

No. 07-1050

**In the
Supreme Court of Texas**

ZACHRY CONSTRUCTION CORPORATION, *ET AL.*,
Petitioners,

v.

TEXAS A&M UNIVERSITY,
Respondent.

On Petition for Review from the
Tenth Court of Appeals at Waco, Texas

RESPONSE TO MOTION FOR REHEARING

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TO THE HONORABLE SUPREME COURT OF TEXAS:

This case does not warrant any further time or attention from the Court. The court of appeals addressed all of the issues necessary to its decision and correctly ruled that there was no waiver of sovereign immunity that permitted Petitioners to join the University as a party to the litigation. Further, because the statutory language at issue was removed from the Texas Civil Practice and Remedies Code in 2003, this case lacks statewide impact and importance. The Court properly denied the petitions for review, and Petitioners have offered no good reason to revisit that decision. The Court should deny Petitioners' motion for rehearing.

ARGUMENT

I. REMANDING TO THE COURT OF APPEALS IS UNNECESSARY AND WILL WASTE JUDICIAL RESOURCES.

After complaining that interlocutory appeals consume “massive amounts” of appellate resources and stall trials for years, Zachry Defs.’ Mot. for Reh’g 2, Petitioners invite the Court to delay this case even further by remanding it to the court of appeals so that the intermediate court can more thoroughly discuss Petitioners’ standing argument.¹ Such a move is unnecessary because the court of appeals has already addressed—and correctly rejected—Petitioners’ claim that the University lacks standing to contest its own joinder in this suit.

A. The Court of Appeals Complied with Rule 47.1.

Petitioners were sued in connection with the 1999 Bonfire collapse and sought to join the University to the lawsuit for purposes of contribution, indemnity, and proportionate responsibility. The trial court denied the University’s plea to the jurisdiction, and the University exercised its right to seek an interlocutory appeal of that decision. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8). In its original opinion, the court of appeals held that the University was a party to the lawsuit by virtue of its joinder under the 1995 version of Texas’s proportionate-responsibility statute. *Tex. A&M Univ. v. Bading*, 236 S.W.3d 801, 802-03 n.1 (Tex. App.—Waco 2007, pet. denied). Because Petitioners had not identified a

1. “Petitioners,” as used in this brief, refers to the Zachry defendants and Scott-Macon, Ltd. Petitioner Texas Aggie Bonfire Committee did not join the motion for rehearing and has previously asked the Court to dismiss its appeal.

waiver of sovereign immunity that would permit the joinder, the court dismissed the claims against the University for lack of jurisdiction. *Id.* at 803.

The Zachry defendants filed a motion for rehearing before the Tenth Court, which was adopted by Scott-Macon. Their third point of error asserted that the court of appeals violated Texas Rule of Appellate Procedure 47.1 by “failing in its opinion to address the following reply and/or cross-issue . . . ‘[W]hether Texas A&M University lacks standing to contest its responsible third party status.’” *Zachry Defs.’ Mot. for Reh’g* (10th Ct.) 2. In its opinion on rehearing, the court of appeals specifically listed each point of error, *Bading*, 236 S.W.3d at 806-08, and described Petitioners’ third point as “Whether we should have addressed cross-issues properly briefed by the Zachry defendants” *Id.* at 806. The court concluded that issue three lacked merit and referred to a quotation from the University’s briefing to describe its decision: “[B]ecause there is no clear and unambiguous legislative or constitutional waiver of the University’s sovereign immunity for [Petitioners]’ third-party claims, the Court properly dismissed their claims for lack of subject-matter jurisdiction [T]hat unremarkable conclusion disposed of *all* of [Petitioners]’ claims” *Id.* at 806-07.

Although the court never mentioned the word “standing,” its decision is easily understood: because the court lacked subject-matter jurisdiction to entertain *any* of the claims against the University, it had no choice but to dismiss them, regardless of any standing issue. Subject-matter jurisdiction cannot be waived. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). Indeed, “a court is obliged to ascertain that subject matter

jurisdiction exists regardless of whether the parties have questioned it.” *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004). Therefore, even if the University had not raised the jurisdictional issue, the court of appeals would have been required to confront it.

The moment the court of appeals concluded that it lacked subject-matter jurisdiction over Petitioners’ claims against the University, Petitioners’ standing argument became moot. It was, therefore, unnecessary for the court to consider the merits of the argument. Petitioners may disagree with that conclusion, but they cannot establish that the court failed to “address[] every issue . . . necessary to final disposition of the appeal.” *See* TEX. R. APP. P. 47.1. The court of appeals’s opinion satisfies Rule 47.1.

B. Remanding to the Court of Appeals Will Only Serve to Further Delay This Case.

Reversal for the alleged violation of Rule 47.1 is uncalled for, not only because the court of appeals complied with the rule, but because it would serve no practical purpose. To begin with, the University does have standing.² *Cf. Latham v. Castillo*, 972 S.W.2d 66, 70-71 (Tex. 1998) (addressing the merits of an argument, even though the court of appeals failed to comply with Rule 47.1). Petitioners do not deny that the University was joined to the lawsuit as a responsible third party, and the University surely has standing to contest its own improper joinder. The briefing that the University has already filed with the Court further

2. To be clear, Petitioners’ standing argument only applies to the University’s joinder as a responsible third party. There can be no question that the University has standing to challenge Scott-Macon’s attempts to join it for purposes of seeking monetary damages.

explains why the University has standing in this instance. *See* University’s Br. on the Merits in Resp. to Zachry’s Br. on the Merits 38-39.

Moreover, there is no indication that remand would lead to any conclusion that is different than the one the court of appeals already reached. For the reasons noted above, even if the court of appeals concluded that the University lacked standing, it would still have been required to dismiss the claims against the University once the court determined it lacked subject-matter jurisdiction. *See supra*, 3-4.

The remainder of Petitioners’ arguments concerning Rule 47.1 are easily dismissed. Petitioners’ assertion that the court of appeals violated their constitutional rights to due process and equal protection is without legal support. *See* Zachry Defs.’ Mot. for Reh’g 4, 9. Petitioners cite no case for the proposition that the United States Constitution requires state appellate courts to describe in detail those legal arguments that the court deems moot or irrelevant. As for Petitioners’ thinly-veiled allegations that the court of appeals was prejudiced in favor of the University, *see id.* at 3, 5 (suggesting the University was the “favored side[]” and claiming that the court “deliberately rushed to render judgments favoring” the University), Petitioners’ only “evidence” of bias or prejudice is that the court of appeals wrote a short opinion that did not find in favor of Petitioners. Petitioners’ exaggerated rhetoric is no substitute for evidence and law, and it does not raise this case to a level worthy of the Court’s attention.

This case has been pending since 2001. Because the court of appeals complied with Rule 47.1 and because remanding the case to the court of appeals would accomplish nothing but delay in these proceedings, the Court should deny Petitioners' motion.

II. BECAUSE THE RELEVANT LAW HAS BEEN AMENDED, THERE IS NO COMPELLING REASON TO HEAR THIS CASE.

This case revolves around language in the 1995 version of Texas's proportionate-responsibility statute which requires that responsible third parties be "joined" to the lawsuit. Act of May 18, 1995, 74th Leg., R.S., ch. 136, §1, 1995 Tex. Gen. Laws 971, 972 (amended 2003). In 2003, the proportionate-responsibility statute was amended to remove the joinder language. Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847, 855-59. Responsible third parties are now "designated." TEX. CIV. PRAC. & REM. CODE §33.004. Despite this fundamental change, Petitioners claim that the construction of the 1995 statute is still of "immense importance" to the State's jurisprudence. Zachry Defs.' Mot. for Reh'g 11-14. Yet, they fail to cite any case, under the either 1995 or 2003 version, that involves the same issue presented here—whether Petitioners can join the University as a responsible third party without showing a waiver of sovereign immunity.

Petitioners rely on *MCI Sales & Service, Inc. v. Hinton*, 272 S.W.3d 17 (Tex. App.—Waco 2008, pet. filed), as proof of a "continuing interest in" responsible third party issues under the 1995 statute. But, *MCI Sales* does not address any of the issues presented in this case. *MCI Sales* was a products liability suit between private parties and, therefore, never considered the impact of sovereign immunity on responsible third parties. The only

discussion regarding responsible third parties was whether the motion to join them had been timely filed.³ *Id.* at 35-36.

Petitioners appear to claim that *MCI Sales* stands for the proposition that the court of appeals was required to defer to the “discretion” of the trial court in this case. Zachry Defs.’ Mot. for Reh’g 12. That is simply wrong. Because *MCI Sales* concerned the timeliness of a motion for leave, the court in that case correctly applied an abuse of discretion standard. See *In re Arthur Andersen, L.L.P.*, 121 S.W.3d 471, 483 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). The instant case, however, asks whether sovereign immunity bars the joinder of the University as a responsible third party, which is an issue of law that is reviewed de novo. *Hoff v. Nueces County*, 153 S.W.3d 45, 48 (Tex. 2004) (per curiam) (stating that the Court reviews sovereign immunity pleas de novo because subject matter jurisdiction is an issue of law). No deference of any sort is required.

Petitioners’ discussion of *In re Grant Thornton, L.L.P.*, No. 14-03-00712-CV, 2004 WL 114978 (Tex. App.—Houston [14th Dist.] Jan. 26, 2004, orig. proceeding) (mem. op.), and *J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*, 192 S.W.3d 189, 201-02 (Tex. App.—Houston [14th Dist.] 2006, no pet.), is not illuminating either, as neither case considers the issues in this case. *Grant Thornton*, like *MCI Sales*, was about whether responsible third parties had been timely joined, 2004 WL 114978, at *2, and explicitly limited its ruling to the 1995 version of the proportionate-responsibility statute. *Id.* at n.2. *J.M.K. 6* concerned another

3. It does not appear that the court of appeals saw a connection between the two cases either, as *MCI Sales* did not cite *Bading*, even though both cases were decided by the same three justices.

statute entirely and referred to Texas's proportionate-responsibility statute only by way of analogy. 192 S.W.3d at 201-02 (comparing duty to timely join responsible third parties to duty to timely bring counterclaims and cross-claims). Neither case touches on the sovereign immunity issue presented here.

Finally, Petitioners cite two cases as examples of opinions that "thoughtfully discussed" "analogous issues." Zachry Defs.' Mot. for Reh'g 13-14. Both cases involve the Federal Tort Claims Act in which Congress waived the United States' immunity for certain tort claims. *In re N-500L Cases*, 691 F.2d 15, 19 (1st Cir. 1982) (listing issues as "whether appellants had a right to a jury trial and whether the district court erred in its findings of fault and allocation of liability"); *In re Colo. Springs Air Crash*, 867 F. Supp. 630, 632-33 (N.D. Ill. 1994) (concerning choice-of-law issue with respect to settlement credit amount). But, the fact that two federal courts wrote longer opinions on issues that are unrelated to those presented in this case is hardly a reason to believe that this case is of "immense importance."

Given that it has been almost six years since the language at issue in this case was removed from the statute, there is little chance of new litigation arising that would require the Court to issue an authoritative interpretation. Petitioners have wholly failed to show that there is any ongoing need for the Court's intervention. The Court should deny the motion.

PRAYER

The Court should deny Petitioners' Motion for Rehearing.

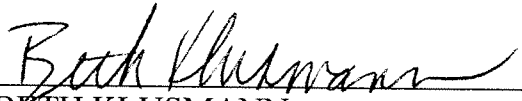
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CERTIFICATE OF SERVICE

I certify that on April 13, 2009, a true and correct copy of this Response to Motion for Rehearing was served by certified U.S. mail, return receipt requested, on all appellate counsel of record in this proceeding as listed below:

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