

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 REPLY BRIEF

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNCEL

Pursuant to Rule 38.1 (a) of the Texas Rules of Appellate Procedure, the Appellant, Ronald F. Avery, certifies to the best of his knowledge, the following is a complete list of all persons or entities with an interest in this appeal:

1. Appellant - Ronald F. Avery - Pro Se.

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Seguin, Texas 78155

2. Appellee - Guadalupe-Blanco River Authority (GBRA).

Guadalupe-Blanco River Authority
933 E. Court Street
Seguin, Texas 78155

3. Appellee - Mr. William E. West Jr. (General Manager of GBRA).

4. Appellee - Mr. David Welsch (Project Manager of GBRA).

The Attorney of record for Appellees is:

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REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 9.4 (g) and 39.1 of the Texas Rules of Appellate Procedure, Appellant requests oral argument.

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POINTS OF APPELLANT’S REPLY BRIEF

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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 (A-12) refers to page 12 of the separate Appellant's Second Amended Appendix.

STATEMENT OF THE CASE

Refer to Appellant's Second Amended Brief.

STATEMENT OF THE FACTS

Refer to Appellant's Second Amended Brief.

SUMMARY OF THE ARGUMENT

Refer to Appellant's Second Amended Brief.

The issues have been joined. The question on appeal is truly understood by both the Appellant and the Appellees. The issue is the existence of Sovereign or Governmental Immunity by the state over the citizens (**2.7 herein**). If the state has such immunity the TTCA and CPRC governs and the Appellant loses his appeal. If the citizens are sovereign over the state they created for their benefit then the Appellees lose on appeal and must return to trial court. Appellees failed to prove their position in their Brief.

REPLY BRIEF ARGUMENT

TO THE HONORABLE COURT OF APPEALS:

Now comes Appellant, Ronald F. Avery, and respectfully submits Appellant's Reply Brief Argument. This is an appeal from the 25th Judicial District Court, Honorable B. B. Schraub, Presiding, in Cause No. 04-0499-CV, in which Ronald F. Avery was the Plaintiff and Guadalupe-Blanco River Authority (GBRA), William E. West Jr., and David Welsch were the Defendants.

1. Reply Points:

- 1.1. The Appellant, Avery, nor the Appellees have ever taken a position that Appellant is special or uncommon to the citizens of Texas until the filing of Appellees' Brief.
- 1.2. Appellees' Statement of Facts is inflammatory and argumentive.
- 1.3. Appellees' failed to follow the Appellant's outline of Points and did not answer the Point of Error and the Subsidiary Points.
- 1.4. The Appellees did not show source of Sovereign or Governmental Immunity for the State of Texas over its Citizens.
- 1.5. Appellees admit that Texas Tort Claims Act does not establish source of Sovereign or Governmental Immunity.

1.6. The Appellees did not show the overturning of Dickson v. Strickland to maintain their position that the State of Texas is now sovereign over its citizens and may thereby enjoy immunity to harm them with intent without recourse in the courts of the people of Texas.

1.7. The Appellant is not compelled to show unambiguous, unequivocal waiver of Sovereign or Governmental Immunity on behalf of the State of Texas unless the Appellees can show unambiguous, unequivocal possession of Sovereign and Governmental Immunity by the State of Texas over the Citizens of Texas.

1.8. The Appellees' three assertions based upon the notion that the legislature may trickle down Sovereignty to the people and then soak it back up at their will.

2. Reply Points:

2.1. The Appellant, Avery, nor the Appellees have ever taken a position that Appellant is special or uncommon to the citizens of Texas until the filing of Appellees' Brief.

Under Appellees' Brief Statement of Facts (page 3 top of page) they say, "Plaintiff rejects any notion that he is a party to the Tort Claims Act and its codification. (CR-123)." This is indeed a quote from Appellant's First Amended Original Petition but it was

taken out of context. For the immediately preceding sentence in the same document says, "The adoption of monarchial common law cannot stand over the sovereign people of Texas in their right to create the state of Texas by the social contract of the Texas Constitution which Plaintiff claims as his herein." Therefore, it is clear from the context of Appellees' quote that the Appellant is not claiming to be special or uncommon to other citizens of Texas, but on the contrary, a member under the social contract of the Constitution of Texas, to which the Texas Tort Claims Act is in contradiction. The Appellant is not denying that the Legislature of Texas can create laws that apply to him, but rather, the legislature cannot make laws that are contradictory to the Constitution of Texas that would apply to any citizen of Texas including the Appellant.

2.2. Appellees' Statement of Facts is inflammatory and argumentive.

The Appellees' recitation of a small portion of Appellant's 35 page First Original Amended Petition covers only the GBRA contractors and the "drill bit" episode in an attempt to inflame and distract the Appellate Court from the Point of Error on Appeal.

The Appellees's Statement of Facts is argumentive by trying to shift the emphasis from the existence of Sovereign and Governmental Immunity to avoid the Appellant's claims on appeal to a fictitious

issue of a contract between the Appellant and the GBRA Contractors that the Appellees hope or presume to have existed. Had there been a real contract between GBRA contractors and Appellant it would not impact this appeal. TRAP 38.1 (f) requires that this statement of Facts not include argument of an issue not pertinent to the issue or point presented.

2.3. Appellees' failed to follow the Appellant's outline of Points and did not answer the Point of Error and the Subsidiary Points.

It would be practical in the Appellees' Brief to answer each of the Appellant's Subsidiary Points brought under his One Point of Error to show, if they could, that the State of Texas did in fact have Sovereignty and Immunity over its citizens to harm them without recourse except where waived. If Appellees can show what Sovereignty is and that the State of Texas possesses it over its citizens they should have answered each of Appellant's questions and complied with TRAP 38.2 (a) 2 of the Texas Rules of Appellate Procedure:

"When practicable, the appellee's brief should respond to the Appellant's issues or points in the order the appellant presented those issues or points."

The Appellees have failed to answer the Appellant's vital questions related to Sovereignty and Governmental Immunity.

2.4. The Appellees did not show source of Sovereign or Governmental Immunity for the State of Texas over its Citizens.

The Appellees Brief did not show the source of Sovereign or Governmental Immunity to intentionally, or otherwise, harm the citizens of Texas without recourse in "her" courts except where the Legislature waives such immunity. None of their cases establish the source of such immunity to be anywhere but where stated in Appellant's Second Amended Brief (page 33), i.e., in Hosner v. DeYoung 1 Tex. 1847. However, this case does not give one citation of any authority including statutes, constitutional provisions or case law, for its existence as verified by the Southwestern Law Journal (Appellant's Second Amended Brief page 33 and Appendix page 12 and 91).

2.5. Appellees admit that Texas Tort Claims Act (TTCA) does not establish source of Sovereign or Governmental Immunity.

The Appellees admit (page 7 second paragraph) that The TTCA does not establish state sovereign or governmental immunity. They have admitted that Sovereign and Governmental Immunity is a Presumption:

"It is a common misconception that the Texas Tort Claims Act creates liability. On the contrary, the Texas Tort Claims Act merely waives to a limited degree the **general presumption of immunity** to which a governmental unit is entitled. In other words, immunity is the rule; waiver of immunity, which must be proven by a claimant, is the exception." (Bolding added)

Appellees admit that the TTCA merely waives some degree of "the general presumption of immunity." The question is, "Can the State of Texas **Presume** a right to harm the citizens of Texas, with or without intent, without recourse to "her" courts?" The Appellant has shown in Dickson v. Strickland that anything of such magnitude infringing upon the rights of the People of Texas cannot be presumed but must be explicitly declared in the fundamental or constitutional law of Texas **(A-10 2.4.4)**:

"It would be in the power of such convention to take away or destroy individual rights, **but such an intention would never be presumed**; and to give effect to a design so unjust and unreasonable would require the support of the most direct, explicit affirmative declaration of such intent."¹ (Bolding added)

Therefore, Appellees have failed to show the source of Sovereign or Governmental Immunity as there is no source that is not contradictory to the present Constitution of Texas. In fact this same Texas Supreme Court case establishes the fact that the Citizens of Texas are Sovereign:

"With the ultimate political sovereignty of the people so forcefully declared throughout our history, the court would be unmindful of its high responsibility were it not careful in examining any claim of restriction on the liberty and authority of those who establish governments, and can change them in the mode prescribed by the fundamental law."² (Bolding added)

¹ Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1020.

² Ibid.

Further, this same Texas Supreme Court case establishes that the constitution declares the citizens to be sovereign in Article 1 Section 2:

"In the Constitution of the Republic is a statement of rights never to be violated on any pretense whatever. There we find it recorded that **"all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit."** The declaration is carried into every Constitution, appearing as section 2 of article 1 of the Constitution of 1876."³
(Bolding added)

It is therefore clear that something as unjust as governmental immunity to harm its own citizens is not something that can be presumed. Immunity to harm citizens must be declared in the Constitution or Fundamental Law. But we see that the contrary is stated in the Fundamental Constitutional Law, namely, that the citizen is sovereign and has established government to protect his life, liberty, possessions and reputation. When the property of a citizen is harmed by the state, the constitution has provided courts for justice and repair of that property or property right. The state must answer and repair the damage done by their employees, agents and contractors.

2.6. The Appellees did not show the overturning of Dickson v. Strickland to maintain their position that the State of Texas is now sovereign over its citizens and may thereby enjoy

³ Ibid.

immunity to harm them with intent without recourse in the courts of the people of Texas.

The Appellees Brief did not show a constitutional amendment that would overturn Dickson v. Strickland. All their authorities were merely cases applying the TTCA and the CPRC (Texas Civil Practice and Remedy Code). Those cases cannot overturn the Constitutional Provisions of Article 1 Sections 2, 13, 17 and 19. Therefore, the Appellees have failed to show the existence of Sovereign or Governmental Immunity to harm the citizens of Texas without recourse in the courts except where waived by the legislature. Therefore, immunity is not available for the state of Texas or any of its subdivisions when it harms a citizen of Texas.

2.7. The Appellant is not compelled to show unambiguous, unequivocal waiver of Sovereign or Governmental Immunity on behalf of the State of Texas unless the Appellees can show unambiguous, unequivocal possession of Sovereign and Governmental Immunity by the State of Texas over the Citizens of Texas.

The Appellees' expect the Appellant to show unambiguous, unequivocal waiver of Sovereign Immunity by the state in the areas of Appellant's claims, yet they cannot show anything other than a groundless or unlawful assumption or presumption of state

sovereignty or governmental immunity. The Appellees' Brief says on page 7:

"Furthermore, any waiver of immunity from suit must be clear and unambiguous. *Federal Sign*, 951 S.W. 2d. at 405. The Texas Supreme Court interprets the Texas Tort Claims Act narrowly. *Amador v. San Antonio State Hosp.*, 993 S.W. 2d 253, 257 (Tex. App.-San Antonio 1999, pet. Denied). If it is questionable whether sovereign immunity has been waived, it has not been waived. *Schaefer v. City of San Antonio*, 838 S.W. 2d 688, 693 (Tex. App.-San Antonio 1992, no writ)."

It is ludicrous to expect the Appellant to show unequivocal waiver of state immunity when the state can only presume or hint around at the possession of immunity. But the Appellees admit that the real question is the existence of the immunity doctrine at page 8 of their Brief:

"Once this Court recognizes, as it surely will, that the immunity doctrine is alive and well, it can summarily reject Avery's appeal without hesitation and need not examine any of GBRA's arguments as to why, **assuming the immunity doctrine exists**, Avery's pleading fails to invoke an exception or waiver of immunity covering his claims."
(bolding added)

The Appellees are correct, "assuming the immunity doctrine exists," the Appellant would not win his appeal. But it is the answer to that question that will permit the Appellant to return to the trial court for further proceedings.

2.8. The Appellees' three assertions based upon the notion that the legislature may trickle down Sovereignty to the people and then soak it back up at their will.

The Summary of the Argument in the Appellees' Brief asserts only three grounds to which they think the Trial Court's dismissal must

be upheld: First, sovereign immunity is firmly entrenched or *stare decisis*, which was fully addressed and defeated in the Appellant's Second Amended Brief and Appendix. Second, the Legislature is the only branch of state government that can determine if the state or one of its subdivisions can be sued. Third, Appellant's First Amended Original Petition in Trial Court fails to show subject matter jurisdiction.

The Appellant has shown in his Second Amended Brief and Appendix that all these assertions are without merit because the Judiciary of Texas is the only branch with jurisdiction to determine the existence of Sovereign and Governmental immunity. The Constitution of the State of Texas (Art. 1 Sect. 2,13,17,19, & Art. 2 Sect. 1) determines subject matter jurisdiction not the TTCA or the CPRC. If the Judiciary determines that the state of Texas is sovereign over the people and has immunity to harm them without recourse to the courts of Texas unless waived, then the legislature can make any law they want and the people are helpless and the constitution is worthless. Subject matter jurisdiction then can be determined by the state legislature. But if the Judiciary finds that the People of Texas are sovereign over the state they create for their benefit, then the state and its subdivisions may be sued when it harms the citizen and the legislature cannot determine when subject

matter jurisdiction is obtained. The Judiciary comes first and they can and must determine if the people of Texas are sovereign or if the state is sovereign over them. Once that is determined all other matters can be properly addressed.

RELIEF SOUGHT:

The Appellant prays that the Court of Appeals:

1. Find the Appellees' Brief in want of substantial law;
2. Find the Appellees' Brief to be unresponsive to the Appellant's valid questions and point of error in his Second Amended Brief and Appendix;
3. Find the merit of the Appellant's exhaustive proof of the want of Sovereign and/or Governmental Immunity of the State of Texas over its citizens;
4. Find that there is no need to show waiver of state immunity under the TTCA or CPRC when the State does not possess the slightest scintilla of Sovereign or Governmental immunity;
5. Reverse the Order of the Trial Court granting a dismissal of the Appellant's law suit based upon Appellees' Plea and Supplemental Plea to the Jurisdiction by signing said Order on July 27, 2004;

6. Remand this cause to the Trial Court for further proceedings.

Further, the Appellant prays for any other relief that he may be entitled to.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded by certified mail, return receipt requested # 7099 3220 0001 5083 3431, on this the _____ day of _____, 2005 to the following:

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