This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
In re Satterfield and Pontikes Construction, Inc., Relator;
San Diego Independent School District, Real Party in Interest.
No. 08-0660.

October 8, 2009.

Appearances:
Nicholas A. Parma, Royston Rayzor Vickery & Williams LLP, San Antonio, TX, for relator, for petitioner.
Craig T. Enoch, Winstead PC, Austin, TX, for real party in interest, 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 (Chief Justice Wallace B. Jefferson participating in deliberations despite absence during argument).

CONTENTS

JUSTICE NATHAN L. HECHT: The Court is ready to hear argument in 8-660, In re Satterfield & Pontikes Construction, Incorporated.
MARSHAL: May it please the Court, Mr. Parma will present argument for the Relator. The Relator has requested five minutes for rebuttal.

ORAL ARGUMENT OF NICHOLAS A. PARMA ON BEHALF OF THE PETITIONER

ATTORNEY NICHOLAS A. PARMA: May it please the Court. Satterfield & Pontikes Construction, Incorporated is here today to ask this Court to issue an opinion holding that the trial court abused its discretion when it severed from this case the parties whose actions are the basis of the dispute. Now, Satterfield --
JUSTICE NATHAN L. HECHT: Can we start by asking you the same questions we asked earlier, about whether the parties at least are in agreement to move the district court to proceed to trial with all the parties joined?
ATTORNEY NICHOLAS A. PARMA: Well, it's hard for me to say that we are in agreement with that. We certainly want that outcome, the problem is through the history of this case, both the District and district court's views on this matter have shifted. Now, initially when the suit was filed, which the suit was filed in March of '06, in September of '06 when Satterfield filed its motion for leave to join the third parties, the motion for leave to file a third party petition, the District was not opposed and the trial court actually granted it, the

trial court agreed with it, unfortunately the --

JUSTICE NATHAN L. HECHT: But the Clerk didn't.

ATTORNEY NICHOLAS A. PARMA: Yeah, there was some kind of communication at the Clerk's Office and the Clerk received the impression that the parties were no longer interested in the order, and apparently she blotted out the judge's signature and put the order in the file without telling anybody, so of course we didn't know and nothing was done on that. And then this matter went to arbitration literally overlapping with the order being issued bringing the third parties in. At arbitration, the District opposed bringing in the subcontractors, so and in fact that was one of the reasons the original agreement to arbitrate fell apart because Satterfield wanted to bring the subcontractors into the arbitration, the School District didn't. As a result of the arbitration agreement falling apart, this case came up here on a petition for writ of mandamus dealing with the arbitration issue. That left this case stayed until January 25th of 2008. At that point, we get back to the trial court level, and that's in the spring of '08 is when we discovered that the order was granted and we actually have the third parties in the case, so we begin to serve them with an amended petition. At that point, the District continues to oppose the joinder of the third parties, the subcontractors, and the Court now severs them. So the trial court which initially began by agreeing with bringing in the third parties, then issues an order severing the third parties even though there had been actually no motion moving to sever the third parties. So why isn't this, this sudden change in position mooting this opinion, well, or mooting this mandamus?

JUSTICE NATHAN L. HECHT: Well, I didn't quite ask you that.

ATTORNEY NICHOLAS A. PARMA: Oh, I'm sorry.

JUSTICE NATHAN L. HECHT: I understand your position on that, but I was wondering if you were in agreement that the trial court should now reverse that and proceed to trial with all the parties joined?

ATTORNEY NICHOLAS A. PARMA: That's --

JUSTICE NATHAN L. HECHT: I understand your concern that the trial judge is not a party to that agreement and that it or the District may change its mind, I understand that position, but I'm just wondering if you're in agreement that far?

ATTORNEY NICHOLAS A. PARMA: Yes, we are in agreement that far. The concern of course is that the trial court, without an order from this Court, the trial court is always free to change its mind. And the District, although it's now in agreement, is always free to change its mind. Plus we will have the third parties, there's always a possibility that one of them will file a motion to sever on their own volition. Without this Court's order in place, there's nothing to prevent this situation from repeating itself.

JUSTICE DALE WAINWRIGHT: So the School District agrees with the consolidation now, you think?

ATTORNEY NICHOLAS A. PARMA: That's what they're telling me. At this time, they are.

JUSTICE DALE WAINWRIGHT: What did the trial court say about its order? I mean the trial court signs an order that says, "Yes, bring these parties in," and then the District Clerk, I'm not sure which clerk, but a clerk blotted out his signature. What did the judge say when you brought that to his attention?

ATTORNEY NICHOLAS A. PARMA: Your Honor, I don't know if we actually brought it to his attention. I don't think we actually asked him his opinion on that.

JUSTICE DALE WAINWRIGHT: Yeah.

ATTORNEY NICHOLAS A. PARMA: I mean he did recognize that the order had been granted. I mean that is one thing I want to make clear, nobody, neither the District Clerk nor the trial judge have claimed that order didn't issue. I mean I think it's noted in the docket sheets, and once it was brought to the Court's attention, the Court recognized that it did exist and that the subcontractors were in fact part of the lawsuit.

JUSTICE DALE WAINWRIGHT: Has anyone moved to reconsider that order, or has the order been withdrawn by the Court?

ATTORNEY NICHOLAS A. PARMA: Well, the order was essentially overturned when the judge severed the subcontractors out. I mean that's one of the differences between this case and the case you heard earlier today. In that case, the trial judge never allowed the parties to come in. In this case, the judge recognized the parties were in and then severed them out.

JUSTICE DALE WAINWRIGHT: Okay. So, you know, sometimes trial dockets are pretty large and complicated in Harris County, there can be 700 or 1200 or so cases pending. You think the trial judge knew about the prior order granting your motion and then implicitly reversed it in severing the parties?

ATTORNEY NICHOLAS A. PARMA: The trial court --

JUSTICE DALE WAINWRIGHT: Do you think the --

ATTORNEY NICHOLAS A. PARMA: The chronological problem is --

JUSTICE DALE WAINWRIGHT: -- trial court decided to reverse its prior order?

ATTORNEY NICHOLAS A. PARMA: Yeah, it's kind of a chronological issue.

JUSTICE DALE WAINWRIGHT: Okay.

ATTORNEY NICHOLAS A. PARMA: The judge knew he signed it when he signed it, at some point I'm sure he forgot that he had signed it, and everybody, no one knew it had been signed. In 2008, when we brought it up and we started filing the amended third party petitions, the trial judge then at least remembered or became aware of the existence of the order. And what happened, the District filed a motion to strike the third party petition, and the trial judge, instead of granting a motion to strike the third party petition, instead severed out the third party, so he explicitly overturned his earlier ruling bringing the third parties, the subcontractors in.

JUSTICE PHIL JOHNSON: So why did he do that, did he say?

ATTORNEY NICHOLAS A. PARMA: I think it's, he accepted the arguments made by the School District. The District originally filed a suit based solely on negligence, their March original petition was solely on negligence. They amended later to bring in warranty breach of contract, and ultimately I think they've honed it down to where it's a very narrow breach of contract claim with no facts alleged, and I think the trial judge simply agreed with them, this is purely a breach of contract case between the School District and the general contractor and we're not going to bring in any of the subcontractors.

JUSTICE NATHAN L. HECHT: He didn't say?

ATTORNEY NICHOLAS A. PARMA: He didn't say, no.

JUSTICE HARRIET O'NEILL: Possibly the passage of time? Were you up against a trial date?

ATTORNEY NICHOLAS A. PARMA: We were approaching a trial date, but --

JUSTICE HARRIET O'NEILL: Could it the fact that they had not been served and brought in yet would have factored into the decision?

ATTORNEY NICHOLAS A. PARMA: Your Honor, I hesitate to speculate.

JUSTICE HARRIET O'NEILL: I know.

ATTORNEY NICHOLAS A. PARMA: They had, one of the subcontractors actually had been kind of tagging along throughout this litigation, and I think there's some debate as to whether they had even been served, and I don't even want to get into what that was all about, but they are or they were later served. I don't know that time was an issue. I mean from our perspective we have been diligent in trying to bring the third parties in from the beginning of this litigation. I mean we tried September, May or March to September of 2006 in a complex construction defect case, that period of time is not egregious. And we tried to bring them in during arbitration. One of the reasons we didn't push it stronger, we didn't push it with the trial court during the arbitration process is we did not want to appear to be availing ourselves of the jurisdiction of the trial court by pushing our third party petition because we were planning to bring the subcontractors into the arbitration, which of course all of this was after the order actually issued granting us leave to bring the third parties in. The result, also along with this, we filed a motion to consolidate because we have filed a claim against the subcontractors in our cause of action, and I think that was a belt-and-suspenders approach. We filed to consolidate that and to consolidate a claim thath the District had pursued against the architects and engineers in this case which was denied. There was, this case actually involves three lawsuits because the School District, along with suing us, has sued the engineers and architects, and it's my understanding that the architects and engineers have settled their claims out, and we felt they should be in the initial suit as well because some of the allegations against Satterfield will turn on whether the defects, the alleged defects in the school are a result of design defects or architectural failure.

JUSTICE NATHAN L. HECHT: It's unclear from the record whether the Third Party Petition was filed and served before any deadline in a docket control order. Can you illuminate that issue?

ATTORNEY NICHOLAS A. PARMA: Your Honor, I'm not sure, to be honest, what the status was on the docket control order in September of 2006, I'm not even sure there was one in place. I don't think there was a trial date in place.

JUSTICE NATHAN L. HECHT: There's some reference to an April docket control order, but it's not in the record.

ATTORNEY NICHOLAS A. PARMA: I honestly don't know. What I do know is that the District, when we argued that motion, never brought up any claim that, no, you shouldn't be allowed to bring these guys in at this point, you're outside the docket control order. The issue of timeliness was not raised back in 2006. I think a lot of the problems in this case obviously are the same as the problems that were addressed in the first case this Court heard today. What we have here -- and by the way, I want to make one difference clear. It may appear from the brief that Satterfield was solely the general contractor here and did not actually do any construction. Satterfield did in fact build the foundation on this school, the high school. Now, Satterfield built the foundation, but subcontractors built everything from the foundation up. So the walls, the roof, the HVAC, plumbing, electricity, that was all done by someone else. What we've got right now are actually three cases that all arise from the same school building and the same allegations of defect. One of those cases has settled, one of them is before the Court right now, and the other one is kind of hanging fire while this matter is stayed. We've got --

JUSTICE NATHAN L. HECHT: And that's not, that's wholly apart from

the cases that were mentioned in the earlier argument?

ATTORNEY NICHOLAS A. PARMA: Yes. In fact, Your Honor, right now as I understand it, there's this case coming out of Duval County, the Court has two cases before it out of the Mercedes Independent School District, there's the one that was argued this morning, and then there's another petition for writ of mandamus that has been pending without anything happening on it, and then I think there are five cases teed up, and I -- also coming out of the Mercedes School District case, and I believe the Amicus referenced another case out there. And that's one of the issues right now. This, traditionally school districts have not taken this approach of saying, "No, we want to sue the architects in one case, the subcontractors in another, and the general contractors in a third, or general contractors in a third." Typically these cases, in my experience, everyone gets sued in one case and it all proceeds together. So this is a recent development and this is one of the reasons that I think this Court needs to rule in this case. We're going to be facing repeats of this situation in all likelihood in the future, that's one of the things that makes this, these two petitions for writ of mandamus relevant to the jurisprudence of the state.

JUSTICE DALE WAINWRIGHT: Are there any claims that you foresee that would necessitate your bringing in, your client bringing in the architects and engineers, or you're solely looking at claims, or potential claims against the subcontractors?

ATTORNEY NICHOLAS A. PARMA: Well, I think that their work is part of the same set of operative facts. I mean in this case there's been some allegations, the School District's experts have complained about a vapor barrier issue with the foundation, and there's allegations that we failed to do that or maybe a sub failed to do that. There's also the allegation that that's actually a design defect, that the architects and engineers did not call for that vapor barrier. So potentially we could be looking at a situation where a jury could be saying, "Well, there's no vapor barrier, the general contractor messed that up," and we're going to be pointing at someone who's not in the lawsuit that the School District is going to argue shouldn't be considered in the lawsuit. So, yes, and that is one of the issues before this Court. We moved to consolidate the claims against the architectural team, the engineering team into this case. This is not purely the severance issue. I'm running out of time, so are there any questions before I do?

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Counsel. The Court is ready to hear argument from the Real Party in Interest.

MARSHAL: May it please the Court, Mr. Enoch will present arguments for the Real Party in Interest.

ORAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF THE RESPONDENT

ATTORNEY CRAIG T. ENOCH: May it please the Court, the question before the Court is did Judge Gabert have but one choice to make in this case. And the argument Satterfield makes to you is that the only choice Judge Gabert had was to accept whatever strategic decisions Satterfield made about its subs in this case. There are two considerations, as I see it, that is concerning the Court. One is it's all about fairness, it's all about judicial efficiency and it's all about cost. All of that goes to the heart of judicial discretion, the discretion of the trial judge. The other consideration --

JUSTICE NATHAN L. HECHT: Could I ask you just at the outset, whether you still are willing to move the trial court to proceed to

trial with all the parties in the case?

ATTORNEY CRAIG T. ENOCH: Yes, sir. Yes, Your Honor, we are. I do have to make a caveat about that. Part of that decision process, as Justice O'Neill recognized, is a time, it's a function of time, and if we get a -- we asked the Court to lift the stay so we could approach the Court to answer all of their questions, what would the trial judge do, and they objected, and so we have not had that opportunity. If the Court has to wrestle for a long time on the mootness question about that, then we have lost the advantage that we're trying to get which is we think we can go to trial in the next year, and we lose that advantage if the Court has to wrestle about it. The other consideration the Court has of course, and Justice Johnson raised this earlier, what kind of principle can this Court craft for the facts of this case to decide or guide the trial judges on what to do. Let me tell you a little bit about the facts of San Diego Independent School District. The high school was built in 2003, almost immediately they discovered structural defects. You heard a reference to a moisture barrier. The moisture barrier was placed between the foundation and the flooring, the moisture barrier is missing. There's a question about reinforcements in the walls, some of the reinforcements are missing. There's a question about the basketball court because when you dribble the ball, all of a sudden it goes flying off at a weird angle because there's something uneven about the floor. If not a buckling, maybe some air underneath the wood, but the basketball makes a strange bounce off the floor. San Diego Independent School District sued Satterfield because Satterfield was the one that took on the obligations to build it according to the plans and specifications. San Diego agreed in April 2007 that Satterfield could bring in its subs, and at the time Satterfield said the timing isn't right. As you heard Mr. Parma, they were concerned about protecting their rights in arbitration so we don't want that to happen now, so it was a strategic decision on their part. Now we come forward many months later, a year and a half later arguing about this.

JUSTICE HARRIET O'NEILL: Wait, I thought he said that it was you who didn't want to bring all the subcontractors into the arbitration?

ATTORNEY CRAIG T. ENOCH: At that arbitration. This was not at the arbitration, this was at a different point in time in April. There is a transcript in the Court's record where there was a discussion about it, and we had no, we had no objection to it, but their argument was that they didn't want to do it at that point because they didn't want to affect their rights under the arbitration agreement and to bring them.

JUSTICE PHIL JOHNSON: But you did not want the subs in the arbitration?

ATTORNEY CRAIG T. ENOCH: That's correct, we did not want the subs in the arbitration.

JUSTICE PHIL JOHNSON: So how does that differ from not, from the prior case where you don't want them in the lawsuit? It seems like you come out, the arbitrator may not help out any more than at trial where you have a single liability question and a single damages question. The arbitrator comes out with a single finding of liability, single damages, it seems like the contractor is in the same position as far as seeking to assert its contractual indemnity rights.

ATTORNEY CRAIG T. ENOCH: Well, two issues, Your Honor. One, the question was, did the trial judge, did the trial judge abuse discretion by severing them out, and they did not want them in at one point in the process. And when the judge is considering those issues, the judge considers the circumstances. In specific answer to your question, Your

Honor, there are false premises within their arguments, and I would like to address that. In their brief if they say it once they say it a dozen times, we cannot, "we," the San Diego Independent School District cannot prevail in our claims against Satterfield unless we prove, San Diego Independent School District proves that a subcontractor breached their duty. That's in their brief and they say it four times. That is not a correct premise. We don't have to prove any subcontractor breached any duty to Satterfield to establish our claim against Satterfield in this lawsuit. Their next premise is that their damages are indivisible from the subs, that there is no damage against Satterfield that we could claim that would not necessarily have to be damage caused by the sub. That is not true. They claim in their briefing, they are entitled to apportion damages among the subs for whatever our award in our trial case, San Diego, against them is made. That is not a true premise. Additionally, San Diego Independent School District, and this was the question Justice O'Neill raised earlier, has a contract with a general contractor for the very purpose that they don't have to deal with individual subs to perform individual functions on a building. What is happening in this case is the contractor who contracted with us to stand behind all of the subs is asking this Court now that San Diego is saying "Honor your contract, we are suing you to honor your contract." saying, "Wait a minute. We hired subs to do the work. San Diego, your case requires you to come in and prove what the subs did wrong in order to establish liability for what we did wrong," a false premise.

JUSTICE HARRIET O'NEILL: Now, let me follow up as a practical matter. The representation has been made that typically these claims are brought in tort and typically that's the way they're tried, but this contract theory is a little bit of a new animal. So if we were to rule your way and say that the trial court has considerable discretion in that regard, then is every lawsuit going to name, within 30 days is there going to automatically include every single sub and see how it goes from there? Is that going to be the natural result, and do we want that?

ATTORNEY CRAIG T. ENOCH: Your Honor, I don't know. It seems to me this Court has made it fairly clear that if all of your damages are economic damages, only economic damages, then you have a breach of contract claim. We may have economic damages. We don't necessarily claim that any action was taken that damaged other property, although that's involved in this lawsuit, and I'll try and explain that a little bit later. But there's nothing that keeps them from bringing whatever claims they have against the subs. But I don't believe that if we brought the claim under our contract for performing under the contract, we have a different set of damages. There may be some negligence, could be our client chose not to bring negligence claims. We think we have a good contract claim against them and we're asking them to honor their contract.

JUSTICE NATHAN L. HECHT: But the rule, to follow up with Justice O'Neill's question, and the rule gives them 30 days during which the trial court does not have discretion to strike the claim.

ATTORNEY CRAIG T. ENOCH: That's correct, Your Honor.

JUSTICE NATHAN L. HECHT: So why wouldn't you just out of an abundance of caution join everybody in sight just in the first 30 days and then let it all sort out, rather than take a chance that once it is sorted out and you kind of know who's at fault and who's not, then joining them in?

ATTORNEY CRAIG T. ENOCH: Your Honor, it seems to me you have, I

think the standards apply of use, whether you cut them out or let them in by discretion at the other side of it, but I think it's more, it's more difficult if there's no discretion to allow them in in the first 30 days, no discretion.

JUSTICE NATHAN L. HECHT: Why is that, by the way, that there's 30 days?

ATTORNEY CRAIG T. ENOCH: Two things, Your Honor. I think one, it's reasonable to expect that everybody can be up and ready to go to trial in a reasonable period of time, in roughly the same amount of time, if all the people are in the lawsuit all at one time. That's a different question. When you get closer to the time of trial, now the judge has got to exercise discretion, "Do I really want it because it's likely it could interfere with the trial of the case," so now the judge has discretion. Or the opposite, everybody is included and all, and now the judge is determining, "You know, I think I better sever these out because I'm concerned about how I can try this lawsuit with all of these parties here." And so then the question is when you sever them out, what is the discretion being exercised by the Court?

JUSTICE NATHAN L. HECHT: Well, it's pretty limited, right? I mean we've written that there are some limits on discretion of severing out.

ATTORNEY CRAIG T. ENOCH: Um-hm.

JUSTICE NATHAN L. HECHT: If the claims are related, then they ought to be tried once. The judge has limited discretion to sever them all out.

ATTORNEY CRAIG T. ENOCH: That's correct, Your Honor.

JUSTICE DALE WAINWRIGHT: In FFP we reversed a severance of the trial judge. FFP vs. Duenez, and said that he abused his discretion in doing that. It's not cited in either brief. How does that apply to your argument?

ATTORNEY CRAIG T. ENOCH: Your Honor, I do not argue and don't stand before you that there are not limits to the judge's discretion. My point is that the judge's discretion has to be evaluated based on the circumstances before the judge at the time the judge makes the ruling, and we're going through those circumstances. And one of those circumstances is, that I emphasize again, one of the circumstances is their premises about what it is we have to prove. Their entire argument is it's the same facts that will be presented to the jury that will decide this case. Don't deprive us of the right to use those facts at the same time against our subs. And I think that's a false premise and I think the Court will conclude that that is a false premise because we do not -- let's use the basketball court as an example. They say, Satterfield, that we have to show it was a subcontractor who messed up the basketball court.

JUSTICE PHIL JOHNSON: Well, they may be wrong about that.

ATTORNEY CRAIG T. ENOCH: Yes, Your Honor.

JUSTICE PHIL JOHNSON: They may have a contractual obligation to make it good.

ATTORNEY CRAIG T. ENOCH: Yes, Your Honor.

JUSTICE PHIL JOHNSON: But the question goes, how do you determine what the jury, what their awarded, what you're awarded against them for the basketball court as opposed to the vapor barrier not being there as opposed to all those things, and we have to retry all those same questions we had in the first case?

ATTORNEY CRAIG T. ENOCH: Your Honor, I respectfully disagree, I don't believe they are the same questions because the evidence will be, does the basketball court work? No, it doesn't, it's buckled, they did not honor the contract to have a basketball court that worked. What's

the value of that basketball court? And they will say the cost of repair is X dollars or the value is.

JUSTICE PHIL JOHNSON: But the jury says that.

ATTORNEY CRAIG T. ENOCH: That's what the jury, the jury will say that. In their trial against their -- they will have to decide, do their own investigation, look for why did the basketball court buckle, not if it did, but why did it. Was it the vapor barrier, was it because they used the wrong wood, did somebody order the wrong material, did they use someone who was not expert at it? They will then bring it to the jury, a different set of evidence, the evidence on why did it fail.

JUSTICE PHIL JOHNSON: But they're only entitled to indemnity, so they're only entitled to get from their sub what they had to pay for the basketball court.

ATTORNEY CRAIG T. ENOCH: Your Honor, they only get from the sub what the sub caused in damage to the basketball court --

JUSTICE PHIL JOHNSON: Right.

ATTORNEY CRAIG T. ENOCH: -- not the basketball court.

JUSTICE PHIL JOHNSON: Well, but they only get what they had to pay for the basketball court. I mean if the first jury found the sub caused $300,000, but we don't know that because it's just all hidden in a big number, and then they sue the sub, how do they know how much? They only get indemnity, they don't get damages against the sub, do they? They just get indemnity, as I understand their position.

ATTORNEY CRAIG T. ENOCH: The indemnity is limited, Your Honor.

JUSTICE PHIL JOHNSON: To what they had to pay you?

ATTORNEY CRAIG T. ENOCH: No, sir. Their indemnity is limited to what the subcontractor actually caused in damage. The jury in our case will say the value of that basketball court will be --

JUSTICE PHIL JOHNSON: But the jury might not say the value of the basketball court, it might say the value of the damage to the school is $10 million, not basketball court, vapor barrier, HVAC, and foundation.

ATTORNEY CRAIG T. ENOCH: All right, I understand. I understand, Your Honor, I'm sorry. When they go against their subs, they will say that we had to repair, or we will found liable for all of this evidence. There won't be just, "Jury, what is it?" There will be evidence about what the School District says is wrong with the building. There will be one number out there, but by the time the trial is over, Satterfield will know, was it the air-conditioning unit, was it the basketball court, was it the wall? They will know that. The indemnity of the subcontractor is not the amount of money awarded, the indemnity of the subcontractor is only to the extent if the basketball court doesn't work, "Subcontractor, what did you do on the basketball court that caused damage?"

JUSTICE DALE WAINWRIGHT: But they won't know that from the first case unless they get specific issues on all of those items. What was wrong? The basketball court was a problem. Who did it? Surely you're going to put on evidence of not just it didn't work and how much does it cost, but who built it wrongly, which will bring in --

ATTORNEY CRAIG T. ENOCH: Your Honor, that -

JUSTICE DALE WAINWRIGHT: -- something about the subcontractor surely. Surely you're not going to ask the jury to say, to agree with you that there's no support here in the wall and that it caused you X damages, without putting on who caused there to be no support in that wall? And that may be bringing in the subcontractor. And of course, you will say, "Satterfield is responsible," but surely you're going to tell the jury who did it, otherwise the jury will ask and wonder and think about it and won't know.

ATTORNEY CRAIG T. ENOCH: Your Honor, that's their false premise. I can take an x-ray of the wall and I can look at my plans and specs that says it calls for rebar every 16 inches in the concrete wall and it calls for a concrete stub in that wall every 16 inches, and when I do the x-ray I find there is not the rebar in that wall, and there is not the concrete stub, and I sue Satterfield and I say, "Satterfield, you breached the contract because the plans and specs call for it every 16 inches with concrete." The expert gets up there and says --

JUSTICE DALE WAINWRIGHT: Is there a master contract?

ATTORNEY CRAIG T. ENOCH: -- "Yes, this doesn't comply with" -- I'm sorry, Your Honor.

JUSTICE DALE WAINWRIGHT: Is your contract with Satterfield a master contract? Does it include the contracts with the subs?

ATTORNEY CRAIG T. ENOCH: Your Honor, our contract says they are solely responsible for any failure.

JUSTICE DALE WAINWRIGHT: I'm talking about the form of the contract. Does it include all the subcontracts?

ATTORNEY CRAIG T. ENOCH: I do not know, Your Honor.

JUSTICE DALE WAINWRIGHT: When you submit as an exhibit your contract with Satterfield at trial, will it include the identity of the subcontractors and what they were supposed to do as well?

ATTORNEY CRAIG T. ENOCH: I'm fairly sure it will not include the identity of the subcontractors. It may say that we give them the authority to go hire subcontractors to work on the project, but the contract expressly says that they are solely liable for the performance under the contract. But the point, the expert will say, "This wall does not meet the plans and specifications." Their premise is that we have to say, "It was XYZ company that was responsible for doing it." No, Your Honor, Satterfield, under our contract is responsible for doing it. In fact, Satterfield might have made the decision to put the rebar at 18 inches instead of 16. Satterfield might have made a decision to put concrete stubs every 18 inches instead of 16. There may not be a --

JUSTICE DON R. WILLETT: Is it possible that the severed suit might go to trial before the School District suit against Satterfield?

ATTORNEY CRAIG T. ENOCH: Your Honor, under their indemnity, their indemnity kicks in when Satterfield is found liable for damages.

JUSTICE DON R. WILLETT: Okay.

JUSTICE DALE WAINWRIGHT: So let's assume then that you're right, the jury is not going to know, at least not from your side who the subcontractors were and what they did in this project, which I'm skeptical of, but assume that's right. Then Satterfield can take the position that it's all correct, that there's not problems here, the building was built fine. Then as was asked in the prior case, the second suit, if there is a second suit between Satterfield and the subcontractors, the subcontractors are going to say, "Great, because we weren't in that first suit and Satterfield defended the building, now we're going to use Satterfield's own testimony against it in the second suit." Is that a problem?

ATTORNEY CRAIG T. ENOCH: No, Your Honor. In fact, I remember a very famous question asked of Senator Cornyn when he appeared after he left the bench. He was taking a position inconsistent with a position that he had done while he was on the Supreme Court, and his answer was, "I lost." And I think there is no difference if they lose. That's the threshold for the indemnity, if they win there's no indemnity claim.

JUSTICE DALE WAINWRIGHT: Well, assuming the practicalities can be worked out, our most recent statement on abuse of discretion for severance, FFP vs. Duenez, we said, "We have explained that avoiding

prejudice, doing justice and increasing convenience are the controlling reasons to allow a severance." How are those goals satisfied by having two suits about the same project involving the same parties and the same facts? I guess you would say the subcontractors would be different in the two suits?

ATTORNEY CRAIG T. ENOCH: I think the subcontractors, Your Honor, would be different, but from the perspective of what it looks like to try the case, what it looks like to try the case. 57 subcontractors have been included in their complaint, 57.

JUSTICE DALE WAINWRIGHT: Out of how many?

ATTORNEY CRAIG T. ENOCH: I have no idea, Your Honor.

JUSTICE DALE WAINWRIGHT: More than 57 or is that all of them?

ATTORNEY CRAIG T. ENOCH: I don't know if it's only 57 subs they had, but 57 have been included in this. Asking about the case, when I talked about the apportionment, no subcontractor is liable for any damages that it did not cause by its work. It is not apportioned. Those 57 are entitled to a separate trial, a separate trial on their work and whether their work contributed to the particular damage that Satterfield complains. Not to the building, Satterfield will tell you, "Well, it's a school building." No, it's not. For a subcontractor it's that wall, for a subcontractor it could be that corner in the ceiling, and they are entitled to try each one of those because indemnity depends on them causing that damage. As a trial judge I am entitled also to consider whether they speak out of both sides of their mouth, whether they defend there's nothing wrong and then they turn around to the subs and say, "But you caused the problem," and then they tell you, their premise, it's my duty, San Diego, to identify the sub and identify the problem.

JUSTICE PHIL JOHNSON: Well, don't we have that in a lot of lawsuits that, "We didn't do anything wrong, we're not liable, but if we're liable, the damages are not nearly as much as they say they are anyway." I mean isn't that the nature of, and we allow alternative pleadings, and isn't that the nature of the lawsuit when you're defending cases?

ATTORNEY CRAIG T. ENOCH: Generally, yes, Your Honor, when the duties that arise and the damages that are caused are the same. This case, the duties do not arise the same and the damages are not the result of the same duties that are breached, and as a result, you will have many trials as to each of the subs to determine their responsibility for what they did.

JUSTICE DALE WAINWRIGHT: If they're not in the first trial, isn't Satterfield going to bring the sub in to explain why your argument about the basketball court is wrong? Aren't they going to bring their expert in to say, "I am a subcontractor for Satterfield, this is how I built the floor and this is why it's correct. I'm not sure what the problem is, I haven't bounced a ball out there, but it was done properly." So how is it going to be -- I mean the larger question is isn't it more efficient to have one proceeding rather than two? If the experts, the subs, 57 subs perhaps, are going to be brought in or likely to be brought in to the first trial in any event?

ATTORNEY CRAIG T. ENOCH: I think that's far from certain, Your Honor.

JUSTICE DALE WAINWRIGHT: Assume with me that that will happen.

ATTORNEY CRAIG T. ENOCH: Well, I could assume that we'll have 57 subs all traipsing in to say that their work was okay, and that will be their evidence at the trial of this case, and then the jury says there's no breach of contract, and that's the end of the indemnity. But

it will be an entirely different case, Your Honor, if they bring the subs in not to testify they didn't do anything wrong, but they bring the subs in individually to testify that the subs did do something wrong, and therefore they're liable for whatever damage the jury awards. That's a different amount of evidence --

JUSTICE DALE WAINWRIGHT: Well, they wouldn't do that. That would be your argument. The subs would defend their work. If there's something they can't defend, I would suppose they would acknowledge it, but they would come in to state presumably the truth, and then you would say, "No, they did this wrong, we have a disagreement," and then the jury would decide who they believe, but I don't think they're going to make different arguments under oath, I would hope.

ATTORNEY CRAIG T. ENOCH: Your Honor, I think we will simply say, "Does the basketball perform the function that they agreed to build it to?" And if the basketball court does not perform under the functions, we don't go any farther to say why it doesn't perform. That's the problem with their evidence, they will have to move forward and say why it doesn't perform.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Counselor.

REBUTTAL ARGUMENT OF NICHOLAS A. PARMA ON BEHALF OF PETITIONER

ATTORNEY NICHOLAS A. PARMA: The problem is the first jury is not going to be asked, "Is there something wrong with the basketball court?" If that's all we had was a jury saying the basketball court is faulty, then it would be an easy matter to go and pursue the basketball court subcontractor for indemnity. Breach of contract in the first suit could be found because of the basketball court, because of the wall, because of the roof, because of the HVAC, because of the foundation we built, because of the design, and we will not know. We will have to go against everybody. Now, I think there's a misunderstanding here, there's the purported false premise. We're not saying they're going to have to prove that a particular subcontractor, they're not going to have to say, "Subcontractor X failed to do their job," but what they are going to have to say is, "Subcontractor's X product, what they built is defective." And if you've got a wall that's lacking rebar, that's lacking some function of that wall, then you are necessarily proving that the person who built that wall built it defectively. The subcontracts incorporate the obligations of the prime contract. The prime contract specifically says you can hire subcontractors, but you must hold them to the same standards as the general contract, and they must work up to the architectural engineer standards referenced in the prime contract. So a subcontractor cannot perform defective work -- or there cannot be defective work without a subcontractor having failed to meet the standards. So if they can prove the HVAC system is defective, then they have necessarily proven that the HVAC subcontractor failed to work, breached their contract with us. They're going to have to make the same burden of proof. The only problem is --

JUSTICE HARRIET O'NEILL: But isn't it sort of like joint and several liability? I mean you're both responsible under the contract because you insured the subcontractor's work, so why wouldn't you treat it that way? Then it's up to you to go pay all the damage that you stood behind, and then it's up to you to go collect what you can based upon who you think failed to perform.

ATTORNEY NICHOLAS A. PARMA: The problem is we won't be able to. We

won't be able to tell who failed to perform because a breach of contract claim, we can be found we breached our contract based on failures to perform by any numbers of subcontractors, so who do we sue? Who do we tell -- you know, we go and sue everybody that they put on evidence of. Well, at the second trial -- and this is a little bit of a problem I have with their position that, well, we can just go -- in the first trial, we stand in the shoes of the subcontractors and defend their work, then we go and we attack their work and stand in the shoes of the School District, and when the jury says, "What's going on here?" We aren't going to be able to just say, "Well, we were wrong." I mean the jury is not going to understand that and they're going to be infuriated because they're going to think that we're playing games. But in any event, how will we know who we're supposed to get indemnity from? I mean there's going to be, the allegations are pretty broad here.

JUSTICE PAUL W. GREEN: Well, why wouldn't that be the general's responsibility? It just strikes me that if somebody wants something built and they hire a contractor to build it, they expect it to be built like they wanted it to, and if it's not, then the person who would know more clearly why that is not so is the person who built it, not the owner.

ATTORNEY NICHOLAS A. PARMA: Well, what we know is one thing, what the jury knows is another. The first jury is going to be the one making the decision, who made mistakes, who did what defectively, and that's going to be the injury to Satterfield, that's going to be the basis of Satterfield's claims against a subcontractor, but we won't have any idea of what compelled the first jury to find that we breached the contract. So there is no way for us to meet that burden, and I think that this --

JUSTICE PAUL W. GREEN: But the owner didn't have a contract with the subs.

ATTORNEY NICHOLAS A. PARMA: The owner didn't have a contract with the subs, but the owner did contemplate the use of subs, did obligate us to hold the subcontractors to the same standards as the prime contract, did tell us if you're going to hire subs, they have to work to the same specifications and the same standards. So this is not like coming out of the blue, they had no idea that there might be subs and that subs might be blamed.

JUSTICE HARRIET O'NEILL: Let's say you get a jury charge that breaks it down. Let's say all the subs are in and you get a jury charge that says, "Was the flooring subcontractor, did they breach their duties to perform in a good and workmanlike manner, and what's the amount of the damages next to that?" $100,000 for bad flooring on the basketball court. You're still responsible for that, right?

ATTORNEY NICHOLAS A. PARMA: We're still responsible for that, the problem is we'll have a verdict that's nothing more than an advisory verdict because our claim against the subcontractor will be tried in a separate case. We won't be able to say, "Well, subcontractor that built the floor, you're responsible for $100,000," because they will say, "We weren't in that case." I mean I'm not even sure that you could legally have a granulated charge like that because you'd be apportioning damages to parties that are not in the case. It would be a violation of their Constitutional rights to have their liability adjudicated when they're not before the trial court.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Counsel. That concludes the argument in the third case. The cases are submitted, and the Marshall will adjourn the court.

[End of Audio Recording.]

2009 WL 3400654 (Tex.)