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Supreme Court of Texas.
TEXAS NATURAL RESOURCE CONSERVATION COMMISSION, Petitioner,
v.
IT-DAVY, Respondent.
No. 99-1114.

September 5, 2001.

Appearances:
William Rich Thompson, Office of the Texas Attorney General,
Austin, TX, for Petitioner.
Kevin M. Sadler, Baker & Botts, Austin, TX, for Respondent.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla R. Owen,
Justice Harriet O'Neil, Justice Wallace B. Jefferson, Justice Nathan
L. Hecht, Justice Deborah Hankinson, Justice James A. Baker, Justice
Craig Enoch.

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JUSTICE: The Court is now ready to hear argument from petitioner
in TNRC v. IT-Davy.

SPEAKER: May it please the Court. Mr. Thompson will present
argument from petitioner. Petitioner has reserved five minutes for
rebuttal.

ORAL ARGUMENT OF WILLIAM RICH THOMPSON ON BEHALF OF THE PETITIONER

MR. THOMPSON: May it please the Court.

Earlier this year in Little-Tex, this Court rejected the waiver-
by-conduct doctrine, and reaffirmed the State's immunity from suit and
breach of contract cases, absent special statutory or legislative
consent. This Court stated that there is but one route to the
courthouse for breach of contract claims against the State.

JUSTICE: But we did that because of the statutory scheme and
hasn't that now been rendered so it doesn't apply to this contract?

MR. THOMPSON: It doesn't apply to this contract, your Honor, but -

JUSTICE: But doesn't that throws right back to addressing the
waiver-by-conduct exception?

MR. THOMPSON: I don't think so, your Honor, because you didn't --
you didn't refer to the legislature simply because the Little-Tex down

Macro Air Electronic contract would have fallen within chapter 2260. You deferred to the legislature because the legislature addressed the problem, weighed the policy decisions, and came up with a comprehensive administrative scheme for addressing breach of contract claims against the State whether a particular claim falls within the provisions of chapter 2260 should not matter.

JUSTICE: Why not, if -- if the basis for our reasoning in the Little-Tex case was the fact that the legislature had devised an administrative scheme to settle breach of contract scheme. And if that scheme is not applicable then we don't have legislative action in the area as to this contract.

MR. THOMPSON: Not as to this contract, your Honor. But it's just like when the court enacted the Tort Claims Act. Some provisions -- some claims fall within the act, some claims fall without -- outside the act. But the legislature has still acted and in this case it's the same thing. The administrative scheme is still in place. The legislature --

JUSTICE: But it's only -- it's only in place from a certain date forward from the end of August 19. The contracts entered into from the end of August 1999 forward. The contracts before that day are actually outside the scheme and would predate any legislative action.

MR. THOMPSON: And for those contracts, your Honor, they need to go to the legislature under chapter 107. They simply exempted them from previously going to chapter 2260. It's just as if these contract claims existed beforehand, and didn't have the benefit of chapter 2260. It is the State's position that those contracting parties were required to go to the legislature to seek permission.

JUSTICE: But, you [inaudible] concede this is an open question based on language and some of other [inaudible]

MR. THOMPSON: Your Honor, the court had not addressed it. However, in -- in the Little-Tex case, this Court said, "In light of the administrative scheme that the legislature has enacted, the court would not recognize a waiver-by-conduct exception." It did not say simply because these two contracts followed in chapter 22.

JUSTICE: Assume that we disagree with your interpretation of Little-Tex, and that -- that we believe we need to revisit the waiver-by-conduct exception. Why shouldn't we recognize the waiver-by-conduct exception with respect to this contract?

MR. THOMPSON: For the same reasons you've had this before, your Honor. We believe the legislature is the appropriate body to weigh this policy decisions. They have done so, even when they enacted 2260. They didn't include all contracts. They only included written contracts for goods, services, and construction. There were gonna be contracts that fell outside the scope of those provisions.

JUSTICE: Well, then as to those contracts that are outside the scope of the provisions for one reason or another, why should we not recognize the waiver-by-conduct exception when the doctrine of immunity was in the first instance a judicially created doctrine -- doctrine?

MR. THOMPSON: Your Honor, we believe that the court has historically always deferred to the legislature to waive on immunity and should continue to do so.

JUSTICE: Okay. Well, what's that?

JUSTICE: Well, we said that to be immunity.

MR. THOMPSON: Go ahead.

JUSTICE: Well, what I'm trying to get you to talk to me about is [inaudible] of that aside and give me good policy reason assume with us that we're really gonna look at that issue. I would like to know what

the State's position is as to why it would be a good public policy for us not to adopt the waiver-by-performance exception.

MR. THOMPSON: Your Honor, we believe that it would be better to allow the legislature to crack that scheme. They can appropriately waive the policy decisions. We don't think that court should do so.

JUSTICE: I -- I just -- I know but I understand that -- that's your position, but I would just like to know the State's position has been about why it's not good policy for that doctrine to apply? There's [inaudible] of good public policy whoever gets to decide, the legislature or this Court.

MR. THOMPSON: Your Honor, we don't think a court should decide on the case by case basis, whether equitable circumstances warrant the judicial waiver by conduct? We think instead that there should be a rule established by the legislature.

JUSTICE: I know --

JUSTICE: If you're not gonna answer my question in terms of, or else I'm not communicating it very well. I understand you think we should defer the legislature.

MR. THOMPSON: Yes, your Honor.

JUSTICE: I -- I've gotten that but my question to you is that assume with me that we don't. And we are squarely going to decide whether that waiver-by-conduct exception should be part of Texas Law provided to immunity. Why would it not be good policy for us to adopt that doctrine? It's just a matter of public policy.

MR. THOMPSON: Your Honor, we -- we simply do not think it's for the -- for this Court to act.

JUSTICE: Okay, and then that's not --

JUSTICE: What argument would you make to the legislature?

MR. THOMPSON: Your Honor, we would -- we would say that it is the same public [inaudible] arguments that are always made in support of immunity from suit, your Honor, and that certain claim should fall within and certain claim should not fall within a waiver of immunity --

JUSTICE: Isn't there some danger if -- if the State never has an obligation to pay that goods and services are going to become more expensive that there must be a built in injury policy --

MR. THOMPSON: It's been --

JUSTICE: -- you know, that the public [inaudible] would suffer from -- from private contractor not having any evident of enforcement.

MR. THOMPSON: If we assume that the State flagrantly breaches contract all the time, your Honor, but that hasn't been the case or the experience of the State. The State often has -- has much business in [inaudible] contract and it has not been problem.

JUSTICE: Well, this is not question of whether the State can pay, this is a question of, are we ever gonna resolve this dispute in half? And the legislature is never gonna resolve this dispute. All they're ever going to do is send you back to the courts to resolve, right? That's -- that's the most [inaudible] they're not gonna hold the hearing on whether the State should lose this case.

MR. THOMPSON: No, your Honor, they will have a -- a determination of whether or not they should grant a permission to sue.

JUSTICE: So, why -- why shouldn't that go far?

MR. THOMPSON: Because your Honor, if there really are equitable circumstances that warrant being able to sue, those can be presented to the legislature. If it strikes a particular court that it is such an inequitable circumstance that this party really should be able to sue the State, the legislature should make that policy decision and they'll reach the same decision as the court should, and permit that claimant

to sue the State. But --

JUSTICE: Let me ask you, there's been a trend on the Courts of Appeals obviously, recently to -- to apply the waiver-by-conduct exception. Couldn't we avoid all these dangers that you're talking about by directing a narrow waiver-by-conduct exception? There have been some cases that have talked about requiring full performance and acceptance of performance. And if there's been full performance, and there's been acceptance of performance by the State, why shouldn't we craft a narrow waiver-by-conduct exception?

MR. THOMPSON: Your Honor, this case presents that exact example. The contract was completed and they were paid not only the full contract price, several millions of dollars. They were also paid above and beyond that for additional work orders that they submitted to the TNRCC after that. However, they say, "We wanna pay the full amount of what it was worth for us to do that work. We should have been paid more." And that's the problem, your Honor. That is a bona fide contract dispute. And it doesn't mean they weren't paid the full amount of the contract, they were. It means that they think that they deserve more, and that's not something the Court should look into.

JUSTICE: But if it's a bona fide contract dispute as you just said, why -- why should go to court? Some court is gonna have to decide it someday.

MR. THOMPSON: Your Honor, after it goes through 2260, we think there will be a recommendation from the ALJ. That's what the legislature said up, then there can be a legislative consent to sue, and they can do it that way.

JUSTICE: Is it fair to say though that after this Court's decision in Federal Sign the legislature got nervous about people's willingness to do business with it --

MR. THOMPSON: Your Honor.

JUSTICE: -- created this administrative scheme to give the appearance that they will in advance agreed that they should be bound by contract. Is that a fair reading of what the legislation can do?

MR. THOMPSON: Your Honor, I think you sent a message in Federal Sign to the legislature, and we believe in part that is the reason they enacted chapter 2260 --

JUSTICE: I -- I didn't send a message

JUSTICE: Yeah, but --

JUSTICE: Others -- others gave them that message isn't real. The legislature got nervous about what that really meant to their contracts. There is another issue in this case which is that the party that was given the authority by the legislature the contract also contracted to go to court to resolve disputes. Is that a different twist in this rather than just simply by conduct? Is this -- is this a little bit different twist in this case?

MR. THOMPSON: You're referring to the contract clause, your Honor?

JUSTICE: Right.

MR. THOMPSON: We do not believe that there can be a contractual waiver of the State's immunity from suit. We believe that in Little-Tex the court set apart from this special statute, or unless there's legislative consent, you have to go to chapter 1 or 7 for breach of contract claims. And this Court in DalMac implicitly rejected that argument because in the terms of that contract it's stated prior to litigation between the owner and the contractor. The language of that contract itself contemplated that there may be future litigation. Nevertheless, this Court said that there was no jurisdiction. And this very argument has been expressly rejected by federal court. In

Presidential Garments the plaintiffs try to hold the United States liable for reaching a settlement agreement. In the terms of the settle agreement it said, we are going to be bound in every to submit to jurisdiction of the federal district court. Nevertheless, they said, it's a well settled principle, the Second Circuit said it's well settled principle sovereign immunity that the waiver of the United States can only be read by congressional enactment.

JUSTICE: What if the congressional enactment does in this case says, gives authority to the executive director on behalf of the commission to negotiate the contract.

MR. THOMPSON: Your Honor, you're talking about the thing that was --

JUSTICE: In the Water Code Section 5.229, the executive director on behalf of the commission may negotiate, and with the consent of the commission entered in the contracts of agreements would state some political subdivision, etc. Does that -- so -- so you're saying that the legislature gave the right to contract, but not the ability for parties entering into that contract to resolve disputes about that contract in court.

MR. THOMPSON: The State did not -- the legislature did not enact clear and unambiguous waiver of the State's immunity from the suit. In Federal Sign and in another court, the right to contract and even the statutory right to contract is not a waiver of state's immunity to suit.

JUSTICE: How do you distinguish the Potawatomi Nations case.

MR. THOMPSON: Your Honor, I also happened to be counsel of record in Potawatomi and we made it very clear to the court during oral argument.

There was a question from the justice that -- that with this [inaudible] state sovereign immunity for eleventh amendment if the -- if it were state instead of a tribe. The Indian tribe waiver of immunity is a matter of federal law, it's well established by statute and federal law that they can waive at either by congressional abrogation or by agreeing in the terms of a contract to waive their immunity.

And Mr. Coleman the Former Solicitor General said, "I believe not for couple of different reasons." First of all the standards that the State has set for waiving their own immunity are matters of state law. And the State had adopted a variety of standards. So, one can't speak for uniform standard waiver with respect to states, I presume.

JUSTICE: The congressional enactment that permits tribes to waive through their contract sovereign immunity.

MR. THOMPSON: Absolutely, your Honor. We cited in the brief, that's 25 U.S.C. Section 81.

JUSTICE: And that would -- and that's an expressed waiver of sovereign immunity, it's not simply the authority of the tribe to contract generally --

MR. THOMPSON: But it also is as a matter of federal law, that courts upheld that there are two ways unlike this Court which is always said, "it's a matter for the legislature and defer." They say not only can congress abrogate it in the statute, but also as a matter of Federal Indian Autonomy, they should be permitted as a tribe to waive their own immunity in the terms of a contract.

JUSTICE: So, the State got to be able to -- in order to make its contract binding, the State ought to be able in its contracts to waive its immunity.

MR. THOMPSON: We think not, your Honor. We think there are good

reasons for the distinction between state immunity and tribal immunity. When one deals with the State, if [inaudible] wanted to, you could build them to your contract price.

The contingency that there might be some kind of problem and you may not be able to go to court. But at least you know you are dealing with the State. Many tribal businesses sometimes they're running their gas stations, but sometimes they're [inaudible] gas stations. You may not know that you're dealing with the tribal entity, and therefore, some third party that's contracting with that person doesn't know that he needs to get a waiver of immunity from the tribe. We think that the protection is necessary for the citizen and that's why, we intervened in that case and called it an amicus brief.

JUSTICE: Let me ask you, a state has been made that the legislature send a message and enact in 2260. It seems that they've send a message to that mail in amending it. What do you think the purpose of them accepting contracts like this one, was, I mean if they wanted to invade this field and take over and make these decisions they could have easily done it under our decision. Why would they then go back and make an amendment that accepts this contract? What message are we to get from that?

MR. THOMPSON: Your Honor, there were many contracts that fell in some kind of no man's land with respect within chapter 2260. Most of them were these older contracts. Your Honor, if one of the things that the legislation did was made clear that even if you had not complied with --

JUSTICE: Mm-hmm.

MR. THOMPSON: -- if you had not complied with the provision of chapter 2260, you can still go to the legislature. This Court in Little- Tex said it was a precursor that you had to go to 2260 before 107. The legislature here said, you can go directly to 107, and in fact old contracts that's what you should do. Any other questions?

JUSTICE: Thank you, Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court Mr. Sadler will present argument from respondent.

ORAL ARGUMENT OF KEVIN M. SADLER ON BEHALF OF THE RESPONDENT

MR. SADLER: Good morning. May I proceed?

JUSTICE: Mr. Sadler.

MR. SADLER: Yes, your Honor.

JUSTICE: The State says, in its brief -- reply brief that to quote, IT-Davey admits that the court refused to adopt what this Court adopt the waiver-by-conduct exception to sovereign immunity in General Services v. Little- Tex. Do you agree with that?

MR. SADLER: I do not agree with the Statement at all, by the --

JUSTICE: The next question is, because of the amendment, do your first two issues become the --

MR. SADLER: I think that is correct, your Honor, the -- the parties have extended considerable time in resources briefing an issue and in fairness to my colleague. They briefed an issue which while this case was in the pipeline, the legislature rendered moot by amending the statute --

JUSTICE: So, on the other side the court's question indicates that

the question of waiver by contract is still an issue but your -- your issues don't really cover that. You argued mostly about the third, fourth, and fifth issues that you raised in your responsive brief in the merits.

MR. SADLER: Your Honor, our most important issues are labor by contract, declaratory judgment, and we certainly think we fit within any permutation of any waiver-by-conduct exception that any Court of Appeals has -- has approved prior to Little-Tex.

JUSTICE: You said waiver by contract?

MR. SADLER: Yes, your Honor.

JUSTICE: Are you arguing that by merely contracting here in your case that the State waived its immunity?

MR. SADLER: Absolutely, no. We are relying on Article 11 in the contract which very importantly, now, I wanna stress this right now, this was not an accidental boilerplate provision that found its way into our agreement. We provided this morning, as a handout, a copy of the Code of Federal Regulation that was in effect at the time our contract was negotiated.

The way these remedies cost got into our contract is very simple, TNRCC went to the federal government, the EPA, and said, "help us clean up the State toxic waste site. Give us federal money." And the EPA agreed, and the EPA said, "All right, here is the money but here are some strings attached to the money." And one very important string is, you the State, have to include in your contracts with the people who are gonna the work. Certain contractual provisions and the very provision that we all relying on Article 11 in our contract is stated almost verbatim in the CFR, the remedies provision. So, there is really a -- a fundamental important way that this provision got into our contract. The TNRCC went to the federal government, got the money and in return had the promise the federal government that they would put this provision in our contract. They did that and now ten years later after getting the federal money, after getting all of our work, they don't wanna live up to this particular provision and so that is a -- a very unique circumstance that we say constitutes a waiver of the State's right to assert sovereign immunity in this case --

JUSTICE: Do you have any cases that interpret this or a similar clause [inaudible].

MR. SADLER: Your Honor, I do not have any cases I could offer at this time. I would be happy with the Court's lead to provide some short supplemental brief on that issue.

JUSTICE: You can always file a supplemental brief.

MR. SADLER: But -- but I have to be [inaudible]

JUSTICE: You don't have any -- you don't have any third or any outside source that says that this provision trumps the State's normal sovereign immunity.

MR. SADLER: Well, no, your Honor. But what we do have is a very well-established body of law by the United States Supreme Court that says, "federal regulations do in fact trumps state law, if the State law conflicts with or frustrates the purpose of the federal regulation, and here is the unusual circumstance in our case. This is not a situation for the State to refuse to put the contract provision in that the CFR said had to go and they put it in. The twist is now they don't wanna live up to it. So, in that sense their conduct now, thus, I would absolutely say, frustrate and conflict with the purpose of 40 C.F.R. but they --

JUSTICE: The conflict would have to be very, very [inaudible]. All of these really says is that they -- they can resolve it in the court

of confident jurisdiction. I'm sure the State's argument is they can still do that as long as they go through the perfect channel. So, this is not such a direct conflict that it would preempt [inaudible]

MR. SADLER: Well, and -- and I don't, again I'm not saying that they have refused to put that in. What they are refusing to do is to honor it and to live by it. The argument they made very succinctly is, number one, this is only a venue provision. Well, I think I wanna [inaudible] argument with [inaudible].

Second, they say, "Well, there is no court of confident jurisdiction. We agreed, we would submit our dispute to a court of confident jurisdiction but right in their brief to this Court they say, "You know what, there isn't one." And I -- I don't think that's a very sound position for them to take. Because what it says is, you've got to strip that word out of the contract and add some new words into --

JUSTICE: Well, but all those thing is you have to go through the proper channels and if the legislature give consent there will be a court of confident jurisdiction.

MR. SADLER: I -- I understand clearly that is what they are saying. What we are saying is by going to the federal government, getting the money in the way they did, complying with the regulations, putting this in our contract, binding themselves to that that they cannot now repudiate this provision.

JUSTICE: Well, let -- let's talk real quick about waiver by conduct --

MR. SADLER: Yeah, your Honor.

JUSTICE: -- if -- if we were to adopt some formulation of waiver by conduct. I know that the Court of Appeals had -- had made some recognition of that doctrine and they've -- they've -- some have narrowed it very much as articulated before, full performance, full acceptance. But is that a bit simplistic? Are we always gonna be able to tell when there's been full performance and full acceptance? Is that always gonna be a sort of -- of [inaudible] for the courts to determine whether it happened on the case by case basis?

MR. SADLER: It -- I -- I have to tell you it can be. It's not in this case because it's conceded [inaudible] that there was full performance, but depending upon how you define those performance --

JUSTICE: Well, exactly. I mean, the State says just the opposite that there was full performance and -- and the contract was live up to and paid. And we're in that [inaudible] right now, aren't we?

MR. SADLER: I -- I understand. If -- if, your Honor is talking about to craft a -- a broader waiver by conduct rule that would apply not only to this case but perhaps to others. You're gonna have to recognize the fact that full performance is gonna depend on the facts and circumstances of each case. I -- I'd be less than candid about [inaudible] otherwise. But we're here now in this case where that is not an issue. Full performance is not an issue.

JUSTICE: Well, let's say that it were, what do you do? I mean, who -- who makes that determination? I guess the court does or does the jury make that determination?

MR. SADLER: Well, your Honor --

JUSTICE: -- the trial on whether the conduct has been -- waiver by conduct applies and then you go into phase two or you -- how does it work?

MR. SADLER: Let me make a suggestion. I believe there is case law to support the idea that in this -- determining of the trial court level, a plea to the jurisdiction, it is appropriate for the trial court to hear evidence. And I -- I believe they rule perhaps could be

crafted where the burden would be on the person bringing the case to establish jurisdiction by some -- by prima facie case, by preponderance, by some legally definable standard to the satisfaction of the trial court at an early stage perhaps with -- with limits, severe limits or limits on no discover whatsoever. But I -- I believe that there are mechanisms in place that deal with the fact that if you're gonna go with something called full and complete performance, that there's gonna based on litigation over, "Yes, it was. No, it wasn't." But I don't think we have to reinvent the wheel. I think there is already case law that says, "A court can hear some level of evidence in response to plea to -- to the jurisdiction. The waiver by --

JUSTICE: The State argues that you can't have a contractual waiver of federal immunity, do you agree with that?

MR. SADLER: Well, I do not agree that the -- with what they say, what they say is, "The highest officials of the TNRCC had no authority to agree this contract provision," that's -- that's the precise statement I think almost quote out of the brief. And I don't think that's correct. I do not think that's correct under the facts and the law. They didn't cite you any Texas law on that. Now I went out and found a Second Circuit case on that, but those are very different facts and circumstance. The reference that was made to down that a minute ago, that's a very different fact and circumstance.

Again going back to how this contract provision made its way in here. This is something the State bargain for at the two levels. First, with the federal government to get the money and then with us and I --

JUSTICE: And my question is a clause like this and a federal contract did not waive federal immunity.

MR. SADLER: I -- I'm not sure, your Honor. I -- I'm not sure the answer to that question. I think under state law it does not and should not and there is no state authority that says that this is an invalid clause because the highest officials of TNRCC had no authority to negotiate.

And let me speak to that just a moment, because it raises an issue not addressed by the State. I think even Federal Sign recognized that in circumstances where state officials act without authority that there is a remedy and sovereign immunity is not a [inaudible].

JUSTICE: But the remedies against the [inaudible] official not the entity --

MR. SADLER: That -- that is --

JUSTICE: It's clear, isn't it?

MR. SADLER: You're -- you're absolutely -- it's -- it's -- it's not considered as suit against the State but there is a legal remedy. Well, here that's a complete [inaudible] argument from their side --

JUSTICE: But also he said that those officials don't get the benefit of sovereign immunity under those circumstances.

MR. SADLER: That's also correct.

JUSTICE: This is a pretty big difference than what your argument is.

MR. SADLER: Well, my argument here is that for them to take the position that these officials had no authority at two levels to negotiate this particular clause in the contract --

JUSTICE: That [inaudible] you the question about that argument of --

MR. SADLER: Yes, your Honor.

JUSTICE: -- are you arguing that that clause is in there because of federal regulations, therefore because in the federal reg that preempts the state sovereign immunity law?

MR. SADLER: Yes, your Honor. If --

JUSTICE: Did you argue that in your brief?

MR. SADLER: No, your Honor. We did not submit the -- the preemption --

JUSTICE: Is it -- is it preemption of [inaudible] that has to be pled and argued? That just doesn't come up the first time in front of this Court, does it?

MR. SADLER: No, you're -- you're absolutely correct. And -- and my position on that is does their conduct now conflict with the regulation? Yes, I think it does. But I think the preemption is a much narrower issue and you don't really get to that if in fact they comply [inaudible].

JUSTICE: Well, with abrogating laws because most of the comments that being made directly affect the waiver-by-conduct but most of the briefings has to do with two sections, the Water Code, your declaratory judgment claim and the -- the 2260 matter. And most of what I'm hearing this morning is completely outside the scope of that briefing.

MR. SADLER: No, your Honor. Let me point -- if I can your attention to -- in -- in this -- I would blame the legislature for this let me just say it that way. The whole issue of waiver by contract in the briefing got wrapped up into the issue of does 2260 apply or not. If you look in their brief on the merits, they say, "These guys cannot have a contractual waiver because they are pushed out of court by 2260 [inaudible]"

JUSTICE: But that argument, if I understand your response, should be made under your -- issue for the Declaratory Judgment Act discussion, is that correct?

MR. SADLER: No, your Honor. We -- we made very succinctly and clearly in our response brief on the merits that we had a contractual waiver. We -- we made that argument succinctly. We cited the case that concerns --

JUSTICE: But you're asking us as part of your Declaratory Judgment Act to sue, to construe this contract in that manner, isn't that correct?

MR. SADLER: What I'm asking the court to do on our declaratory judgment claim is to allow us to proceed with the bona fide contractual dispute that's been conceived. This is not a -- as -- I -- I think they can see, well, they do can see quite plainly that under the Leeper case, there is a waiver of both immunity from suit and liability under the Declaratory Judgment Act. Well, with --

JUSTICE: Well, did they respond to your labor case with State of Texas v. Operating Contractors and say that all that you have here is an article pleading of the declaratory judgment to get around the sovereign immunity doctrine. I mean all that you're really asking for is to be paid \$7million, that's their answer.

MR. SADLER: Yes, and may I respond to that now quite directly. We do have and we will -- we will stand on our pleadings. Our first amended petition that's -- that's in the record. Our Declaratory Judgment Act claim is a separate, independent, stand alone claim from the other claims in our plead and -- and let me tell you what, it is absolutely correct that the core of this dispute between the parties turns only in interpretation and construction of a couple of key provisions in the contract. The whole issue, what we're fighting about is we claim we did some extra work above and beyond the contract and they still owe us money. Our basis for saying that is look under the contract, the contract provides a mechanism for resolving it. It says, "You, the contractor, if you find site conditions when you go out there

and do the work that are materially different, you can apply for an equitable adjustment, more money. Also if you go out there and find that our TNRCC specifications were quote, unquote, defective, you can apply for an equitable adjustment. That's precisely what we've been telling them since 1992. You gave us defective specs. You gave us [inaudible]

JUSTICE: But all this argument does is go to the issue of the dispute of why you weren't paid. But the issue we have before us today is how can you get into court in the place of the sovereign immunity and their response is, "You can't get into court by calling it a declaratory judgment because it's merely a dispute over payment or not and it doesn't --

MR. SADLER: And -- and what I --

JUSTICE: -- you can't use a Declaratory Judgment Act [inaudible] to obey sovereign immunity" and that's what State v. Contractors --

MR. SADLER: That -- that is what they are saying and what I -- what I am saying is we have a separate independent stand alone, could have brought it by itself deck action, that's doing exactly what the deck statute says and let me quote from the statute, "We are authorized to seek a suit, to declare a relief, whether or not other relief is or could be claimed," that's 37.003 (a). That's exactly what we're doing. We are authorized to maintain that suit without legislative permission, that's what Leeper holds. We're even entitled to a jury trial if construction or interpretation of these disputed terms of the contract, require resolution of some fact issue that's why out of the statute and most importantly of course and this is where Leeper came down. We must join the TNRCC, there's nobody -- no other part of this contract.

JUSTICE: That is why [inaudible] even if you got declaratory judgment it says, yes if -- if there were these conditions or yes if you were given wrong specifications, you do have the right to make an equitable adjustment plan, that still wouldn't get you anywhere because you want determination that yes, you were in fact given that specification or yes, in fact the conditions were different and you can't get that declaratory judgment I think.

MR. SADLER: I think we can because right now the parties are a complete [inaudible] over the meaning of materially different site conditions and what defective means, I -- I would point out and this is the contract I did address so, I can criticize it. Those two key terms are not defined in the contract, defective specification is not defined. Materially different site condition is defined in a completely circular way. It's defined as things that you find that are different from what you expect in a material way.

Well, that's -- that's the court to dispute. Now I think this is just like any other contract dispute where the parties have a different interpretation over specific key terms. We are entitled to go to court and have a judge declare. This is what the -- this term means.

JUSTICE: Well, wouldn't that swallow up all our prior jurisdiction on sovereign immunity because every contract like you -- you would go into [inaudible] declaratory judgment that says, yes, the State has breached and you get everything up to the award of damages.

MR. SADLER: And -- and let me be very clear, there was a case cited, the Jones [inaudible] case that was cited in their brief. Well, that's exactly what Jones [inaudible] did. They -- they simply said, please declare that we're entitled to money. And -- and that's not all what we're asking. We have a separate purer declaratory judgment claim that says the parties are unsure what this contract says. Judge, tell us what this contract says, and let me point out right here, they have

never, in ten years, taken the position that if it were determined that there were materially different site conditions and there were defectives specs, that they wouldn't make the equitable adjustment. They never said that. What they said is they don't agree on the front end that there were different site conditions within the meaning of the contract or that they gave us defective specs within the meaning of the contract. So, that is a -- a separate and independent dispute that can be litigated, should be litigated, and can only be litigated, I would say, under the declaratory judgment.

JUSTICE: But -- if -- if they don't pay, you still got to go back to somewhere doesn't it and get a breach of contract action [inaudible].

MR. SADLER: I -- I have to concede if -- if we litigated that and we got a declaratory judgment that says, "A material conditions means this, defective means that, the work you did was because of that." We need that point would go to the State and say, "All right, undo the contract make the equitable adjustment that is specifically provided for."

JUSTICE: Mr. Sadler before your time runs out can you tell me --

MR. SADLER: Yes.

JUSTICE: -- what is the clear and expressed language outside of this contract as we've been talking about. What is the clear and expressed language about the legislature that you contend shows a waiver of sovereign immunity, what statute, what language, [inaudible] expressly the state sovereign immunity?

MR. SADLER: What I would point to, your Honor, and -- and with specific regard to your question, all I can point to, is the legislature specifically authorized the TNRCC executive director in consultation with the commission to execute contract for the purpose of carrying out their work and everything they did in disregarding going to get the federal money, to do this or they did and -- and that is the authority that -- that I would point to. And I don't believe what they did was ultra [inaudible] or outside the scope of the authority quite in the contrary, I believe it was [inaudible].

JUSTICE: Has IT-Davy been to the legislature?

MR. SADLER: No, your Honor.

JUSTICE: I -- I have one quick question.

MR. SADLER: Yes.

JUSTICE: I think it's fair to say we have no briefing from you on waiver by conduct. I understand why, given the certain odd to circumstance, but we don't have.

MR. SADLER: If -- if we would be -- I think we will be happy to submit what other supplemental briefing on -- on that broader issue. The Court would find appropriate and again --

JUSTICE: Well, I -- more quickly just for purposes here before you sit down is there -- is there a particular Court of Appeals case that you would rely on for our formed relation of that doctrine. We have not heard from you on how you would craft a waiver-by-conduct exception.

MR. SADLER: And -- and let me answer that quickly in -- in two parts. I think the -- the Court of Appeals as I recall it, the Court of Appeals, San Antonio Austin and Houston followed or interpreted Federal Sign to authorize this waiver-by-conduct. I think they all tried to adhere to some concept of full or complete performance. And -- and I -- I certainly agree with that formulation of -- of and again, I apologize that this isn't clear from -- from our brief that, I mean, you certainly litigated through the Court of Appeals saying, yes, waiver-by-conduct. It is the appropriate rule we -- we like the opinion that

we got out from the Austin Court of Appeals on that. But to answer your question, your Honor, that the formulation if there's gonna be a broad waiver-by-conduct rule as distinct from this contract issue. I can only at -- at this time offer you the standard of -- if the State accepts complete performance under a contract and then refuses to abide by the terms of contract that would constitute the [inaudible].

JUSTICE: Any other questions? Thank you, Counsel.

MR. SADLER: Thank you.

REBUTTAL ARGUMENT OF WILLIAM RICH THOMPSON ON BEHALF OF THE PETITIONER

JUSTICE: Well, Mr. Thompson what about Leeper which said act does contemplate a declaratory judgment. That the government and just maybe indeed must be join in the suit constitutional legislative [inaudible].

MR. THOMPSON: Yes, your Honor. We think that Leeper did two things. It waived immunity of liability for attorney's fees and immunity of suit for statutory construction and to through the declaratory judgment claims. But we also believe from the Haden v. Dodgen case and everything else, this Court's jurisprudence, you can't characterized what is essentially a breach of contract and where you want money damages from the State as a declaratory judgment action in order to side step the immunity.

JUSTICE: How do you have -- how do you have a declaratory action involving interpretation of contract that does not have an economic impact?

MR. THOMPSON: It may have an economic impact, your Honor, but there can also be one as to whether or not there's a coverage. I think that's a common issue that's done by the declaratory judgment claim.

JUSTICE: But that simply is segregating out the claims, you want the money. The question is, is there a careful [inaudible] if you lose on the coverage, you don't get the money. It's the same thing in this case. If this is a material change or defective deal, you get the money, if it's not, you don't.

MR. THOMPSON: We -- we believe, your Honor, that if your goal is to take the declaratory judgment action and turn it in to a claim for monetary damages, then essentially you're taking a breach of contract claim and trying to characterize it.

JUSTICE: But why isn't a coverage question a contract claim in the breach?

MR. THOMPSON: I'm sorry?

JUSTICE: Why isn't the coverage question which is the example you got of a contract dispute.

MR. THOMPSON: It is a contract dispute.

JUSTICE: But [inaudible] only the money?

MR. THOMPSON: But the question is whether or not an action should be taken before the ultimate trial.

JUSTICE: But nobody takes, spends money from declaratory action to interpret contract if they don't think it's gonna have some sort of economic impact which may mean something monetarily.

MR. THOMPSON: Exactly, your Honor, but we -- and that's why we think that it can't be done that way here. We think that the primary goal is to get money from the State for breach of contract claim.

JUSTICE: With Mr. Sadler, his explanation of how that contractual provision got into the contract, is that your understanding as well?

MR. THOMPSON: Your Honor, I received that this morning for the very first time. I -- I do understand that that is the exact language that is in the contract.

JUSTICE: Was there a negotiation between the federal government and the State that require inclusion of this contract?

MR. THOMPSON: I cannot answer that question this morning, your Honor. All I can say is that even if it were, we believe that the federal government doesn't have the authority to waive the State's immunity in state court under [inaudible]. Justice Hankinson, I'd like to give one more shot to your question if I might. We believe there are a lot of problems with trying to craft the now waiver-by-conduct exception. We believe one is that in this case it was the head of the TNRCC could -- could negotiated the contract but it also to be a low level [inaudible] that could do some sort of contract agreed to it, take some action, accept some performance and thereby waived the State's immunity on a huge contract and we don't think that that should be the case.

Second, it could also involve a legislative tug of war, exactly what we discussed to mean [inaudible] a little text argument. If the legislature crafts something that this Court doesn't like, this Court can amend it and you don't have to go back to the legislature and if they like what she did versus not, we believe that that decision should still stand the legislature.

And finally, we think that it is such a fact states the exception that by the time you figure out whether or not there were substantial performance or whether or not there had been equitable conduct or inequitable result, you basically require the State to try the merits of the case before you can make a jurisdiction for determination and that deprived the State of some of the primary benefits of immunity [inaudible] which is not to be subject to the attended burdens of litigation.

JUSTICE: Thank you.

MR. THOMPSON: Any other questions?

JUSTICE: Thank you, Counsel. That concludes the argument in the first case. The Court will now take a brief recess.

SPEAKER: [inaudible]

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