

NO. 21-1027

IN THE SUPREME COURT OF TEXAS

OFFICE OF THE ATTORNEY GENERAL,

PETITIONER,

v.

JAMES BLAKE BRICKMAN, J. MARK PENLEY, DAVID MAXWELL,
AND RYAN M. VASSAR,

RESPONDENTS

APPEAL FROM CAUSE NO. 03-21-00161-CV,
IN THE THIRD COURT OF APPEALS, TEXAS

RESPONDENTS' MOTION TO LIFT ABATEMENT

On February 16, 2023, this Court granted the parties' Joint Second Motion to Abate "to allow the parties to proceed with settlement negotiations." The Court expressly ordered the parties to "immediately notify this Court about any changes in status in the settlement proceedings." Things have changed, and Respondents therefore provide notice and move the Court to lift its abatement order.

I. OAG refuses to agree to a deadline by which the litigation will resume if the Legislature does not approve settlement funding.

The premise for commencing settlement negotiations in January (at OAG's invitation) and the very foundation for the Mediated Settlement Agreement

(“MSA”) on file with this Court was that the Legislature is in session, and therefore any deal the parties might strike could immediately be presented for funding approval. Indeed, the MSA is expressly contingent upon funding approval.

Respondents’ joinder in the motion to abate—requested, drafted, and filed by OAG—was intended to briefly postpone any potential ruling on OAG’s petition for review while approval was sought this legislative session. That is why the parties assured this Court in the Joint Second Motion to Abate that “[s]hould the parties prove unable to obtain funding, they will jointly move the Court to lift the abatement order.”

But with uncertainty surrounding legislative approval, OAG has now reneged on the fundamental concept of a deadline by which this condition precedent must be met. In *oral* communications with Respondents, OAG contends that it has maneuvered Respondents into a GOTCHA position. If funding approval is not achieved this session, OAG says the case should remain abated until the 89th Legislature considers it in 2025. And if that Legislature refuses to approve it, OAG says the abatement should remain in place until the following session. And so on in perpetuity. OAG tells Respondents the case will never resume; they have given up their claims *forever*, even if legislative approval is not forthcoming. OAG thus reaps all benefits of a settlement, and Respondents achieve none.

OAG has been craftier in its *written* communications. OAG's written position is that, despite the combined legal workforce within the agency and among its outside counsel, it is unable to determine a position on the issue. OAG says it is still researching what happens if the Legislature decides not to fund during this session, and it will not address the issue with Respondents unless that eventuality comes to fruition.

Both positions are preposterous. The hedged written position undermines the basis for Respondents' joinder in the abatement motion just as much as the candid oral position. Respondents would never have joined a motion for perpetual abatement, or *potential* perpetual abatement, or a lengthy abatement of any sort. Indeed, Respondents would never have joined a motion to abate longer than the conclusion of the current legislative session, which comes within approximately one month of the conclusion of this Court's current term.

OAG has kept this case in the starting gate for 28 months. Its petition for review has been pending for 16 months, during which OAG sought and received an extension of every single deadline. The petition is fully briefed and ripe for decision, and Respondents would never have given away their right to seek a decision from this Court before the term ends, absent funding approval.

II. OAG's position is preventing the parties from completing their settlement agreement.

Respondents' joinder in the abatement motions was also premised on giving the parties time to finalize their settlement negotiations. In the first abatement motion, the parties assured this Court: "Should negotiations appear fruitful but require additional time, the above-captioned parties may jointly request an additional *limited* abatement." (Emphasis added).

That is exactly what happened. The MSA requires the parties to negotiate and "execute a formal settlement agreement" containing not only the terms set forth in the MSA but also "terms typical of settlements of this nature." Based on this express requirement, no party believed the MSA was complete in and of itself. Nor did this Court, which granted the Joint Second Motion to Abate "to allow the parties to proceed with settlement negotiations."

Consistent with all parties' understanding that the MSA of barely over one page was materially incomplete, OAG's initial draft of the formal settlement agreement was seven single-spaced pages. The draft contained numerous critical terms that are not in the MSA yet are "typical of settlements of this nature." After a quick exchange of redlines—during which more terms were added and agreed despite not being set forth in the MSA—Respondents sent a February 18 email to OAG explaining that OAG's current draft of the formal settlement agreement is acceptable except as to four terms. One of those terms was the all-important deadline

that the Texas Legislature approve the funding of the settlement payment in the current regular legislative session (which will conclude on or before May 29, 2023) and that the funds be paid to Respondents on or before September 30, 2023.

None of the issues has been resolved, and they cannot be resolved while OAG refuses to acknowledge an approval deadline. Therefore, as ordered, Respondents notify the Court that the parties' negotiations are no longer proceeding toward a final settlement agreement, and the basis for Respondents' joinder in the second "limited" abatement motion has been undermined.

III. OAG controls the fate of the settlement.

Respondents want to finalize the settlement. If OAG reverses its position and agrees to an end-of-session approval deadline before the Court disposes of its petition for review, the settlement agreement could be finalized and Respondents would join in another request to abate until the settlement is approved or the deadline expires. Conversely, even if the Court rules on the petition—whether grant or deny—Respondents would still be willing to abate the litigation pending a joint effort to achieve funding approval by the deadline described herein. No matter what, Respondents cannot accept OAG's attempt to avoid a ruling on its petition beyond this regular legislative session, much less in perpetuity, and nevertheless enjoy all benefits of a settlement while Respondents' meritorious claims go uncompensated.

WHEREFORE Respondents pray that the Court lift the abatement order of February 16, 2023, and restore the case to the Court's active docket.

Respectfully submitted,

/s/ Thomas A. Nesbitt

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CERTIFICATE OF CONFERENCE

I certify that I consulted with one of Petitioner's counsel of record, Bill Helfand, on March 8, 2023, and he confirmed that Petitioner opposes the relief sought in this motion.

/s/ Joseph R. Knight

Joseph R. Knight

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion to Lift Abatement has been served upon the following via electronic mail on the 8th day of March 2023.

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