

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

**MOTION OF TEXAS A&M UNIVERSITY TO DISMISS PETITIONERS' CASES
AS MOOT PURSUANT TO TEXAS RULE OF APPELLATE PROCEDURE 56.2**

Petitioners' cases against Texas A&M University should be dismissed as moot. The University settled with the Plaintiffs in the underlying action in October 2008 (after the close of merits briefing in this matter) as part of a global settlement agreement that primarily involved various University officials, but also included the University as well. As a result, the University is now a "settling person" under Chapter 33 of the Civil Practice and Remedies Code. This fact moots the cross-actions and third-party petition filed by the Zachry Defendants and Scott-Macon against the University. Accordingly, the Court should dismiss Petitioners' cases as moot, while leaving the opinion of the court of appeals intact. *See, e.g.,* TEX. R. APP. P. 56.2; *Ritchey v. Vasquez*, 986 S.W.2d 611, 612 (Tex. 1999).

I.

The cross-action and third-party petition filed by the Zachry Defendants in the trial court below sought to join the University as a “responsible third party” in the underlying suit pursuant to Chapter 33. The Zachry Defendants sought this result, they say, *solely* in an effort to place the University on the jury verdict form for purposes of assigning proportionate responsibility—and not to impose actual party status or liability on the University. The University has maintained that this might have been permitted were this case governed by current law as amended in 2003—but it is plainly not permitted under the previous version of Chapter 33 that (the parties agree) applies to this case.¹ Applicable law provides only that a defendant may effect a “joinder” of a “responsible third party” so that a defendant may file a “third party claim” against it. TEX. CIV. PRAC. & REM. CODE § 33.004. That cannot be done here due to the University’s sovereign immunity, as the court of appeals correctly held. *See also* TEX. CIV. PRAC. & REM. CODE § 33.011(6)(A) (defining “responsible third party”).

Now that the University has settled with the Plaintiffs in the underlying litigation, the University is a “settling person” under § 33.011(5) of the Texas Civil Practice and Remedies Code. And § 33.003 makes clear that all “settling person[s]” shall be listed on the jury verdict form. As a result, it is now inevitable that the University will appear on the jury

1. References to the Texas Civil Practice & Remedies Code are to the version enacted in 1995, which is the applicable version in this case. *See* Act of May 10, 1995, 74th Leg., R.S., ch. 136, 1995 Tex. Gen. Laws 971.

verdict form—the only result the Zachry Defendants say they sought in filing their original cross-action and third-party petition.

This fact moots the entire case brought by the Zachry Defendants against the University in the trial court below. The Zachry Defendants suffer no harm by having the University listed on the jury verdict form (correctly) as a settling person, rather than (incorrectly—and unlawfully) as a non-settling “responsible third party.”

Indeed, the Zachry Defendants themselves have already said as much, in a motion they filed with this Court on November 3, 2008. Page 3 of that motion states that “the Zachry defendants believe Texas A&M University is now (and forever will be) a ‘settling person’” as to all plaintiffs. *See also infra*, at 5-6 (discussing Zachry’s November 3, 2008 motion).

II.

The University’s status as a “settling person” also largely moots the cross-action filed by Scott-Macon in the trial court. That cross-action seeks to join the University as a “responsible third party” for purposes of obtaining contribution under Chapter 33. The University has maintained that its sovereign immunity prevents Chapter 33 from being used against it for purposes of contribution—especially because Plaintiffs themselves could not have filed suit against the University in the first place, under the Texas Tort Claims Act and the established precedents of this Court. *See, e.g., Tex. A&M Univ. v. Bishop*, 156 S.W.3d 580 (Tex. 2005) (use of property); *Johnson County Sheriff’s Posse, Inc. v. Endsley*, 926 S.W.2d 284 (Tex. 1996) (premises defect).

These issues are now moot as well, because Chapter 33 makes clear that “[n]o defendant has a right of contribution against any settling person.” TEX. CIV. PRAC. & REM. CODE § 33.015(d). Now that the University is a “settling person,” Scott-Macon no longer has any right of contribution against the University.

Indeed, Scott-Macon itself has already indicated as much. On page 3 of its filing with the Court on December 4, 2008, Scott-Macon said that its “contribution claims are moot . . . if Texas A&M University is a ‘settling person’ under the applicable version of Chapter 33.”

That still leaves the indemnity claim filed by Scott-Macon against the University in this matter. But the indemnity claim is plainly meritless—and certainly unworthy of this Court’s review in any event—in light of established precedent. *See, e.g., Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 597 (Tex. 2001) (“[T]here is but one route to the courthouse for breach-of-contract claims against the State, and that route is through the Legislature.”); *Tex. Natural Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 860 (Tex. 2002).²

III.

In light of these developments, the Court should dismiss Petitioners’ cases as moot and vacate the judgments of both the district court and the court of appeals—while leaving the opinion of the court of appeals intact.

2. Petitioner Texas Aggie Bonfire Committee had previously joined Scott-Macon in its Petition. But TABC has also settled with Plaintiffs—accordingly, TABC and the University filed a joint motion with this Court asking that the Petition be dismissed with respect to TABC. The Court denied the motion as moot when it initially denied both Petitions for Review.

Rule 56.2 of the Texas Rules of Appellate Procedure expressly provides that, “[i]f a case is moot, the Supreme Court may, after notice to the parties, grant the petition and, without hearing argument, *dismiss the case* or the appealable portion of it without addressing the merits of the appeal.” TEX. R. APP. P. 56.2 (emphasis added).

Consistent with Rule 56.2, the appropriate procedure to follow in this case appears to have been established by the Court in *Ritchey*, 986 S.W.2d at 612. There, as here, the underlying case became moot while the matter was pending before this Court on petition for review. The Court responded by holding that “the petition for review is granted, the judgments of the court of appeals and of the district court are vacated without reference to the merits, and the cause is dismissed as moot.” *Id.*

Notably, the Court in *Ritchey* expressly declined a request by petitioners to vacate the *opinion* of the court of appeals, viewing such a request as inconsistent with the Court’s “usual procedure.” *See id.* (“Petitioners move us to vacate the court of appeals’ opinion, but we decline to do so, consistent with our usual procedure.”) (citation omitted). *See also* TEX. R. APP. P. 56.2 (“If a case is moot, the Supreme Court may . . . dismiss the case or the appealable portion of it *without addressing the merits of the appeal.*”) (emphasis added).

Petitioners in this case have made no such request in any event. *See infra*, at 5-6.

IV.

The Zachry Defendants previously requested that their Petition for Review be dismissed as moot, as an alternative to their November 3, 2008 motion to amend their

Petition. They did so provided that this Court affirmatively hold that the University is indeed now a “settling person” for purposes of Chapter 33. The University opposed the motion.

Technically, the rules do not provide for dismissal of a petition for review as moot under these circumstances. The proper result, as previously noted, is for the Court to grant the petitions for review and dismiss Petitioners’ cases as moot, while leaving the opinion of the court of appeals intact. It is nevertheless noteworthy that the Zachry Defendants have previously sought to moot this litigation based on the settlement agreement—and that moreover, in doing so, the Zachry Defendants did not seek to vacate the opinion of the court of appeals below.

The present Motion is not filed for purposes of delay. Due to staff turnover, the Office of the Attorney General has had to assign new counsel to handle this matter. This is the first document that has been filed by undersigned counsel since taking over this matter as lead counsel. (In any event, mootness is jurisdictional and thus can be raised at any time, either by the parties or on the Court’s own motion. *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). *See, e.g., Clayton Brokerage Co. v. Mouer*, 531 S.W.2d 805, 806 (Tex. 1976) (dismissing case as moot on motion for rehearing).)

The November 3, 2008 motion of the Zachry Defendants was filed before the Court took any action on their Petition for Review. Indeed, the Court subsequently denied their Petition on January 9, 2009 (but later granted their motion for rehearing on May 15, 2009). The University continues to believe that the Court was correct in its original decision to deny

the Petition for Review; that the judgment of the court below was plainly correct; and that the Petition does not raise issues worthy of this Court's attention.

Most importantly, the University believes that the Court may now avoid addressing the various legal issues presented by both Petitions by dismissing Petitioners' cases as moot.

V.

For these reasons, the University respectfully requests that the Court dismiss both Petitioners' cases as moot, while leaving the opinion of the court of appeals intact.

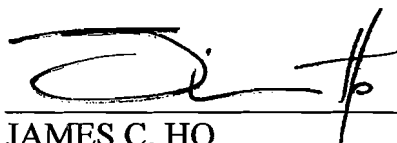
Oral argument is presently scheduled in this matter for September 8, 2009. Unless the Court decides not to hear oral argument in this matter, the University will appear and address any questions about the Petitions and about this Motion to dismiss Petitioners' cases as moot.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "J. Ho", written over a horizontal line.

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COUNSEL FOR TEXAS A&M UNIVERSITY

CERTIFICATE OF CONFERENCE

On August 26, 2009, I contacted counsel for both the Zachry Defendants and Scott-Macon by telephone. Both indicated by electronic mail on August 27, 2009, that they are opposed to this motion.


James C. Ho

CERTIFICATE OF SERVICE

I certify that on August 27, 2009, a true and correct copy of the foregoing document was served by certified U.S. mail, return receipt requested, on:

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In addition, courtesy copies were sent to all counsel by electronic mail on August 27, 2009.


Beth Klusmann