

No. 4-04-00582-CV

IN THE COURT OF APPEALS FOR THE
FOURTH COURT OF APPEALS DISTRICT
SAN ANTONIO, TEXAS

RONALD F AVERY

APPELLANT

VS.

GUADALUPE-BLANCO RIVER AUTHORITY

MR. WILLIAM E. WEST JR.; MR. DAVID WELSCH

APPELLEES

ON APPEAL FROM THE 25TH JUDICIAL DISTRICT COURT

GUADALUPE COUNTY, TEXAS

THE HONORABLE B. B. SCHRAUB, JUDGE PRESIDING

APPELLANT'S MOTION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF CONTENTS..... 2
REFERENCE CONVENTIONS:..... 2
MOTION..... 2
LIST OF ISSUES PRESENTED FOR REVIEW:..... 2
ARGUMENTS..... 3
CONCLUSION..... 13
PRAYER..... 15
CERTIFICATE OF CONFERENCE..... 15
CERTIFICATE OF SERVICE 15

REFERENCE CONVENTIONS:

1. The note (F-12) refers to page 12 of the clerk’s Files;
2. The note (H-12) refers to page 12 of the Hearing transcript;
3. The note (2AB-12) refers to page 12 of the Appellant’s Second Amended Brief;
4. The note (A-12) refers to page 12 of the separate Appellant’s Second Amended Appendix;
5. The note (RB-12) refers to page 12 of Appellant’s Reply Brief;

MOTION

Appellant, Ronald F. Avery, submits this motion for rehearing in response to the Memorandum Opinion issued by the Court on April 20, 2005, and requests that the Court consider the following issues:

LIST OF ISSUES PRESENTED FOR REVIEW:

1. The Court erred in failing to answer any of the Appellant’s vital questions on appeal and is therefore out of compliance with TRAP 38.1(e) and TRAP 47.1: 3
2. None of the eight cases offered by the Court answer the Appellant’s vital questions on appeal related to the unlawful state presumption of “sovereign immunity:” 7
3. The Court erred in not resolving two Supreme Court Cases that are in obvious contradiction questioned by Appellant: 12

ARGUMENTS

1. The Court erred in failing to answer any of the Appellant's vital questions on appeal and is therefore out of compliance with TRAP 38.1(e) and TRAP 47.1:

TRAP 38.1(e):

Issues presented. The brief must state concisely all issues or points presented for review. The statement of an issue or point will be treated as covering every subsidiary question that is fairly included.

TRAP 47.1:

Written Opinions. The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.

1.1. It is a fact that the Appellant did not question any "waiver" of any component of "sovereign immunity," but questioned the whole premise and law behind "absolute sovereign immunity" fallaciously claimed by the state against the wording of the most important language in the Texas Constitution and a Supreme Court of Texas case (Dickson v. Strickland 1924). All issues related to waiver in the Texas Tort Claims Act (TTCA) and its codification in the Texas Civil Practice and Remedy Code (CPRC) and Vernon's etc., etc. are irrelevant to the vital questions on appeal. The Appellant, unlike all challengers in the eight cases cited by the Court, challenges the unlawful "presumption" of "sovereign immunity" and every element attached to that ancient monarchical common law perception that was defeated at least 100 years prior to the establishment of the United States and almost 200 years prior to the establishment of the present Constitution of the state of Texas.

1.2. The Appellant in his Second Amended Brief asked the Court to show by substantial or fundamental law the following essential elements related to the existence of a lawful foundation for state "absolute sovereign immunity" and if they could not, to reverse and remand this case to the Trial Court:

1.2.1. Show what "sovereignty" is, if not the ownership of the property (**2AB-14,15**) of the citizens consisting of life, liberty, possessions, lands and reputations protected under Art 1 Sec 13 of the Texas Constitution as Appellant showed by his exhaustive material;

1.2.2. Show how "sovereignty" could transfer from the people to the state contrary to the Appellant's exhaustive proof otherwise (**2AB-15,16**), (**2AB-41 Adam's quote**);

1.2.3. Show how the power of the state is in the possession of "sovereignty" and "sovereign immunity" rather than delegated authority (**2AB-18-20**) from the people limited to the protection of their property only, as stated in Art 1 Sec 2 of the Texas Constitution;

1.2.4. Show how Art 1 Sec 2 declaring that, "All political power is inherent in the people, and all free governments are founded on their **authority**, and instituted for their benefit," actually means

the transfer of their properties or sovereignty **(2AB-18,19), (2AB-42,7.3);**

1.2.5. Show how the state acquires "immunity" to harm when the citizens do not possess it to somehow give to the state **(2AB-23,3.7.2);**

1.2.6. Show how the Court cannot declare "sovereign immunity" unconstitutional and null and void from inception when the "presumption of absolute sovereign immunity" came to Texas solely by the Supreme Court of Texas in Hosner v. DeYoung in 1847 without citation **(2AB-33,6.2,6.3);**

1.2.7. Show how the Judiciary of Texas cannot operate under its direct jurisdiction of Article 16 Sec 48 of the Texas Constitution **(A-11,2.4.7)** do what other states in the union have done to rid themselves of the iniquities of the past when created wholly and solely by the Court as in Stone v. Arizona in 1963, Molitor v Kaneland in Illinois in 1959, Muskopt v Corning in California in 1961 **(2AB-30,5.5), (2AB-33,6.3), (A-1 to 8);**

1.2.8. Show how Art 2 Sec 1 is circumvented and the combination of the judiciary and the legislative is now lawful to permit the legislature to determine when a court of law has jurisdiction of any matter, much less a suit against the state by a citizen **(2AB-29,5.2);**

1.2.9. Show how the Texas Judiciary can only address statutory and remedial law in neglect of the substantial law as guaranteed by the Supreme Court approved Texas Rule of Civil Procedure (TRCP) #1 and #13 when dealing with "sovereign immunity;" **(2AB-30,5.3,5.4)**

1.2.10. Show how the citizens of Texas are not sovereign under the Supreme Court case of Dickson v Strickland or what has overruled it **(2AB-16,3.2), (A-9 to 11)**;

1.2.11. Show how the citizen can be sovereign over the state as declared in Art 1 Sec 2 of the Texas Constitution as stated in Dickson v Strickland in 1924 and the state sovereign over the citizens in Hosner v DeYoung in 1847, simultaneously;

1.2.12. Show how the state has power to invade and destroy the life, liberty and possessions of each citizen, when the sole purpose of government in the first place is to protect those very things, as exhaustively shown by Appellant **(F-77)**;

1.2.13. Show how the state can acquire "absolute sovereign immunity" by waiving that which it does not possess in the slightest scintilla **(A-inside cover), (RB-7,2.5), (A-10,2.4.3)**;

1.2.14. Show how the Texas Constitution is not the will **(2AB-32,5.8)** of the Sovereign Citizens and that any judicial decision or legislative act in contradiction to it must be declared void from inception **(A-10,2.4.5)**.

2. None of the eight cases offered by the Court answer the Appellant's vital questions on appeal related to the unlawful state presumption of "sovereign immunity:"

2.1. Texas Dept. of Parks & Wildlife v. Miranda

This case discusses whether a tree limb can be considered a premise defect under the TTCA. The court found that the Trial Court did not need to look further into merits of a case to find jurisdiction by waiver of the state's presumption of "sovereign immunity" under the TTCA.

2.2. Guadalupe-Blanco River Authority v. Pitonyak

This case discusses the duty owed to a person entering a restricted area controlled by the state. It further considers whether warning signs can be considered tangible personal property under the TTCA and CPRC. The case discussed two elements of "sovereign immunity," immunity from suit, and immunity from liability. The case further discussed whether a saltwater barrier could be considered as a roadway defect or real property or tangible personal property all related to "premise defect" of the TTCA and CPRC. Also the case discussed negligent discretionary functions in contrast to negligent implementation functions all related to waiver of "sovereign immunity." It is stated in this case that:

"sovereign immunity derives from the principle that the sovereign (KING) may not be sued in its (HIS) courts without its (HIS) consent."
(parenthesis added)

This is ancient monarchical common law that was intellectually defeated in 1644 by Rev. Samuel Rutherford, in 1683 by Algernon Sidney, and in 1689 by John Locke, and militarily defeated in 1783 at Yorktown and in 1836 at San Jacinto and declared so in the constitutions of both the United States and Texas. The case further discussed the violations of other laws or codes (Texas water code, Recreational use statute, etc.) that the court said do not effect "sovereign immunity."

2.3. Texas Dept. of Parks & Wildlife v. Lowrey Realty, Ltd.

This case concludes that a burning vehicle does not fall within "motorized vehicle" waiver of "sovereign immunity" in the TTCA and CPRC. This case determined that contracts (lease agreements) do not automatically waive "sovereign immunity." This case also distinguished between "official immunity" and "sovereign immunity." But concluded that both were the state.

2.4. Salazar v. Lopez

An attempt was made to show waiver of "sovereign immunity" through court's power to ensure the integrity of their proceedings which the court rejected. In this case it was stated that:

"Any waiver (of sovereign immunity) exposes the governmental units to increased liability, the burden of which must be born by the general populace."

"We consider the Legislature better suited than this Court to try to accommodate these policies, and therefore we continue to refuse to disturb the balance it has struck."

2.5. Dallas Area Rapid Transit v. Whitley

This case found that a motor vehicle must do more than provide the condition of damage but must be the actual direct cause of the damage to come under the waiver of "sovereign immunity" of TTCA and CPRC.

2.6. Texas Natural Resource Conservation Comm'm. v. IT-Davy

This case tried four ways to develop waiver: Conduct, Contract, Other Codes, and Other Acts, all to no avail. This case found that breach of contract does not waive "sovereign immunity" under TTCA and CPRC as found at 2.3 above. The IT-Davy Court also found that the Declaratory Judgment Act does not waive "sovereign immunity" under TTCA and CPRC. This case said:

"[it is] the Legislature's sole province to waive or abrogate sovereign immunity."

"in the Code Construction Act, the Legislature expressed its **desire** to **maintain control over sovereign immunity** in order to **preserve its interest in managing state fiscal matters** through the appropriations process..."

"Subjecting the government to liability may **hamper governmental functions by shifting tax resources away from their intended purposes** toward defending lawsuits and paying judgements."

"Accordingly, the Legislature is better suited than the courts to weigh the **conflicting public policies** associated with **waiving immunity** and exposing the government to increased liability, the burden of which the general public must ultimately bear." (Bolding added)

No constitutional or fundamental challenge to the "presumption of sovereign immunity" is made in the IT-Davy case and is inapplicable to this instant case.

2.7. Jackson v City of Galveston

The Jackson Court distinguished between "mandatory" and "discretionary" acts or "governmental" and "proprietary" acts and "tangible property" in medical records of the city relating to the TTCA and CPRC. This case again stated "waiver of sovereign immunity is matter to be addressed by Legislature." The case states that Jackson challenges the "constitutionality of sovereign immunity" and its application to their case on the grounds that a "self-insured" political subdivision is an "insurance association," thus owing a duty to "deal fairly and in good faith" when processing workers' compensation claims. However, it is clear that this case does not apply in any way to the instant appeal which challenges the substantial foundation of the concept of "absolute sovereign immunity." The Jackson Court then says:

"We overrule Jackson's points of error regarding the constitutionality of the doctrine of sovereign immunity."

Yet, the Appellant in this instant appeal is not challenging "sovereign immunity" as an "outmoded principle." The Appellant is declaring that the state has never held sovereignty nor immunity **(2AB-42,7.3)** and it cannot assert it or obtain it by waiving any amount of that which it has not **(2AB-19,3.4.3), (F-79)**. But Jackson only shows the provisions of the TTCA and CPRC that are in conflict

with Constitutional provisions and other statutes and codes. The Jackson case also states that:

"The supreme court has held that any waiver of sovereign immunity is a matter to be addressed by the Legislature."

2.8. Lynch v Port of Houston Authority

Lynch asserted that Art 16 Sec 26 requiring punitive damages for homicide constituted a "waiver of sovereign immunity." Or in the alternative, that the "no punitive damages" provision of the TTCA was unconstitutional in relation to said article. But this is still not the issue in this instant appeal. The Appellant herein has maintained that it is unlawful and unconstitutional for the state to "presume" "sovereign immunity" in the first place and since they cannot have or possess sovereignty or immunity they cannot obtain "absolute sovereign immunity" or partial "sovereign immunity" by attempting to waive in the TTCA what they do not have in the smallest scintilla. This therefore, voids the whole of the TTCA and CPRC mainly chapters 101-110 from inception. The Lynch case also tried to demonstate that certain portions of the TTCA and CPRC violated the 5th and 14th amendments to the U.S. Contitution all to no avail. It is irrelevant what any U.S. Contitution provision has if "sovereign immunity" cannot be "presumed" against the clear language of the Texas Constitution. The 5th 14th and 11th Amendments to the U.S. Constitution cannot grant sovereignty to the state over

the citizens of it to harm them. Again the only attack on "sovereign immunity" was that it was an "outmoded principle" rather than an unlawful and unattainable fiction which could not be given to the state even if the people wanted to **(A-34,4.3.22)**, **(2AB-19,3.4.3)**, shown to this court by the Appellant's quotes of the greatest thinkers who have walked the earth and who also founded America and the State of Texas.

3. The Court erred in not resolving two Supreme Court Cases that are in obvious contradiction questioned by Appellant:

3.1. The Appellant has shown that there are two supreme court rulings that remain the law in Texas but are in complete opposition to one another. Hosner v. DeYoung 1847 **(A-91)** is the case that **initiated the "presumption"** that the state of Texas had "absolute sovereign immunity" over the people to harm them in their lives, liberties and possessions without recourse to "her" courts without "her permission" and then the state could only be sued in the "manner specified" in "her permission." Then in contradiction to that, the Appellant showed Dickson v. Strickland 1924 **(A-9-11)** which established that Art 1 Sec 2 of the Texas Constitution declared that the citizens of Texas are sovereign over the state they created for their benefit. This case further stated that **nothing against the rights of the citizens could be "presumed"** but

must be explicitly declared in the fundamental law or Constitution (A-10,2.4.4). Therefore, this instant case stands in complete opposition to the whole foundation of the TTCA which is fallaciously set upon "presumption" in opposition to the explicit declared law in the Constitution of Texas.

CONCLUSION

Contrary to the Court's Memorandum Opinion, the Appellant did not "invite" the Court "to judicially abrogate the doctrine of sovereign immunity," as if this "doctrine" were lawful. The Appellant rather asked this Court to show how and where the "doctrine" is lawful under the Constitution of Texas. The Court failed to prove the lawfulness of the "doctrine of sovereign immunity," therefore, the Appellant requests that this Court use the same cold analytical discernment they use to distinguish the fine nuances determining "waiver of sovereign immunity" to find that Texas does not possess sovereignty nor immunity over the citizens to harm them and they cannot "presume" it, and that it is irrelevant what the Legislature has "desired" or "expressed" in acts, statutes, codes and resolutions.

The Judiciary of Texas has for too long asked the innocent who have been beaten, fired for refusing to perjure themselves, denied insurance claims due from injuries, and been made widows by

government to have patience while the Court distinguishes the fine points of whether the state has "waived sovereign immunity by statute."

Time is well overdue for the Judiciary of Texas to tell the Legislature to "ignore the merits" of their "expressed desires" to "control the purse strings" and regulate the "conflicting policies," or of their concern for the poor tax "burdened" citizens while the Court uses the same cold analytical discernment to determine if "sovereign immunity" can be "presumed against the rights of the citizens."

The lawfulness of the "presumption of sovereign immunity" cannot be shown by straining at the gnats of waiver. The Appellant is therefore demanding that the Court either prove the lawfulness of "presumed absolute sovereign immunity" to kill the citizens and steal all they have without recourse or spit up the camel and all that goes with it. The dispute is not the existence of the "doctrine" but the lawfulness of the doctrine's foundation.

The Appellant is also demanding that the Texas Judiciary opine and order the Legislature to get back into its own Department as described in Art 2 Sec 1. The Legislature of Texas has no part in determining the subject matter jurisdiction of the Courts of the Citizens to hear any matter.

PRAYER

For the reasons stated herein, appellant prays the Court grant this motion for rehearing, withdraw its Memorandum Opinion dated April 20, 2005, and reverse the Judgment of the Trial Court and remand for further proceedings.

Respectfully Submitted,
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CERTIFICATE OF CONFERENCE

In accordance with TRAP 10.1 (5), I hereby certify that a reasonable attempt was made to confer with Mr. Helfand or Mr. Jewell at ___AM PM on ___of _____, 2005. He, was, was not, N/A, opposed to this motion for Rehearing.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Motion for Rehearing was forwarded by certified mail, return receipt requested # 7004 2890 0004 4558 3438, on this the _____ day of _____, 2005 to the following:

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