

NO. 04-0694

IN THE SUPREME COURT OF TEXAS

**RANDY and REBECCA RAMOS, Individually and as Next
Friends of ERIKA and RANDY RAMOS, JR., Minor Children,**

Petitioners,

v.

BAY, INC.,

Respondent.

On Petition for Review from the Court of Appeals for the
Fourth Judicial District of Texas at San Antonio, Texas
Cause No. 04-02-00196-CV

**ERIKA AND RANDY RAMOS, JR.'S
RESPONSE TO BAY, INC.'S PETITION FOR REVIEW**

ORAL ARGUMENT REQUESTED

DEE J. KELLY, JR.
State Bar No. 11217250
BRIAN S. STAGNER
State Bar No. 24002992
KELLY, HART & HALLMAN, P.C.
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
Facsimile: (817) 878-9280

**AD LITEM COUNSEL FOR
PETITIONERS ERIKA and RANDY
RAMOS, JR., Minor Children**

TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES iii

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

 I. Bay’s Defense of Sovereign Immunity 2

 A. Bay is Not Immune from Liability 2

 B. The Court of Appeals Must Review the Factual
 Record in Deciding Sovereign Immunity 3

 II. Plaintiffs Were Properly Granted a New Trial 5

 III. Bay Should Pay its Own Costs of Appeal 6

PRAYER 7

CERTIFICATE OF SERVICE 8

INDEX OF AUTHORITIES

CASES	Page(s)
<i>BMC Software Belgium, N.V. v. Marchand</i> , 83 S.W.3d 789 (Tex. 2002)	4
<i>Briscoe v. Goodmark Corp.</i> , 102 S.W.3d 714 (Tex. 2003)	5
<i>Cummins v. Paisan Constr. Co.</i> , 682 S.W.2d 235 (Tex. 1984)	5, 6
<i>Pace Concerts, Ltd. v. Resendez</i> , 72 S.W.3d 700 (Tex. App.—San Antonio 2002, pet. denied)	4
<i>Pool v. Ford Motor Co.</i> , 715 S.W.2d 629 (Tex. 1986)	3, 4
<i>Powell v. Stacy</i> , 117 S.W.3d 70 (Tex. App.—Fort Worth 2003, no pet.)	4
<i>Rodriguez v. Texas Dep’t of Mental Health and Mental Retardation</i> , 942 S.W.2d 53 (Tex. App.—Corpus Christi 1997, no writ)	2
<i>State v. Brannan</i> , 111 S.W.2d 347 (Tex. Civ. App.—Waco 1937, writ ref'd)	2
<i>Travis v. City of Mesquite</i> , 830 S.W.2d 94 (Tex. 1992)	2
<i>Volkswagen of America, Inc. v. Ramirez</i> , 79 S.W.3d 113 (Tex.App.—Corpus Christi 2002), review granted, 46 Tex. Supp. Ct. J. 489 (Mar. 6, 2003)	5, 6

STATUTES AND RULES

Tex. R. App. P. 43.4	6
Act of June 20, 2003, 78 th Leg., R.S., ch. 584, 2003 TEX. GEN. LAWS 1953 (H.B. 1699, approved June 20, 2003, and effective Sep. 1, 2003).....	3

SUMMARY OF THE ARGUMENT

Bay, Inc.'s Petition for Review is a serial collection of arguments containing little substantive discussion of the issues presented to this Court. Rather than superficially responding to each of these eighteen points, the Respondent minor children have identified three findings that, if reversed by this Court, could substantially impair their rights, to wit:

1. The court of appeals' ruling that Bay was not entitled to sovereign or official immunity;
2. The court of appeals' conclusion that the trial court's decision to grant a new trial was not reviewable on appeal; and
3. The court of appeals' assessment of costs on appeal against the "party who incurred them."

On each of these issues, the Respondent minor children believe the San Antonio Court of Appeals was correct; nevertheless, the lower court's opinion should still be reversed and judgment rendered for the minor children for the reasons cited in their Petition for Review. Moreover, the minor children believe the questions raised in their Petition for Review are so important to the jurisprudence of this State that this Court should accept review of this case regardless of whether the issues presented by Bay rise to that level.

ARGUMENT

I. Bay's Defense of Sovereign Immunity.

Bay lodges a variety of attacks on the court of appeals' decision regarding sovereign immunity. Below, the Respondent minor children challenge two of Bay's primary assertions.

A. Bay is Not Immune from Liability.

The court of appeals ruled that a private enterprise engaging in an activity "highly regulated by a state agency does not necessarily place it under that agency's control and direction for purposes of the Texas Tort Claims Art." Op. at 5, citing *Rodriguez v. Texas Dep't of Mental Health and Mental Retardation*, 942 S.W.2d 53, 56-57 (Tex. App.—Corpus Christi 1997, no writ). The Respondent minor children agree with this point of law but would actually take it one step further - by removing the word "necessarily" from the court's statement.

Bay's argument that it should be insulated from liability based on sovereign immunity defies all logic. The entire purpose of sovereign immunity is to protect the State from liability so that it can fulfill its inherent and exclusive responsibilities towards its citizenry. *See State v. Brannan*, 111 S.W.2d 347, 348 (Tex. Civ. App.—Waco 1937, writ ref'd)(the state is "inherently and exclusively sovereign and must necessarily act as such at all times and in all capacities."). Significantly, this Court has never held that a "for profit" private entity is entitled to the benefits of sovereign immunity, having expressly limited the doctrine to "the State, its agencies and political subdivisions." *Travis v. City of Mesquite*, 830 S.W.2d 94, 104 (Tex. 1992).

No purpose could be served by expanding sovereign immunity to protect a private contractor like Bay, which acts in its own best interests rather than for the benefit of the public as a whole. If Bay's position were to be accepted, there would be no end to the attempts made by private contractors to take advantage of this defense at the direct expense of the public. Ultimately, every private entity that chooses to do business with the State has the unfettered discretion to accept or reject the proposed work based on a normal risk/reward analysis. There can be little doubt that Bay made its choice with its eyes wide open.

Finally, Bay's argument on sovereign immunity is much like its argument on H.B. 1699: Bay seeks to stretch a statutory defense to avoid accountability for its actions. Just as H.B. 1699 should not be reductively applied to limit Bay's liability for its tortious conduct, the defense of sovereign immunity should not be enlarged to protect a private, for profit tort-feasor. The real question in this case is whether the court of appeals' erroneous decision to use the mother's alleged negligence as a means to deny the minor children their recovery has the effect of giving Bay an exculpatory defense it otherwise would not have available. That is the reason this Court should review this case, not because of sovereign immunity.

B. The Court of Appeals Must Review the Factual Record in Deciding Sovereign Immunity.

Another of Bay's contentions is that the court of appeals "found" facts to negate sovereign immunity that the plaintiffs/Respondents allegedly did not cite in their briefs. More specifically, Bay cites *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 634 (Tex. 1986)

for the proposition that appellate courts cannot constitutionally “find” facts; instead they can only “unfind” them. Extrapolating from this, Bay suggests the lower court did not have authority to review the trial court’s record in rendering its decision on sovereign immunity, and therefore its “factual findings” should not be binding on the parties in the event of a remand.

Bay’s interpretation of *Pool* is misguided. The issue in *Pool* was the standard of review that appellate courts should apply in determining a factual sufficiency challenge. The *Pool* decision does not stand for the proposition that an appellate court cannot (or should not) review a trial court’s record and apply facts “found” in that record to the legal questions presented for review. As previously noted by this Court:

The appellant may not challenge a trial court’s conclusions of law for factual sufficiency; however, the reviewing court may review the trial court’s legal conclusions drawn from the facts to determine their correctness.

BMC Software Belgium, N.V. v. Marchand, 83 S.W.3d 789, 794 (Tex. 2002).

Indeed, there is no way for an appellate court to determine a legal question other than through a careful review of the evidentiary record. This is hardly a novel concept; most appellate courts consistently follow this practice:

The trial court’s conclusion of law will be upheld if the judgment can be sustained on any legal theory supported by the evidence; they will not be reversed unless they are erroneous as a matter of law.

Pace Concerts, Ltd. v. Resendez, 72 S.W.3d 700, 702 (Tex. App.—San Antonio 2002, pet. denied). Or stated another way:

Conclusions of law may be reviewed to determine their correctness based upon the facts.

Powell v. Stacy, 117 S.W.3d 70, 72-3 (Tex. App.—Fort Worth 2003, no pet.).

Accordingly, Bay’s argument that “the appeals court exceeded its authority by finding facts on appeal to dispose of Bay Inc.’s defense of sovereign or governmental immunity” is simply wrong. Moreover, Bay’s primary concern - that if this case is remanded for new trial, the trial court will be bound by the court of appeals’ holding on sovereign immunity - is well-founded because “[u]nder the law of the case doctrine, [the] court of appeals is ordinarily bound by its initial decision....” *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003). Any effort by Bay in this Court to avoid the law of the case doctrine should be refused.

For all of these reasons, the Respondent minor children request that the court of appeals’ ruling on sovereign immunity be affirmed.

II. Plaintiffs Were Properly Granted a New Trial.

Bay takes the position that the trial court’s decision on “good cause” in deciding a motion for new trial should be reviewable on appeal. For support, Bay cites its Amicus Curie brief filed in *Volkswagen of America, Inc. v. Ramirez*, Case No. 02-0557. While the Respondent minor children are not required to respond to legal arguments filed in another case (the brief was not even included in Bay’s appendix), they do object to Bay’s attempt to change the rules of procedure in the middle of the litigation process. Furthermore, Bay admits that its position would require an overruling of long-standing legal precedent.

Specifically, Bay’s argument runs headlong into this Court’s prior decision in *Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 235-36 (Tex. 1984). There, the Court

held that an order granting a new trial is not reviewable on direct appeal from the order or a final judgment. *Id.* Both the San Antonio Court of Appeals in this case and the Corpus Christi Court in *Volkswagen* noted that *Cummins* is directly on point and controlling on this issue. Although the pending *Volkswagen* case does challenge the holding in *Cummins*, the Respondent minor children do not believe the facts in *Volkswagen* necessarily follow those in the instant case, and therefore object to Bay's suggestion that this Court should automatically apply any future decision in *Volkswagen* to this case for the purpose of "harmonizing" the two opinions.

III. Bay Should Pay its Own Costs of Appeal.

The San Antonio Court of Appeals ordered costs of appeal to be borne by the "party who incurred them." Remarkably, Bay seeks to have this Court reverse the court of appeals' judgment and force the minor children and their parents to pay *all of its costs*.

Bay's attitude on costs ("no one is ever going to reimburse Bay, Inc. for the costs incurred in order to suspend enforcement of respondent's windfall \$62 million judgment") is utterly shameful. Bay appears far more worried about the costs of its supersedeas bond than the devastating injuries suffered by Erika Ramos and the resulting costs for her medical care. Would Bay have Erika forego her medical treatment to ensure that its costs on appeal are satisfied?

Costs on appeal are awarded based on the discretion of court of appeals. TEX. R. APP. P. 43.4 ("But the court of appeals may tax costs otherwise as required by law or for good cause."). In light of the circumstances of this case, the San Antonio Court of Appeals saw fit to exercise that discretion in a just manner. Bay's overreaching request is

indicative of a party with no conscience and no concern about the plight of the minor children.

PRAYER

For the reasons stated herein, Erika and Randy Ramos, Jr., minor children, respectfully request the Court to deny Bay, Inc.'s requested relief but to grant their Petition for Review, and, after oral argument, reverse the judgment of the court of appeals as to them and render judgment in their favor consistent with the trial court's final judgment.

Respectfully submitted,

DEE J. KELLY, JR.
State Bar No. 11217250
BRIAN S. STAGNER
State Bar No. 24003001
KELLY, HART & HALLMAN, P.C.
201 Main Street, Suite 2500
Fort Worth, Texas 76102
Telephone: (817) 332-2500
Facsimile: (817) 878-9280

**AD LITEM COUNSEL FOR
PETITIONERS ERIKA and RANDY
RAMOS, JR., Minor Children**

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of October, 2004, a true and correct copy of the foregoing Response to Petition for Review was served by certified mail, return receipt requested, to the following counsel of record, in accordance with Rule 9.5(e) of the Texas Rules of Appellate Procedure:

W. Wendell Hall
Rosemarie Kanusky
Fulbright & Jaworski L.L.P.
300 Convent Street, Suite 2200
San Antonio, Texas 78205

Darrell L. Barger
Hartline, Dacus, Barger, Dreyer & Kern, P.C.
800 N. Shoreline Plaza, Suite 2000
One Shoreline Plaza
Corpus Christi, Texas 78401

Reagan W. Simpson
King & Spalding LLP
1100 Louisiana, Suite 4000
Houston, Texas 77002

Tom Hermansen
Hermansen, McKibben, Woolsey & Villareal
1100 Tower II, 555 N. Carancahua
Corpus Christi, Texas 78478

Ben Taylor
Fulbright & Jaworski L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201

Wallace W. Canales
Canales Law Offices
111 North Almond Street
Alice, Texas 78332

Robert Patterson
Patterson & Associates
101 North Shoreline, Suite 210
Corpus Christi, Texas 78401

Steve T. Hastings
Hastings & Alfaro, L.L.P.
101 North Shoreline Blvd., Suite 420
Corpus Christi, Texas 78401

Rebecca E. Hamilton
Sumner, Schick & Hamilton
3838 Oak Lawn Avenue, Suite 400
Dallas, Texas 75219

R. Michael Northrup
Cowles & Thompson
910 Main Street, Suite 4000
Dallas, Texas 75202

Dee J. Kelly, Jr.