

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.  
Rusk State Hospital, Petitioners

v.

Dennis Black, Pam Black, individually and as representatives of the Estate of  
Travis Bonham Black, Deceased, Respondents.  
No. 10-0548.

October 6, 2011.

Appearances:

Michael P. Murphy, Office of the Attorney General, Austin, TX, for the Petitioner.  
Dennis G. Black, Black & Skaggs, P.C., Tyler, TX, for the Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green,  
Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

ORAL ARGUMENT OF MICHAEL P. MURPHY ON BEHALF OF THE PETITIONER  
ORAL ARGUMENT OF DENNIS G. BLACK ON BEHALF OF THE RESPONDENT  
REBUTTAL ARGUMENT OF MICHAEL P. MURPHY ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 0548 Rusk State Hospital vs. Dennis Black.

MARSHAL: May it please the court, Mr. Murphy will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF MICHAEL P. MURPHY ON BEHALF OF THE PETITIONER

ATTORNEY MICHAEL P. MURPHY: May it please the Court. In declining to address the jurisdictional issue in this case, the court of appeals erred in two ways. First, it misinterpreted Section 51.014 as a restriction on its consideration of subject matter jurisdiction. Second, it disregarded the fundamental principle as subject matter jurisdiction can be raised at any time, including for the first time on interlocutory appeal as this court held in Gibson because without subject matter jurisdiction, the court is powerless to act. For these reasons, the Court should reverse the court of appeals judgment with respect to the jurisdictional issue and dismiss Plaintiff's remaining Court claims. To begin, the court of appeals decision departs from the text and purpose of Section 51.014. Section 51.014 expands appellate jurisdiction over certain interlocutory orders. Nothing in the text restricts the court's consideration of subject matter jurisdiction, which is an inherent duty of the court. Also, the Court of Appeals's decision undermines the purpose of Section 51.014, which is judicial efficiency requiring remand of jurisdiction-required claims only adds needless expense and delay to the disposition of jurisdiction-required claims.

JUSTICE NATHAN L. HECHT: Is there any indication in the record why the hospital did not raise immunity in the trial court?

ATTORNEY MICHAEL P. MURPHY: There is not.

CHIEF JUSTICE WALLACE B. JEFFERSON: And you talked about judicial efficiency; wouldn't that have been the better thing to do?

ATTORNEY MICHAEL P. MURPHY: It is and there is a strong incentive for parties to raise jurisdictional issues as early as possible, but sometimes they escape the attention of the court and parties and are only discovered on interlocutory appeals. So the purpose of Section 51.014 is advanced by the resolution of these jurisdictional issues that are clearly barred by sovereign immunity.

JUSTICE DALE WAINWRIGHT: If we decided that some of these jurisdictional issues had to be raised at the trial court, I bet counsel would pay more attention to raising them at the trial court, wouldn't they?

ATTORNEY MICHAEL P. MURPHY: Yes, but that would--

JUSTICE DALE WAINWRIGHT: If you could waive this.

ATTORNEY MICHAEL P. MURPHY: Yes, but subject matter jurisdiction is not waivable as the Court has held over and over as a fundamental duty of the court to determine its jurisdiction. Subject matter jurisdiction cannot be acquired by waiver.

JUSTICE DEBRA H. LEHRMANN: But does sovereign immunity have to necessarily be considered subject matter jurisdiction for this purposes? When we've looked at it before, haven't we looked at in other contexts?

ATTORNEY MICHAEL P. MURPHY: Yes, well, the concept of subject matter jurisdiction recognizes that sovereign immunity bars a trial court subject matter jurisdiction. So if sovereign immunity is established as clearly the case here, the trial court has no jurisdiction over those claims.

JUSTICE DEBRA H. LEHRMANN: But isn't that only if we say that sovereign immunity is a matter of subject matter jurisdiction for this purpose.

ATTORNEY MICHAEL P. MURPHY: Well for what purpose are you speaking of?

JUSTICE DEBRA H. LEHRMANN: For purposes of not being waivable. I mean subject matter jurisdiction is something that you either have it or you don't, right? And we've talked about in our cases that with regard to subject matter or with regard to sovereign immunity that's something that courts interpret because it's a common law doctrine, right?

ATTORNEY MICHAEL P. MURPHY: Correct.

JUSTICE DEBRA H. LEHRMANN: So we haven't really held that specific issue and why would we have to?

ATTORNEY MICHAEL P. MURPHY: Well, sovereign immunity is not waivable because it's a fundamental doctrine that courts will not be subject to lawsuits against itself in its own courts unless there's a statutory waiver. In this case, there is no statutory waiver.

JUSTICE DEBRA H. LEHRMANN: You're not answering my question. I'm asking why do we have to consider sovereign immunity to be a matter of subject matter jurisdiction with regard to this issue of whether it's waivable?

JUSTICE DALE WAINWRIGHT: There's no statute or constitution provision that requires that, is it?

ATTORNEY MICHAEL P. MURPHY: That requires the subject matter jurisdiction?

JUSTICE DALE WAINWRIGHT: That requires that immunity be able to be raised at any point in time even on appeal for the first time. That's a doctrine that we.

ATTORNEY MICHAEL P. MURPHY: No, it's a fundamental concept.

JUSTICE DALE WAINWRIGHT: That's a doctrine that we've kind of generically stated and held. I don't recall ever dealt into it in detail. I mean there's a difference, isn't there, between us as a matter of the common law saying this is the case about a jurisdictional matter and when it can be raised versus something like you know bankruptcy if it's filed in a state court. An actual bankruptcy, there's an attempt to file a bank, you just can't do that under the federal statutes. On the other hand, what Justice Lehrmann I think is talking about is something we've talked about as a matter of common law and I haven't really dealt into whether there are certain areas of it that make more sense and certain areas that don't.

ATTORNEY MICHAEL P. MURPHY: I'll try to answer your question, Justice Lehrmann. I'm sorry for, I don't mean to evade it. Sovereign immunity is not waivable because it is fundamentally --

JUSTICE DEBRA H. LEHRMANN: Why? Why? That's what I'm asking, why?

ATTORNEY MICHAEL P. MURPHY: Because as a fundamental concept, it deprives the courts of subject matter jurisdiction. It's a jurisdictional issue and jurisdictional issues are not waivable. They are not.

JUSTICE DEBRA H. LEHRMANN: But what I'm saying is that, what you're saying is circular it seems to me. You're saying that sovereign immunity is not waivable because it's subject matter immunity. Well, I mean subject matter jurisdiction. That's only, that's a common law doctrine, that's because we've said it is, but why do we have to say it is. We've said it as a matter of subject matter jurisdiction for other purposes, but not for this purpose and the problem is there's so many ramifications with saying that sovereign immunity can be brought up at any time. It's a matter of efficiency. They could be brought up 10 years, 20 years later because it could be a void judgment. So there's a lot of baggage associated with us saying that sovereign immunity is a matter of subject matter jurisdiction for this purpose. And we haven't said that before, so why do we have to say that now?

ATTORNEY MICHAEL P. MURPHY: Well I mean the Court has considered sovereign immunity for the first time on appeal.

JUSTICE DEBRA H. LEHRMANN: But that's because this issue really hasn't been raised. We haven't held on this issue.

ATTORNEY MICHAEL P. MURPHY: Okay. I'm sorry. I'm really - I'm - yes.

JUSTICE EVA M. GUZMAN: May I ask you a question about the Austin Court of Appeals, the decision?

ATTORNEY MICHAEL P. MURPHY: Lowery?

JUSTICE EVA M. GUZMAN: Yeah. Do they seem to draw jurisdiction between the vehicle used to challenge summary judgment versus plead the jurisdiction in their analysis of these cases and whether or not we can consider the issue for the first time.

ATTORNEY MICHAEL P. MURPHY: The vehicle 51.014 summary judgment?

JUSTICE EVA M. GUZMAN: Yeah, whether you file a summary judgment or plead the jurisdiction, they seem to have indicated that in some context you can raise it on appeal first.

ATTORNEY MICHAEL P. MURPHY: Well I think that the Court's going to look at the substance of the claim. So if it is raised, I think this came up in the Thomas v. Long case where it wasn't technically a plea to the jurisdiction, but the Court concluded that it was reviewable on interlocutory appeal because its substance was essentially a plea to the jurisdiction. The Lowery case, which is case of the court below relied on exclusively held just that issues of subject matter jurisdiction that were not raised in a plea cannot be considered. Essentially, that those are waived, but that violates the fundamental principle that subject matter jurisdiction is not acquired by waiver and can't be waived. And that also is not a mandate of 51.014. 51.014 actually expands appellate jurisdiction. It in no way restricts review of subject matter jurisdiction and that is a duty that the Court expressly has, which says a fundamental concept of separation of powers and is recognized in acts as an association of business Loutzenhiser, Gibson and a host of other cases. The [inaudible] --

JUSTICE PAUL W. GREEN: Your argument is that we should recognize subject matter jurisdiction, I mean sovereign immunity as complete subject matter jurisdiction issue. If we haven't said it before, you say we should declare that.

ATTORNEY MICHAEL P. MURPHY: Yes. Subject matter -- sovereign immunity can't be waived, if that's your question.

JUSTICE PAUL W. GREEN: Well I mean, if it's not purely subject matter jurisdiction then I guess it could be waived. So your argument has to be that sovereign immunity is a matter of subject matter jurisdiction all the time.

JUSTICE DEBRA H. LEHRMANN: For all purposes.

ATTORNEY MICHAEL P. MURPHY: It is.

JUSTICE DEBRA H. LEHRMANN: Because like the things that you brought up that have to do with separation of powers issues and taxpayer issues and the different issues that are associated with sovereign immunity, don't apply to all aspects of subject matter jurisdiction, right? And so I mean we could say that for certain purposes, sovereign immunity is part of subject matter jurisdiction, but for other purposes like whether it gives rise to avoid judgment or whether it's waivable, it's not. And so that's our question or that's my question is why would we consider it that subject matter jurisdiction for those purposes when it carries so much baggage with it?

ATTORNEY MICHAEL P. MURPHY: Well, I think one reason is that it's judicially efficient to resolve issues when they're on interlocutory appeal. We're talking about jurisdictional issues. I mean you know the Court, if the Court determined that subject matter jurisdiction or I'm sorry sovereign immunity could be waived by failing to raise it on an interlocutory appeal, that would create a host of problems because it would violate the rule that the court has established over and over again, which is that sovereign immunity deprives the trial court, deprives courts of subject matter jurisdiction as a general matter.

JUSTICE NATHAN L. HECHT: I think Justice Brister argued in his concurrence in the Reata case that maybe it's not subject matter jurisdiction for all purposes. The component pieces, you can raise it at any time. It's never waiveable. It makes a judgment void. You can collaterally attack the judgment long after it's rendered and maybe those pieces or characteristics of subject matter jurisdiction should not all belong to sovereign immunity. So the question is is being able to raise it for the first time on appeal one of those characteristics or should sovereign immunity be different from subject matter jurisdiction in that respect?

ATTORNEY MICHAEL P. MURPHY: I don't think so. I mean I think sovereign immunity, whether a court

can consider a claim and whether an entity retains its sovereign immunity shouldn't depend on whether it was raised in an interlocutory appeal because it goes to the question of whether the state can be sued in its own courts and also difference.

JUSTICE NATHAN L. HECHT: But it might be -- we held in that Jones case that immunity from liability could be waived. You didn't raise it. And although we said immunity from suit is different, maybe it's not completely different. Maybe if the government wants immunity from suit, it should say so at some point, that's the question.

ATTORNEY MICHAEL P. MURPHY: Well, certainly the government should claim immunity from suit and it did so here and if the case were remanded, if the Court held that the court of appeals correctly remanded this case, then there's nothing to prevent the hospital from raising sovereign immunity again in a plea to the jurisdiction.

JUSTICE NATHAN L. HECHT: There's an argument that the plaintiff might be entitled to discovery on the jurisdictional issue. What's your response to that?

ATTORNEY MICHAEL P. MURPHY: The answer is no. These claims are clearly barred by sovereign immunity. There's no waiver of Tort Claims act for murder or assisted suicide and there is clearly no use by the hospital of the bag and there is clearly no condition of the bag that caused the harm. These are all well-established standards that the court can apply even assuming--

JUSTICE DAVID M. MEDINA: And a [inaudible] question though as it pertains to the bag.

ATTORNEY MICHAEL P. MURPHY: No, even assuming that the plaintiff's pleadings are correct, taking their plead facts as true, the jurisdictional defect is incurable here because, as a matter of law, the hospital did not use the bag and the condition of the bag did not cause the harm even taking us through their pleadings.

JUSTICE EVA M. GUZMAN: Would they be entitled to some discovery to delve into that specific question or should the state's word just be taken as true or would they get some discovery on that?

ATTORNEY MICHAEL P. MURPHY: It's not taking the state's word as true; it's taking the plaintiff's pleadings as true and to even taking their pleadings as true, their pleadings affirmatively negate jurisdiction in this case. I mean I can imagine a case where there might be a fact issue regarding jurisdiction or if there is a curable jurisdictional defect like a failure to correctly plead all the elements. In that case, certainly it would be appropriate for remand to re-plead, especially in a case where jurisdiction is raised for the first time on appeal, but that's not this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Black will present argument for the Respondent.

#### ORAL ARGUMENT OF DENNIS G. BLACK ON BEHALF OF THE RESPONDENT

ATTORNEY DENNIS G. BLACK: May it please the Court. Basically we think the question here is whether or not the court of appeals has the authority to go outside its limited interlocutory jurisdiction to decide that a trial court lacks jurisdiction. Especially when you consider these facts that the trial court never had the opportunity to rule or plea the jurisdiction, it was not brought to their attention and we did not have the opportunity to do any of the discovery on a plea to the jurisdiction.

JUSTICE NATHAN L. HECHT: It sometimes happens that even after a full trial goes to, maybe it's a jury trial,

goes to verdict, judgment's rendered, goes up on appeal, maybe it goes through the court of appeals, comes to this court and for the first time, somebody thinks, wait a minute, it wasn't ripe. There's no standing or some jurisdictional problem and the law is pretty clear, the court has an obligation to look at that even though nobody has looked at it before. Why shouldn't that rule apply here?

ATTORNEY DENNIS G. BLACK: That'd be on a final judgment, Your Honor, and what we contend here is that this particular statute gives jurisdiction to the trial court except for any specified exceptions made in that rule and one of the exceptions is the filing of an expert report that we did and they're challenging it and they were overruled basically by the trial court. So they could appeal on that issue, but I think the law would say everything else remains in the trial court's jurisdiction. Only that one issue was appealed and it was interlocutory; therefore, we think the courts are confined to follow the statute and if the order was not signed before the trial court denying jurisdiction, it cannot be considered on appeal just as Lowery said, Your Honor. Now what we have here, as the courts noted, we're not looking at a situation where you could look on the face of the record and see, for example, that a JP court can award \$1 million in damages. That's not the issue here. There are some discovery issues that have still yet to be determined here because we have basically been cut off completely from taking depositions. Discovery has been stayed because of the expert reports and we've not taken one oral deposition in this case. So what they're asking this Court to become is actually a fact-finder and that's not the role of the appellate courts. It's the role of the trial court. They're saying there's nothing we could ever do to show a liability. We think there is. We pled liability and also we think there are some things that could be discovered that we still do not know about. It's in the record before the trial court that just based on the facts here that it'd make a difference on discovery. There's a record that was produced to us by the state that there was a witness, apparently a client or a patient at Rusk State Hospital, that witnessed a staff member put a plastic bag over Travis's head. And we think that that's important to depose that witness and find out the circumstances. They redacted the name of the witness and wouldn't even tell us that person's name. And so what you're looking at here, let's say this example could have occurred. If it shows that Travis was, in fact, murdered that would be a defense, but if there's some other intent involved or negligence, that would not be a defense. For example, let's say, and we don't know what the facts are because we're not there. Travis died behind closed doors. We hadn't seen any discovery to any extent whatsoever. Let's assume that Travis, due to the stress of the hospitalization, was having some type of hyperventilation and perhaps an employee thought well we would like to use a paper bag, but none is available. So we'll use a plastic bag in the interim and that, if that, in fact, happened that would be negligence, but what they're trying to do is do an end-run on us and cut us off. We had one chance to take a deposition in this case. Yes, sir.

JUSTICE PAUL W. GREEN: Correct me if I'm wrong, but it seemed like if we send this case, it goes back down, do you agree that they have a right to bring the plea to the jurisdiction in the trial court rather than here so we're dealing with the same law issues?

ATTORNEY DENNIS G. BLACK: Your Honor, that probably can. I'd like to argue a waiver, but that may not work. I think that's all I can make on that. But if they go the plea, the problem with that, Your Honor, is that we're going on an incomplete record without discovery of the facts. That I think is the critical issue here because we hadn't had the discovery that we need to determine what happened here. And we're kind of going into this thing blindfolded because we just don't know what happened without discovery and I think it's very essential that we have that information to be able to, and the trial court, trial courts do this all the time, Judge, Your Honor. They will limit the amount of time for discovery on a jurisdictional issue and then they, like I said, plea the jurisdiction. That's an orderly process that makes sense in line with the statutory law, Your Honor. We think that's something that could be done. And then the plea could serve at that point in time possibly, but that's something that could be done in an orderly process.

JUSTICE DEBRA H. LEHRMANN: Can you answer this issue though that we keep coming back to that has to do with subject matter jurisdiction and whether it must be raised in the trial court or it's waived. I mean that's an issue that we're deal with at the front end before we get to the issues that you're talking about now.



ATTORNEY DENNIS G. BLACK: We think they can waive sovereign immunity.

JUSTICE DEBRA H. LEHRMANN: Okay and, what about the question about whether sovereign, clearly we've said that for certain purposes, sovereign immunity is a matter of subject matter jurisdiction. But if you look at Justice Brister's dissent in *Reata*, he talks about how for all purposes, it would not have to be considered subject matter jurisdiction. For example, that it could be waived. And so what is your response to that question?

ATTORNEY DENNIS G. BLACK: Well that it could be waived, there's a good policy reason for it, I think the Court talked about. If it can't be waived, let's say you have a judgment that is 10 years old and for the first time now they're bringing sovereign immunity to that point of time. The policy still raising that you shouldn't be reopening judgment that's been around for 10 years or so, so there's good reasons to say that it can be waived, Your Honor.

JUSTICE DAVID M. MEDINA: What's a good reason here?

ATTORNEY DENNIS G. BLACK: The reason here? Because they failed to assert it timely.

JUSTICE DAVID M. MEDINA: So any time the state fails to assert it at the trial court level then it's waived, is that rule?

ATTORNEY DENNIS G. BLACK: Well, Your Honor, I think in this particular situation, if they went through trial and failed to assert it, I think that would be a difference. In an interlocutory situation, I think they probably still can do that at the trial level because it's not a final judgment yet.

JUSTICE EVA M. GUZMAN: If your current theories that you pled do not assert a valid waiver, the opportunity to replead it after discovery is what you're after or?

ATTORNEY DENNIS G. BLACK: Yes, yes, Your Honor, I believe that we should have the chance, hopefully, to be able to do discovery and then see what the facts are. As you know, many times in trial law, we don't know what all the facts are and we have to start out pleading certain things and as discovery progresses, then we might learn some new theory that would be something we'd have a cause of action on.

JUSTICE EVA M. GUZMAN: And they say that you're pleadings negate all basis of the jurisdiction, that you pled yourself out and how would you respond to that?

ATTORNEY DENNIS G. BLACK: We have not pled ourselves out. We've actually pleaded that they, that they have provided proper use, property concerning Travis. We also claim that they gave some property that was inherently dangerous. I think that's a critical issue in this particular case if we go to that. And what I want to ask the court to consider is going back to the *McAllen* decision, it begins with this particular statement from Justice Hecht. He says the issue here is whether merely providing someone with personal property that is not itself inherently unsafe is a use within the meaning of the act. So what happened in the *Cown* case, the plaintiff did not allege that the suspenders, I think it was, and the [inaudible] used to hang himself, it alleged it was inherently unsafe. No allegation made about that. Now what we have here and that's why the Court did make the distinction as it began the introductory paragraph. In the lead discovery that we have gotten so far, we have found, we believe Rusk State Hospital had a policy in effect at the time of the incident that they classified plastic bags as being inherently unsafe in a psychiatric setting. And so we're saying that, by their own definition, what they're saying is that that plastic bag is inherently dangerous, inherently unsafe. And there are cases that go along the lines for some time that say you cannot provide a defective property to somebody, that that can be an exception to the sovereign immunity and the use for condition theory that we have. So I think that's important distinction there, Your Honor, that inherently dangerous is a very critical thing. You cannot say something is inherently dangerous and nondefective at the same time. Those terms are mutually exclusive and cannot go together. And so if the state says it's inherently dangerous, they have to admit that it was defective and if they provide defec-

tive property to Travis, then they are liable and sovereign immunity is waived in that situation. And I know the court also ruled on Posey. Posey was a situation where, of course, the inmate hung himself with a telephone cord that had some exposed wires. There's some talk about the defect being the exposed wires in that particular case, but nothing about that defect caused the death of the person. And nobody in that case alleged that, nobody found or alleged that that particular cord was inherently dangerous. That's again a very important distinction in the case law we think that is very significant. So going back to some of, I guess some of the policy matters here as far as what, why should the, why should the court not consider or let them raise jurisdictional issues for the first time on appeal? What that, in effect, do is to almost try to change this into a mandamus action. We know that in mandamus as original proceeding, but the Court cannot grant those unless there's any dispute as to what the facts are. So when you have a dispute of facts like we have, we believe that makes a lot of difference. We believe that jurisdiction will only pass to the appellate court only to the extent that the specific order allows it to be done. So if there's no order in the trial court, the nine jurisdiction, that can not be heard for the first time on appeal. It can't get piggybacked on because it denies the right we have to do discovery. And it looks like the legislature had a specific intent here. It looks like their intent was that there's going to be a limited situation where they can't be interlocutory appeals because it's going to disrupt the flow of the trial and cause delay. So the state needs to follow that in this particular situation. If they're going to appeal on something, they should list it all at one time, not try to add something on when you get to the appellate court level. For example, would they say that you can list all the other 10 items that are set forth in 51.014 just because you got up on one issue that you can have an appeal on interlocutory, can you now add class certification, motion for summary judgment as to government employees. Can you add all those on just because you add one that got you to the appellate court?

JUSTICE DAVID M. MEDINA: That takes us to, that takes us back to Justice Green's question though, if we send it back then they can raise it at the trial court level now for the first time and it's going to come right back to us.

ATTORNEY DENNIS G. BLACK: It well could, Your Honor, it well could. Yes, yes, Your Honor.

JUSTICE DAVID M. MEDINA: So how do we remedy that if we don't want to take a second look at it?

ATTORNEY DENNIS G. BLACK: Right. Well, again, what I'm saying here basically, Your Honor, is first we say the pleas we do have to demonstrate a waiver cause of the inherent dangerous property we've alleged.

JUSTICE DAVID M. MEDINA: So how would you write his opinion if you were writing it?

ATTORNEY DENNIS G. BLACK: What I would say on that particular situation, Your Honor, first I think the number one issue that has to be reached first is the whether or not they could raise a jurisdictional issue at this point in time and add it on and I think they cannot. But secondly if they could do that, we believe that sovereign immunity, we have alleged facts that would destroy sovereign immunity if we can prove those things. If we can prove that this plastic bag was inherently dangerous and defective as we have alleged and that the state hospital provided that bag to Travis, then there's a waiver of immunity in that case, Your Honor. Also I would say, Your Honor, with all due respect, that I believe that we'd have an opportunity at some point in time and if there wasn't enough to go back and take some depositions and have some amount of discovery on the jurisdictional issue and let the trial court decide what the facts show because the problem we have here is the trial court is the finder of facts. That is the job of the trial court and that's what has always been recognized in our jurisprudence. They decide the facts. I know the court gives deference to what the trial court does. So I think that's a critical issue there, Your Honor.

JUSTICE DALE WAINWRIGHT: If you went on your second point, we don't have to address the first point though.

ATTORNEY DENNIS G. BLACK: That would be great, Your Honor, if that--



JUSTICE DALE WAINWRIGHT: It wasn't a statement of intent.

ATTORNEY DENNIS G. BLACK: I understand, yes, sir, yes, sir, but that's true. That would make everything on that moot or I should say that would be sufficient. If we could prove that, then I think it would make everything, all that go away, all the jurisdictional issue go away, yes, sir. But basically, Your Honor, I think I pretty much summarized what I want to tell the court and ask the court to consider in this case. We believe that what is happening here that if the state can do this, it contravenes the legislative intent of being very specific on what can be appealed in interlocutory judgment. They're very specific and the hospital did not follow the law and what they're trying to do to add things on, didn't follow that. And they're trying to actually usurp the authority of the trial court. You almost have really two courts having jurisdiction at the same time. The trial court really should have jurisdiction to determine its jurisdiction at this point in sovereign immunity because they're not authorized. The state's not authorized to make that appeal on jurisdiction yet. You almost have two courts with an overlapping, with jurisdiction with some extent over the same issue. So we think the appellate court is, was not entitled to consider that. But if it does consider that, we believe that the facts in this case very clearly demonstrate, if we can prove and we say we have and the law would say that our pleadings have to be taken in consideration that they're true and give us the benefit of the doubt in the pleadings because there's been really no meaningful discovery and the pleadings we have we feel demonstrate there's a waiver of sovereign immunity because of the inherently dangerous exception. That has the exception, we believe, because you cannot have something inherently dangerous and have it be noneffective at the same time. You cannot marry those to concepts in any event whatsoever.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Black.

ATTORNEY DENNIS G. BLACK: Thank you, Your Honor.

#### REBUTTAL ARGUMENT OF MICHAEL P. MURPHY ON BEHALF OF PETITIONER

ATTORNEY MICHAEL P. MURPHY: May it please the Court. Having considered Justice Lehrmann's question a little bit more the last 20 minutes, I would say that sovereign immunity should not be considered waived on interlocutory appeal because it wasn't raised below. Simply because it certainly was not waived, is not waived in the trial court. Even the Plaintiffs agree that the hospital can raise sovereign immunity as a jurisdictional bar in the trial court in a plea to the jurisdiction. So looking at the trial court's subject matter jurisdiction, it is clear that it is barred by the hospital's sovereign immunity. The failure to raise sovereign immunity in an interlocutory appeal wouldn't waive its sovereign immunity in the trial court. And because we're looking at the trial court subject matter jurisdiction, there's no reason to not address that issue here. Addressing Plaintiff's allegation that inherent dangerousness is a condition that waives immunity, the answer is provided in Cowen and the answer is no. The Tort Claims Act waives immunity for a condition that's defective only in its intended or ordinary use. There's no allegation here or dispute that the bag was not used as intended here to cause the harm. There's also no allegation that the hospital used the bag as the Court held in Posey and Cowen and Bosley, the issue is use. The hospital's actual use of the property not the provision of the property.

JUSTICE PAUL W. GREEN: What if it's true as he suggested, it could be true. Discovery might show that the hospital did use the bag for hyperventilation treatment or something of that sort.

ATTORNEY MICHAEL P. MURPHY: Well, plaintiff had an obligation to plead that. His allegation is that the hospital merely provided the bag or the hospital murdered Travis or assisted in his suicide. And all three of those claims are clearly barred by the hospital's sovereign immunity.

CHIEF JUSTICE WALLACE B. JEFFERSON: Have we, has this Court overruled the Texas Tech case, the provision of the [inaudible] --

ATTORNEY MICHAEL P. MURPHY: The Low case?

CHIEF JUSTICE WALLACE B. JEFFERSON: What did you say? What is the case?

ATTORNEY MICHAEL P. MURPHY: The Low case?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes, where the university didn't use it; it provided equipment that was in some sense defective. We haven't, I know we've kind of written around that, but I don't think we've overruled that concept and this would be a case more like that where an item was provided by the hospital that the hospital itself acknowledged was inherently dangerous in that setting and that it caused the harm that one might predict.

ATTORNEY MICHAEL P. MURPHY: Well, Low has been limited to situations where the government has provided defective equipment that lacks an integral safety component. There's no allegation that the bag lacked an integral safety component in this case and, therefore, Low wouldn't apply. There's also other distinguishing features of Low from this case, which is in Low the student was required to wear a uniform that was defective. In this case, there's no allegation that the hospital required Travis to put the bag over his head for any reason. And there's also no allegation that the bag was defective in its ordinary use and that is the test for condition under the Tort Claims Act. This Court has held in Posey and in Cowen. Finally, just to sum up, the court of appeals' decision violates the fundamental principal that this court recognized in Gibson that subject matter jurisdiction can be raised at any time, including for the first time, on interlocutory appeal because without it, the trial court and the court of appeals is powerless to act. The Court should reverse the court of appeals's judgment on the jurisdictional issue and dismiss plaintiff's [inaudible] for claims as bared by the hospital sovereign immunity.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you Mr. Murphy. The cause is submitted and that concludes the arguments for this morning. The Marshal will adjourn the Court.

MARSHAL: All rise.

END OF DOCUMENT