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FEDERAL SIGN V. TEXAS SOUTHERN UNIVERSITY

PLESSALA: May it please the court. A state like a merchant makes a contract. A dishonest state like a dishonest merchant wilfully refuses to dis_____. The latter, the merchant, is amenable in a court of justice. Upon general principles of right shall the former, the state, when summoned to answer the demands of the creditor be permitted proteus like to assume a new appearance and to insult him and justice by declaring: I am a sovereign state. The answer is surely not. Those are the words of Justice Wilson written 200 years ago in the case of Chisum v. Jordan. Justice Wilson was one of the framers of the United States Constitution.

HECHT: And yet you can't sue the United States.

PLESSALA: Well you can in the Court of Claims if we assert a contract.

HECHT: After you go through the administrative process that is required to get there?

PLESSALA: That's correct.

HECHT: But the rule that you advocate in this case would not have that protection that the administrative process offers.

PLESSALA: For two reasons.

HECHT: Why not?

PLESSALA: First of all, because of the nature of a contract. The state by the doctrine of implied mutual consent authorizes itself to be sued when it breaches a contract. That's the provision which has been adopted in about 10-12 states across the country. The second reason is that such an administrative pre-clearance violates the open courts provision in this constitution.

Let me start with the open courts provision first. It is paramount as set forth in the constitution, I believe §29, that the Bill of Rights is inviolate from judicial legislative governmental encroachment. One of those rights is the open court provision. The open court provision was dissected in McCoy v. Hanlon by this court as well as Nelson v. Cruzen(?) and Sax v. _____, specifically says

that's the courts of this state shall be open.

It's mandatory. They shall be open to every person, and they should be open for every claim. And a remedy will be provided by due course of law. There is no exception for state of war, there's no exception for state of an emergency, there's no exception when one of the parties on the other side of the law suit happens to be the State of Texas. In a contractual setting the State has obligated itself and bound itself and it should be no different than any other citizen who has pledged itself to abide by a contract.

PHILLIPS: Are our repeated holdings of the Open Courts provision only applies to protect well-recognized common law causes of action that have been abrogated by statute; is that just wrong? Do we need to repeal, to overrule all those cases?

PLESSALA: I am not aware of any decision that holds that a breach of contract action is not a

well recognized cause of action. The State, Texas Southern University has argued that since Texas adopted the common law in 1840 as it existed in England and the various states of this country, that sovereign immunity was present that, therefore, my claim as I stand here today and just as if I had stood there in 1840 would not be cognizable. And I say that's wrong.

PHILLIPS: If there is a sovereign immunity claim, and in this case it is, because of judicially erected defense, whether first erected in England in 1802, or by this court at some time, and our court has held repeatedly that our expansion or contraction of the common law does not violate open courts. Now my question is are you saying that we've just been wrong in that and some states go the other way under our nearly identical open courts language?

PLESSALA: Well I think the answer to that is two-fold. Number 1, four justices of this court, including yourself, have acknowledged that the Doctrine of Sovereign Immunity is one that can be abrogated by this court. That's in the Texas Department of Mental Health v. Petty. There you were dealing with the Tort Claims Act. The principle is the same. Number 2, I firmly disagree that a common law breach of contract action was not recognized a common law against the state. So therefore, your decisions under the open courts provision would not restrict your ability to recognize that that open courts provision allows a breach of contract action to be filed against the state.

Now let me take by way of example what the legislature and this court has pronounced with regard to the Tort Claims Act. Under the Sacks case and the rest of them dealing with open courts provisions we've talked about reasonable restraints on a well-recognized cause of action. The reasonable restraints placed by the legislature were among other things capping the amount of damages that you could recover against the State for certain specified torts. That has withstood scrutiny under the open courts provision as a reasonable restraint. With good reason because tort actions are not intentional barring intentional torts like assault and battery, what have you. But those things are accepted out of the Tort Claims Act any way. We are dealing with something that is negligent and is not meant to happen.

HECHT: But why isn't accepting those out a violation of the open courts provision as you look at it?

PLESSALA: Because of the due process test the courts have applied in that situation to measure the restraints the State has placed.

HECHT: We say you can't sue them for intentional acts, you can't sue them where a discretion is involved, you can't sue them unless it involves an automobile or the use of personal or real property; how are those reasonable?

PLESSALA: Well one of the classic cases is the Barr v. Burnhart case, which is several years old, dealing with immunity of an official, or a public school official. If a coach beats up a student, and it is found to be an intentional tort, that coach is responsible for his own actions. They are not binding upon the state. When the State acting through its authorized agencies enters into a contract, the State binds itself, here TSU. And the State has to stand up for its obligations. One of the first things insofar as what existed in 1840, one of the first things that the people of the State of Texas said to the world when it leased Mexico in 1835 was that the public faith of Texas is pledged for the payment of any debts contracted by her agent. So that's the declaration of the people of Texas when the general convention assembled. Found at page 469 of vol. 3 of the constitution. The right to be compensated for a breach of contract by the State preexisted the adoption of the very first Texas constitution. When the constitution was adopted in 1836 they directed the legislature to adopt the common law _____ the common law of the other states such as it was not inconsistent with what the present circumstance and condition of the people of Texas was. And I respectfully suggest and implore that the situation of the people of Texas was that the State has

to honor its contracts, and it is not required to have it pre-submitted to it in the form of legislative consent to do so.

HECHT: Setting aside your constitutional argument we have written recently and repeatedly that the waiver of sovereign immunity is a matter for the legislature to consider. Why aren't we bound by that in this case?

PLESSALA: I think more accurately your honor that this court has simply abstained from stepping forward and defer to the legislature to do something. I think there is a difference between saying this is constitutional a matter for the legislature verses sitting back and letting the legislature handle it. This court is empowered by the constitution. I can't get away from the constitution to this court and the other courts of the state including the district courts of Harris county to hear all disputes. Not disputes that deal only with claims that don't involve the State. And so by deferring to the legislature, that's judicial extension.

HECHT: But we've said we are going to so how do we get around that?

PLESSALA: Nothing says you can't do it now.

HECHT: We've changed our minds.

PLESSALA: You can. You did that in a case of Price v. Price when you overruled the interspousal rule. You did it in a case of Davis v. Davis where you overruled the _____ of Mansfield case, and cited 6 other instances not to mention the fact that the constitution doesn't prohibit a woman from holding office of the Governor of the State of Texas in the Strickland case, in finding that the doctrine of common law marriage in this State was consistent with what the people of Texas wanted as opposed to the common law of England, which did not allow it. You can step in now, you could have stepped in 20 years ago, or you can step in 20 years from now. But you are empowered to step in and say that we are not going to leave it to the legislature to handle this.

HECHT: This is the good reason for extension that there really doesn't need to be an administrative process making claims against the government, like the United States has, and to not have it in Texas would do as much harm as it does good?

PLESSALA: I don't think it would do any harm whatsoever frankly. To allow the legislature or legislative body to pre-clear the merits of a legal dispute violates the separation of powers for one thing. Now you can allow it to go on by deferring to the legislature to come up with an administrative mechanism. But I believe the better way to handle it is to allow litigants to file suit. If they want to go to the legislature and present their grievance on a building that was erected on the UT campus - fine. But what's to prevent the legislature from saying we are not going to pay that claim, and you can't do anything about it, which frequently happens. If the legislature granted 100% of the time consent to sue in a contractual setting I would say that would be a reasonable restraint, that type of administrative function, but it doesn't happen that way.

So to say as the State does in this case that well limitations hasn't started running, your claim hadn't been extended, so we are just not going to let you sue us. That doesn't resolve the controversy and that closes the courts to the people in this state contrary to the Bill of Rights which is accepted from the legislative governing power.

CORNYN: Assuming we agree with you would they still have to appropriate the funds to pay your judgment?

PLESSALA: In some instances yes, and many instances no.

CORNYN: And if they elected not to what's the point if it's ultimately up to them whether you are going to have an affected remedy or not?

PLESSALA: There is a case out of Missouri, the DeCarlo case, which spoke to that. But I think that the principle itself stands. And that is courts don't bother to determine whether or not there is a deep pocket at the other end of the rainbow in the form of a defendant who can pay a judgment. The court's function is to adjudicate. If you can't collect, and there is no question and no dispute, I can't go out if I win this thing and go execute on some property of Texas Southern University. I still have to rely on the graces of the legislature to pay that claim, or Texas Southern University to pay that claim out of its own local funds, which the Education Code allows it to do.

Now whether or not the judgment is collectable is beside the point. Constitutionally the courts are to adjudicate. When the legislature takes upon itself as contended by the State the power to create debt and appropriate funds they claim that to abrogate sovereign immunity violates that principle of separation of powers. I say when you enter a contract that's authorized the debt has been created. Whether you have appropriated the funds at that point in time is irrelevant. Many times those funds are already appropriated.

When the claim is adjudicated, that doesn't create a debt, that simply adjudicates the debt, enters a judgment on the terms of the debt, the agreement between the parties. If the contract is disputed it's for the courts to settle that dispute. If the legislature acknowledges the debt in some type of administrative pre-clearance, fine, we don't have to bother the courts. But the courts are here to adjudicate claims. When we get a judgment it's up to the legislature or the pertinent local authority, whoever that may be, in this case Texas Southern, to appropriate the money, come up with the money to pay the claim. But that doesn't interfere with the judicial function of adjudicating.

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RESPONDENT

SMITH: May it please the court. My name is Kerry Smith. I am an assistant to the AG of Texas. This court is being asked today to reverse a 150 years of Texas jurisprudence and 150 years of its own rulings. If this court and the various courts of Texas are correct when they have held that this is a jurisdictional matter, then this court is being effectively asked to simply expand its own jurisdiction on its own.

The case would probably be a lot simpler if we had something straightforward in our constitution that said one way or the other what the powers of government were.

ENOCH: Don't we?

SMITH: No, your honor.

ENOCH: If a representative of Texas Southern came in and said I want to buy a new lawn mower for our grounds, and I am a vendor so I give them that lawn mower and send them a bill; and they said: "Now, sue me", couldn't I make an argument that they've taken my property under art. 1, §17 of the Constitution? Doesn't the constitution specifically say the government cannot take the property without paying for it?

SMITH: Yes it does your honor. And I think the point I was trying to make is illustrated

very well by that very provision. It does not say that government may take. It assumes that the government has that power. All it says is when they do they have to pay. And that is the impact of art. 1, §17 is the limitation on government. It says when they do something that we assume government has the right to do, government has to pay. But it does not expressly say the government can take. That's nowhere contained in there. And in that sense the powers of our government are assumed, and not enumerated, and not defined in a very global and general sense. This court has held a number of times that our constitution is a limiting document. Article 3, §1, which is called legislative or governmental or plenary by this court and the legislature, and that is where we submit the power to waive the state's immunity from suit would lie.

ENOCH: My question was going to be doesn't the constitution specifically say the state does not have the option to choose not to pay?

SMITH: When it takes private property for public use without the consent of the owner, that is correct. And that very provision was before this court in 1949 in a case that I don't believe is in our briefs, but in the last couple of days getting familiar with this has come up and will be in a supplement I will file, Texas Highway Dept. v. Weber 219 S.W.2d 70. A gentleman had his field burned due to the highway dept's activities, and he filed a lawsuit claiming that it was taken under art. 1, §17. And in looking in that the court said two things that I think is significant, this court said: The Constitutional provision of Texas under consideration and more or less similar provisions are contained in the constitutions of all the states of this nation without doubt constitutes a limitation on the right of imminent domain, which power is an inherent attribute of sovereignty. And the court went on to compare that to the state's lack of liability for torts, because this is way before the Tort Claims Act. In other words find _____ no liability for the acts of its agents. And noting in one's life and person are infinitely more valuable than his material possessions. Had it been intended by the framers of our constitution that the state should be liable for all tortious acts of its agents, it would have been so stated in the article in question in some form or manner. Instead the provision relates only to private property which is taken for public use. Manifestly it was not intended that where private property has been damaged or destroyed through the tortious conduct of the state's agents in the performance of their official functions, the state should be suable.

What this court did was look at that limitation on the power of government as applying an imminent domain and inverse condemnation cases and concluded because it does not apply to torts, and it does not apply I would submit equally well this court should conclude that because it does not apply to contract cases, that is one of the plenary powers reserved to the legislature.

CORNYN: So you are saying sovereign immunity is constitutionally grounded?

SMITH: Yes, I am your honor.

CORNYN: It's not a common law doctrine?

SMITH: That is a phrase...I don't have an alternative phrase for it. I would submit that it is not a common law doctrine in the same sense that official immunity for governmental employees is.

CORNYN: So notwithstanding our language that it is within our power to abrogate sovereign immunity, you disagree with that because you think sovereign immunity is constitutionally grounded and we do not have the power?

SMITH: That is correct your honor.

CORNYN: What do you do with the language in all the cases where we call it a common law power and note that it is within our power to abrogate it, but we nevertheless defer to the legislature on

these matters?

SMITH: Well I believe there is two issues in that question your honor. And the first one is the labeling of common law power. I don't know that that has much significance because I don't know what label one should put on it when one is identifying an enumerated power of government that is assumed by our constitution to exist. Is it a common law doctrine to say that the government has police power and can do certain things, and it can take or destroy your property for public use? The Constitution doesn't say it can do that. But the courts have said it can. And they have used the term "police power." I don't know. Is that a common law doctrine? If it is, then it too is subject to abrogation by the court. Just as many other powers of government that are not enumerated, but are merely limited by our constitution would be.

If the courts were correct for the last 100 years in calling this a jurisdictional matter, I would submit that jurisdiction does not flow from the common law - it flows from the constitution and the statutes, and it is really an article 2 issue. It's for the legislature to abrogate. And that is ultimately why this court has said it is a matter for the legislature.

Now I am obviously dealing with the 2nd issue. If in fact it is appropriate for the court to abrogate jurisdiction under its common law authorities. We are submitting that it is not appropriate for the court to do that because we believe the language of art. 3, §1 and this court's prior interpretations of that, and I will submit the cases for these: it is well established the state legislature is clothed with all governmental power, which resides in the people subject to such limitations as may be expressed in the constitution of the state and any limitation embraced in the constitution of the United States. There can be no dispute that in this state the provisions of the constitution serve only as a limitation on the power of the legislature, and not as a grant of power. The power and authority of the state legislature is plenary, and its extent is limited only by the express or implied restrictions therein contained in or necessarily arising from the constitution itself.

And I would also add that the legislature has relied on this court's opinions, that this is a jurisdictional matter for the legislature for at least 60 years. Our brief refers to Ch. 107 in the Civil Prac. & Rem. Code which sets out the mechanisms for obtaining a resolution from the legislature granting consent decision. Prior to that art. 43.51-1/2 was in place, and it said the thing with much less detail that a resolution is the proper way to get consent.

CORNYN: If the Federal Sign had delivered this sign and Texas Southern was in fact using it and if Texas Southern said:

> we are not going to pay you one red cent from this point forward there would be no remedy absent a legislative consent to sue,

is that your position?

SMITH: Absent legislative consent, that is correct your honor.

CORNYN: If in fact they have a perfected security interest couldn't they come in and repossess it, or are they devoid of all remedies whatsoever?

SMITH: Well you are getting way beyond my expertise with that question your honor. I frankly don't know what the limitations on them are.

CORNYN: But as far as you are concerned there is no remedy whatsoever in terms propelling

payment?

SMITH: The remedy they seek is damages, money, this court's opinions have consistently held that is a suit within the scope of the doctrine of immunity and they need consent from the legislature.

CORNYN: Ordinarily when you and I would enter into a contract I would say I will purchase this item from you in return for your promise to pay me, and the enforceability is based upon the mutuality of agreements, is that not the case in a contract with the state? Is there no mutuality?

SMITH: The case law has never suggested that the state is not liable in contract like anyone else. What it has done is bifurcate liability from immunity from suit and say in contracts we are liable. Indeed there wouldn't be a contract if we weren't.

HECHT: But that's pretty hollow isn't it: We are liable but we are never going to pay you, we don't have to we are the state.

SMITH: Your honor with all due respect I do not believe one can legally reach the conclusion that anyone is never going to be able to get consent.

HECHT: Well you can't do it without their consent. I mean if I were dealing with John Doe in a contract and he said: Well if I don't perform I will be liable of course but you can't sue me and you can't collect unless I agree to it. I would be kind of reluctant to get into a deal like that.

SMITH: But parties know about sovereign immunity. They are certainly charged with knowledge of that. And they know that if they believe the state is breached, their remedy is to go to the legislature and seek consent.

HECHT: If we were writing on a clean slate today what would be the political science philosophical justification for that? What would be the good reasons for having that be the verdict?

SMITH: The original justifications in the older opinions are the fiscal justifications of allowing the state to control the expenditure of revenues and to anticipate what those would be.

HECHT: And that has some weight in the tort context because the damages are more uncertain in a tort context, but in a contractual context the damages are not so uncertain?

SMITH: Well certainly in construction contract context the damages are often extra work in quantum meruit that are way beyond the scope of the original contract, and equally uncertain in that regard. They are often millions of dollars. Certainly far in excess of the limitation of the Tort Claims Act. One of the other justifications for why it should be to the legislature goes to the court's presumption that the legislature will grant consent where there is merit, and will weed out some of the meritorious claims.

Now there is more to that story. I think it needs to be pointed out that the legislature has the authority to pay a claim. It's not necessary to sue the state and reduce one's claim to judgment before the legislature can appropriate a claim.

HECHT: In fact as we've seen recently the Lt. Gov. apparently has the power to pay a claim. Right? Even after it fails the legislature there still appears to be some discretionary way that the claims can be paid.

SMITH: That does appear to be what happened in that case your honor.

CORNYN: That's all a matter of grace is it not? Not a bright?

SMITH: Collection?

CORNYN: Yes. Payment of any claim is all a matter of legislative grace, and there is no right you say to compel payment?

SMITH: That's what this court has consistently held your honor. Yes. That's way beyond the scope of article 1, §17 as this court has interpreted it. And I believe the observations made earlier about the open courts provision are indeed accurate. In fact if a doctrine that has only been articulated judicially and that sovereign immunity...and again I don't know if we should call it common law or call it something else, but that's where we find out what it is and what the scope of it is. It's in the judicial opinions. And if that violates the open courts provision, then every other doctrine that comes from judicial opinions is subject to that challenge as well. Obviously. Whenever the court says there is no cause of action for this recognized in Texas, the same challenge would apply under open courts if open courts is going to be used to apply to doctrines that are only articulated in judicial opinions.

GONZALEZ: Mr. Smith let me ask you a question that's somewhat tangential as Justice Hecht as observed in the Green case, the legislative budget board through whatever political compromises were made with the Lt. Gov, that claim was paid. The identical issue as to whether or not the State has consented to be sued in a contract in the Green Int'l v. State case, and that case was settled, I am assuming the State paid some money on that case too. If the State has paid Mr. Green, or Green Int'l and Green in the whistle-blower case, why isn't the State paying this claim, because apparently Federal Sign has no political muscle to talk the Lt. Gov to do what he did in the whistle-blower case for this case? Help me understand it, sort it out.

SMITH: I think one has to approach again from the perspective that there is more than one party involved in any litigation. A case such as Green Int'l cannot be settled until both sides agree on a figure. And if the non-state party to a dispute insists on more money than the State is willing to pay...

GONZALEZ: Well we have a jury finding here.

SMITH: Well not in Green Int'l. In this case in fact there is one, but it is our position that that was basically tried in a court that did not have jurisdiction over that matter.

HECHT: Can the AG settle this case?

SMITH: Well again I would have to go back to the newspaper on George Green's case on that. The current Appropriations Act like the last one has language in there that says no money can be used to pay a settlement or a judgment of a case except in the terms of this Act. And there is global language this time that was not in the other Act up to $250,000 out of an agency's budget can be used where there is a valid waiver of sovereign immunity. And certainly the current case law we don't believe there is one in this case.

GONZALEZ: You did pay some money in Green Int'. under an identical situation?

SMITH: Yes, your honor. And the way that occurred was that the resolution was granted but the case was not filed. The other case that was filed prior to getting consent Green Int'l had basically lost, although it was writ granted here. The agency still had its initial authority to conclude: hey we owe you guys more money; here's what we will offer you. And Green Int'l agreed with the agency on what an appropriate figure would be. So under its contracting authority and the lack of litigation it did not run into

the problems in the Appropriations Act that I cited. And all I can really say is that get's extremely complex, and I think probably someone from the bowels of the comptroller's office would be more appropriate for explaining why that can work sometimes and not work other times.

ENOCH: I was having a little bit of difficulty in what you are talking about. Do you accept the premise that even if Federal Sign had a judgment it would have to wait on an appropriation from the legislature to pay?

SMITH: One way or another, yes.

ENOCH: So if that's the case isn't that sufficient to meet the state's concern about the opportunity to deal with its finances and it might have a rate on the treasury and all those circumstances, the fact the State can control the payment on the judgment as opposed to the suit to begin with doesn't that satisfy all the State's concerns about the rate on the treasury?

SMITH: Well your honor we are almost shifting it from a legal analysis to a political analysis and that is inherent in this if it is a legislative power.

ENOCH: Well you concede that the State has an obligation to pay if they take the property from public use, and you are not arguing in this case. There doesn't seem to be an argument in this case, that the State was contracting for something for public use. Right? So you have no problem with the State being obligated to pay for that.

SMITH: If the State has liability and it breached a contract we are not saying the State is allowable or shouldn't have to pay. All we are saying is it's up to the legislature to grant consent of a suit. And when that is granted then that can be appropriately resolved in a court. We are also observing that the legislature has the power to pay a claim without it being resolved in court. Federal Sign can go to the legislature in the next session and seek consent or payment. And either one can happen. Or it can be denied in which case they can go back to the next session. One of the parties that got consent in this session appeared in 1989, 1991, 1993 and got it in 1995. And they certainly could have gone to court immediately after the 1989 session and said: It's impossible; I can't get consent; they turned me down; you should abrogate this doctrine and allow me to proceed. But in fact legally it's not possible to conclude they can't get consent. They came back, they did get consent. The same would apply to Federal Sign.

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REBUTTAL

PLESSALA: I respectfully assert that if we had presented this claim to the legislature before filing suit we would have been one of the parties weeded out, because...

HECHT: Well if the legislature is not going to pay your claim wouldn't it be better to know that ahead of time rather than after you spend a whole bunch of money trying a lawsuit?

PLESSALA: There's a certain school of thought for that. But the claim has been adjudicated, and we had our day in court under the open courts provision, and under common law. We filed a lawsuit, and we adjudicated it, and we won. The State denied authority to enter the contract. The jury found there was a breach. The jury found the contract had been breached and found damages.

HECHT: But surely a practical person would want to know if there is no way I am going to get paid except by the grace of the legislature why do I want to pay my lawyer and take my time and run up the State's expense to have a trial that's not going to result in anything?

PLESSALA: The answer to that lies in something counsel said; and that is anybody who deals with the State ought to know better. And my answer to that is, and it also refers to the fact that maybe we aren't writing on a clean slate here. One hundred years ago there was a case of Fristo v. Blum, which makes no reference, no holding, that you have to get the consent of the legislature to file a breach of contract suit. What it says is: The State is to be regarded as a sovereign when it's performing governmental functions has prerogatives which don't appertain to the individual. But when it becomes a _____ in its own court or a party to a contract with a citizen, the same law applies to it as under like conditions governs the contracts of an individual. There is reference in the Fristo case to a New York case and it says New York law requires legislative consent. The Fristo case does not say we agree with that, and that's the law in Texas. As a matter of fact the case that is universally cited in this State for the proposition of the date and point in time when this court adopted the doctrine of sovereign immunity is Hozner(?) v. Young, which is in the first vol. of the Texas Reports. Hozner v. Young was a mandamus case. That's the one everybody says says you've got to get consent of the legislature. Fristo v. Blum makes absolutely no reference to that case. None whatsoever. None. The second case that's universally cited and is also cited by the CA in this case is W.D. Hayden v. Dodgen. That is cited for the proposition if you are going to sue the State keep in mind that it's liable in contract, but you've got to get its consent to sue it. Hayden v. Dodgen was not a contract case. It was a permit case. The plaintiff in that case was given a permit. Justice Calvert specifically noted that the State had its option when it entered into its arrangements with this guy: to give him a permit or to give him a contract mutually binding on the parties. The prior option was chosen, that of a permit. A permit is not a contract. It's not an agreement to be mutually bound. Reference to W.D. Hayden v. Dodgen in a contract setting is inappropriate.

So I respectfully suggest that we are not writing on a clean slate here. The last pronouncement in a contractual setting by this court was in Fristo v. Blum. The last time the issue was raised was in Delaney v. University of Houston and Justice Doggett dissented I believe in that decision, but it had to do with a tort. The claim was made that the official handbook of the University was a contract. And said well that's just nonsense because it's not a contract, it's a handbook. This is a tort claim. That's the last time this court has been called upon to decide this issue. And I respectfully submit that it was decided in Fristo v. Blum, 100 years ago.

GONZALEZ: That was immunity from liability not immunity from suit?

PLESSALA: They made no distinction. No immunity.

GONZALEZ: But the court has. Perhaps erroneously, but we have made that dichotomy.

PLESSALA: But not in a contractual setting your honor. You've said that in tort and you've said that in permits, but you've not said that in a contract case. And I respectfully suggest that a contract case is much different than a tort, and is much different than a permit. A permit is issued pursuant to a governmental function: like a driver's license. You can drive a car in the State, but you can't do it legally without a license. If you get a license, you've got to go get a permit. A driver's license is not a contract. If you revoke somebody's license you are doing it but not pursuant to a contractual right. That is a governmental function.

I would also like to point out that counsel I believe for the reasons stated before is mistaken when he says that sovereign immunity and consent from the legislature to sue is constitutionally granted. That is just not relevant. Section 29 says: to guard against the transgressions of high powers herein delegated we declare everything in the Bill of Rights, including the open courts provision, as accepted out of the general powers of government. Anything contrary shall be void. I am not trying to set up a constitutional cause of action here. I am simply trying to say that I've got a breach of contract cause of action; and the State is bound and it is bound without me having to get legislative consent to sue them.

We would have preferred not to have to sue them, but we had to. And we got it adjudicated. And the jury spoke. And we've got a judgment. Now whether or not we can collect it, okay, that happens all the time. Plaintiffs sue defendants that can't pay, they don't have insurance, and they are stuck with a judgment they have to renew every 10 years. I can't even do that in this case because I can't execute against the State. But the fact remains they disputed my claim; I would have been weeded out, and I got a judgment. Now it is adjudicated. In Herrin v. Houston Nat'l Bank, which is about the turn of the century in another case that is universally cited they weren't dealing with a contract. They were dealing with whether or not a claim was one made against the State or against individuals. No individuals involved in this case. We are solely talking about Texas Southern University, which is an agency of the State.

Perhaps permission from the State to sue it was necessary. It never existed in this State to 150 years ago. There was a recent article that came out quoting that Texas if standing alone would be the 11th largest economy in the world. We are no longer an agrarian society. We are commercially sophisticated and we deal in very sophisticated issues, and we deal with very sophisticating contracted parties who rely on the State of Texas to honor what they say they are going to do.

I think it's time that we take the step, that the court takes the step, that it recognize that it can abrogate sovereign immunity, and do so in a contractual setting. If a litigant has no right to enter into a court in this State, but for the benevolence of the legislature, then you don't have open courts, and you are allowing the legislature to encroach on the separation of power to adjudicate and weed out claims, which is the problems of the court to do, not the legislature.

GONZALEZ: So when the legislature gave specific authority in the Education Code for the Boards at the University of Texas at Tyler, and University of Houston to be sued, that was wholly unnecessary?

PLESSALA: I think it's appropriate they did it. I think they should do it statewide.

GONZALEZ: But that was unnecessary?

PLESSALA: Well I believe it was unnecessary. But I think it is unnecessary only because people have been relying on the idea that legislative consent is necessary. The legislature is writing its own laws when they deal with those universities or school districts for that matter. They are putting those things in there - it's not necessary. But until the court steps up and says we are going to abrogate sovereign immunity as a law and quit letting the legislature be the gate keeper only then do we realize that sovereign immunity has no place here. And sure it's unnecessary they did that. I think from an academic standpoint it was unnecessary.