

# Cause No. 07-1050

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IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

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*Zachry Construction Corporation, et al.,*

Petitioners

vs.

*Texas A&M University,*

Respondent

Petitions for review from 11-14-2007 judgment in No. 10-05-00139-CV, Tenth Court of Appeals District, at Waco (8-15-2007 and 11-14-2007 opinions and 8-16-2007 and 11-14-2007 special notes published at **236 S.W.3d 801**), from Brazos County, Texas, 361st Judicial District (Honorable Steve Smith, Presiding)

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**Petitioners' Response and Opposition to Motion of Texas A&M University to Dismiss Petitioners' Cases as Moot Pursuant to Tex. R. App. P. 56.2**

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Counsel for petitioners the Zachry defendants

**ORAL ARGUMENTS SEPTEMBER 8, 2009**

To the Honorable Supreme Court of Texas:

The Zachry defendants have no “case” against Texas A&M University, there is no settlement agreement between Texas A&M University and the Zachry defendants, and this cause is not even close to moot. The solicitor general’s recent substitution as lead counsel and his personal participation belie Texas A&M University’s prior protestations that the issues now before this court are unimportant to Texas jurisprudence. The Zachry defendants are obeying an August 27, 2009, letter from the clerk’s office stating that a response “is due to be filed in this office no later than **5:00 p.m., September 1, 2009.**”

#### **UNDISPUTED PROCEDURAL BACKGROUND FOR THE 8-27-2009 MOTION**

Pursuant to this court’s request, supreme court case no. 07-1050 was fully briefed on the merits at considerable expense to the actual parties. The case was admitted into this court on May 15, 2009, when five or more of the eight participating justices appropriately granted the petitioners’ motions for rehearing and their petitions for review. Tex. Gov’t Code Ann. § 22.007(e) (Vernon 2004); *Saenz v. Fidelity & Guar. Ins. Co.*, 925 S.W.2d 607, 612 (Tex. 1996). On July 10, 2009, the court scheduled this cause for oral arguments on September 8, 2009. Preparations for oral arguments ensued.

Late on the afternoon of August 26, 2009, Texas’s solicitor general James C. Ho (with two of his assistants) telephoned the Zachry defendants’ undersigned counsel to advise his office planned to file a motion orally described as a motion to “dismiss” the petitions as “moot.” The Zachry defendants’ undersigned counsel expressed concern that unless the judgment of the court of appeals were vacated or reversed, the Zachry defendants would have no choice but to oppose such a motion. At 9:36 the following

morning, August 27, 2009, the Zachry defendants confirmed their worry in an e-mail:

jim beth and kris, thanks to the three of you for all calling me to confer (late yesterday wednesday 8-26-2009) and to inform me about your new planned motion to dismiss. as you know, we still have not seen a draft of your planned motion, but i will go ahead and send this now because you indicated you were trying to get your motion completed "and" filed before close of business today thursday 8-27-2009, and i don't want to slow you down completing your required certificate of conference to the court.

out of an abundance of caution, the zachry defendants are opposed to any dismissal of the petitions for review. (my understanding from randy nelson is scott-macon also opposes dismissal of the petitions for review but i am copying him so he can confirm or otherwise state his client's position.) i think vacatur of the 10th ca's 11-14-2007 modified judgment is required if the supreme court agrees with texas a&m university's new position that the appeal as between the zachry defendants and texas a&m university is now moot. i also think texas a&m university is required, if it files this new motion, to disclose the following texas supreme court authority i am sure each of you already knows about: Valley Baptist Medical Center v. Gonzalez, 33 S.W.3d 821 (Tex. 2000) (per curiam), rev'g 18 S.W.3d 673 (Tex. App.--Corpus Christi 1999) (en banc).

respectfully, bt

At 1:24 the afternoon of August 27, 2009, Texas A&M University's new lead counsel replied back:

Thank you both for your reply. We will list you both as opposed.

I should clarify that the motion is technically styled not to dismiss the PFRs as moot, but to dismiss Petitioners' entire cases as moot. But I would not expect that fact alone to alter your analysis.

Thanks again and take care.

At 1:38 p.m. Zachry's undersigned counsel replied:

i would think the relief requested will be most import [*sic*], and the relief described during our late afternoon conference yesterday was "dismissal" of the petitions for review as "moot". we still of course have only an oral description of the relief requested; i agree we have sufficiently conferred about the merits; and the zachry defendants (and i expect scott-macon also)

remain opposed to any dismissal motion that does not include vacatur of the 10th ca's 11-14-2007 modified final judgment.

jim, beth has been kind enough in the past to immediately pdf me an emailed extra copy of other relatively recent filings, and in light of the lateness of this motion in relation to the scheduled oral arguments, if you could repeat that courtesy it would help us make sure our clients can be fully advised of texas a&m university's newest position as soon as possible once the motion has been filed with blake's office. (united states mail from austin to dallas tends to be pretty slow!)

When the Zachry defendants later saw Texas A&M University's actual 8-27-2009 motion, they had to oppose it as written. Instead of neutrally presenting Texas A&M University's *new* position that this cause is now moot, it tiresomely *re-argued* Texas A&M University's (already fully briefed) views about the merits scheduled for oral arguments on 9-8-2009. *See, e.g.*, 8-27-2009 motion at 2 (arguing joinder of Texas A&M University as a responsible third party *solely* for purposes of assigning proportionate liability "is plainly not permitted" and "the court of appeals correctly held" that "cannot be done here due to the University's sovereign immunity . . ."); 8-27-2009 motion at 4 (arguing Scott-Macon's indemnity claim "is plainly meritless"); 8-27-2009 motion at 6-7 (arguing that "the judgment of the court below was plainly correct").

### **THIS CAUSE IS NOT EVEN CLOSE TO MOOT**

The Zachry defendants have no case against, and are not seeking any monetary relief from, Texas A&M University. The trial court's orders permitting "joinder" for "percentage of responsibility" purposes were reversed when the 10th CA's 11-14-2007 modified judgment ordered that "Texas A&M University's pleas to the jurisdiction" were granted "in accordance with the opinion of [the Waco] court." Zachry pet. tab 1 (last

page). The 10th CA's 11-14-2007 opinion on rehearing said the court had "render[ed] an order granting the University's pleas and dismissing all of Appellees' claims for lack of jurisdiction." *Id.* at 12 (236 S.W.3d at 811). The 10th CA's 8-15-2007 opinion said that "sovereign immunity bars all of the Appellees' claims, whether for contribution, indemnity, *a determination of proportionate responsibility*, or based in contract. *Id.* at 3 (236 S.W.3d at 803) (italics added).

In a transparent effort to avoid this Court's decision on the merits, Texas A&M University judicially admits not only that it is a "settling person" under section 33.011(5) of the Texas Civil Practice and Remedies Code, but also that it is "inevitable that the University will appear on the jury verdict form . . ." (8-27-2009 motion at 2-3). That certainly seems to be the solicitor general's new opinion, and the Zachry defendants agree that Texas A&M University *should* be submitted in the jury charge, whether as a responsible third party, a settling person, or both. But the solicitor general does not speak for all the Bonfire wrongful death and personal injury plaintiffs (nor did he serve them with a copy of Texas A&M University's 8-27-2009 motion). And neither the solicitor general's opinion, nor the Zachry defendants' opinion, binds the plaintiffs or the learned trial judge (Hon. Steve Smith). Until this court reverses or vacates the decision below, the only things that bind the trial court are the 10th CA's 11-14-2007 modified judgment and the 10th CA's purported opinions published at 236 S.W.3d 801.

The applicable version of section 33.003 provides that the trier of fact "shall" determine the percentage of responsibility of "(1) each claimant; (2) each defendant; (3) each settling person; and (4) each responsible third party who has been joined under

Section 33.004.” Tex. Civ. Prac. & Rem. Code Ann. § 33.003 (before inapplicable HB4 amendments in 2003) (Zachry pet. tab 2). “Settling person” means “a person who at the time of submission has paid or promised to pay money or anything of monetary value to a claimant at any time in consideration of potential liability pursuant to the provisions of Section 33.001 [*sic*] with respect to the personal injury, property damage, death, or other harm for which recovery of damages is sought.” Tex. Civ. Prac. & Rem. Code Ann. § 33.011(5) (before inapplicable HB4 amendments in 2003).

This Court knows from reading the briefs that Texas A&M University has previously argued (here, and with remarkable success in Waco) that (1) it is not a “person,” (2) there has been no applicable waiver of sovereign immunity, and (3) it is not subject to any kind of “liability” for the 1999 Texas A&M University Bonfire tragedy. Not one of the Bonfire wrongful death and personal injury plaintiffs has judicially admitted that Texas A&M University’s settlement makes Texas A&M University a “settling person” (or even a “person”) who “inevitably” will “appear on the jury form” for proportionate responsibility purposes (*cf.* 8-27-2009 motion at 2-3).

As things currently stand, this cause is not anywhere *near* moot. *Cf. Texas Farmer Ins. Co. v. Soriano*, 844 S.W.2d 808, 842 & n.8 (Tex. App.--San Antonio 1992) (Peeples, J., dissenting), *modified*, 881 S.W.2d 312 (Tex. 1994) (“under our ethical rules can advocates be faulted for trying to structure their lawsuits for full collection, to the extent the cases allow it”). If the solicitor general gets his way and the 10th CA’s purported opinions are not vacated, who could blame plaintiffs’ counsel for objecting to the submission of Texas A&M University and arguing: “Judge Smith, the Waco Court of

Appeals held sovereign immunity bars *all* of the defendants' claims against the University, including a determination of proportionate responsibility.”<sup>1</sup> While the Zachry defendants believe any such objection should (and would) be overruled, the facial plausibility of the argument proves this cause is not even *close* to moot.

The solicitor general's overreaching request that judgment of the court of appeals *and* the district court's orders<sup>2</sup> should be vacated (8-27-2009 motion at 4) — “while leaving the opinion of the court of appeals intact” (*id.*) — is unfair to the hardworking trial judge (*see* 212005.RR.44-45), whose orders were reversed without compliance with appellate rule 47. Moreover, the relief suggested by solicitor general would apply only if there had been a settlement between Texas A&M University and *these petitioners*.<sup>3</sup>

The solicitor general would not be personally advocating the 8-27-2009 motion (which he prefers to argue over the merits) if the issues resolved in the 10th CA's opinions were not important to Texas jurisprudence. And while Texas A&M University's decision to pay settlement dollars to the plaintiffs is inconsistent with its pleas to the jurisdiction (and matter-of-fact assertions about the 10th CA's allegedly “correct” opinions), *these petitioners* have done nothing to moot *this* cause, and they (like

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<sup>1</sup> *See Texas A&M University v. Bading*, 236 S.W.3d 801, 803 (Tex. App.--Waco 2007, petitions granted [cause no. [07-1050](#)]) (superficially and sweepingly adopting the Attorney General's “briefs” and “oral arguments” and thus opining that “sovereign immunity” bars “all” of the Zachry defendants' claims, including “a determination of proportionate responsibility . . .”).

<sup>2</sup> There was no “judgment” of the district court. (This was the only error the 10th CA agreed both to disclose *and* correct in its opinion on rehearing. 236 S.W.3d at 807.)

<sup>3</sup> *See generally Houston Cable TV, Inc. v. Inwood West Civic Ass'n*, 860 S.W.2d 72, 73 (Tex. 1993) (per curiam) (emphasizing “public purpose” of our Texas state courts of appeals and their published opinions, as here, addressing “matters of public importance”).

the hardworking trial judge) should be entitled to at least one true appellate review.

Again, the Zachry defendants are not seeking any dollars from Texas A&M University; have not settled with Texas A&M University; and have not enjoyed (like Texas A&M University) appellate due process, compliance with appellate rule 47, nor any semblance of the equal protection of the law. *See In re Columbia Medical Center of Las Colinas*, 52 Tex. Sup. Ct. J. 1016, 1020 (July 3, 2009) (orig. pro.) (reminding that all Texas appellate courts have a duty to “explain by written opinion their analyses and conclusions as to the issues necessary for final disposition of an appeal”) (citing Tex. R. App. P. 47.1 and Tex. R. App. P. 63); *accord* U.S. Const. amend. XIV, § 1.

Even ignoring the flawed process, unequal treatment, and resulting bad published opinions below, “[t]he court’s action in this cause does affect the rights of the parties.” *VE Corp. v. Ernst & Young*, 860 S.W.2d 83, 84 (Tex. 1993) (per curiam); *accord Black’s Law Dict.* 909 (5th ed. 1979) (a case is “moot” *only* “when a determination is sought on a matter which, when rendered, *cannot* have any practical effect on the existing controversy”) (italics added). As things **currently** stand, Texas A&M University’s new mootness argument is simply wrong as a matter of law.

### **CONCLUSION AND PRAYER**

If (but **only** if) this court makes an express determination (as a matter of **law**) that Texas A&M University is now (and will be at the time of jury submission) a “settling person” for proportionate responsibility purposes (and that therefore the “responsible third party” “join[der]” issue is moot), then, and **only** in that event, the Zachry defendants respectfully would agree that, without reaching the merits, this court could grant the

petitions for review, vacate the 10th CA's 11-14-2007 modified final judgment without reference to the merits, and dismiss any purported "case" between Texas A&M University and the Zachry defendants.

Otherwise, this cause is nowhere near moot and the Zachry defendants continue to request that the court reverse the Waco court's 11-14-2007 modified judgment, and then render its own judgment affirming (or alternatively dismissing Texas A&M University's purported appeal from) the district court's orders permitting Texas A&M University's joinder merely for proportionate responsibility purposes. Unless a majority of the eight participating Justices constituting the court until September 7, 2009, orders otherwise, the Zachry defendants' undersigned counsel will appear for the oral arguments properly scheduled for September 8, 2009.

The Zachry defendants request that the Court deny Texas A&M University's Motion to Dismiss Petitioners' Cases as Moot Pursuant to Tex. R. App. P. 56.2. Alternatively, the Zachry defendants request that Texas A&M University's 8-27-2009 motion be carried with the case for any appropriate discussion during oral arguments previously scheduled to be heard on 9-8-2009.

(The Zachry defendants' undersigned counsel is authorized to state that petitioner Scott-Macon, Ltd. joins in and adopts this response and the relief requested above.)

Respectfully submitted,

FULBRIGHT & JAWORSKI L.L.P.

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## CERTIFICATE OF FILING AND SERVICE

I certify that a .pdf copy of this response has been transmitted by e-mail to [blake.hawthorne@courts.state.tx.us](mailto:blake.hawthorne@courts.state.tx.us) and [claudia.jenks@courts.state.tx.us](mailto:claudia.jenks@courts.state.tx.us) before **4:00 p.m. on September 1, 2009** (with thirteen paper copies hand delivered to Blake Hawthorne's office before 5:00 pm) (no filing fee per the clerk's 8-27-2009 letter), and paper copies have also been sent by first-class United States mail today, **September 1, 2009**, to the persons, parties and other interested parties listed below:

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501 Washington Avenue, Rm. 415  
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**(with copy of 8-27-2009 motion)**

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(additional interested district court parties follow on the next page)

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