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Supreme Court of Texas.
Geffrey Klein, M.D. and Baylor College of Medicine, Petitioners,
v.
Cynthia Hernandez, as the Parent and Next Friend of N.H., a Minor, Respondent.
No. 08-0453.

October 7, 2009.

Appearances:
Cameron P. Pope, Andrews Kurth LLP, Houston, TX, for petitioners.
Robert J. Talaska, The Talaska Law Firm PLLC, Houston, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnsonand Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08-0453 Geffrey Klein, M.D. and Baylor College of Medicine vs. Cynthia Hernandez as the Parent and Next Friend of N.H.

MARSHALL: May it please the Court, Mr. Pope will present argument or the Petitioner. Petitioner has reserves five minutes for rebuttal.

ORAL ARGUMENT OF CAMERON P. POPE ON BEHALF OF THE PETITIONER

ATTORNEY CAMERON P. POPE: With the Court's permission, I will begin by addressing Dr. Klein, because the nonsuit against Baylor left no case or controversy with regard to that particular entity.

JUSTICE HARRIET O'NEILL: But there's no dispute about that any more, is that right? The way I read the briefing, everybody kind of agrees on that.

ATTORNEY CAMERON P. POPE: Everybody agrees to a certain extent, except as to the effect of the nonsuit. Baylor maintains at this juncture that the nonsuit requires the vacation of the Court of Appeals' opinion and the District Court's order insofar as it applies to Baylor. Obviously, Dr. Klein, the order and the Court of Appeals' opinion is not vacated because of the nonsuit. The nonsuit applies only to Baylor, so we are agreed in that respect.

JUSTICE HARRIET O'NEILL: As to Baylor?

ATTORNEY CAMERON P. POPE: As to Baylor, yes. As to Dr. Klein, the

Court of Appeals essentially held that he was not entitled to an interlocutory appeal because for those purposes he's not an employee of the state agency, and thus there's no immunity to assert. That flies in the face of the language of the statute, the language of Chapter 312 of the Texas Health and Safety Code, and its legislative history. Section 312.007(a) expressly provides two purposes for which Dr. Klein is an employee of a state agency, and one of those purposes Chapter 104, Indemnity. That's not an issue at the moment. The other purpose is determining the liability if any for his acts or omissions at the school, rather at the school in terms of the care that it provides at Ben Taub Public Hospital.

JUSTICE DAVID MEDINA: So can we just simplify this by saying that any time a private entity enters into a contract with a state agency, then that employee of the private entity becomes a public -- or state employee?

ATTORNEY CAMERON P. POPE: No, Your Honor, we cannot simplify it in that way, because Baylor in these respects is not a private entity. It is a specific entity, and in fact, Chapter 312 is designed expressly for Baylor. That is its only real function, and if you trace back the legislative history, Chapter 312 is a nonsubstantive provision of Article 4490-14, which itself is directed, and if you look at the legislative history of that, the bill analyses are directed expressly to Baylor. They apply only be Baylor, because at the time, and this is in 1987 when it was enacted, the Harris County Health -- Hospital District rather, was going to create a new entity and wanted Baylor's assistance in providing that care. And in the bill analysis, in both the Senate Health and Human Services Committee and the House Education Committee both looked at that purpose and expressly say, "At the time the Baylor people were treated differently from the UT people," and so as part of that coming together for the new entity, part of the deal, if you will, is that Baylor people would get, and this is in the Bill analysis, equal liability, the same treatment. And so when they're providing care in that particular public hospital, all those entities that are part of the Harris County Hospital District, then, yes, Baylor is not, insofar as you will, a private entity just for that care. Now, and this is in the record, obviously Baylor provides care at a number of other institutions, Memorial Hospital in Harris County, Texas Children's Hospital, Texas Women's Hospital. When Baylor residents are providing care at those facility, then, no, they are still private entities and the same rules apply to them as any other physician. But when we are strictly talking here about the care that they provide for the Harris County Hospital District, under this coordinating entity arrangement that the Legislature has set up for just this purpose, then they are not a private entity. They are in effect borrowing state-agency status.

JUSTICE NATHAN L. HECHT: And is that for all purposes or just the extent and limits of liability? Would it apply to notice, for example?

ATTORNEY CAMERON P. POPE: Well, it depends on how you look at, how you define "liability." I submit that for all purposes it's limited in the sense that it applies only to the care that they provide at these places and only in that sense, but --

JUSTICE NATHAN L. HECHT: Well, to put a fine point on it, does 101.101(a) notice, the notice requirement, apply to Baylor in these circumstances?

ATTORNEY CAMERON P. POPE: Well, in this particular case, no, because we're dealing with the old 101.106 -- oh, sorry, I misheard, 101. Yes.

JUSTICE NATHAN L. HECHT: So it's in your view, Baylor just becomes a state agency for purposes of Chapter 101, all of its provisions?

ATTORNEY CAMERON P. POPE: For the care that it provides at that particular instance. And if you were suing them for the acts and omissions for someone's acts and omissions at that particular institution, then, yes. For the care that it provides elsewhere, no, and it's limited in that sense because --

CHIEF JUSTICE WALLACE B. JEFFERSON: Would 101.106(f), which we talked about in the last case, would that also apply? So Dr. Klein is sued and then can he move to dismiss so that they state the claim against Baylor, would that be the case?

ATTORNEY CAMERON P. POPE: Well, not in this particular case, no, Dr. Klein would not get the benefit of that for this particular case because obviously it arose before the amendment --

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, let's say after the amendment and let's say it's the same kind of case as last time.

ATTORNEY CAMERON P. POPE: Yes, he would get the benefit of that if it was after the effective date, then, yes, he would for that care. If he was working in another facility than Baylor, then, no, but it's limited in that sense, yeah. But that's the whole point of the Act, Chapter 312 is designed for that very purpose to make Baylor equal to UT because they are providing the same care to the same people in the same facilities, under the same public funds, that's part of the arrangement. With regard to Dr. Klein in this particular instance, we are talking about determining the liability, and the Court of Appeals read that narrowly and didn't actually provide any kind of guidance as to what determining of liability means, and the case, the majority rather, pointed it out as a grant of limited liability, but did not go on to explain why such a grant would not entitle Dr. Klein to raise any other kind of affirmative defense or any kind of defense that any other state agency employee would be able to raise. Justice Taft, in his concurrence disagreed with that notion from the majority and pointed out that it should, determining liability if any, is an adjudicative process which encompasses the same rules of law and the same affirmative defenses that are open to any other state agency employee, and I submit that that has to be the way that "determining liability if any" is read. If you look at the way that 312.007 is set up, "determining liability" has to be read broadly within the context of the purpose and point of Chapter 312.

JUSTICE NATHAN L. HECHT: It says, of course, one problem with this case is we're looking at it through the filter of jurisdiction.

ATTORNEY CAMERON P. POPE: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: So it gets kind of murky a little bit, but when 312.006(a) says "is not liable," is that the same as immunity or is it just for purposes of appeal under the Interlocutory Appeal Statute or is it something else?

ATTORNEY CAMERON P. POPE: Well, I'll go with the first one. "Is not liable," and you've got to read the rest of it, "except to the extent and up to the maximum amount of liability of 101.023(a)," and then there's that comma, and then "for the acts and omissions of a governmental unit of state government." So it is not -- "is not liable" relates also to the "except to the extent," and then you have to read the last part of 312.006(a) because obviously 101.023(a) does not contain any kind of specific governmental unit of state government requirement, and just is a very broad provision about liability of state government, so it doesn't contain the same kind of restriction. "Except to the extent" and "is not liable," the way that the sentences

are structured, have to relate to that last part, "is not liable except to the extent for the acts and omissions of a governmental unit of state government." So in that sense, it's a governmental unit, again for the limited purposes of providing care at the Harris County Health District -- Hospital District rather. It has to be read broadly to afford the same kinds of rights as any other state agency. Particularly when you consider that in the context of 312.007(a) because here, of course, we are dealing with an individual who is being sued and sought to be held liable for his acts and omissions. And there, 312.007(a) says, "Is a state agency" for those purposes that we previously discussed, one of which is implicated in this case. So under both 312.006(a) and 312.007(a) Baylor is a state agency and is a governmental unit, so we're still in the case. Where there's still a case or controversy, Baylor would be entitled to bring an interlocutory appeal.

JUSTICE DAVID MEDINA: Well, the other side, I think argues that there's no express language to state that, and you're kind of reading that too broadly.

ATTORNEY CAMERON P. POPE: Well, I disagree with the notion that it's nonexpress. Your Honor, I think it's quite express, that the Legislature has created state agencies, "is a state agency" is to me is very express. "For the acts and omissions of a governmental unit," and 312.006(a) is similarly express. And what the Legislature has typically done in these instances is have an establishment, if you will, an establishment of a state agency clause, and then this separate jurisdictional interlocutory appeal grant in 51.014. So, for instance, the Texas Higher Education Coordinating Board is established in part of the Education Code, Chapter 61.034 I think, and it says "is a state agency." Nowhere in that particular provision does it provide for an interlocutory appeal right there, no, but of course it relates to the 51.014. So if you were created as a state agency over here, then you get the rights that state agencies get. They don't have to be -- and I think the Court of Appeals fell into the same trap of thinking that, "Well, if the Legislature had wanted to be clear, they would have put it in 51.014 or they would have put it in 312." Well, that's not how they do it typically and not how they've done it for other agencies that are clearly state agencies for all purposes. So that we've got the grant in 312, Chapter 312, and we've got the interlocutory appeal rights. So to think that they are somehow different, that they change, that it's a flexible definition of "state agency," I don't think accords with the legislative intent or the language of the statute.

JUSTICE NATHAN L. HECHT: To be clear, did Chapter 312 only applied to Baylor when it was passed?

ATTORNEY CAMERON P. POPE: Well, if you look in -- yes, Your Honor -- well, if you look in 312.002, the Definition Section, "supported medical school" is one of those defined terms, and it says Subchapter D of Chapter 61 of the Texas Education Code. Well, if you look in Subchapter D of Section 61, you will see that it applies to contracts with Baylor Medical and Dental Schools, so it applies to those two entities.

JUSTICE NATHAN L. HECHT: So the answer is it only applied to Baylor when it was enacted?

ATTORNEY CAMERON P. POPE: Yes, and that was deliberate.

JUSTICE NATHAN L. HECHT: And it only applies to Baylor now?

ATTORNEY CAMERON P. POPE: As far as I'm aware, yes, Your Honor

CHIEF JUSTICE WALLACE B. JEFFERSON: Are the doctors under this program who have committed the surgery or performed the medicine in a

way that the statute applies, is that doctor entitled to representation by the state or are they indemnified by the state under Chapter 104 as well?

ATTORNEY CAMERON P. POPE: Well, that is still something of an open question. They're obviously indemnified by Baylor under 312.007 --

CHIEF JUSTICE WALLACE B. JEFFERSON: But they're a state agency, so can they get the -- would the attorney-general defend a doctor if they notified them within ten days, and then are they entitled to indemnity if there is a judgment against them from the State of Texas?

ATTORNEY CAMERON P. POPE: We would submit that they would, they would be, and in this case, of course, we have not chosen to go that route, but they are a state agency, is a state agency so they would have that right. That is an open question somewhat with regard to how Chapter 104 would work, given the specific language in 312.007(a), but perhaps it would have to be indemnification first through Baylor and then Baylor would of course get the money from the Harris County Hospital District through its arrangement with them. That's part of the deal that Harris County and us taxpayers are ultimately responsible for any of these kind of indemnification claims or any liability determinations we would submit. Let's be clear. Dr. Klein and Baylor are not asking for anything more than what a state agency and its state agency employees are entitled to. That's all, no more, no less. That's what 312.007 and 312.006 do. They make Baylor and they make Dr. Klein and all Baylor's other residents, when they are performing services at a covered facility, it's undisputed that's the case here, they make them state agency employees and state agents, if you will. I see my time is almost up. If there are no further questions?

JUSTICE DAVID MEDINA: I was just wondering what part of East Texas you are from?

ATTORNEY CAMERON P. POPE: New Zealand. Deep, deep West Texas, I guess.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Pope. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Talaska will present argument for the Respondent.

ORAL ARGUMENT OF ROBERT J. TALASKA ON BEHALF OF THE RESPONDENT

ATTORNEY ROBERT J. TALASKA: May it please the Court, Baylor College of Medicine is not before the Court, as I think we've established, this whole issue is whether or not Dr. Klein, a private individual in the State of Texas, gets the entire protection of the Texas Tort Claims Act as if he were a State employee. In a reading of the statute that the doctor is trying to apply to this case does not read the way they want it to read. The Legislature did not craft, did not draft, did not put anything into Section 3112, extending the entire Tort Claims Act to Baylor College of Medicine, nor did they extend the protections of the Tort Claims Act to individual physicians, nor did they grant sovereign immunity to either of these defendants.

JUSTICE DAVID MEDINA: What's the purpose of this statute?

ATTORNEY ROBERT J. TALASKA: The statute is, which we will concede, there is a limitation of liability in the case, that if Baylor was a named defendant, which they are not, their limitation, their liability would be limited up to the amount that had the University of Texas been sued, and we will concede that. That's the purpose of the limitation. The individual liability, the second part of 312, talks about the

liability of an individual who is employed by Baylor would be capped as if they were an employee of the state. But the second half of that is, there is no official immunity that applies in this case under the Court's reasoning, under Kassen v. Hatley, which has recently been cited and approved again. The providing in issuance of medicine is not a government, inherently a government function. It is a private discretion. Medical decisions are not made by the government, they are made by individuals. So the official immunity would not apply. What we have here, because we're dealing with old law, the old Tort Claims Act, this is a portion of the law that said, A, if you don't sue Baylor, just like if you don't sue the University of Texas Health Science Center or Medical Branch, but just sue the individual physicians, they are not entitled to Tort Claims Protection because they are not in their official capacity. That is extremely important in this case, because under the old law, an individual private practicing physician, whether they worked for UT or worked for Baylor or worked for themselves, had the same responsibility and accountability that is together because it's not an official immunity act. So in this case, Dr. Klein and Baylor College of Medicine are trying to read too much into the statute, which is simply a limitation on the liability.

JUSTICE DAVID MEDINA: Well, help me understand that, because the way I read it, and it's probably too simple, but it seems like if Baylor and these doctors agree to do this, perhaps charitable work, then the State has agreed to give them some protection. Is that too much of a simplification?

ATTORNEY ROBERT J. TALASKA: That is a simple way, that is a fair way to say that's why they get the limitation of liability, because Baylor College of Medicine in the past did have larger judgments and settlements than against the University of Texas, and that in terms of the financial component put them on even footing. And so it's a limitation of liability as opposed to giving them the entire immunity of the Texas Tort Claims Act, which would then include things like having to give notice, and misuse of tangible property, all of that which is not expressly stated in this Section 312, nor is it implied in Section 312.

JUSTICE NATHAN L. HECHT: Why not? It just says a covered entity, and I guess that it's just Baylor is not liable except to the extent of liability of state government. And that would be for motor-driven vehicles and misuse -- or I mean the use of, condition of personal property, and if there was notice and, but not if there was discretion and not subject to punitive damages and a whole raft of things.

ATTORNEY ROBERT J. TALASKA: Yes, but that's not what the statute says.

JUSTICE NATHAN L. HECHT: Well, I just read it.

ATTORNEY ROBERT J. TALASKA: In reading that --

JUSTICE NATHAN L. HECHT: 312.006(a) says Baylor, I'm just substituting that for the first 50 words which describe all these things, which only include Baylor, I guess, kind of a special law, but that's a subject for another case. "Baylor is not liable except to the extent of liability of state government." That's what it says.

ATTORNEY ROBERT J. TALASKA: Right. "Except to the extent and up to the maximum amount of liability."

JUSTICE NATHAN L. HECHT: Right. And I see it, "up to the maximum amount," but it also says "to the extent," and "the extent" doesn't extend, import all of those other things.

ATTORNEY ROBERT J. TALASKA: I think that "the extent" has to do with the range of remedies, that this specific statute will say that

Baylor is going to be held up to the same amount of liability and to the extent of whatever other remedies that were available against UT, that those same remedies could be applied against UT.

JUSTICE NATHAN L. HECHT: So you think "extent" in 312.006(a) refers to remedies and not to the 101.00022 definitions of what the government is going to be like?

ATTORNEY ROBERT J. TALASKA: Yes, sir. I think the Legislature is saying, "Baylor, we're going to give you a cap, but don't take too much from that cap because you're going to be in the same position in terms of whatever remedies could be sought, and the amount of money that could be sought from the state can be brought against you, individually Baylor." That's the way that this would be interpreted. Again, if we read that, "A supported medical school is not liable for its acts and omissions, except to the extent and maximum of liability of state government," again, trying to put them to the liability cap that would be in place for a government entity.

JUSTICE NATHAN L. HECHT: Well, but then 312.007(a), 07(a) says Baylor is a State agency for purposes of determining the liability of an employee.

ATTORNEY ROBERT J. TALASKA: And if we read that sentence, "is a state agency, and any of their physicians are employees of state agency for purposes of Chapter 104 Civil Practice and Remedies Code."

JUSTICE NATHAN L. HECHT: Right. Go on. "And for purposes "--

JUSTICE: And then there is an "and."

JUSTICE NATHAN L. HECHT: -- "of determining the liability of the person or the persons acts/omissions." It's that "and" that's bothered me.

ATTORNEY ROBERT J. TALASKA: "Is a state agency," and then we look at them being a state agency, and then we look at the individual people who are employed by that medical school, that they both would then lead to Chapter 104, which has to do with whether or not an individual has immunity. And so reading that, that's, those need to be read together, that again it goes to -- this whole 312.007 has to do with individual liability.

JUSTICE NATHAN L. HECHT: And then do you agree that 312.007(b) imports Section 101.106?

ATTORNEY ROBERT J. TALASKA: Yes. And I think that brings up an interesting point, because if they wanted to incorporate the whole tort claims, they could have said Baylor is a governmental agency subject to the same immunity and waiver of immunity of the Texas Tort Claims Act, and they don't do that.

JUSTICE NATHAN L. HECHT: So you think they imported the dollar amount limits and the remedies, and 101.106, and that's it?

ATTORNEY ROBERT J. TALASKA: Yes. Yes, because that's all they say that they do. And had they done more, had they put more in, they could have expressly stated that, and the fact that (b) is stated in there, which is redundant to the Texas Tort Claims Act, gives them that additional protection that I couldn't get a judgment against Baylor as well as the individual physician. And I know you just heard the argument on Election of Remedies, this is before the Election of Remedies Statute. So there was Thomas vs. Oldham and some of the statutory, 10106 said you can't get a judgment against the agency as well as the individual, and this states that same thing. And had they just adopted the Texas Tort Claims Act and all of its immunity and protection, they wouldn't have had to redundantly put that in there. And again, this is a section dealing with individual liability as opposed to the learned medical institution or medical school, or

supported medical school's limitation on liability, which again, reading that prior thing, prior 3.12.006 is, just goes to the cap. And you know, frankly, you know, the Legislature has, if this was a loophole, if you will, the Legislature has corrected this with the new Texas Tort Claims Act that now does put caps on employees of the state, back under Kassen v. Hatley and the old law which Kassen v. Hatley still applies parts of it, but again, individual physicians under the old law, state physicians employed by UT did not have official immunity and they were liable as if they were a private citizen. In this case Dr. Klein has even tried to go beyond that in the sense that asking for other limitations. So again, the whole purpose of the statute was to give Baylor College of Medicine, put it into the same footing as, in terms of what they would have to pay out for medical malpractice. And again, this statute came about in 1987 time frame, late 1980s. Reading an opinion that was cited, which came out after the initial briefing in this case, in Asade [Ph.] vs. Villareal case, which petitioner has cited, they go through an analysis that I think it's very clear in why Baylor does not get the entire tort claims protection. Looking at the common question in terms of what does it modify, it's a state agency for purposes of Chapter 104, and given the limitations, and they specifically say it is unlikely and illogical that they would not have completely spelled that out and try to slip it into an individual liability paragraph when the implications are so far reaching across the board. The, what they say, "dropping a provision that supported medical schools and certain other medical entities are state agencies for all purposes, a mandate that could have far-reaching effects, in the middle of this section otherwise dealing only with individual liability makes no sense." So it is trying to fill in the gaps that the Legislature did not give Baylor College of Medicine and did not give Dr. Klein, that they're trying to get in. And because ultimately where that boils down to is as it pertains to this particular action that's before you is, because Dr. Klein is not entitled to all of the protections of the Tort Claims Act, and therefore he is not entitled to appeal either a summary judgment or a plea to the jurisdiction with, according to the immediate interlocutory appeals. That's why the Court of Appeals said they have no jurisdiction over this matter because the Tort Claims Act doesn't apply and give all of the protections to Dr. Klein that he would have otherwise had. So in putting all of the information that we have together, the statute, the literal reading of the statute, what the intent of the Legislature was, is to give them a cap, which again we concede that Baylor would have a cap if they were a party to the case, the individual physicians are not, are entitled, in reading through this that they can go to Chapter 104 to determine if they have liability. We don't have any problem with that, because then we get into the fact that it's not official immunity and under the Kassen v. Hatley argument. So for all of those reasons, the First Court of Appeals' decision should be left to stand that there was no jurisdiction for the Appellate Court to continue to consider an interlocutory appeal, when the individual bringing the appeal does not meet the statutory requirements of who can file an interlocutory appeal, given their official immunity and official capacity.

CHIEF JUSTICE WALLACE B. JEFFERSON: And with respect to Baylor, the only point of dispute now is whether to vacate the Court of Appeals and Trial Court's --

ATTORNEY ROBERT J. TALASKA: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: -- judgment and order?

ATTORNEY ROBERT J. TALASKA: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: And why should they not be?

ATTORNEY ROBERT J. TALASKA: I do believe that the nonsuit ended all, you know, justiciable issues between the parties, and that it would be an advisory opinion. While we agree with the logic and the conclusions reached by the Court of Appeals, you know, that was a nonsuited issue. So the sole issue before us, is whether Dr. Klein can appeal this issue, and we don't think he has the right to an interlocutory appeal for the reasons that he doesn't get all the protections because the statute and the dealing with the supported medical school and the employee physicians does not extend to them. So with that, that would conclude my argument as to why the Court of Appeals' opinion should remain in place and that there be no jurisdiction to hear the appeal.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? Thank you, Counselor.

REBUTTAL ARGUMENT OF CAMERON P. POPE ON BEHALF OF PETITIONER

ATTORNEY CAMERON P. POPE: If I could start, Your Honor, with the Asade case. Of course in that case, the Court exercised jurisdiction over the doctor's claim for official immunity under 51.014(a)5. So in that sense that's the point of disagreement here between the Fourteenth Court of Appeals and Asade and Young, and but the First Court of Appeals here and in the Zimmerman case that's also pending before you, it exercised jurisdiction. Here, of course, the Court declined to exercise jurisdiction. Let there be no mistake, Dr. Klein has asserted official immunity in the Defendant's Third Amended Answer, this is Volume 3 of the record at page 550, he pleads the affirmative defense authorized by Chapter 312, limiting liability from suit -- the affirmative defense authorized by Chapter 312 includes but is not limited to official immunity, the defendant's motion for summary judgment, defendant's -- rather supplement motion for summary judgment and motion to dismiss, pages 375 and 383 of the record, Volume 3. Again, expressly cites the official immunity defense, says we've satisfied all elements necessary for official immunity, correctly asserted that they have official immunity. They've asserted -- whether or not he's proven it, of course, is not before the Court at this juncture, but he has certainly asserted it, and so in that sense we are similar to Asade in that sense, but he's asserted official immunity and he has a right to have that assertion heard by the Court of Appeals. That's the sticking point here. To go further into the Asade case, of course, once you get past that initial jurisdictional hurdle we're talking about the determining liability if any portion. The Asade Court ignored the "if any" part and sliced the "determining liability" very fine. Apparently, according to that Court, you're not really determining liability when you're determining immunity from suit. So apparently you can be immune from suit, but you're somehow not determining liability. We, of course, disagree with that notion. If you are immune from suit, you are of necessity not liable, you cannot be liable, and so if you cannot be liable, then it should be part of the determination of liability. So in that sense we disagree with Asade, but as to the jurisdictional argument, it's right on. Of course we agree with respondent with regard to the vacation, it seems we're all in agreement now that at least the Court of Appeals' opinion as to Baylor needs to be vacated because obviously the constitutional issue of standing that we're dealing with, the lack of a case or controversy

should perceive the analysis of whether or not you have a statutory basis for the appeal. In all but the most unusual cases, and this is not an unusual case, we're all in agreement that we have a nonsuit that was issued something like three months before the orders that we're dealing with, and so in that sense the Court of Appeals' opinion is advisory as to Baylor and must be vacated. If there are no further questions, I'll surrender the remainder of my time. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counselor. The cause is submitted, and the Court will take another brief recess.

[End of Audio Recording.]

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