

06-0348

**In the
Supreme Court of Texas**

THE STATE OF TEXAS,
BY AND THROUGH THE TEXAS DEPARTMENT OF TRANSPORTATION,
Petitioner,

v.

PRECISION SOLAR CONTROLS, INC.,
Respondent.

On Petition for Review to the
Third Court of Appeals at Austin

MOTION FOR REHEARING

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for
Litigation

R. TED CRUZ
Solicitor General

DON CRUSE
Assistant Solicitor General
State Bar No. 24040744

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1827
[Fax] (512) 474-2697

COUNSEL FOR PETITIONER

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Although this case would have been a suitable vehicle to reach certain questions left open by *Reata*, the Court should at a minimum grant rehearing to vacate the court of appeals's judgment under Rule 60.2(f). The court of appeals based its judgment on the now-withdrawn April 2, 2004 opinion in *Reata*. Unless the court of appeals's judgment is vacated, it might provide a different rule of law for the trial court than is now applied in other cases—at least until the court of appeals (if it overcomes the law-of-the-case doctrine) or this Court (if it grants a later petition) chooses to revisit the question on a subsequent appeal. The Court can prevent that anomalous result by doing in this case what it has done in similar cases—setting aside the judgment below and remanding.

ARGUMENT

I. VACATING THE COURT OF APPEALS'S JUDGMENT WOULD AVOID CONFUSION OVER WHETHER THE CASE IS GOVERNED BY THE COURT OF APPEALS'S DECISION OR BY THIS COURT'S OPINION ON REHEARING IN *REATA*.

A. This Case Is a Good Candidate for Remand Under Rule 60.2(f).

The appellate rules provide this Court a tool to “vacate the lower court’s judgment and remand the case for further proceedings in light of changes in the law.” TEX. R. APP. P. 60.2(f). The Court has used that tool when, during the pendency of a petition, it has issued a new decision that clarifies an area of law or that alters a precedent on which the court of appeals had relied. *Cary v. Alford*, No. 05-1018, ___ S.W.3d ___, 49 Tex. Sup. Ct. J. 1057, 1057 (Tex. Sept. 22, 2006) (per curiam) (vacating and remanding where “[w]e recently clarified the standard of review”); *O’Donnell v. Smith*, 197 S.W.3d 394, 394 (Tex. 2006) (per curiam) (vacating and remanding where the Court had recently overruled one of the authorities on which the court of appeals had relied); *St. Luke’s Episcopal Hosp. v. Marks*, 193 S.W.3d 575, 575 (Tex. 2006) (per curiam) (vacating and remanding for further consideration in light of a recent opinion).

This is such a case. On June 30, 2006, this Court clarified its 2004 *Reata* opinion in ways not anticipated by the court of appeals—and that bear directly on the scope of immunity. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006). Those clarifications pull the support out from under the court of appeals’s prior reasoning. For example, the court of appeals held that a counterclaim asserted against the State could secure an affirmative judgment rather than merely an offset. *State v. Precision Solar Controls, Inc.*, 188 S.W.3d 364, 369 (Tex. App.—Austin 2006, pet. denied) (reh’g filed).

In the court of appeals, the State had argued that the Austin Court’s prior holdings to that effect had been based on an erroneous view of Texas law, as reflected in opinions such as *State v. Martin*, 347 S.W.2d 809, 814 (Tex. App.—1961, writ ref’d n.r.e.). The court of appeals defended its prior holding by noting that this Court—in its 2004 *Reata* opinion—had endorsed that principle by also relying on *State v. Martin*:

In *Martin*, we stated that when the State filed suit, the defendant’s “right to defend such suit included the right to cross-claim and obtain affirmative judgment on such claim We decline to overrule our precedent, and note that in *Reata Construction* the supreme court quoted approvingly from *Martin*, stating, “[B]y filing a suit for damages, a governmental entity waives immunity from suit for *any claim* that is ‘incident to, connected with, arises out of, or is germane to the suit or controversy brought by the State.’”

Precision Solar Controls, 188 S.W.3d at 369-70 (citing the now-withdrawn *Reata* opinion, with the internal quotations taken from *State v. Martin*).

But when this Court re-heard *Reata*, it removed any reference to *State v. Martin* from its opinion—and also removed any inference that an affirmative judgment could be obtained that went beyond the governmental entity’s claim. *Reata*, 197 S.W.3d at 378 (concluding that immunity was waived “to the extent any recovery on those claims will offset any recovery by the City against Reata”). Indeed, in its response to the petition, Precision Solar Controls (PSC) candidly acknowledged that the court of appeals’s holding would now require modification to limit the effect of any counterclaim to being an offset. Resp. 3. Because the law has changed in a way that materially undermines the court of appeals’s judgment, the Court should, at a minimum, vacate that judgment under Rule 60.2(f).

B. Applying Rule 60.2(f) Would Avoid Potential Confusion in the Jurisprudence, Since the Lower Court’s Decision Was So Heavily Based on the Pre-Rehearing Opinion in *Reata*.

A denial of review in this case—rather than vacating or reversing the court of appeals’s judgment—appears somewhat anomalous in light of how the Court has disposed of the other pending cases affected by *Reata*. For those lower courts that had (like the court of appeals in this case) found a waiver of immunity, the Court has chosen to reverse and remand under Rule 60.2(d) with a per curiam opinion.¹ Indeed, in two of those cases the Court specified that one ground for reversal was that the court of appeals had—like the court of appeals in this case—held that the governmental entity’s filing of a claim generally waived immunity from suit even beyond an offset. *Port Neches-Groves Indep. Sch. Dist. v. Pyramid Constructors, L.L.P.*, No. 04-0737, 49 Tex. Sup. Ct. J. 993 (Aug. 31, 2006) (per curiam) (“Because the court of appeals held that the [government unit’s] counterclaim operated as a complete waiver of immunity, we reverse its judgment and remand the case to the trial court.”); *City of Angleton v. USFilter Operating Servs., Inc.*, No. 05-0098, 49 Tex. Sup. Ct. J. 1010 (Aug. 31, 2006) (per curiam) (same). A reversal or vacatur is appropriate here for the same reasons.

By contrast, the Court chose to deny review when several lower courts had, contrary to the court of appeals in this case, found *no* waiver. *See My-Tech, Inc. v. Univ.*

¹ The August 31, 2006 order list contained six such dispositions—the two discussed in the text above, as well as *City of Midland v. Goerlitz*, No. 03-0185, 49 Tex. Sup. Ct. J. 992, 992 (Tex. Aug. 31, 2006) (per curiam); *City of Houston v. United Water Servs., Inc.*, No. 04-0547, 49 Tex. Sup. Ct. J. 992, 992-93 (Tex. Aug. 31, 2006) (per curiam); *Metro. Transit Auth. v. M.E.B. Eng’g, Inc.*, No. 04-0757, 49 Tex. Sup. Ct. J. 994, 994-95 (Tex. Aug. 31, 2006) (per curiam); and *City of Irving v. Inform Constr., Inc.*, No. 04-0984, 49 Tex. Sup. Ct. J. 995, 995-96 (Tex. Aug. 31, 2006) (per curiam).

of *N. Tex. Health Sci. Ctr. at Fort Worth*, No. 05-0590, 49 Tex. Sup. Ct. J. 965 (Aug. 31, 2006) (denying the petition); *Cooper v. City of Dallas*, No. 06-0202, 49 Tex. Sup. Ct. J. 965 (Aug. 31, 2006) (denying the petition).

In this unusual situation, a denial of review that leaves in place the court of appeals's judgment could have two unfavorable effects on the jurisprudence. First, it may leave the court of appeals's judgment as precedent in the Third Court of Appeals, which handles a sizable portion of the civil-litigation docket involving the State. Second, litigants and other courts of appeals may draw undue meaning into the Court's decision to deny review of a case in which the lower court had authorized the intentional tort of defamation to proceed against the State. Although a denial of review may not strictly control other cases, advocates and judges alike consult petition histories to inform guesses as to how this Court might rule in a future case. Given the stark holding of the court of appeals permitting a \$10 million intentional-tort counterclaim to proceed against the State, *see* 188 S.W.3d at 372, this Court's denial of review may quite inadvertently pave the way for similar claims until this Court takes up the question on its merits.

C. Not Vacating the Judgment Complicates the Upcoming Trial Proceedings and Any Future Appeal—Which May Turn on Whether the Court of Appeals's Prior Decision Is Now “Clearly Erroneous” in Light of *Reata*.

Vacating the court of appeals's judgment is particularly needed because of the interlocutory nature of this appeal. As this litigation continues, the answer to the threshold question “Which rule of law binds us?” will become inordinately complex. Although this Court would have a free hand to reach the merits in some ultimate future

appeal, the lower courts might be impeded by the constraints of the appellate mandate or the law-of-the-case doctrine from applying the teachings of this Court’s *Reata* opinion.

The district court will be placed in the unenviable position of having to sort out the tensions between the court of appeals’s decision (as embodied in an appellate mandate) and this Court’s decision clarifying the law in *Reata*—tensions that even PSC has acknowledged to this Court. *See* Resp. 3 (suggesting that the judgment below now be “affirmed. . . but [its counterclaim] limited to an offset” on remand). Indeed, given the court of appeals’s judgment and this Court’s subsequent denial of review, there is some question whether a district court could consider the question in any meaningful way. This unwelcome bind can most readily be avoided by vacating the court of appeals’s judgment to permit fresh consideration of how *Reata* affects this case, just as this Court has permitted in a number of other cases raising similar questions.

The court of appeals will also be in a difficult position. Unless this Court vacates the judgment, any future merits appeal might be dominated by the law-of-the-case doctrine. That doctrine requires an inquiry into whether the court of appeals’s prior decision—which was based on the pre-rehearing opinion in *Reata*—was “clearly erroneous” in light of the subsequent *Reata* opinion on rehearing.² Vacating the judgment now would render such questions academic rather than making them central to the case.

² *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 717 (Tex. 2003) (stating that a court of appeals would not be bound by its prior ruling on a question of appellate jurisdiction “if the appellate court’s prior decision is clearly erroneous”).

PRAYER

Petitioner respectfully requests that the motion for rehearing be granted; the judgment of the court of appeals, at a minimum, be vacated under Rule 60.2(f); and the case remanded to the district court.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

R. TED CRUZ
Solicitor General

DON CRUSE
Assistant Solicitor General
State Bar No. 24040744

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1827
[Fax] (512) 474-2697

COUNSEL FOR PETITIONER

CERTIFICATE OF CONFERENCE

I certify that on October 9, 2006 I spoke with Barry Bishop, counsel for the Respondents, who informed me that he was opposed to this motion.

Don Cruse

CERTIFICATE OF SERVICE

I certify that on October 9, 2006 I caused a copy of the **Motion for Rehearing** to be served by certified U.S. mail, return receipt requested, on all appellate counsel:

Barry K. Bishop
CLARK, THOMAS & WINTERS, P.C.
P.O. Box 1148
Austin, Texas 78767
Counsel for Respondent

Michael Burnett
SHAUNESSY, BURNETT & GREENBERG, P.C.
1000 Norwood Tower
114 West 7th Street
Austin, Texas 78701
Counsel for Interested Party

Don Cruse