome the financial barrier to access to the courts.

Here, the four points I intend to address are as follows. First, the case is not moot because Ms. Marshall vacated the apartment. Under the *Reyes*, she's not acquiesced and the judgment of favorable ruling on the merits will substantially affect her rights. Second, the judgment has direct consequences for her beyond meritorious possession from the apartment.

JUDGE O'NEILL: Well, let me ask you about the direct consequences fees. Do we have any record problem with that? I mean -- or -- or does the other side stipulate that she will, in fact, lose housing assistance?

MR. FUCHS: She did lose housing assistance, your Honor, as a result of the eviction.

JUDGE O'NEILL: But is that -- that's in the record? We don't have any problem with that?

MR. FUCHS: It -- it -- there's nothing per se in the record but it was -- it's -- it -- it was the consequences [inaudible] in this particular case. The San Antonio Housing Authority had not only issued the voucher, it was also the landlord; somewhat unusual under the section 8 program. And when it evicted her, it did not issue her a voucher to move elsewhere. And there is an affidavit by her counsel under paragraph 5 of our -- paragraph 5 of the reply brief stating that she moved -- moved from her premises to avoid the humiliation of another move. Here, the Housing Authority had no incentive because it was the one evicting her to give her a voucher to move -- to move elsewhere.

The -- the third point here and the reason the case is not moot is that a favorable ruling on the merits would relieve Ms. Marshall of liability for the court cost. And finally, under this Court's precedent, the right to obtain appellate review cannot be conditioned on satisfaction of a financial requirement.

With respect to our federal of -- federal constitutional claims, I'll simply refer the Court to our brief at pages 22 and 23. The legislature enacted section 24.007 at the Texas Property Code behind paragraph 7 of the brief in 198, and it became effective January 1, 1984. It provides for appeals of the issue of possession in eviction cases only if the rest -- rest benefits are being used for residential purposes. It further provides, however, that a judgment of eviction may be stayed only if the appellant files a supersedeas. It does not require the filing of the supersedeas in order to proceed with an



appeal if that is the effect of the ruling of the court of appeals. Here, Ms. Marshall moved under the Reyes to avoid forcible removal of her family and her property. This Court has consistently held that an appeal is not moot when a party satisfies the judgment under the Reyes.

JUDGE O'NEILL: Well, what happens if you win your appeal?

MR. FUCHS: If -- if we win the appeal, then this -- then this case would be remanded to the Court of Appeals. Is court asking what would happen if we obtain the favorable ruling from the court of appeals?

JUDGE O'NEILL: Yes --

MR. FUCHS: If we --

JUDGE O'NEILL: -- if she's not contesting possession, then what's left?

MR. FUCHS: If -- if we obtain the favorable ruling on the merits from the court of appeals, there would be two direct consequences to the client. One, she would be entitled to get her voucher back and if the Housing Authority would not issue her a voucher on some pretense, then she will be entitled to sue to get that voucher because there would be no eviction on the record.

JUDGE O'NEILL: Yes, but -- but I guess what I'm saying is what -- what would the judgment said? The judgment would say possession was wrongfully rested from her.

MR. FUCHS: I -- I think that -- that the judgment would simply say that -- that possession -- that she is entitled to possession.

JUDGE O'NEILL: Well, but in that, the problem, I mean --

MR. FUCHS: Here, your Honor, she doesn't -- she -- she's isn't seeking possession of the apartment anymore.

JUDGE O'NEILL: But the judgment would say she is entitled --

MR. FUCHS: Entitled to possession, and she would use that then to say, "I'm entitled to a voucher because I should not have been evicted, and beyond that, I can no longer be denied federal housing assistance for a period of five years because the eviction was -- the eviction has disappeared."

JUDGE O'NEILL: But -- but under that judgment, couldn't she then -- I mean, I understand you're saying she doesn't wanna use it to obtain the possession. She merely wants it to get a housing assistance. But couldn't she, under the judgment you'd be requesting, get back to that landlord and say, put me back in the premises?

MR. FUCHS: Certainly, if one applied the same principles that one applies to a money credit -- to a money creditor who it -- who executes on a money judgment, and then the debtor wins, the debtor or the debtor would be able to seek -- seek satisfaction back from the money creditor. Here, is she is -- is -- it gets the possession of the apartment and the court finds that she was entitled to possession, then she could certainly ask for that. As a practical matter though, that's not something that we're seeking in this case.

JUDGE O'NEILL: Well, let's get in the practicality instead. What judgment -- sort of judgment granting her possession would give you the remedy to wrong that you're seeking to -- to [inaudible]?

MR. FUCHS: The -- the only judgment that can be entered is a judgment for her, for possession. That would then remove the consequences of the eviction, and allow her to obtain another voucher.

JUDGE: But she didn't really want the possession. So, really, it just the declaratory judgment.

MR. FUCHS: It -- it wouldn't --

JUDGE: But -- but the declaratory judgment that she should have won.

MR. FUCHS: And that would have concrete effects for her, your

Honor.

JUDGE: I understand. But it wouldn't be any different from the wrongful eviction -- declaratory judgment and wrongful eviction suit.

MR. FUCHS: It would be -- it would be very different because in order to do that in a wrongful eviction suit, she -- she has to actually file another suit. She assumes the burden of proof and she would and in wrongful eviction suit, you're limited to recover any damages.

Here, what she has to gain by a favorable ruling on the merits is that voucher in the removal of the stigma that keeps her from getting other federal housing assistance either a voucher or public housing.

JUDGE: But she hasn't applied -- she hasn't applied for other federal assistance or hasn't had a hearing to determine whether or not she can get additional vouchers --

MR. FUCHS: Correct.

JUDGE: -- why is this right for us to hear this now?

MR. FUCHS: Because, your Honor, it's -- it is currently a bar that exist against her, even if she hasn't applied. If she does apply, she will be denied that -- that housing. And in addition --

JUDGE: But the judgment -- but the judgment is not gonna give her that certificate. We don't make that.

MR. FUCHS: Your Honor, I believe that the -- that the judgment would entitle her to do -- do that. If the --

JUDGE: In the -- in the judgment itself [inaudible] --

MR. FUCHS: No, your Honor. I -- I agree with the court that the judgment wouldn't say that but the practical effect would be that she can go to the housing authority and say, I prevailed. There wasn't an eviction in this case of me. I'm entitled to get my voucher back. There --

JUDGE O'NEILL: The -- the problem I'm struggling with though is if the judgment is actually gonna say, possession, She is entitled to possession, then doesn't that undermine the whole purpose of the FED statute to make a quick resolution of possession that, I mean, the [inaudible] return the whole system on it's own?

MR. FUCHS: The response to that, your Honor, is that the FED statute is very expedited through the justice in the county courts. There's no provision provided for expedited review once it gets into the court of appeals. And the legislature recognized the right to appeal in section 24.007, but say that if you wish to remain in possession, you have to post a bond. It didn't say that in order to get appeal, one has to post the supersedeas bond.

JUDGE O'NEILL: But that's what our -- our rule says that. [inaudible] rule 749?

MR. FUCHS: Well, rule 749, your Honor applies only to appeals from justice court to county court. In -- in -- it is a similar situation and that if a tenant appeals from justice court to the county court and wishes to remain in possession, the tenant has and files an affidavit of inability to pay the court cost.

To remain in possession in a -- in a nonpayment of rent case, the tenant has to pay rent into the court registry. If it's not a nonpayment of rent case, the tenant can simply proceed on the affidavit. But this Court held in -- in the Blue Water Gardens Apartments case that that payment of rent access as supersedeas and -- in another case, the -- the court of appeals in Dallas, the Kennedy v. Highland Hills case, the court of appeals there when a landlord sought to -- had obtained the judgment on the merit because the tenant had failed to pay the rent into the court registry, the Dallas Court of

Appeals said, "All that deed was entitled to landlord to obtain possession." It did not entitle the landlord to obtain a --a finding on the merits of the -- of the case.

JUDGE: Well, but in this case, if you prevail in the court of appeals, all the judgment is going to say is that, the housing authority take nothing, right?

MR. FUCHS: That's correct, your Honor.

JUDGE: And you're not seeking any further relief after that and you can't.

MR. FUCHS: The -- the relief -- the relief we're seeking, your Honor, then is the -- the removal of the text of that judgment and that would be, we would go to the housing authority and say, we prevailed. She is entitled to get back her voucher.

JUDGE: But you didn't really -- you didn't really prevail. You just didn't lose.

MR. FUCHS: Well, we -- well, we didn't lose, but that would be the same as -- that that would be the same as prevailing for -- for purposes.

JUDGE: Aren't they taking position that you had a shooting at your apartment so, we are not gonna give you another voucher?

MR. FUCHS: Well, but -- but they terminated here because there was the eviction. She'll be entitled once that removed -- eviction is removed from her record to get another voucher. Here --

JUDGE O'NEILL: Would your position be different if she were actually seeking possession?

MR. FUCHS: No, your Honor. It would -- it would not under -- because here that would give an additional element keeping the case alive, but because of the consequences that flowed from her here regardless of whether she is seeking possession or whether she is simply seeking to get -- remove the direct consequences of the eviction from the record, the -- the result, it seems to me would be the same.

JUDGE: Assuming the judgment could be superseded, what does the -- we have -- we have a brief from [inaudible], an apartment association, what would landlord have to do? Do they have to keep that apartment vacant during the pendency of --

MR. FUCHS: No --

JUDGE: -- the appeal or do they advise any tenant that they're renting to that, you know, this may be a short duration, it just depends on when the appeal resolved.

MR. FUCHS: No, your Honor. I don't think they have to do that -- to do that at all and if -- if in a particular case, and this is not a particular case, but if a tenant wanted to remain in possession in a particular case, and this would really only occur in public housing cases and -- and federally assisted housing because in most cases, the lease will have expired and the landlord could have subsequently terminate the lease. But if a tenant wanted to obtain possession, then -- thank you.

JUDGE: You can continue -- continue your talk.

MR. FUCHS: If -- if the tenant wanted to obtain possession, then as a practical matter in our society today with large apartment complexes, the -- the landlord can make available the next available apartment to the tenant. Thank you.

JUDGE: Thank you, Counsel.

JUDGE: The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. David Fritsche will present argument for the respondent.



ORAL ARGUMENT OF R. DAVID FRITSCHKE ON BEHALF THE RESPONDENT

MR. FRITSCHKE: May it please the Court. First, Mr. Chief Justice and the members of the Court, I wanna thank the Court's indulgence, the counsel for the petitioner's indulgence, to Mr. [inaudible] indulgence in changing the day of my oral submission.

JUDGE: Have a good trip.

MR. FRITSCHKE: Thank you and my wife appreciates it --

JUDGE: (laughter)

MR. FRITSCHKE: -- your Honor.

This case turns on two issues first of all we have to look at the judicial intent of this Court in promulgating rule 746 of the Texas Rules of Civil Procedure; 746 is a codification of the old revised civil statute 3984, which establishes that there is one issue -- with one issue alone in a forcible detainer action. That rule along with other rules and statutes that were passed by the Texas Legislature create a scheme of handling forcible detainer action as an ancillary proceeding in the justices -- justice of the peace Courts and established what has been called a speedy, simple and effective remedy for landlords. The second issue that --

JUDGE O'NEILL: How would she ever get her cost back?

MR. FRITSCHKE: I'm sorry.

JUDGE O'NEILL: How would she ever -- how would she ever get out from underneath the judgment at cost against her?

MR. FRITSCHKE: She could pay the cost.

JUDGE O'NEILL: What if she doesn't owe them and she wants to appeal the fact that she [inaudible] against her?

MR. FRITSCHKE: She can file a supersedeas bond and comply with rule 24.007 and 24.2 of this Court.

JUDGE O'NEILL: So, even if possession is not an issue, you can say that if she filed the bond to cover the cost, she can get forward with her appeal or she filed an affidavit [inaudible] she could go forward with the appeal of the cost.

MR. FRITSCHKE: Well, there -- under the Lovelace case, your Honor, an indigent still has to follow supersedeas bond in -- in order to -- to appeal. And then when you look at 24.2, the rule of the appellate procedure 24.2 of this Court, in order to recover real property --

JUDGE O'NEILL: Let's -- let's assume she is not trying to get possession, all she wants to do is to get this judgment you raised on her record and get the eviction expunged basically.

MR. FRITSCHKE: I think she could follow supersedeas bond.

JUDGE O'NEILL: For how much?

MR. FRITSCHKE: In order to cover the court cost, the 355 or the 345 plus the amount of any prejudgment interest that had occurred.

JUDGE: Did you all insist on the \$8,000 court bond?

MR. FRITSCHKE: Your Honor, we did put on the evidence and if the Court looks at the record, the -- the record that any order issued by the Judge Crouch, there was a hearing on the merits with regard to what the fair market value of rent would be during the pendency of appeal pursuant to 24.007.

JUDGE: Right, but your -- but your client was the owner.

MR. FRITSCHKE: Was the owner.

JUDGE: And was subsidizing her rent a hundred percent.

MR. FRITSCHKE: Under subsidizing and she had a voucher that was used [inaudible], yes, your Honor.

JUDGE: So -- so, it wouldn't have been any different if on appeal she hadn't been paying anything -- she hadn't been paying anything before.

MR. FRITSCHKE: She hadn't been --

JUDGE: So, why did you insist on \$8,000 for a bond if she wouldn't pay anything before, you weren't out that much.

MR. FRITSCHKE: Because the -- the events under this particular lease resulted in a termination of her housing assistance. This was a -- this was not a [inaudible] of lease, this was actually a Texas Apartment Association Lease which has a specific provision in paragraph 20 that says that the conduct of this resident and the resident's guest cannot disturb the rights, comfort, health, safety, and conveniences of others in or near the apartment community. The effect of the act of this person's guest was to terminate her right --

JUDGE: I know. You -- you assume you gonna win but you really didn't lose 8,000 bucks that this lady state there. You haven't lost 8,000 bucks for the year she had been there or how [inaudible], right?

MR. FRITSCHKE: Your Honor, we have to remember, however, that street rent for this property was approximately \$750, and the Housing Authority does not have to lease every unit to a section 8 voucher holder. This unit was going to remain perhaps --

JUDGE: But the fact of the matter is, you make a lot more money from this lady on the supersedeas bond than you ever made from ancillary --

MR. FRITSCHKE: If we could enforce it, yes, your Honor

JUDGE O'NEILL: Tell me how about the timing here? When did she give up physically in the appeal process? When did she physically give up possession?

MR. FRITSCHKE: Apparently, after it was appealed to the Fourth Court of Appeals. We don't have specific time, that's part of the record. In fact, there are 12 citations in the petitioner's brief to the fact that she was -- she left but under duress, she left before the writ of the possession issue. There -- there are 12 allegations of fact that are not supported by the record in -- in the petitioner's brief. So, you know, at some point during the appeal process, she did vacate in the affidavit, that's part of the record, indicated she left the state.

JUDGE: You agreed that the eviction compromises her right to obtain the future [inaudible]?

MR. FRITSCHKE: I do, your Honor.

JUDGE: And that doesn't make the appeal not moot?

MR. FRITSCHKE: Well, interestingly, your Honor, if the Court reviews page 6 of the petitioner's brief, one of the -- one of the statements they say is under Texas Law where an appellate court concludes that the case is moot as Justice Green did at the Fourth Court of Appeals, all orders entered in the cost by the lower court are set aside including the original judgment. Now, under that reasoning, what Mr. Fuchs is requesting before this Court today seems to me to be exactly what they want. The fact that if the original judgment is set aside, Ms. Marshall maybe able to go request her voucher just because the Fourth Court says it was moot.

JUDGE: But that's not what happened.

MR. FRITSCHKE: That's not what happened.

JUDGE: So, did the court of appeals err in -- in not rendering that judgment?



MR. FRITSCHKE: No, your Honor. I do not believe that the court of appeals erred.

JUDGE: Instead of dismissing it for want of jurisdiction, the theory would be court of appeals should have vacated the judgment below, dismissed the case as moot.

MR. FRITSCHKE: Well, I believe that the court of appeals was correct in dismissing the case as moot because of the loss of possession.

JUDGE: But is that -- is that what it did or did the judge dismiss the appeal for want of jurisdiction?

MR. FRITSCHKE: It dismissed the appeal for want of jurisdiction over --

JUDGE: So, it didn't set aside?

MR. FRITSCHKE: It did not set aside.

JUDGE: But you think it should have?

MR. FRITSCHKE: Well, I was just quoting out of petitioner's brief, your Honor. Their position is that -- that -- the -- a dismissal as moot, in fact, sets aside the original judgment which is apparently what -- one of the issues that the petitioner is requesting so that this person could potentially go back and request another voucher.

JUDGE O'NEILL: Well, the judgment is not vacated.

MR. FRITSCHKE: I understand.

JUDGE O'NEILL: She still owes the court cost, so how is it that she can get her court back -- cost back when she gives up possession but she still says, "I was wrongfully evicted. I'm not trying to get possession. I want my court cost back." What should she have done here?

MR. FRITSCHKE: The only thing I can say, your Honor is that she would need to comply with 24.2 to follow supersedeas bond to supersede that judgment to proceed with the -- with the appeal.

JUDGE O'NEILL: With \$307?

MR. FRITSCHKE: Yes.

JUDGE: What is the practical harm of allowing the -- what's the practical harm of allowing the appeal?

MR. FRITSCHKE: Your Honor, one of the issues here is what happens with this landlord and the -- the unit. Was the unit supposed to remain vacant?

JUDGE: No.

MR. FRITSCHKE: I agree, I mean, --

JUDGE: So, what's the -- I mean, it's -- like if a money judgment -- judgment creditor [inaudible] and executes, he does it -- at his risk and you [inaudible] takes the car or whatever there is, sales it. The debtor, if he prevails on the appeal, can go get it back, it's gone. But you make it a judgment against the creditor for -- for seizing it, which you agree. I take it that the tenant could do through a wrongful eviction.

MR. FRITSCHKE: Absolutely, your Honor.

JUDGE: So, I'm just wandering what the practical consequence of that?

MR. FRITSCHKE: Well, we have to go back in -- in -- I think this Court actually has to, instead of looking at legislative history, look at judicial intent in promulgating the rules regarding forcible detainers. Did this Court intent for there to be a speedy, inexpensive, and -- and summary procedure beginning with rule 746 --

JUDGE O'NEILL: When you get an appeal, it -- it's not -- it's not summary in the sense that you don't have no right to appeal.

MR. FRITSCHKE: No, I understand that.

JUDGE O'NEILL: So, what's the harm in allowing someone to appeal a

money judgment against a \$307?

MR. FRITSCHER: Well, in -- in our brief, your Honor, we believe that that -- that's addressed by the -- the doctrine of -- of de minimis clause.

JUDGE O'NEILL: Well, that's not de minimus to a lot of folks --

MR. FRITSCHER: I understand.

JUDGE O'NEILL: -- that's why we have JP courts and that's why we have appeals.

MR. FRITSCHER: But when it's coupled with the super possession in the -- the sole --

JUDGE O'NEILL: But it -- let's just -- but that is dropped out of case. That \$307 is real money to a lot of people and they have a right to appeal.

MR. FRITSCHER: I understand, your Honor. But -- but our position is in a forcible detainer action when they have other remedies that are available to them like a -- a super wrongful eviction or -- or some other action because they -- the forcible detainer rules are -- are cumulative under 24.008, it doesn't stop an action for any other basis. So, she did --

JUDGE O'NEILL: But it doesn't -- but by the same token, it doesn't say that she were limited. In your [inaudible] say it's -- that rules are rules of procedure like damages and costs.

MR. FRITSCHER: Damages and costs owned.

JUDGE O'NEILL: And all were talking about here now at this point are costs.

MR. FRITSCHER: I agree.

JUDGE O'NEILL: So, where in the statute said you can't appeal the rendition of costs?

MR. FRITSCHER: I don't think the statute says that, your Honor. I think what -- what were -- were saying is because it is coupled with a super possession and it is only coupled with the super possession --

JUDGE O'NEILL: So, once that goes away, you're tagged with cost no matter what.

MR. FRITSCHER: That's our position, your Honor, that's our position because this forcible detainer, the set of procedures, if -- if you look at the rules for forcible detainers, they coupled with 24.008 of the property code 24.007 of the property code 8 being the fact that it's accumulative remedy, it doesn't put in any other remedies. And also specifically 24.007, the one that -- that we're -- we're on here today says that a supersedeas bond like 24.2 of the rules of this -- this Court is required to be posted in order to supersede the judgment.

JUDGE: Well, does it come down to this that the practical consequences that the parties are going to have to go through an appeal over essentially court cost?

MR. FRITSCHER: Yes, your Honor.

JUDGE: Otherwise, the possession, [inaudible] belong, rights and remedies are the same, everybody is basically in the same position so we got an appeal and the legal issue is -- was that judgment on possession act, was it correct?

MR. FRITSCHER: It was correct.

JUDGE: And the consequences are the court cost?

MR. FRITSCHER: That is correct. And in this case, your Honor, the Housing Authority weighed the attorney's fees. They did not seek attorney's fees at the time they were seeking possession. The judgment for attorney's fees is zero, the judgment for rent is zero.

JUDGE: Well, the case will be different if there were an award of [inaudible].

MR. FRITSCHKE: Your Honor, our position is again because it's coupled with this unique super possession under rule 746, it would not -- it -- it would not [inaudible]. Now --

JUDGE O'NEILL: So, if she gotten \$20,000 plus attorney's fees assessed against her and she voluntarily vacate the premises, she could -- did not -- would not have the right to appeal with \$20,000 judgment against --

MR. FRITSCHKE: I think she would, your Honor. I think she would.

JUDGE O'NEILL: Then why did she have the right to appeal the \$307?

MR. FRITSCHKE: Again, under the doctrine of non curat lex about the de minimus amount where it is cut, this Court has to make some determination as to win an appeal --

JUDGE O'NEILL: We have statutes on the books that allow you appeal if the amount in controversy is at hundred dollars or more, that was -- that's a legislative.

MR. FRITSCHKE: I understand. And -- and again, my -- my position is because it's coupled with this forcible detainer procedure, which is unique in Texas, that she should not be able to appeal that. Now, with regard to --

JUDGE: You don't mean you need two Texas --

MR. FRITSCHKE: You need two Texas.

JUDGE: Other states have several procedures.

MR. FRITSCHKE: Well, I don't know that the -- other states have this speedy, effective procedures that we have in -- in Texas -- I mean, Texas has -- because of the -- the coupling between 746, 740, 752, 747(a) with the property code 24.007 and 24.008, it is a unique procedure. I think from -- from the cases that I have seen, it's a very unique procedure for -- for evictions and because it turns on the sole issue of possession back on 746, at eviction case, only is in terms on the issue of possession. If that issue of possession goes away, there should be no -- no eviction case.

Now, with regard to the -- to the petitioner's argument with regard to the open court's doctrine, the -- the case cited under the open court's doctrine, Dillingham v. Putnam, only dealt with a statute for a receiver to post bond in order to affect in the [inaudible]. The court recognized -- this Court recognized in Dillingham that with regard to a receivership, the receiver actually does not have possession or ownership of personal property or real property in order to post a supersedeas bond. So, when you look at Dillingham v. Putnam and applied it to this case, it is -- it is -- they are two different animals, Dillingham dealt with a specific statutory procedure whereby a receiver did not actually owned property but would have to get court approval to dispose of any property and in that case, the Dillingham as this Court should struck down, that particular statute is unconstitutional.

Now, what's interesting about 24.007, the statute that we're arguing about here is it does not require that the court assessed a bond for rent. It says that the court may assess a bond for rent. It is not a mandatory requirement upon -- incumbent upon the county court to establish the payment of rent in the bond.

JUDGE: Counsel, [inaudible] all out supersedeas [inaudible] those are allowing the person to stay in possession, is that correct ending the appeal?

MR. FRITSCHKE: That is correct.

JUDGE: But how does -- how does -- what affect does it have on you and your client to come on appeal to determine propriety of the initial determination that she is not entitled to possession. How does it



affect you other than you come up here and to try to find out all that?

MR. FRITSCHKE: Well, the -- the first five --

JUDGE: You got the possession -- you got the possession. You can go ahead and read it and if that's wrong, well, she can recover the damages later.

MR. FRITSCHKE: Well, primarily, your Honor, we have to rely potentially on collecting under the bond as oppose to a typical tenant that resides there that is paying rent -- rent on a monthly basis.

JUDGE: Well, in this case, you have possession. You can rent.

MR. FRITSCHKE: We can.

JUDGE: You're not out on any money.

MR. FRITSCHKE: That is correct.

JUDGE: What harm to your client to allow an appeal to determine the propriety of that evictions under this -- the possession, the right to possession and wasn't determination? What harm to you to allow that to be appealed?

MR. FRITSCHKE: Well, the question is, can you give effective relief on appeal? What could this Court do? Would the court award possession back to the tenant at -- at some point in the future and then you have -- you have the quandary? Does that apartment unit or that specific unit have to be provided since the -- since the lawsuit was based on -- based on a specific apartment unit or specific single family home? Do you have to remove the person who is -- is currently renting there and -- and put the tenant back in the possession?

JUDGE: I'm not saying we have a question about renting but my question to you is what harm has your client suffered if, in fact, we -- we allow an appeal to determine the propriety of possession. Now, there's a question on remedy, I understand that, but -- but what harm did you suffer to get your property? You rented it, you get what you need, you have the immediate determination, the right of possession and you prevailed. You got the property. Now, why can't -- what harm other than that? Now, we may have to craft the remedy but that's a different question.

MR. FRITSCHKE: Well, the -- the uncertainty of what the result of the appeal is going to bring and enforce upon -- upon the landlord.

JUDGE: But isn't that a question for a wrong conviction suit?

MR. FRITSCHKE: I would think so, your Honor. It -- that landlord should not be subject to -- that landlord should not be subject to the potential of having to put that person back into possession of that particular unit. And the uncertainty is what if it's a -- if it's a single family home owner with one unit and the -- the person vacates during the pendency of the appeal, then appeals and is return the possession, the landlord is -- is in a -- is in a -- between a rock and a hard place with regard to the existing tenant.

Now, I would agree with the court that they don't lose rent, they don't lose utilities, or anything else that is due under the terms of the lease and, in fact, they may have a duty at some point in the process to mitigate their damages by reducing the amount of supersedeas bond if, in fact, there has been payment of rent during the pendency of the appeal.

JUDGE O'NEILL: Let me ask you, we haven't spoken much about the collateral consequence's doctrine and that you relied on [inaudible] in your briefing but none of the tenants there alleged that they would suffer any collateral consequences. We held in Korea v. State that a juvenile, for example, he was adjudicated delinquent and it serve their time, still had a stigma or collateral consequences attached to that that would keep you from being moot. Why is this any different?

MR. FRITSCHER: All of the stigma cases, your Honor, deal with juvenile delinquency of criminal situation intent for child support violations, family violates orders and that sort of thing. This Court has never extended the stigma -- the collateral --

JUDGE O'NEILL: But the reasoning would be the same. Wouldn't that there's a stigma about being adjudicated delinquent where there is stigma as well about the evicted from your apartment complex that has very real, perhaps, more tangible consequences than on those contexts, why shouldn't we extend it here?

MR. FRITSCHER: Well, I can see that the stigma is there but there is also the stigma of the fact that this person had a shooting occurred in her unit between two of her guest, one of her guest shot another. In this particular case, I'm not sure that the stigma that attaches with regard to an eviction --

JUDGE O'NEILL: Well, let me not say stigma because that's a bit of an intangible term. Let's talk about collateral consequences, the very real loss of voucher assistance. Why would that not be enough to say this from moot?

MR. FRITSCHER: There are thousands and thousands of people on waiting list for vouchers in the state of Texas. There are thousands of people who are willing to reside in public housing and low income housing and affordable housing who are willing to follow the rules. In this case, in Rutherford, I think [inaudible] v. Rutherford is very instructive. It's a unanimous United State Supreme Court opinion [inaudible] to nothing determined at record time where Pearly Rutherford was held to be evicted because she was an innocent tenant --

JUDGE O'NEILL: But that case was not dismissed as moot.

MR. FRITSCHER: It was not dismissed as moot.

JUDGE O'NEILL: The -- the merits of the appeal were addressed.

MR. FRITSCHER: I agree.

JUDGE O'NEILL: So that would work against --

MR. FRITSCHER: But in that case, it was administered tenant offense that was raised by Pearl. Theresa Marshall raised in this [inaudible] defense and I think the collateral consequences are outweighed by the public policy providing homes.

JUDGE O'NEILL: Which goes to the merits but not moot.

MR. FRITSCHER: Which -- yes, all right.

JUDGE: If Ms. Marshall had been physically evicted rather than voluntarily relinquishing possession, would your answer to the mootness question change?

MR. FRITSCHER: No, it would not. The -- the eight cases that we cite and -- and are recited by a petitioner all deal with the situations where possession was delivered both before and after a writ of possession was served. And I think we need couple that between 24.007 of the property code, once the writ of possession is served, it's -- it is also moot.

JUDGE: Any further questions? Thank you, Counsel.

MR. FRITSCHER: And I thank this honorable Court.

REBUTTAL ARGUMENT OF FRED FUCHS ON BEHALF OF THE PETITIONER

MR. FUCHS: May it please the Court again.

JUDGE: Counsel, following up on some dialogue we have your opposition. The ordinary rule is that if a case becomes moot while it's

on appeal, the judgments below are vacated and the case is dismissed, not just as the court of appeals dismisses the appeal, the want of jurisdiction issued that difference. Why doesn't -- why wouldn't that give your client all that she wants in this case?

MR. FUCHS: That is a very interesting point and, your Honor, I think there are two responses on that.

First, in *State of Texas v. Lodge*, that argument was made by the descent and the majority there said that a favorable ruling on the merits would not be the same as a finding that the -- a case was mooted and the vacation of all of the lower court orders. If the court decided that that's the consequence and that all lower court orders or indeed vacated and of no effect that would have to be clear in this Court's -- in this Court's opinion. Otherwise, you will still have party saying that there was an eviction that was just dismissed as moot.

JUDGE: But does it give your client any less than she wants by going through the appeal? Because you can understand there would be some reluctance to have the court of appeals in a complex eviction case, have to go through all of the analysis of the legal rights that are being asserted if the only issue was gonna be court cost.

MR. FUCHS: Well, if we apply the logic again, *State of Texas v. Lodge*, the court there again held that the court's finding that the case was -- was -- is moot is not the same as the favorable ruling on the merits of the case. Here, if we require a supersedeas in order for a tenant to obtain appellate review, then we are creating a system where those who have the money can obtain appellate review. Those who are poor will not be able to obtain appellate review. This --

JUDGE: Well, do -- do you have a point on this Court complaining about the court of appeals refusal to reduce the \$8,000 bond? You're not complaining about that anymore.

MR. FUCHS: No, we're not complaining about -- the amount of the bond. That's -- that's correct, your Honor.

JUDGE: Well, shouldn't -- shouldn't before we declare the statute under constitutional because of the bond, shouldn't we have to complain of it?

MR. FUCHS: Your Honor, we're not seeking a declaration that 24.007 is unconstitutional. We're saying this statute is perfectly constitutional. We're saying that you can still obtain the right of review even if you do not post the supersedeas bond. The statute does not require posting a supersedeas --

JUDGE: But -- but what do we do in a case where the dispute was overland or stuck or something and after it was over the defendant -- the judgment therefore said, "Okay, I give up, here is what you want but I wanna clear my good name because I'm think I was right after all and I want an appeal and I don't wanna play the [inaudible]?" Would we dismiss that as well?

MR. FUCHS: That's a different case because there's a voluntarily acquiescence standing in the judgment and there aren't collateral direct consequences as in this statement. Thank you.

JUDGE: Thank you, Counsel. That concludes the argument and the Court will now take a brief recess.

2005 WL 6193612 (Tex.)