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Supreme Court of Texas.
TEXAS A & M UNIVERSITY-KINGSVILLE, et al., Petitioners,
v.
Grant M. LAWSON, Respondent.
No. 00-1127.

November 14, 2001.

Appearances:
Meredith Bishop Parenti, Weil Gotshal & Manges, Austin, TX, for
Petitioners.
Bradley L. Houston, Bradley L. Houston, P.C., Austin, TX, for
Respondents.

Before:

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

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JUSTICE: The Court is ready to hear argument from petitioner in
Texas A & M University Kingsville v. Lawson.

SPEAKER: May it please the court. Ms. Meredith Parenti will
present argument for petitioner. Petitioner has reserved five minutes
for rebuttal.

ORAL ARGUMENT OF MEREDITH BISHOP PARENTI ON BEHALF OF THE PETITIONER

MS. PARENTI: May it please the court. For over 150 years, both the
legislature and this Court have agreed on, at least one, thing. That it
is a legislature's prerogative to grant or deny waivers of sovereign
immunity. In amending Chapter 2260, the legislature made clear that
Chapter 107 remains the one route to the courthouse for breach-of-
contact claims not covered by Chapter 2260.

JUSTICE: Since our decisions in [inaudible] those cases, the
legislature came back in and threw us back into the position we were in
before 2260, didn't they? On some contracts and my question is
[inaudible] contracts?

MS. PARENTI: No, your Honor. But the legislature, in amending
2260, simply made clear that certain contracts would not be covered by
2260 but it expressly asserted its authority to grant or deny waivers

of sovereign immunity in section 2260.007 --

JUSTICE: But --

MS. PARENTI: -- the court, I mean, the legislature expressly stated they've retained authority to deny or grant waivers --

JUSTICE: Let me just rephrase my question. By carving out these contracts that were executed before a certain date and, I assume, this is one of those.

MS. PARENTI: This is a contract we admit it is not covered by Chapter 2260.

JUSTICE: Okay. By specifically carving that out after our decisions in those cases, don't they throw us back into the pre-2260 jurisprudence that had some waiver about conduct cases [inaudible]. In other words, aren't we now faced directly with that question?

MS. PARENTI: No, your Honor. The legislature made clear in its legislative history that it did not question the underlying premise of Little-Tex that -- and it simply wanted to clarify that parties could always go to the legislature regardless of 2260, they can always directly petition the legislature under Chapter 107.

JUSTICE: But as I recall the premise of Little-Tex, it was that the legislature has, by enacting 2260, demonstrated its intent to control this field. And because of that intent, we are going to find that waiver by conduct exception. Then the legislature went back after we did that and said, "No, not as to these contracts." Is it that not a signal to us some way about the legislature that they wanted us to end the laws that were established before 2260?

MS. PARENTI: No, your Honor. They did not question the court's finding in Little-Tex that that apart from the special statute grants and consent to sue, a party simply may not sue the State absent consent, legislative consent under Chapter 107, or some other statute. And in this case, there is no clear unambiguous legislative consent to sue. Respondent is attempting to file suit directly in the court without bypassing the legislature.

JUSTICE: But why did the legislature go back and amend after our decisions, do you know?

MS. PARENTI: Well, your Honor, from the legislative history it appears that the legislature wanted to make it easier for certain contracts to go directly to the legislature. For example, contracts over 250,000 that were subject to 2260 previously wouldn't have to go to the administrative procedures even though they would not have been able to get an appropriation. Contracts over 250,000 would have had to be referred back to the legislature. And it would have -- basically, the legislature was making it easier for certain contracts to -- for all contracts to directly go to the legislature to seek consent under Chapter 107. So, in a sense, it did make it easier for certain -- for contracts [inaudible] --

JUSTICE: Was that an [inaudible], did they?

MS. PARENTI: Yes, your Honor. Actually, the legislative history -- and we've -- the State decided it in IT-Davy case, in the briefing there --

JUSTICE: No. I'm talking about the legislative history of the latest amendment of 2260.

MS. PARENTI: Yes, your Honor. In the requested supplemental briefing in the IT-Davy case, we have legislative history asserted that shows that the legislature wanted to make it easier for parties to go directly to the legislature rather than going through Chapter 2260 when those procedures could not grant relief to a party --

JUSTICE: But --

MS. PARENTI: -- over -- with the contract over 250,000.

JUSTICE: Alright. I don't remember. It's been a while since I've read those briefs but I thought that the amendment dealt with contracts executed before a certain date, not as to certain amounts. And how does that square with the legislative intent as you've just expressed there.

MS. PARENTI: Well, the statute does exempt certain contracts, the contracts that were entered into prior to August 30th of 1999.

JUSTICE: And why?

MS. PARENTI: Many of those contracts were the older contracts that were in existence, were over 250,000, that -- those were still around and were -- would not have been able to get an appropriation directly to the administrative procedures. They would have had to go through the administrative procedures and then, gone to the legislature to get a waiver still. So, basically, in enabled parties -- the legislature expressed that it always has retained the authority to grant or deny waivers of sovereign immunity. And some contracts are going to fall under 2260 --

JUSTICE: They may have said that but we've said all along that sovereign immunity was a creation of the court. The court could do away with it. So, I mean, it's nice that the legislature to say, "Well, this is ours," but that's the [inaudible].

MS. PARENTI: Well, Justice Enoch, we, respectfully, disagree with that -- the idea of sovereign immunity was -- is inherent -- the principle of sovereignty to be immune from suits without the legislature's consent. And, indeed, this Court in its first case, *Herring v. Houston National Exchange Bank*, considered this issue and the breach-of-contract case situation and found that it was -- it is inherent and it is generally recognized as an attribute of sovereignty to be immune from suit without the legislature's consent. But, regardless, what we have here is, the legislature has essentially occupied the field of waivers immunity and breach-of-contract cases --

JUSTICE: If we didn't -- if we didn't have the timing issue with the amendment to section 2260, would 2260 even apply in any event since it governs contracts for goods and services. I mean, it doesn't seem to me that it [inaudible] of the statute and if we didn't have the timing amendment.

MS. PARENTI: We don't believe that it falls within the statute. The Third Court of Appeals in an unpublished opinion stated they believed that settlement agreements could be treated as services contracts --

JUSTICE: But that's not the State's position.

MS. PARENTI: We are not arguing that and we don't disagree that Chapter 2260 does not apply in this case. But what does apply is that Chapter 107 requires the party -- a party to go to the legislature to get legislative consent to sue prior to filing a suit and either the contract falls under the 2260 or it doesn't and Chapter 107 applies. But together, those two provisions address all breach of contract claims against the State even they go to 2260 --

JUSTICE: You were not immune from the underlying claim.

MS. PARENTI: I'm sorry --

JUSTICE: You were not immune from the underlying claim, is that correct?

JUSTICE: And that's where I wanna go --

MS. PARENTI: No --

JUSTICE: -- that the records can't [inaudible] about what the causes of action were in the underlying claim and whether the State filed a plea to the jurisdiction. What happened there?

MS. PARENTI: It was a suit for wrongful termination. And that case was settled. That is a case that -- if immunity had been waived for the wrongful termination suit, that does not apply to this lawsuit.

JUSTICE: I understand the difference. I just wanna understand what happened down below. So, in the first case, is it the State's position that immunity was waived?

MS. PARENTI: It was a suit for wrongful termination. And I believe that the State would have waived the sovereign immunity for that.

JUSTICE: Okay. And then under that circumstance, why would anybody ever settle with the State then if there was no immunity in the first instance? Why, all of a sudden, now settle with the State if there's -- if the State's gonna force immunity against itself from the underlying settlement hearing?

MS. PARENTI: Well, your Honor, there's no evidence that the State is routinely breaching settlement agreements --

JUSTICE: Well, if it just does it once every hundred years. Why would you ever do it? Why would you trade a case where the State doesn't have immunity for a case in which they do?

MS. PARENTI: Well, in -- this settlement agreement is example of -- the primary benefit of settlement agreements is generally monetary. And there's no question that respondent was paid with the \$62,000 by the State.

JUSTICE: But what if he weren't? He still couldn't sue you for the money. That's your position.

MS. PARENTI: He could sue the State only after obtaining legislative consent under Chapter 107. And there is a remedy for the --

JUSTICE: He could have gotten a judgment against the State for whatever damages he was entitled after the trial. The State's not immune. But you could settle the case, sign the document, promise to paying the money and the next day telling, "Sorry, you screwed up for not paying me the money."

MS. PARENTI: Well, generally --

JUSTICE: Go see the legislature.

MS. PARENTI: That has not been the case --

JUSTICE: But you could do that.

MS. PARENTI: That could happen --

JUSTICE: Yeah.

MS. PARENTI: -- but -- there -- a party who would be aggrieved in such a way would certainly have a remedy and could go to the legislature. And the legislature's indicated its willingness to take on these cases. And if, indeed, it becomes problematic that the State is breaching settlement agreements, the legislature -- it is the legislature's role to come in and create a new remedy. And they could craft a new provision that would address settlement agreements or --

JUSTICE: Or they could say, "I'd rather this money go toward highway construction."

MS. PARENTI: They --

JUSTICE: And not try to remedy.

MS. PARENTI: They could not but -- or they can -- they can address these claims directly under Chapter 107 as parties have traditionally been required to and for the -- the court should continue to defer as the legislature now that it has expressed its intention to maintain its -- and it has repeatedly expressed its intention to maintain the exclusive authority to grant or deny waivers of sovereign immunity. If the court were to grant -- craft some kind of a judicially imposed exception to sovereign immunity for settlement agreements, it would --

JUSTICE: That would just say that if you settle a case that you're

not immune from liability and -- you're not immune from liability on the settlement. That seems like a fairly easy route.

MS. PARENTI: Well, your Honor, that would conflict with the court's [inaudible] precedent. It would conflict with the court's holding at Federal Sign that merely by executing a contract that the State cannot waive sovereign immunity and Little-Tex the court held by the State's conduct, it cannot waive its sovereign immunity and --

JUSTICE: In fact, then, the court held that jurisdiction -- that waiver of the right to be sued or the right to not be sued is a jurisdictional inquiry that can be raised at any time.

MS. PARENTI: Yes, your Honor.

JUSTICE: So, irrespective of whether or not you waive jurisdiction and if it's a waived sovereign immunity back to be sued, originally, can be raised at any time. I mean, the court wouldn't have jurisdiction on that. So, you know, this gentleman's gotta go to legislature and get in its redress.

MS. PARENTI: And that is the proper body. The people's representatives in the legislature are best equipped to address policy. The questions such as -- are raised in the suit because, otherwise, if the court were to craft one, I think that would create a Pandora's box of litigation --

JUSTICE: -- policy decision. Why hasn't an argument been made with the decision to settle the lawsuit which the State contends it had the authority, I've gathered, to settle the lawsuit and agreed to various terms including the payment of money. Why aren't those decisions already made?

MS. PARENTI: Because your Honor there is no clear and unambiguous legislative consent to waive suit. All you have --

JUSTICE: But is it the Governor's office in the Counselor's office who ratified this decision?

MS. PARENTI: Yes, your Honor. But that is not a legislative decision and what you have --

JUSTICE: That's right.

MR. HOUSTON: -- in reaching a settlement agreement, only a handful of -- of officials -- state officials can basically agree to bind to the State to potentially far reaching, ill-conceived, and expensive settlements without the input of the people's representative --

JUSTICE: -- that expensive, then the State's never gonna be able to settle the case now. I mean, plaintiffs are gonna be forced to try their cases to judgment. They have no choice but the settlements are [inaudible].

MS. PARENTI: Your Honor, this is nothing new that -- nothing has changed but the court upholds its consistent precedent would not --

JUSTICE: No. But my question is, it ain't gonna hurt the State's ability to settle? Plaintiffs are no longer gonna be willing to settle their cases [inaudible]

MS. PARENTI: No, your Honor. We don't believe so because parties do have a remedy in going to the legislature if the legislature is equipped to handle this under Chapter 107 and it's expressed its intention to do so --

JUSTICE: But why -- if you got a jury -- it's gonna be there in a week or two or three or four months or whenever -- why would you trade that for the legislature in the great by and by, which maybe you'll get there or maybe you won't --

MS. PARENTI: Because --

JUSTICE: -- just go to trial and take your chances and if you win, you win. If you lose, you lose.

MS. PARENTI: This is inherent to the nature of sovereignty to be immune from suit and it is inherent in the separation of powers in the State to -- for the legislature to address, to waive sovereign immunity, and it is not a judicial role for the courts to step in and craft a judicial aggregates of immunity. The court is always understood it may not selectively aggregate sovereign immunity where here the legislature has crafted a remedy for certain breach-of-contract claims. They have Chapter 107 to address all other breach-of-contract claims. If the court stepped in and say, "Well, despite this legislative action, we're going to create something new."

JUSTICE: [inaudible] back to this Federal Sign and IT-Davy? Aren't you, in fact, feeding back to this Federal Sign which says that, "No matter who enters into the contract, that you have to state that you can't be sued over breach-of-contract in our court." And IT-Davy that says, "Even if you perform the contract, you can't be sued in our court unless you'd have permission legislature." And a settlement agreement is no different from people giving up various rights. They enter into an agreement for a subsequent promise to pay or subsequent promise takes on a sort of action. And the question is, can the State be bound by that agreement and we've said, "Without permission of the State, you can't." Ain't that what we've said?

MS. PARENTI: Yes -- that is, we are in agreement with those decisions. The court should not vary from those. And the court has consistently recognized that where the legislature has been acted in an area that it would be judicially unwise for the court to step in.

JUSTICE: Any other question --

JUSTICE: What is the course of the waiver of immunity for wrongful termination? Is it the statute just in the Labor Code?

MS. PARENTI: Yes.

JUSTICE: Against the State?

MS. PARENTI: Yes, your Honor --

JUSTICE: What section --

MS. PARENTI: I don't know the exact provision.

JUSTICE: When you come back up, if you could tell us.

JUSTICE: The court is ready to hear argument from this [inaudible].

SPEAKER: May it please the court. Mr. Bradley Houston will present argument for the respondent.

ORAL ARGUMENT OF BRADLEY L. HOUSTON ON BEHALF OF THE RESPONDENT

MR. HOUSTON: Good morning. This Court should embrace the waiver by conduct exception in this very narrow fact situation for, at least, two reasons. The first reason is, it is a very narrow fact situation, a very narrow exception and it does not aggregate the legislature's prerogative to waive immunity in all cases. Secondly --

JUSTICE: Let me just ask a practical matter. If you got the money judgment against the State, you've gone to judgment in the underlying [inaudible] and in effect, they were not gonna pay to you. You still would have to go to legislature.

MR. HOUSTON: That is correct, your Honor. And, in fact, that point supports our position and our suggestion of the exception because one of the policy reasons that there ought -- there is for sovereign immunity is that the State should not be bound by long-term contracts

that have big financial implications. And the point that you've made, your Honor, is that regardless of -- if we get this waiver or not, if we do get it, we still gotta go to legislature. And the legislature can still exercise its discretion over these policy issues as to whether to fund the judgment or not --

JUSTICE: But this has already been paid, has it?

MR. HOUSTON: That is correct, your Honor.

JUSTICE: Was this one of those cases where the particular political subdivision has found that they can pay up without legislative approval. In other words, was this within an amount that they have the discretion to decide the settlement pay and all they have to do is get the check [inaudible].

MR. HOUSTON: I believe that that is correct. I believe --

JUSTICE: -- we don't have the public policy the that you're asserting, the necessity to secure appropriation from the legislature which -- or, at least, is part of this kind of arguments. Is that correct in this case?

MR. HOUSTON: In this case, it is, your Honor for the reasons that you've brought up. Number one, I believe that the funding of the underlying settlement was partially from the State and partially from Texas A & M as I understand it. I was not the attorney involved in that action. But that's my understanding. The second issue or point with regard to that issue is that this was an obligation by the State that had no monetary parts. I mean, there was no cost to the State to perform. All they had to do was respond in a certain way to any official inquiry in --

JUSTICE: By lying.

MR. HOUSTON: Pardon me.

JUSTICE: By lying.

MR. HOUSTON: Well, let me address that, your Honor. First of all, that goes to this void in this argument that the State is making. And that argument fails for at least three reasons. First of all, the petition -- the allegations in the petition pertaining to jurisdiction state that there were two obligations, affirmative obligations, with regard to communications with respective employers and also, that they were to only give that information. The allegation in the petition, as to the briefs, says -- it doesn't say, you know, you didn't say that the -- the title directly. What it says is that you failed to give the information as required. That could have been anyone of the three things. So, even if, for the sake of argument, that this was a void provision, there are still two other obligations that have been properly pled as to the breach. Now, as --

JUSTICE: -- is there -- I've read through all the briefs. Is there some other claim in that? I thought that was the only claim.

MR. HOUSTON: Well, the only claim is, your Honor, I think what the confusion here is, is that the State is arguing and focusing on this one of three -- of the three parts of the information.

JUSTICE: What else is it, though?

MR. HOUSTON: Well, they had to give -- there was actually three parts. One is the title. And that's this void in this argument. The second is the salary and the benefits. And the third is -- and it states in the petition that they were to only give that information. The breach alleged in the petition and assuming that the court is going to review the petition in favor of jurisdiction which is the law in the State, that if they gave more than what is required, that would also be a breach. And that is the way that that petition alleges the breach, that they didn't give the information as required, not specifically and

only that they gave the wrong title. And that the evidence in this case will show that not only did they say, "Oh, he was accused only an instructor." But they also said, "If I say anything else, I could lose my job." Can you imagine a prospective employer hearing that about an employee that has risen all the way up to the top of their consideration. They're not --

JUSTICE: -- the agreement says that Director of Personnel shall state that he may not provide any other information.

MR. HOUSTON: That's correct, your Honor.

JUSTICE: But he can't have or I'll lose my job --

MR. HOUSTON: He can't have, you know, I wouldn't hire him in a million years --

JUSTICE: No. He can't have or I would lose my job.

MR. HOUSTON: That's correct, your Honor

JUSTICE: Why not?

MR. HOUSTON: Because that goes beyond the specific terms of the mediation group.

JUSTICE: Well, if the other person says, "Well, why can't you?" What's he supposed to say?

MR. HOUSTON: I would submit to you, your Honor, that the whole purpose of this mediation agreement was to pay this money and to give not only a neutral job reference overall, but to give a favorable one. If you'll look in the other parts --

JUSTICE: -- it's very favorable because it gives him a position he never had.

MR. HOUSTON: Well, let me address that your Honor. The State's argument is that's void. This settlement agreement occurred in 1995. Dr. Lawson obtained his doctorate. He applied for a job in Kansas. He rose to the top of all the candidates. He was told he had the job. They just had to check a few things. And then he got a letter saying, "Sorry, we filled the position with another candidate." As you can well imagine, he was devastated. And that's when he started doing his investigation to find out why. He wrote a demand letter on his own to Texas A & M stating, "We've got an agreement. You promised in writing to get the specific information and you did not." He got a letter back from the Texas A & M System saying, "You know what, we refute all this and you're absolutely right. We messed up. We gave the wrong information. We're sorry. There's nothing we can do about it. You know, we've -- you know, there's -- we can't give you your job back. There's nothing to do. But we're sorry." Well, it wasn't until after the lawsuit was filed and after the Attorney General's Office got involved that they suddenly came and say, "Hey, here's -- here's an [inaudible]. We'll say that it was void." And the reason why it's preposterous that it's void, your Honor, is because, first of all, the president of the university was at the settlement -- at this mediation. The provost of the university was at this mediation. Certainly, those two positions have the authority, as alleged in the petition, to effectively promote Dr. Lawson.

JUSTICE: Let's get back in the sovereign immunity argument.

MR. HOUSTON: Okay.

JUSTICE: Why is that kind of contract when you're agreeing on something not just many [inaudible] but you're agreeing -- obligating the State to take certain actions or to do something [inaudible]. How is that different from a regular contract? Aren't the policy considerations the same? Don't we want [inaudible] individual state actors at lower levels for binding the State to something the State does not want to [inaudible]. What -- not this case. Let's suppose

there were a collusive settlement agreement between a state agency and someone and that [inaudible] obligation is on -- on the school system or prison system or some other state entity in this -- in [inaudible] "Wait a minute. I disavow the settlement agreement and furthermore, you don't have -- if you're gonna sue on, you gotta get permission from the legislature." So, what -- why should we treat those settlement agreement indifferently than other contract?

MR. HOUSTON: Because, your Honor, under the exception that we're proposing, there is an [inaudible] for the State. What we're proposing is that the private citizen or company has fully performed and the State has accepted those benefits. If you get into a long-term contract with financial implications or if -- if you suggest --

JUSTICE: You claimed discrimination -- you claimed discrimination. You fully performed and State entered into [inaudible] judgment and says, okay, we had agreed to take all these measures -- these curative measures as part of the settlement agreement in the future. You say, "Oh, I fully performed but yet the State has always continued the obligations." And [inaudible] wait a minute [inaudible] sovereign immunity, if you gonna enforce this contract, you gotta get permission to sue from the legislature.

MR. HOUSTON: Well, I submit, your Honor, that if the State enters into a settlement agreement, they're not likely to commit the State to obligations that aren't justified. And that kind of goes to this obligation of the title but addressing your point directly --

JUSTICE: But it goes beyond that. Here in this suit and in your -- your petition I think, you're requesting actual damages in your prayer and you're requesting attorney's fees. So, we're not just talking about a title, you all are now seeking money from the State, aren't you?

MR. HOUSTON: We are your Honor, and that -- that is an excellent point because the State should not be allowed as this Court has addressed earlier in these arguments. The State should not be allowed to be the subject of a dispute or lawsuit that is within the proper jurisdiction of the court and, then, okay, we'll enter into a settlement agreement and then we won't perform and there will be nothing they can do about it except go to the legislature.

And, basically, what -- the reason why that cannot stand is the State should not be able to use alternative dispute resolution as an improper shield to eliminate jurisdiction when it once existed.

JUSTICE: Well, you don't have to. You know, it's like any other contract that for a partial [inaudible] perform to the contract and [inaudible]. You don't -- you don't have to deliver the equipment. You can -- I mean, you won't have to partially perform and give it to them like this. You don't have to give up your -- your lawsuit. You can continue with the lawsuit. You don't have to settle but having agreed to give up a valuable property interest in exchange for the promise to pay, you should know that they're not liable for -- they're not -- can't be sued without the legislative permission. I mean, there's no difference in giving up valuable personal property --

MR. HOUSTON: Well, that -- that is a good -- that is a good point, your Honor. And this Court should not stand by and let the the fallout of that principle occur because if personal, it allows the State to improperly use sovereign immunity and to eliminate jurisdiction where it previously existed. It also allows --

JUSTICE: But that argument [inaudible] comes into direct [inaudible] between the determination of [inaudible] and the settlement agreement that they should be treated the same basically with sovereign immunity. Is that right?

MR. HOUSTON: Well, there is the continuing jurisdiction argument that was made by the trial court.

JUSTICE: Well, that's hardly -- is gonna work [inaudible] with --

MR. HOUSTON: Absolutely.

JUSTICE: -- four years later --

MR. HOUSTON: Absolutely, your Honor. And that's why it's incumbent on this Court to adopt this waiver by exception or waiver by conduct exception because --

JUSTICE: So, you would agree that the current law doesn't provide for that theory of waiver from sovereign immunity.

MR. HOUSTON: I agree. I would concede that, your Honor.

JUSTICE: To do so, this Court would be extending the sovereign immunity theory based on the contract. To [inaudible] never been done before except by the [inaudible]

MR. HOUSTON: That is absolutely correct, your Honor, and we submit to the court that that should be done after weighing all the policy. After weighing all the policy in this.

JUSTICE: [inaudible] for a over 100 plus years, this Court for whatever reasons just left the policy decision into the [inaudible] to the legislature. If we have not taken on that chore, why should we change that policy?

MR. HOUSTON: Two points, your Honor. First of all, I disagree with the State's position that sovereign immunity is adherent and the court didn't have to create it. It may be inherent in the sovereign --

JUSTICE: Well, let's say it's genesis to somewhat [inaudible]. We all know [inaudible] no wrong, therefore, you can never sue him. Well, we're not really talking about that -- how the sovereign immunity. We're talking about the notice they can do tomorrow but we're still gonna have sovereign immunity. To be sued, you have to go to legislature to do it. And wherever it started, it's part of the common law that was adopted by the constitution since that time we have said that's the legislative prerogative.

MR. HOUSTON: Well, it's also important to note that this Court created sovereign immunity in the State 154 years ago --

JUSTICE: [inaudible] Tell me a real reason why we should now say where we think we're -- we [inaudible] the wrong for 150 years and we won't take it back and we're gonna change it in this theory because it's a breach of a settlement agreement. What's wrong about the communication process in this [inaudible] why should we do that?

MR. HOUSTON: Your Honor, because the court is not wrong. It is our position that the State is entitled to sovereign immunity until the legislature abolishes it. Now, notwithstanding the fact that Texas is in the minority, there's only three states that haven't either waived immunity in the contract context or eliminated immunity in the contract context --

JUSTICE: By whose stroke would that eliminate --

MR. HOUSTON: These are the judicial. These -- well, by -- there were 21 states that waived immunity by the courts and I believe there are 26 that have done it by the legislature. It is our position that in this narrow situation, this Court cannot stand back after weighing the policy considerations and allow this injustice to occur.

The policy reasons for supporting sovereign immunity in this case don't exist. But the policy reasons in favor of adopting, well, waiver by conduct exception do exist.

JUSTICE: [inaudible] there is a monetary impact of this current litigation based on the breach, the settlement breach.

MR. HOUSTON: And that will be addressed by the legislature if my

client ever gets his day in court and if he gets a judgment, he will then --

JUSTICE: But in order to get his day in court he has to [inaudible] from chapter 107 under the status of this particular brief.

MR. HOUSTON: That's the State's position and it is our position that the court should not allow the State to use alternative dispute resolution in --

JUSTICE: And this, though, will clearly say we want this Court to change the law and extend sovereign immunity as a public policy matter by this Court to this case.

MR. HOUSTON: That is correct, your Honor.

JUSTICE: Based on waiver by conduct.

MR. HOUSTON: That is our position. After weighing the policy reasons --

JUSTICE: Is there anything in the record about -- as to whether or not Mr. Lawson is trying to get the legislature?

MR. HOUSTON: Not in the record, your Honor, but I could address that as background and tell the court for background that that was the worst experience in his life. He could not believe that he got the door slammed on his face so many times. In fact, in the record, in the Federal Sign case, it shows that for an eight-year period, only six percent of the cases were resolutions -- were presented to the legislature. Did they even allow them to go forward? And that doesn't take into account of cases where, like my client, they didn't have any political power to get a legislature to listen to him. They didn't have any lobbyist and that brings out the good point and that is the reason, one of the main reasons why this Court should not stand by when the legislature has failed to act.

MR. HOUSTON: The legislature should have acted in this situation. And in 2260, they could've said, "This is the administrative scheme and any cases before, waiver by conduct, will not, will not --

JUSTICE: The problem under current state of the law is that a claimant against the state can't even get a determination on the merits of the claim without the legislative permission. So, there's no way to know if the claimant has a good case or a bad case or no case because there has never been any opportunity to make a claim, if the state sort of sought immunity at the door. Ain't that right?

MR. HOUSTON: I'm not sure I follow that question, your Honor.

JUSTICE: Well, the problem is -- the problem is on this settlement agreement, there will never be a determination of whether or not there was a valid settlement agreement or an invalid settlement agreement or any consideration for the settlement -- and nothing on the merits of these, if the legislature doesn't even open the door to the courthouse on this claim.

MR. HOUSTON: If the legislature or the court doesn't? That's correct. I would agree. Finally, my client would ask the court to weigh this policy considerations and its number one policy consideration in favor of sovereign immunity but the long-term financial aspects are not there. Of course, if he wins this day in Court, there will be as the court properly pointed out. But he should at least get his day in Court. He should not be denied the jurisdiction that he had before merely because he participated in an alternatively dispute resolution which is an expressed public policy of this State. If there are no further questions.

JUSTICE: Thank you, Counsel.

MR. HOUSTON: Thank you.

JUSTICE: What [inaudible].

JUSTICE: Why if we figure it out [inaudible] happens to State employees because as I understand, 2260 -- 2260 only advised the contractors. So, by definitions what would you mean employees of the State? So, 2260 is not applying now and if waiver of the immunity has already been waived now and discrimination of a wrongful discharge suits by the employees of the State, take it from there for me. And if the State enters into a settlement agreement in one of these employee lawsuits to recover on the settlement agreement of the State reduces the pay, each and every State employee will now need to go to a legislature for redress?

REBUTTAL ARGUMENT OF MEREDITH BISHOP PARENTI ON BEHALF OF THE
PETITIONER

MS. PARENTI: Your Honor, even if sovereign immunity had been waived in the underlying suit, that does not grant -- that cannot resurrect jurisdiction for this lawsuit that was filed four years after the previous lawsuit had been dismissed. The court in *Mansus v.* [inaudible] --

JUSTICE: [inaudible] continuing this jurisdiction either so you can disregard that.

MS. PARENTI: Okay. Well, a party would have to go to the legislature, that is -- it does not fall under 2260's administrative procedures but the legislature has essentially occupied the field here. They have said, "There are certain contracts that fall under 2260." Other contracts do not fall into that but 107 still applies, the parties have to go the legislature to get consent under 107 and this is -- and this is a remedy for parties. They can go the legislature and get that addressed. Here the legislature has acted. This is not like the situation based by the court in *Texas Department of Criminal Justice v. Miller* in the Tort Claims Act context, were despite repeated judicial pleas ...

JUSTICE: Well, Ms. Parenti, if I'm involved in litigation with the State, a litigation in which the State has waived immunity from suit, are you saying that now, people should -- if they settle their case with the State, they should not dismiss their lawsuit. They should leave it pending until they make sure that the State has fully performed under the agreement. Because, otherwise, they could dismiss that lawsuit which they were entitled to bring and entitled to litigate under the State and it will go away dependent then upon whether or not legislature at its pleasure decides to move forward. So, should this opinion reign that people should act with care and not dismiss their lawsuit until the State fully performs the agreement?

MS. PARENTI: No, your Honor. There has been no indication that the state is breaching settlement agreements routinely --

JUSTICE: No, no, no, that -- we have to be concerned about the consequences and I understand that you keep saying we don't do it very often so it's not a problem. But the consequence of this would be, if I am litigating against the State in a suit in which immunity from suit has been waived by the State, I think that I would have to be careful and not dismiss my lawsuit until I make sure the State fully performed and I got everything I wanted. Is that what the State would like to see happen in a settlement agreement?

MS. PARENTI: No, your Honor. In most -- In most cases, a settle --

on cases when the agreement to dismiss --

JUSTICE: Why wouldn't I -- It wouldn't be prudent on my part to dismiss my lawsuit then until I knew that you would fully perform. What advice would you give me if I -- if you were my lawyer?

MS. PARENTI: In most cases, the primary benefit is going to be a monetary payment and the suit can be [inaudible].

JUSTICE: We're all asking about this case. What could Mr. Lawson end up? First, it could go all the way to trial and not go to [inaudible] but if he does, and gets a judgment that includes a mandatory injunction. How would you [inaudible] enforce it? Because the judge does not know [inaudible] case on trial [inaudible].

MS. PARENTI: That's right and in *Mansus v. Fifth Court of Appeals*. The court held that breach of settlement agreements should be -- suits for breach of settlement agreement should be treated like any other breach of contract case they have to meet --

JUSTICE: What if this happen in the prejudgment? What if -- what if the price has gone to mediation and the court had entered this not as a settlement agreement. The court said, "Okay, I'm gonna embody all of these terms and agreed judgment and the state was directed it ought to do exactly what the settlement agreement stated. And how would that -- would that be [inaudible] against the state? The -- and a judgment out of a court embodying these terms?

MS. PARENTI: There is some federal case law that would indicate that if the final judgment incorporated the terms of the settlement agreement and it's cited in our brief that that maybe enough and it is the federal court to have jurisdiction to bring suit. That there's no Texas authority on that but the Texas courts have any clear view of parties name -- a clear unambiguous legislative waiver to bring suit. -

JUSTICE: Was this -- was that --

MS. PARENTI: And they have to plead that as part of -- to show that the court has jurisdiction -- have to show the court -- that there has [inaudible].

JUSTICE: Was this -- Was this settlement agreement breached by people who were authorized by the state to do this settlement agreement and pay this amount of money?

MS. PARENTI: There's no question in that the state officials were authorized in terms of the agreement but [inaudible] --

JUSTICE: And also -- And they could also authorize the amount of money that was paid so they could -- they had -- they were operating within the parameter set out under state law. Are there authorization to be able to settle lawsuits?

MS. PARENTI: Yes.

JUSTICE: And does the state have similar types of authority in place with respect to litigation -- other types of litigations so that there are people who know what their parameters are and what they can do when the states says, "Yes, it's okay for you settle on these terms but if you get outside these terms, more money or something else and you have to have additional [inaudible]." So, the state has a system in place to protect itself for unauthorized settlement agreements.

MS. PARENTI: Yes, but there's no -- what --

JUSTICE: Is that right? Is that correct?

MS. PARENTI: There -- The state officials are authorized -- certain state officials are authorized to enter into these agreements but what can happen and when it happen within these cases -- what happened in cases like this, is that officials may and [inaudible] agree to certain settlement agreements and the State does not

[inaudible] --

JUSTICE: No but that -- that's [inaudible] making a bad decision is an entirely different issue than making a decision without authority. You can have authority and not exercise it wisely. And that's a different matter. My question is, does the state have in place a system in which it has made policy decisions about who should have the authority and the extent of that authority to settle lawsuits on behalf of the State.

MS. PARENTI: I believe so, your Honor.

JUSTICE: Okay.

JUSTICE: You're gonna answer my question about the source? When --

MS. PARENTI: I don't have a cite for you and I could look for them and submit it but regardless --

JUSTICE: Because your oral argument here is trying to sound that the waiver is by express legislative consent.

MS. PARENTI: Yes, your Honor.

JUSTICE: So, that would --

MS. PARENTI: So, regardless of whether the underlying suit had waived interest -- whether [inaudible] been waived for that, there -- that is separate lawsuit that suit is distinguished --

JUSTICE: I understand but I'm -- but I'm interested in what the source of -- the waiver is for wrongful termination.

MS. PARENTI: I can try to find that the court [inaudible] submission letter brief.

JUSTICE: Thank you, Counsel.

JUSTICE: That concludes the arguments in today's causes and then the marshal will adjourn the court.

SPEAKER: All rise.

Oyez. Oyez. Oyez. The Honorable Supreme Court of Texas has been adjourned.

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