Affirmed in Part, Reversed and Remanded in Part, Reversed and Rendered in Part, and Majority and Dissenting Opinions filed June 15, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00244-CV

TEXAS DEPARTMENT OF TRANSPORTATION, Appellant

V.

ZULEIMA OLIVARES, INDIVIDUALLY AND AS THE REPRESENTATIVE OF THE ESTATE OF PEDRO OLIVARES, JR., AND PEDRO OLIVARES, INDIVIDUALLY, Appellees

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On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 2008-19417

D I S S E N T I N G O P I N I O N

Because the Texas Department of Transportation enjoys sovereign immunity and, in my view, has not waived such immunity, I must dissent.

From the pleadings, briefs, and oral arguments it appears there is general agreement among the parties as to the factual background leading to the plaintiffs' loss. In the early

morning hours of January 1, 2007, a severely intoxicated Michael Ladson was observed by startled motorists driving the wrong way in the westbound lanes of a divided highway, namely, the Westpark Tollway.[1] From eyewitness accounts and 911 telephone calls, it appears Ladson continued driving against the traffic for approximately eight and one half miles until he fatally crashed head-on into the appellees' vehicle. How and where Ladson entered the westbound lanes of traffic is not known. However, based on Ladson's location at the time the initial reports of his erratic behavior were received, the closest possible point of entry was the Gaston Road intersection. If Ladson entered the freeway from Gaston Road, he most likely was driving southbound on Gaston when it intersected and terminated at an access road. Contrary to signage, Ladson then turned left, driving eastbound on a westbound access road. Contrary to signage, Ladson continued east on the access road until, contrary to traffic reflectors, he entered the exit ramp of the freeway. Ladson then proceeded another eight and one half miles against oncoming traffic until the fatal crash.

Despite the fact that Ladson was committing a criminal act when the crash occurred, appellees contend the Texas Department of Transportation ("the department") is liable for their damages because the department could have done more to prevent Ladson from entering the tollway by relocating certain signage, adding traffic lights, etc. It is hard to imagine, however, a greater indication of error than eight and one half miles of opposing headlights on a divided highway.

The only reason I can discern for the department's inclusion in this litigation is its "deep pockets," and there are no pockets deeper than the public treasury which can be resupplied by seemingly endless amounts of tax-payer dollars. Accordingly, this case illustrates both the wisdom and necessity of sovereign immunity.

[1] Ladson's blood alcohol was three times the legal limit.

THE DOCTRINE OF SOVEREIGN IMMUNITY

In recent years the doctrine of sovereign immunity has fallen into disfavor.[2] It has been characterized as "archaic,"[3] "feudal,"[4] "primitive,"[5] "absurd,"[6] "a legal fiction,"[7] and contrary to the public interest.[8] At least one jurist has judged the doctrine to have "little relevance in the 21st century."[9]

The King Can Do No Wrong

Ancient though the doctrine may be, it is neither primitive nor contrary to public interest. Although Blackstone has been pilloried for justifying sovereign immunity on the "outmoded" [10] medieval precept that "the King can do no wrong,"[11] critics rarely grasp his meaning.[12] Professor Louis Jaffe and many other scholars are of the opinion that the expression "the King can do no wrong" originally meant precisely the opposite of how it is interpreted today.[13] Blackstone plainly states that the "ancient and fundamental maxim is

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[2] *Principe Compania Naviera, S. A. v. Bd. of Comm'rs of Port of New Orleans*, 333 F. Supp. 353, 355 (E.D. La. 1971).

[3] *Granite Valley Hotel Ltd. P'ship v. Jackpot Junction Bingo & Casino*, 559 N.W.2d 135, 162 (Minn. Ct. App. 1997) (Randall, J., concurring).

[4] *Nevada v. Hall*, 440 U.S. 410, 415, 99 S. Ct. 1182, 1185 (1979).

[5] *City of Danville v. Smallwood*, 347 S.W.2d 516, 518 (Ky. 1961).

[6] *Haynes v. Franklin*, 95 Ohio St. 3d 344, 2002-Ohio-2334, 767 N.E.2d 1146 , at ¶ 31 (Pfiefer, J., dissenting).

[7] *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 848 (Tenn. 2008).

[8] *State ex rel. Hanosh v. State ex rel. King*, 2009-NMSC-047, ¶ 11, 147 N.M. 87, 217 P.3d 100.

[9] *Blessing v. Nat'l Eng'g & Contracting Co.*, 664 S.E.2d 152, 160 (W.Va. 2008) (Benjamin, J., concurring).

[10] *Dairyland Ins. Co. v. Bd. of County Comm'rs of Bernalillo County*, 88 N.M. 180, 181, 538 P.2d 1202, 1203 (N.M. Ct. App. 1975).

[11] 3 William Blackstone, Commentaries 254.

[12] It is the habit of men, like their canine companions, to "always bark at those they know not, and . . . it is their nature to accompany one another in those clamors." Sir Walter Raleigh, *Preface to the History of the World*, in The Harvard Classics 67 (Charles W. Eliot. ed., 1969).

[13] Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 4 (1963). This evolution of contradictory meanings is best described by Justice Frankfurter, "A phrase begins life as a literary

(footnote continued on next page)

not to be understood, as if everything transacted by the government was of course just and lawful."[14] When Blackstone spoke of "the king," he spoke of the regal office, not an individual. Thus, the "king never dies,"[15] he "is always present in all his courts,"[16] and he "is incapable of doing wrong."[17] In other words, as Professor Jaffe suggests, the king must not, was not allowed, and was not entitled to do wrong.

As a proponent of natural law, Blackstone regarded "the Law" as emanating from God, not government. Thus, "the principal duty of the king is, to govern his people according to law."[18] Citing Henry de Bracton, Blackstone observed, the king "ought not to be subject to man, but to God, and to the law, for the law maketh the king."[19] Stated slightly differently, "the king also hath a superior, namely God, and also the law, by which he was made a king."[20] Thus, the unjust actions and edicts of a corrupt king, being not from God, were not law. Accordingly, a corrupt king could be defied, resisted, and even overthrown precisely because "the king can do no wrong."[21]

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expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 68, 63 S. Ct. 444, 452 (1943) (Frankfurter, J., dissenting).

[14] 1 Blackstone, Commentaries 238–39.

[15] *Id*. at 242.

[16] *Id*. at 260.

[17] *Id*. at 239.

[18] *Id*. at 226.

[19] *Id*. at 227.

[20] *Id*.

[21] I recognize that some have concluded the doctrine of sovereign immunity is obsolete because it "was rejected by the colonists when they declared their independence from the Crown." *See Hall*, 440 U.S. at 415, 99 S. Ct. at 1185. Nothing could be further from the truth.

The Declaration of Independence is an articulate justification and defense for revolution under principles of natural law. Jefferson argues that it is "the laws of nature and of nature's God" that entitled the colonists to ignore the edicts of the king. As Blackstone stated:

> This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: *no human laws are of any validity, if contrary to this*;

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Oliver Wendell Holmes, who rejected Blackstone's concept of natural law, nevertheless agreed with Blackstone's maxim, but for a very different reason. As a legal positivist, Holmes believed law was "posited" not by a mythical god, but by the highest sovereign in existence—the state. Holmes held that a "sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353, 27 S. Ct. 526, 527 (1907). Accordingly, in Holmes' view, the law is neither eternal nor immutable; men have no inherent or inalienable rights; and "the king can do no wrong" because, by virtue of his political and military power, the king is sovereign and, thus, has the prerogative to define right and wrong until such time as he is supplanted by one stronger than himself.

Notwithstanding their opposing world views (natural law versus legal positivism), both Holmes and Blackstone recognized the practical limitations of suing the sovereign for there is no higher authority before whom one can prosecute an appeal. Further, it is of no consequence that we live under a republic rather than a monarchy. No writ or appeal, for example, may be brought against the United States Supreme Court. While that tribunal undoubtedly errs (and some believe quite frequently), yet there is no higher tribunal to which one can appeal. Thus, the Supreme Court enjoys, in a very real sense, sovereign immunity. Thrown

Moreover, even when a sovereign "waives" its immunity, as Texas has done to a limited degree under the Texas Tort Claims Act, the waiver is largely illusory. The courts of this state are no less the "State of Texas" (i.e., the sovereign) than is the governor or legislature. Thus, in reality, there is no higher authority before which the aggrieved

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> and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

1 Blackstone, Commentaries 41 (emphasis added). Thus, when a king oppresses his subjects contrary to the just principles of natural law, Blackstone argues he is deemed to have *abdicated the throne* because the king can do no wrong. *Id*. at 238.

Nothing in our Declaration of Independence repudiates the doctrine of sovereign immunity.

citizen can bring his appeal. In this sense, the state must, of logical necessity, remain immune.

Actions Against the Sovereign

Originally, when a person suffered injury or death at the hands of another, he or his kin had a right of "private war" against the offender.[22] These wars, however, had a tendency to escalate.

> The injured kin would avenge its wrong not merely on the person of the slayer, but on his belongings. It would have life or lives for life, for all lives were not of equal value; six ceorls must perish to balance the life of one thegn.[23]

Thus, the blood-feud was both common and immensely destructive. "Private war" damaged the peace of the king's realm. An orderly, productive society was impossible while such conflicts raged. However, in time, it was discovered an offender could sometimes buy off the kin of his victim. Money, every now and then, soothes and satisfies the passion for revenge.

To preserve the peace, the kings of England, as well as other Germanic tribes, encouraged a system of pecuniary compositions.

> The offender could buy back the peace that he had broken. To do this he had to settle not only with the injured person but also with the king: he must make *bót* to the injured and pay a *wíte* to the king. . . . Gradually more and more offenses became emendable.[24]

Thus, the blood-feud could be prosecuted only if the offender failed to pay the *bót* (for injuries) or the *wer* (for homicide). In other words, "the compensation recovered in the appeal was the alternative of vengeance."[25]

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[22] *See* Hugo Grotius, *On the Law of War and Peace* 34–35 (Kessinger 2004).

[23] 2 Sir Frederick Pollock & Frederic William Maitland, *The History of English Law* 450 (2d ed. Cambridge 1899).

[24] *Id.* at 451.

[25] O. W. Holmes, Jr., *The Common Law* 2–3 (1881).

Even unintended injuries were compensable under concepts of vengeance. Thus, if a man was gored by his neighbor's ox, he was entitled to take vengeance against the ox.[26] The owner of the ox was liable only to the extent of his ownership in the offending chattel; thus, he was obliged to either surrender the ox or compensate the injured man and thereby retain his interest in the ox. Even inanimate objects that caused injury or damage were subject to vengeance. As Holmes observed, we see this demonstrated when a civilized man kicks a door that pinches his finger.[27] Thus, the common law action of trespass (seeking compensation for personal or property damages whether intentionally or negligently inflicted) arose directly out of the criminal law.[28] Moreover, all personal actions in civil law have subsequently grown out of trespass.[29]

Viewed in this light, actions against the sovereign seem exceptionally inapt. Such suits have no power to punish or deter as they would if brought against an individual because the state pays with another's money, not its own. No vengeance is achieved; no retribution is meted out. Moreover, a fundamental concept of our government is that the people are sovereign and possess all of the powers of sovereignty. *Byers v. Patterson*, 219 S.W.3d 514, 521 (Tex. App.—Tyler 2007, no pet.). Thus, an action against the sovereign "is in effect suing oneself, which is a legalistic anomaly." *Ace Flying Serv., Inc. v. Colo. Dep't of Agric.*, 136 Colo. 19, 24, 314 P.2d 278, 281 (1957). Since sovereignty rests in the people collectively, one person has no authority to elevate his will over the will of the many. This is not to say that an individual can never be compensated for wrongful injury negligently inflicted by the sovereign or its agents, for even in Blackstone's day there was recompense.

Despite the fact that the king could do no wrong and was absolutely immune from

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[26] *Id*. at 7–10.

[27] *Id*. at 11.

[28] F. W. Maitland, *The Forms of Action at Common Law* 48–49 (Cambridge 1948).

[29] *Id*. at 65.

suit, an individual who suffered injury inflicted by the crown could seek redress from the king by numerous writs and common law actions.[30] One may wonder then in what manner the king was immune from suit. Blackstone continues:

> And, first, as to private injuries; if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion. And this is entirely consonant to what is laid down by the writers on natural law. "A subject, says Puffendorf, so long as he continues a subject, hath no way to *oblige* his prince to give him his due, when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And, if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws." For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him.[31]

Likewise, in a democratic republic, a person allegedly suffering injury due to state action or negligence cannot bring suit without the consent of the sovereign, i.e., the people. Further, the people do not speak through the written opinions of their judges, nor are we endowed with some "divine right" to unilaterally open the coffers of state government. The people speak through their constitution and legislative enactments. Thus, we must look to what extent and under what circumstances the people have consented to be sued.

TEXAS TORT CLAIMS ACT

Apart from specific legislative action in individual cases, sovereign immunity has been partially waived by the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code Ann. § 101.025 (Vernon 2005). The tort claims act waives sovereign immunity for death caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law. *Id.* § 101.021(2) (Vernon 2005). But, sovereign immunity is expressly reserved in claims arising from the

[30] 3 Blackstone, Commentaries 254–69.

[31] 1 Blackstone, Commentaries 236.

failure of a governmental unit *initially* to place a traffic or road sign, signal, or warning device if the failure is a result of discretionary action of the governmental unit. *Id.* § 101.060(a)(1) (Vernon 2005). However, once a sign or signal is installed, "the absence, condition, or malfunction of a traffic or road sign, signal, or warning device [is actionable] unless the absence, condition, or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice." *Id.* § 101.060(a)(2) (Vernon 2005).[32]

Quality and Sufficiency of the Traffic Control Devices

The appellees first contend the department was negligent in that it failed to install sufficient signs, lights, and traffic control devices to prevent Ladson from improperly entering the tollway. The majority correctly surmises that all decisions regarding whether, when and why traffic control devices should be installed are discretionary decisions protected by sovereign immunity. However, the majority remands this cause to allow appellees to amend their pleadings, if possible, to allege "non-discretionary" acts by the department that resulted in injury and, thus, are not protected by sovereign immunity.

The majority does not suggest, and I cannot fathom, what "non-discretionary" acts are involved in deciding if, how, and when to install traffic signs and signals. Thus, no purpose is gained by a remand other than needlessly prolonging the litigation. Accordingly, I dissent to the remand.

Negligent Implementation

Appellees also charge the department negligently implemented its decision to install traffic signs and devices by failing to place them in the most advantageous positions. The majority concludes the placement of traffic control signs and devices is protected by sovereign immunity, but again remands this cause to permit appellees to amend their pleadings to allege "whether the traffic-control devices were inadequate, or the warning

[32] While it is the legislature's prerogative to do so, it appears the statute is contrary to public interest in that it encourages the state to install no traffic signs, warning lights or control devices. So long as the state takes no action to protect the public, it is immune from suit. However, if the state installs a traffic sign or control device and fails to keep it properly maintained, it is subject to liability. Thus, the state installs traffic safety devices at its peril.

signs were negligently located, because of TxDOT's negligent implementation of the construction plans."

The precise placement of traffic signs and control devices to achieve maximum impact and advantage is subject to reasonable disagreement. Without sovereign immunity, every accident would be followed by a suit contending the traffic sign should have been positioned "a few inches higher" or "a couple of feet to the left." These are matters clearly left to the discretion of the department and its engineers in the field. Furthermore, there is not the slightest suggestion of negligent implementation of construction plans in the record and pleadings before us. Accordingly, I dissent to the remand.

Maintenance

Appellees contend some of the traffic buttons on the access road and exit ramp were chipped and damaged. These buttons possess white and red reflectors. When a driver is proceeding in the proper direction, the white reflectors delineate the lanes of traffic. When a driver is going in the wrong direction, he is confronted with red warning reflectors. Appellees suggest that some of these reflectors were damaged and/or missing, and, thus, were not properly maintained. The tort claims act waives sovereign immunity where the defective "condition . . . is not corrected by the responsible governmental unit within a reasonable time after notice." Tex. Civ. Prac. & Rem. Code Ann. § 101.060(a)(2). The department asserts appellees have failed to allege or show it had any notice of the alleged defect. The majority rejects the department's position because it had the burden of establishing sovereign immunity. Relying on *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004), the majority contends the department was required to assert and support with evidence its assertion that it had no notice of the alleged defect. Thus, the majority affirms the trial court's denial of the department's plea to the jurisdiction on this issue.[33]

[33] The majority ultimately determines that appellees failed to allege a required element of their claim concerning traffic buttons and remands for a reasonable opportunity to remedy such deficiency.

Millions of traffic buttons have been installed on Texas highways. If liability can be imputed to the state because some buttons have since been chipped or broken, it would have been better for the state (not the travelling public) if they had never been installed. Whether the traffic buttons on the access road at issue were in need of maintenance has not been established. Here, the department alleged in its plea to the jurisdiction that if the traffic buttons were in need of repair (which it did not concede), the appellees failed to allege or show it had knowledge of the danger. Indeed, one has to wonder how many times department employees are assigned to drive the wrong way at night on a one-way street to test the efficacy of the traffic buttons. Moreover, even a sober citizen who found himself driving the wrong way on a one-way street would not likely make a "button" report to the department. Here, the department did all it could do; it raised the issue before the trial court.

By holding the department was required to prove the non-existence of an event, the majority stands *Miranda* on its head. In *Miranda*, the court sought to protect "the interests of the state *and* . . . injured claimants." *Miranda*, 133 S.W.3d at 228 (emphasis added). Here, the majority asks the state to prove a negative or waive its sovereign immunity. If the plaintiffs possess evidence that the department was notified prior to the accident that the traffic buttons were in disrepair, it is not unreasonable to expect them to allege and prove such facts. Accordingly, I dissent.

Negligent Implementation of Tollway Policy

Appellees contend the department negligently failed to implement its policy to safely operate the tollway when it did not erect traditional toll booths and wider road shoulders. Appellees argue that if traditional toll booths had been erected on the exit ramps, Ladson might not have been able to enter the westbound lanes. The majority remands this claim to permit the appellees to amend their pleadings, if possible, to allege that the failure to build toll booths and wider road shoulders constituted a negligent implementation of construction plans.

The Texas Tort Claims Act does not waive sovereign immunity for roadway design.

Tex. Dep't of Transp. v. Ramirez, 74 S.W.3d 864, 867 (Tex. 2002). The decision to install or not install traditional toll booths or wider shoulders was a matter of roadway design. Moreover, there is not the slightest suggestion of negligent implementation of construction plans in the record and pleadings before us. Accordingly, I dissent to the remand of this issue.

Joint Enterprise

Finally, appellees assert the department is liable under a "joint enterprise" theory. Under Texas law a joint enterprise, as that term is used in the law of negligence, signifies a legal relationship between two or more parties that imposes the responsibility upon each joint venturer for the negligent acts of the other while acting in furtherance of their common undertaking. *Aluminum Chems. (Bolivia), Inc. v. Bechtel Corp.*, 28 S.W.3d 64, 67 (Tex. App.—Texarkana 2000, no pet.). Thus, appellees argue that by virtue of a joint enterprise agreement among the department, the Fort Bend County Toll Road Authority, the Harris County Toll Road Authority, Fort Bend County, Harris County, and Michael Stone Enterprises, the department is liable for the negligent conduct of any and all members of the enterprise.

For its part, in its plea to the jurisdiction, the department submitted two agreements: (1) a contract between Harris County and Fort Bend County; and (2) a contract between the department and the Fort Bend County Toll Road Authority. These agreements simply provide for the construction of the roadway; they make no provision for revenue sharing or the operation of the toll road. However, to establish a joint enterprise, the plaintiff must show: "(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) *a community of pecuniary interest in that purpose, among the members*; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control. *Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 613 (Tex. 2000) (emphasis added).

The majority nevertheless holds the department "has not *conclusively* negated" appellees' allegation that other express or implied agreements existed. (Emphasis added).

Thus, the majority affirms the trial court's denial of the department's plea to the jurisdiction on this issue.[34]

Once again, I am perplexed as to how the department might go about proving the non-existence of alleged contracts. In my view, the department did all it could to raise, sharpen, and clarify the issue. *It denied the existence of any agreements save two which it submitted to the trial court.* What more could it have done? If appellees are aware of any additional agreements, it was incumbent upon them to offer the documents or evidence in rebuttal.

For these reasons, I concur with the majority's dismissal of appellees' joint enterprise theory of liability against Fort Bend County Toll Road Authority and respectfully dissent to all other aspects of the decision.

/s/ J. Harvey Hudson
Senior Justice

Panel consists of Chief Justice Hedges, Justice Seymore, and Senior Justice Hudson.[*]

[34] The majority here and in the companion case, *Fort Bend County Toll Road Authority v. Zuleima Olivares, et al.*, ___ S.W.3d ___, (Tex. App.—Houston [14th Dist.] 2010), concludes that statute bars joint enterprise liability against the Fort Bend County Toll Road Authority. Thus, the majority dismisses appellees' joint enterprise theory of liability against the authority for want of jurisdiction. I concur in this result.

[*] Senior Justice J. Harvey Hudson sitting by assignment.