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Supreme Court of Texas.
Zachry Construction Corporation, et al., Petitioners,
v.
Texas A and M University, Respondent.
No. 07-1050.

September 8, 2009.

Appearances:
Ben Taylor, Fulbright & Jaworski, LLP, Dallas, TX, for petitioners.
James C. Ho, Office of the Attorney General, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, and Phil Johnson, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 07-1050 Zachry Construction and others versus Texas A&M University.
MARSHALL: If it please the Court, Mr. Taylor will present argument for the petitioners. The petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF BEN TAYLOR ON BEHALF OF THE PETITIONER

ATTORNEY BEN TAYLOR: Good morning and may it please the Court and esteemed opposing counsel, we're before the Court on a case that was a denial of pleas to the jurisdiction as to the Zachry defendants.
JUSTICE HARRIET O'NEILL: Mr. Taylor, is there anything left. I mean, as best I can calculate it, we've got some claim of contractual indemnity and complaint about the Court of Appeals' opinion. Is there anything left other than those two [inaudible]
ATTORNEY BEN TAYLOR: The responsible third party is the issue that's the most important and that is definitely left. We have a Court of Appeals opinion and a November 11th, November 14, 2007 modified judgment that holds sovereign immunity bars all the claims the defendants are asserting.
JUSTICE HARRIET O'NEILL: But why, -- why didn't the settlement, why didn't the settlement turn the State into a settling party as opposed to a responsible third party?
ATTORNEY BEN TAYLOR: Settling person is the statutory language and

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there is a good argument that the Texas A&M University is now and forever will be a settling person.

JUSTICE HARRIET O'NEILL: Did anybody disagree that there they're a settling party?

ATTORNEY BEN TAYLOR: The Texas A&M University has now judicially admitted that it is a settling person and the Zachry defendants agree that Texas A&M University is a settling person. Your Honor, we don't have a point of error or an issue or point presented before the Court on that. On November 3rd, we asked for a leave to add that within days after the settlement and Texas A&M University's response was, well that's opposed subject to further review and after the denial of our petition for review and then the grant of our rehearing, apparently it was reviewed a little more carefully.

CHIEF JUSTICE WALLACE B. JEFFERSON: And so the question is if they will be submitted whether as a settling party, obviously is a settling party now. What opinion would you have us write?

ATTORNEY BEN TAYLOR: Well, Your Honor, I believe that the Court does have the power on affidavit or otherwise as the Court may determine appropriate under Article 5 Section 3, we haven't cited this, to ascertain such matter of fact as are necessary and the proper exercise to the jurisdiction, Texas A&M University has it on their website that they are the settling person. The Solicitor General judicially admits it. We apart from some of the adversarial statements in the motion that A&M filed on August 27th, they're probably right that --that if this Court vacates the modified judgment of the Waco Court of Appeals, that's absolutely essential. We've been tagged for 50% of nearly $8,000 or $9,000 of costs, but, more importantly, Steve Smith is a judge who follows Appellate decisions and right now he has a published opinion and a November 14, 2007 modified final judgment and that has to be vacated if, and only if this Court follows that procedure and if this court rules as a matter of law that Texas A&M University is now and forever will be a settling person. Then, in that event, we would respectfully disagree that the cause is moot. The judgment of the Court of Appeals could be vacated and the cause would be dismissed under that rationale and that is the relief that we finally learned was requested.

JUSTICE HARRIET O'NEILL: There would be nothing to prevent the trial court from making that determination. The trial court hasn't had a chance to rule on that.

ATTORNEY BEN TAYLOR: Let me disagree respectfully on that, Your Honor. If, on page 803, the Attorney General has amply demonstrated in the briefs and supported in oral argument that the cause there is no statute or resolution of the legislature authorizing them. The doctrine of sovereign immunity bars all of the Appellees, that's us, claims whether for contribution, indemnity, a determination of proportionate responsibility or based in contract. Our brief on the merits filed in June, 2008 has the Zachry defendant's answer in front of you and we plead the Texas A&M University should be submitted either as a defendant, a responsible third party or settling person. That claim was pleaded and was for the Waco Court. It's true there was not briefing in the Waco Court about the settling person because Texas A&M University did not disclose its settlement to the public until October 28, 2008, but.

CHIEF JUSTICE WALLACE B. JEFFERSON: But it sounds like all the parties are going to go before the judge and say, and agree that Texas A&M is a settling person and it is going to be submitted under Chapter 33.

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ATTORNEY BEN TAYLOR: I'd have to go outside the record on that, Your Honor. There are a number of plaintiffs, the Attorney General did not, Solicitor General, did not copy the plaintiffs on the Motion to Dismiss as mootness, on mootness. We did copy the plaintiffs on our motion. There has been no response from the plaintiffs. I assume they're listening to this argument right now. We have no judicial admission that Texas A&M University is a settling person. The trial court right now is bound by the Waco Court decision. Neither the opinion of the solicitor general nor the opinion of the Zachry defendants binds the trial court.

JUSTICE HARRIET O'NEILL: Well you said they're bound by the Court of Appeals opinion. They're bound to determination of responsible third party as to their ruling, but there's been no ruling as to settling person. So I'm troubled. I'm confused about what the trial court would be bound by in terms of submitting the State as the settling person.

ATTORNEY BEN TAYLOR: Right and when we responded to the mootness motion, we set forward, forth, the objection we anticipate plaintiffs may make. I think, outside the record, I think there's a division among the plaintiffs whether they're going to agree that the settling person elements are met. The elements actually overlap. Is or may be liable. The settlement that Texas A&M University paid had to be in consideration of potential liability to meet the settling person definition. Well, we had a lot of briefing before this Court, before the Waco Court. They're not a person. They're not subject to any sort of liability. The Solicitor General says the opinion of the Court of Appeals is clearly correct. All of the claims are barred. It is true that there was not briefing before the Waco Court about the settling person. There is currently no point of error or issue of point presented about settling person. At the same time, though, the modified judgment of the Waco Court of Appeals is consistent with this opinion saying that all claims are barred. So while we believe Judge Smith would probably overrule an objection, I mean he was going to submit them as a responsible third party. He actually looked at the statute unlike the Waco Court and was going to submit them as a responsible third party. We would still face that objection. It destroys the mootness unless this Court makes an authoritative pronouncement that they are a settling person. It is our respectful submission. I just want to briefly cover a couple of procedural points because it's obvious the Court is now engaged on the mootness issue, but on the merits, our first couple of issues involve Rule 47 and the passage I just read to you. I've never before, I don't know what to tell a client when I write a brief and I learn that the other side's brief and their oral argument have amply persuaded the Court that they're right and I think about, as an appellate practitioner, suppose we, my hat is off to the Solicitor General's office. How do you persuade a Court of Appeals that your opponent's arguments are so meritless they don't even deserve to be mentioned? If the Waco Court of Appeals had written instead the Zachry defendants have amply demonstrated in their briefs and their oral arguments that sovereign immunity it doesn't apply. We affirm. Well the university would be before you and they would be right. We might be right on the merits, but there's no opinion by the Court of Appeals. I want to cite Justice Johnson's opinion for the Court recently in re: Columbia Health Center. This is newer than the briefs and I know the Court divided 5-4 on the propriety of reviewing new trial orders on mandamus. That's a hard issue that divides people in good faith, but what the Court, I believe Justice O'Neill , there was no dissent from the point that the Courts of Appeals and the Supreme

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Court under Rules 47 and 63 have a duty to explain by written opinion their analyses and conclusions as the issues necessary to a final determination of the appeal. We had in the trial court, both in the reporter's record and in the clerk's record, we have Texas A&M University has no standing to complain about being joined as responsib. They don't have any stands. There's no such thing as a money judgment against a responsible third party. Now the terminologies designate before the terminology was joinder, but if you read the definitions in the statute, there's a defendant, there's a liable defendant. Responsible third party is not in there. It's not until like in the case Judge Medina wrote, the, I can't remember, until the plaintiff takes that extra step and serves an amended petition, serves a citation, then that person becomes a defendant, but just the joinder before 2003 or the designation after 2003, doesn't make you a defendant. There's only one case. There's a Fourteenth Court of Appeals unpublished mandamus case that just held without discussing the statute you have to serve a citation and that's not correct. There's a newer published Fourteenth Court of Appeals case that holds correctly that under 33.004, the responsible third parties are not actually parties. We've got before you in our reply brief and I know the Court may struggle with whether.

JUSTICE: What case is that? The case you just cited from the Court of Appeals?

ATTORNEY BEN TAYLOR: The - Fourteenth Court of Appeals, 2006 is J. M. K. It was in a weird limitations context, but they're actually published and they cite 33.004 deals only with non-parties and that was the case coming up under the 1995 version of the act. So the only authority that goes against us is an unpublished Fourteenth Court of Appeals mandamus case that only has a Westlaw cite and this Court didn't even get to look at it on a further mandamus and I would respectfully urge the Court to consider also behind our reply brief is an opinion by Sam Kent and with all of his issues, he is someone who has looked at a lot of bonfire litigation, the Solicitor General persuaded him to make a number of erroneous rulings he got reversed on, but we actually did bring to the Waco Court. We followed their rules. We appended Greg Lensing's thoughtful law review article that actually had this order and we talked to them about it, the idea of being a responsible third party is you're not a party against any whom any relief can be granted and that was so held by Sam Kent. Well, we couldn't get them to address that. We've appended behind our September 22 reply brief and Judge Kent has a couple of citation errors. I mean some of the subdivisions are a little tricky, but it is a well thought-out opinion and you might not even agree with it. We think it actually is right, but, either way, it shows what happened to our case and what is going to happen to the jurisprudence if appeals courts that may be having problems can just decide important issues like this and the reason you know it's important is that the Solicitor General himself has parachuted into this case and realized oh my goodness, we have to have this opinion stand. It's a hugely important opinion. Of course, it's in their favor and if it stands, then I guess we just go let the Solicitor General's briefs and oral arguments tell us what the law is. We continue respectfully to request that the judgment of the Court of Appeals be reversed and the orders permitting joinder merely for responsible third-party purposes be affirmed by this Court and alternatively that this Court dismiss Texas A&M University's purported appeal from that order because Texas A&M University has no standing to complain about that order and unless there are questions, I will give

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back some of the Court's time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? Thank you, Mr. Taylor. The Court is now ready to hear argument from the respondent.

MARSHALL: May it please the Court, Mr. Ho will present argument for the respondent.

JUSTICE DAVID M. MEDINA: Mr. Ho, what's your response to Mr. Taylor's last comment that we should dismiss this because Texas A&M has no standing here to complain?

ORAL ARGUMENT OF JAMES C. HO ON BEHALF OF THE RESPONDENT

ATTORNEY JAMES HO: The standing argument appears to be essentially a restatement of their essentially their merits argument. Their theory of the statute is that we have no liability, no vulnerability to liability under the 1995 law. We submit that that would be great. The university would be happy if that were true. It just does not appear to be the best reading of that statute. That debate is obviously a merits issue, not a standing issue.

JUSTICE HARRIET O'NEILL: So what's left?

ATTORNEY JAMES HO: Nothing's left, Your Honor. Based on petitioner's responses this morning, it does appear that they now agree that this case is moot. After all, nobody really disputes that the university is, indeed, a settling person and that moots this case. If this Court were to hold that A&M is a settling person and that that fact essentially moots these claims, there's no reason to think that the lower courts would not obey that decision.

JUSTICE HARRIET O'NEILL: But how could we make that holding? Isn't that an evidentiary determination to some point? We don't have a formal stipulation here. Why not just let the trial court make that finding? I don't see that we have enough evidence before us to make a finding of a settlement.

ATTORNEY JAMES HO: The settlement itself is before this Court. If this Court decides that the case is moot, the reason for that mootness finding would be because the university is, in fact, a settling person, a fact that this issue, that is not disputed in this Court. So it would be an essential that the finding of settling person would be essential to this Court's jurisdictional analysis with respect to mootness.

JUSTICE HARRIET O'NEILL: When you say the settlement is before this Court, what do you mean?

ATTORNEY JAMES HO: Well that settlement papers have been filed with this Court. It was entered as a judgment and it has been filed with this Court. So there's no dispute. There's no fact dispute certainly that the university has settled. There's no legal dispute that the university is, in fact, a settling person.

CHIEF JUSTICE WALLACE B. JEFFERSON: But when all parties before this Court say the cause is moot, we've settled our differences, do we typically write opinions saying why we dismissed the case as moot because there's a settlement between the parties? I mean, why do we have to go behind the fact that it appears to me that everyone agrees that the case is moot?

ATTORNEY JAMES HO: You would not have to. It would be the Court's option. If you look at the Houston Cable case, Ritchey v. cited in our case, Ritchey v. Vasquez, the Court can issue a very short procurement opinion if it wants to and essentially, as I noted, if the Court decides that this, in fact, the case, that the university is a settling person, no reason to think the lower courts would not obey and, in

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fact, of course, they would be required to obey both under the doctrine of stare decisis and the law of the case doctrine.

CHIEF JUSTICE WALLACE B. JEFFERSON: But my question, maybe it's similar to Justice O'Neill's, do we even have to decide that question or can we just dismiss the case as moot.

ATTORNEY JAMES HO: It would be the Court's option. The Court could just simply go directly to the mootness holding. I will just briefly, if the Court would like, briefly describe what the Court might want to consider doing in light of this mootness that we face today, what the Court should do with the three claims that are in this case. First, the responsible third-party claim is now moot. The only reason the petitioners say they sought to bring in the university, to join the university as a responsible third party was simply to place the university on the jury verdict form. The petitioner's obviously suffered no harm and alleged no harm by having the verdict form correctly list the university as a settling person rather than incorrectly and we would submit unlawfully list the university as a responsible third party. Second, the contribution claim. That claim is now moot because under Chapter 33, defendants cannot obtain contribution from a settling person and the Scott-Macon petitioners have already conceded this point and this is available in the statute in Section 33.015, subsection D. Because those two claims are now moot, the Court should dismiss those claims, vacate the judgments below accordingly while leaving the opinion intact pursuant to the Court's usual procedure as described in Ritchey and Houston Cable. Finally, with respect to the third claim, the indemnity claim, the Court should simply affirm the judgment below as this Court has repeatedly stated breach of contract suits are barred by sovereign immunity. So there is essentially no need to address the merits of the case. I'm happy to answer any questions if there are any issues and happy to talk about the merits, but if there are no questions on the merits, we would be content to rest on our briefing on both the merits and the mootness issues.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions?

JUSTICE PAUL W. GREEN: Just one question. It was suggested by Mr. Taylor that there might be some plaintiffs below that might contest the question of the settling party. Is that a possibility or not?

ATTORNEY JAMES HO: We would not presume to speculate what plaintiff's counsel might say on the Court below. We don't see how it could be disputed under the text of the statute how we're not a settling person and, of course, if this Court were to go ahead and hold that, then there would be really no opportunity for the plaintiffs to dispute, but we obviously can't, we don't know for sure one way or the other.

JUSTICE PAUL W. GREEN: You say it doesn't matter?

ATTORNEY JAMES HO: It shouldn't matter. There's really no argument under the statute. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Ho. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF BEN TAYLOR ON BEHALF OF PETITIONER

ATTORNEY BEN TAYLOR: Only a few points of clarification. The statement was made the settlement is before the Court. What is before the Court at our doing is the October 28, 2008 final judgment. I would have to go outside the record, but I will say having read that

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settlement agreement and we can present it to the Court if the Court wants to see it, a requirement of that agreement was that new petitions be filed again naming Texas A&M University directly as a defendant and on information and belief, I believe that was done and then Judge Smith signed the judgment that Texas A&M University requested. That judgment also, interestingly, had a severance in it. It didn't say set up a new cause number. It just said all claims against Texas A&M University are severed. That was something Texas A&M University requested originally and didn't get and we raised that as a potential jurisdictional problem. In the end, I agree with the Solicitor General, that's probably not a jurisdictional problem. Chief Justice Jefferson, if there was any suggestion that an opinion might not be necessary, I must vociferously and strenuously disagree with that. Judge Green raised the possibility and it is a possibility, there are a lot of plaintiffs and a lot of plaintiffs' lawyers and obviously they have to make their call on what positions they're going to assert, but a lot of the briefing that was presented below would support technical arguments that we would have to litigate before Judge Smith. Again, I believe Judge Smith would correctly overrule those objections, but without, as Mr. Ho admits, an authoritative pronouncement by this Court, the mootness theory doesn't work. It has to be.

JUSTICE HARRIET O'NEILL: Well why wouldn't that be advisory? If they haven't been raised below because they haven't been ripe to raise and if they haven't been brought up to the Court of Appeals then wouldn't it be purely advisory on our part?

ATTORNEY BEN TAYLOR: I've given that a lot of thought. I mean, we did move on November 3, 2008 for relief to amend our petitions for review to add point 13 whether the settlement agreement. We did it and it was opposed and this Court originally denied our petition. The Court could revisit that ruling and grant leave to amend, to add that point of error and if it decides on the mootness issue, I think the Court probably should, Article 5, section.

JUSTICE NATHAN L. HECHT: Why should we decide it in a case where the parties agree? If there is an issue about the language in consideration of potential liability, then why would we want to decide that issue where both sides agree?

ATTORNEY BEN TAYLOR: And this gets to a very sensitive part of the argument and that is with respect, our case is now pending before the Court. The granting of an application for writ of error admits the case in the Court which shall proceed with the case as provided by law and right now, we have points before the Court, a petition for review is an application for writ of error for government co-purposes. The Court in our respectful view must decide the merits, if the merits are still.

JUSTICE NATHAN L. HECHT: We could dismiss as improvidently granted, as well.

ATTORNEY BEN TAYLOR: Right and it's true that this Court has the power to do something that's not right, but that would not be right in our respectful submission. The appropriate judgment of this Court as Rule 47 and Rule 63 require is to explain by written opinion, the Court's analyses and conclusions. If the Court decides the case is moot, we have a judgment that will be argued against us. We have an opinion that will be argued against us. We have very skillful counsel urging how important it is that that opinion stays intact. So we're before the Court asking the Court to do what should have been done. They're before the Court asking the Court, once again, to deny our side equal protection and appellate due process.

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

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you, Mr. Taylor. The cause is submitted and the Court will take a brief recess.

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