FILED
23-0565
10/10/2023 2:05 PM
tex-80435525
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

Supreme Court of Texas

No. 23-0565

LUKE HOGAN, ON BEHALF OF HIMSELF AND OTHER INDIVIDUALS SIMILARLY SITUATED,

Appellant,

v.

SOUTHERN METHODIST UNIVERSITY, AND OTHER AFFILIATED ENTITIES AND INDIVIDUALS,

Appellee.

ON A CERTIFIED QUESTION FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANT'S REPLY BRIEF ON THE MERITS

Philip J. Furia
Jason P. Sultzer
THE SULTZER LAW GROUP P.C.
85 Civic Center Plaza, Suite 104
Poughkeepsie, New York 12601
Tel. 854-705-9460

Jeff Edwards
Michael Singley
David James
EDWARDS LAW
603 W. 17th St.
Austin, Texas 78701
Tel. 512-623-7727

Jeffrey K. Brown
Michael A. Tompkins
LEEDS BROWN LAW, P.C.
One Old Country Road, Suite 347
Carle Place, New York 11514
Tel. 516-873-9550

Counsel for Appellant

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INTRODUCTION

In his merits brief, Appellant and Plaintiff Luke Hogan ("Plaintiff") argues that the Texas' Pandemic Liability Protection Act ("PLPA") is unconstitutional insofar as it retroactively extinguished his right to pursue monetary damages in his breach of contract claim against Appellee and Defendant Southern Methodist University ("SMU"). Plaintiff bases his arguments on the factors established by this Court in *Robinson v. Crown Cork & Seal Co., Inc*., 335 S.W.3d. 126, 139 (Tex. 2010). In its countervailing merits brief ("Brief"), SMU contends that the *Robinson* factors weigh in favor of a finding that the PLPA is constitutional despite its retroactive application. For the reasons detailed herein, this Court should reject the arguments proffered by SMU and rule that the PLPA is unconstitutionally retroactive as applied to Plaintiff's claims.

ARGUMENT

I. Plaintiff's Breach of Contract Claim was Well-Established and Supported by the Record.

As the Fifth Circuit has already recognized, Plaintiff's right to enforce his contract with SMU was well-established at the time the legislature attempted to pull the rug out from under his claim by eliminating his common law rights.

In its brief, SMU argues that Plaintiff had no "settled expectation of recovery" on his claim. SMU contends that "[t]he nature of the right impaired turns largely on the predictability of a plaintiff's recovery at the time a challenged law was enacted."

Brief at 15. According to SMU, the district court found that "any recovery at the time [Plaintiff] brought his novel COVID-19 claims was far from predictable." Brief at 16. What SMU fails to mention is that the district court evaluated the predictability of recovery based upon the mistaken view that Plaintiff's breach of contract claim was subject to dismissal. As the Fifth Circuit noted on appeal, the district court erred in failing to even evaluate the reasonableness of the competing interpretations of the Student Agreement—much less whether the dispute depended upon a material dispute of fact. *See Hogan v. S. Methodist Univ.*, 74 F.4th 371, 375 (5th Cir. 2023). Accordingly, the views expressed by the district court, in a now-reversed opinion, should be afforded no weight in assessing the predictability of recovery on Plaintiff's claims.

Instead, this Court can review the record and find ample factual support for Plaintiff's breach of contract claim. The contract in question is the Student Agreement, which provides that "all proceeds of this agreement will be used for educational purposes." ROA 396. Plaintiff contends that the promise to use the funds for educational purposes amounted to a promise for in-person instruction based on surrounding circumstances.[1] At the time of Plaintiff's execution of the

[1] While SMU disagrees with this interpretation, under prevailing law, if a contract "is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, which creates a fact issue on the parties' intent." *King v. Baylor Univ.*, 46 F.4th 344, 362 (5th Cir. 2022) ((quoting *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996)).

Student Agreement, these educational purposes necessarily included the cost of offering providing an on-campus, in-person collegiate services.

For example, the record shows that "first year students at SMU are required to live on campus and the University promotes "campus [has] built-in resources and opportunities…" including "campus resources, student leadership positions, and increased faculty interactions." CR 334. The Student Affairs website promotes the on-campus educational services, including encouraging students to take a look at the data on "SMU on-campus students as they relate to retention, satisfaction, and success." CR 334-335.

The record further shows that on the Admissions website of SMU, the University promotes its campus and physical location and then states, "From your very first semester at SMU, you have access to everything that defines the signature SMU experience: research opportunities in a variety of disciplines, outstanding faculty who love to mentor, advisors who will help you navigate your academics, business pitch competitions to start a company and so much more." CR 334. In SMU's policy statement and Student Handbook, SMU refers to its policies as campus based or campus wide policies – and utilizes phrases that promote the "campus" and "community." CR 333. In the 2019-2020 Student Handbook, SMU's Vice President for Student Affairs conveys that, "Again, we are pleased that you are part of the SMU community. We believe SMU offers much to its students,

and we hope that you will take full advantage of all SMU has to offer you. We also look forward to what you will contribute to our community." CR 333. The Student Handbook thereafter goes on to list campus and in-person educational services that are available to students at SMU, including 129 physical buildings and areas on campus. CR 333-334. According to the University Policy Manual, the Student Handbook "is a guide for students on the services available at the University." CR 334.

In fact, the Student Handbook lists "campus" 203 times and "community" 116 times as it conveys the policies, practices, and rights of students at the University. CR 334. The Student Handbook goes so far as to define what "campus" and "campus grounds" mean, describing these terms as "refer[ing] to any buildings or grounds owned, leased, operated, controlled, or supervised by the University," indicating that it is a physical location being offered to students. SMU has established different departments within its infrastructure that provide "essential services, support and programs to students, faculty, staff, and the University as a whole" and on its website states that, "Quality resources that enable students to thrive." CR 334. Those essential services are on campus and in person. CR 334.

Here, even without the benefit of discovery, this Court has been presented with a large number of factual inputs to reach the conclusion that Plaintiff's breach of contract claim was both well-recognized under the law and based on a strong

factual underpinning. This is far different from the situation in *Tenet*, where this Court noted that "the record [gave] no indication of the strength of M.R.'s claim." *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 709 (Tex. 2014).

Next, SMU contends that if "any expectation beyond the predictability of recovery matters, the objective inquiry turns on what Texas would be expected to do in response to the strain placed on the State's educational institutions by a global pandemic (or any comparable emergency)." Brief at 16. However, SMU seems to have invented this purported element in the *Robinson* analysis as it does not appear within any case law. Plaintiff is under no obligation to demonstrate or explain how Texas should have responded to the Covid-19 pandemic, but he certainly had no basis to "reasonably expect" that even during a pandemic, the State would arbitrarily nullify specific contracts and cause a windfall to universities by prohibiting students from getting any part of their tuition reimbursed. Plaintiff reasonably believed that in the event that an unforeseen occurrence caused him to lose some or all of the benefit of his contract with SMU, he would be adequately compensated through an appropriate refund. SMU's suggestion that this expectation was unreasonable is both unsupported and illogical.

SMU also argues that Plaintiff's claim was unsettled due to the educational malpractice doctrine. This argument is specious as the Fifth Circuit roundly rejected the application of this doctrine in this case. *See Hogan*, 74 F4th at 375, n.1. ("Even

assuming Texas would apply this doctrine, we have already rejected its applicability to claims like Hogan's.").

Accordingly, Plaintiff had a well-settled and vested right to pursue his breach of contract claim against SMU.

II. The PLPA Completely Eliminated Plaintiff's Claims Against SMU.

The final factor in the *Robinson* analysis is the impairment of the prior right. This factor weighs in favor of invalidating the PLPA because, as drafted, it completely removes Plaintiff's ability to recover monetary damages on his breach of contract claim. In opposition, Defendant contends that this impairment is not fatal to the PLPA because it only bars "one type of remedy" and, thus, "cannot be unconstitutional retroactive under Texas law." Brief at pg. 20. SMU's conclusion derives from a misinterpretation of case law. "The prohibition against retroactive application of laws does not apply to procedural, remedial, or jurisdictional statutes, because such statutes *typically* do not affect a vested right." *Univ. of Tex. Sw. Med. Ctr. v. Estate of Arancibia*, 324 S.W.3d 544, 548 (Tex. 2010) (emphasis added). SMU cannot dodge the Constitution simply by labeling the Law remedial. Instead, this Court requires an analysis of whether the Law affects a vested right.

For example, in *DeJoria*, even after recognizing that the law in question was procedural in nature, this Court endeavored to ascertain the impact of the law on the party's rights. Ultimately, this Court determined that even though the law was

procedural, "[t]he bigger point, though, is that the retroactive law does not abrogate Maghreb's claim." *DeJoria v. Maghreb Petro. Expl., S.A.*, 935 F.3d 381, 389 (5th Cir. 2019). In contrast, in the instant matter, the PLPA completely abrogates Plaintiff's breach of contract claim. While it is true that Plaintiff stated perfunctory claims for injunctive and declaratory relief, they are of no value whatsoever and are most certainly no longer actionable. Plaintiff's pleading requested declaratory "protecting Class members from paying the full cost of tuition and Mandatory Fees during the pendency of the pandemic." ROA 330. Plaintiff is no longer a student at SMU and the Covid-19 pandemic has abated. If this case is litigated further following remand to the district court, SMU will certainly argue that Plaintiff's request for a declaration of rights is subject to dismissal since there is no longer a justiciable actual controversy so as to allow a declaratory judgment to issue. *See Sherwin-Williams Co. v. Holmes Cty.,* 343 F.3d 383, 387 (5th Cir. 2003) (holding that the first step in determining whether to dismiss a declaratory judgment action involves a determination of "whether the declaratory action is justiciable.").

Thus, while the PLPA deprives Plaintiff only of the right to monetary relief, that is tantamount to depriving him of the only relief available to him. Accordingly, this Court must determine whether a law which deprives a Plaintiff of the right to sue for damages affects a "vested right" when that Plaintiff is left only with the option of pursuing legally doomed and worthless declaratory relief.

Plaintiff prays for this Court to rule that the PLPA is unconstitutional as applied to him, as it has left him with no potential avenue to obtain any remedy for his breach of contract claim.

III. The PLPA Legislative Findings Do Not Establish a Compelling Public Interest.

Because Plaintiff had a well-established breach of contract claim which was retroactively extinguished by the PLPA, it was vital that the PLPA be based on compelling as evidenced by the legislature's factual findings. "There must be a compelling public interest to overcome the heavy presumption against retroactive laws." *Robinson*, 335 S.W.3d at 146. Plaintiff argued in his merits brief that all of the Legislature's specific findings regarding public interest in the PLPA relate to individuals and entities in the healthcare field and that the Legislature did not include *any* actual findings of fact related to educational institutions.

In opposition, SMU vociferously argues that this a "(perplexingly) incorrect statement." Brief at 26. Tellingly, though, SMU fails to even identify a single counterexample in the PLRA's specific findings that have any bearing on protecting educational institutions from claims for monetary damages. Instead, SMU only points to generic conclusory pronouncements that only include "educational institutions" among a laundry list of other economic sectors: that the pandemic had "severe and adverse impacts on the . . . ordinary functioning of . . . educational . . . institutions." Brief at pg. 26. While this is certainly true, it is likewise true that the

pandemic adversely affected students. There is no explanation anywhere in the findings of what these "impacts" were on educational institutions, or how they could justify a complete inoculation from claims for monetary damages at the expense of at least equally adversely affected students. Similarly, SMU references a House Report which stated that the "onslaught of COVID-19 on Texas has strained the state's . . . educational institutions[]." Brief at 27. Once again, no information is provided to explain what that strain entails for educational institutions (unlike the other sectors omitted by the ellipses), how that strain can be remedied, or why such as remedy should come at the direct expense of students who were also "strained" by COVID-19. These simple recitations of "concerns" are not actual findings—these are conclusions appended to the actual findings that had nothing to do with educational institutions. These facile, sweeping statements provide no indication that any analysis was conducted or that findings were reached which indicated that there was a compelling public need to protect institutions like SMU from claims for monetary damages from their students—particularly not where, as here, the legislative action would entitle those institutions to receive a windfall of premium on-campus tuition when they opted to provide the cheaper, remote service.

This stands in stark contrast to what occurred in *Tenet* where, prior to passing a statute of repose concerning medical malpractice claims, an actual record was developed. There,

> the Legislature conducted hearings and gathered evidence of the increasing costs of malpractice insurance resulting from claims that endured indeterminately. As a result, the Legislature expressly found that a spike in healthcare liability claims was causing a malpractice insurance crisis that adversely affected the provision of healthcare services in Texas.

Tenet Hosps. Ltd., 445 S.W.3d at 707. Similarly, in *Union Carbide*, "the Legislature provided extensive findings to support Chapter 90's enactment and its effects." *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 57 (Tex. 2014). "Those findings identified a litigation crisis in which more asbestos-related suits were filed in Texas than in any other state, negatively affecting the financial resources available for compensating persons with asbestos-related injuries and the judicial resources available for allocating those financial resources." *Id*.

Here, the legislative record contains nothing remotely similar to the detailed analysis and findings which supported the compelling interests underlying the retroactive laws in *Tenet* and *Union Carbide*. Without a compelling public interest, the Legislature acted unconstitutionally when it determined to retroactively protect institutions like SMU from standard breach of contract claims like the one asserted by Plaintiff.

PRAYER

For the reasons above, this Court should determine that the PLPA is unconstitutional as applied to Appellant Luke Hogan's claims against Appellee Southern Methodist University.

Respectfully submitted,

By /s/ *Philip J. Furia*

Jeff Edwards
State Bar No. 24014406
jeff@edwards-law.com
Michael Singley
State Bar No. 00794642
David James
State Bar No. 24092572

EDWARDS LAW
603 W. 17th Street
Austin, Texas 78701
Tel. 512-623-7727
Fax. 512-623-7729

AND

THE SULTZER LAW GROUP P.C.
Philip J. Furia. Esq.
Jason P. Sultzer, Esq.
85 Civic Center Plaza, Suite 104
Poughkeepsie, NY 12601
Tel: (845) 483-7100
Fax: (888) 749-7747
furiap@thesultzerlawgroup.com
sultzerj@thesultzerlawgroup.com

AND

LEEDS BROWN LAW, P.C.
Michael A. Tompkins, Esq.
One Old Country Road, Suite 347
Carle Place, NY 11514-1851
(516) 873-9550
mtompkins@leedsbrownlaw.com

Counsel for Appellant

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jeff@edwards-law.com
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Brennan HMeier		bhmeier@akingump.com	10/10/2023 2:05:41 PM	SENT
Lizzy Scott		edscott@akingump.com	10/10/2023 2:05:41 PM	SENT
Scott Barnard		sbarnard@akingump.com	10/10/2023 2:05:41 PM	SENT
Heather Peckham		hpeckham@akingump.com	10/10/2023 2:05:41 PM	SENT
Scarlett York-Cockrill		syork-cockrill@akingump.com	10/10/2023 2:05:41 PM	SENT
Lisa Monreal		lmonreal@akingump.com	10/10/2023 2:05:41 PM	SENT
Bill Davis	24028280	Bill.Davis@oag.texas.gov	10/10/2023 2:05:41 PM	SENT
Jeffrey Edwards	24014406	jeff@edwards-law.com	10/10/2023 2:05:41 PM	SENT
Natalie Thompson	24088529	natalie.thompson@oag.texas.gov	10/10/2023 2:05:41 PM	SENT
Maria Williamson		maria.williamson@oag.texas.gov	10/10/2023 2:05:41 PM	SENT
Jessica Mannon		jmannon@akingump.com	10/10/2023 2:05:41 PM	SENT
Valeria Alcocer		valeria.alcocer@oag.texas.gov	10/10/2023 2:05:41 PM	SENT

Associated Case Party: Luke Hogan

Name	BarNumber	Email	TimestampSubmitted	Status
Michael C. Singley	794642	mike@edwards-law.com	10/10/2023 2:05:41 PM	SENT
Paul Samuel		paul@edwards-law.com	10/10/2023 2:05:41 PM	SENT
David James		david.james.tcrp@gmail.com	10/10/2023 2:05:41 PM	SENT
Stephen Lemmon		stephen@edwards-law.com	10/10/2023 2:05:41 PM	SENT
Lisa Snead		lisa@edwards-law.com	10/10/2023 2:05:41 PM	SENT
Matthew Kirkwood		matthew@edwards-law.com	10/10/2023 2:05:41 PM	SENT
Jason Sultzer		sultzerj@thesultzerlawgroup.com	10/10/2023 2:05:41 PM	SENT
David James		david@edwards-law.com	10/10/2023 2:05:41 PM	SENT

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Associated Case Party: Luke Hogan

Michael Tompkins		mtompkins@leedsbrownlaw.com	10/10/2023 2:05:41 PM	SENT
Philip Furia		furiap@thesultzerlawgroup.com	10/10/2023 2:05:41 PM	SENT
Jeffrey Brown		jbrown@leedsbrownlaw.com	10/10/2023 2:05:41 PM	SENT

Associated Case Party: Southern Methodist University

Name	BarNumber	Email	TimestampSubmitted	Status
Christine Patton		cpatton@akingump.com	10/10/2023 2:05:41 PM	SENT
Elizabeth Scott		edscott@akingump.com	10/10/2023 2:05:41 PM	SENT