

We don't have kings in Texas

■ State arrogance grieves relatives of body donors

By MARTIN J. SIEGEL

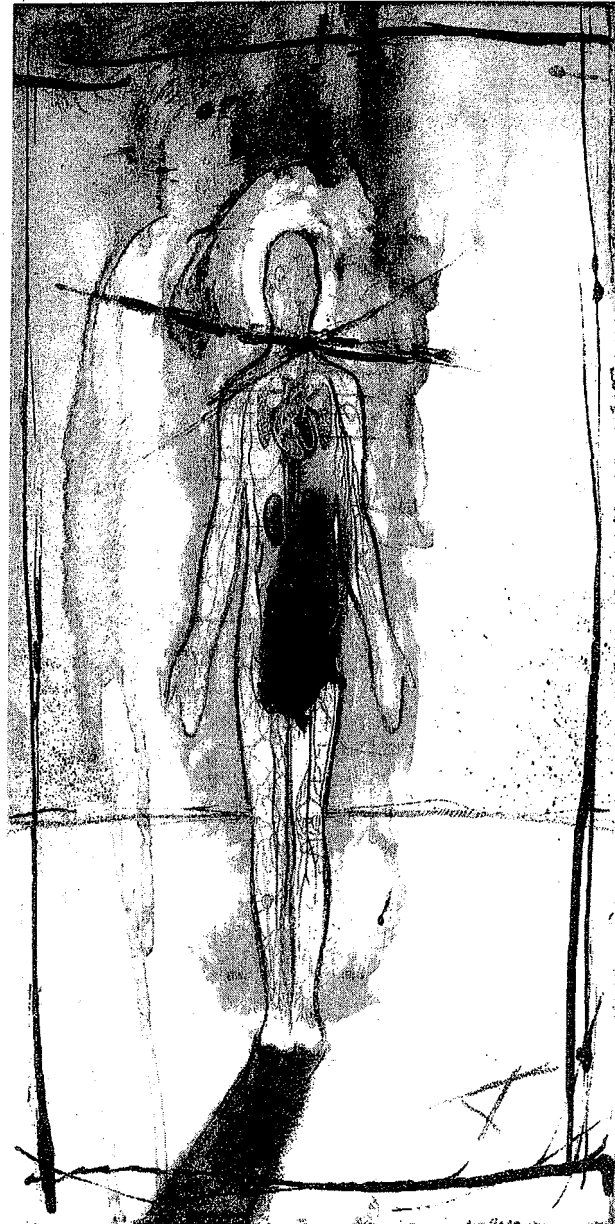
TEXANS have a healthy disdain for government. Our governor has relatively little power and our legislators are part-time. We are next to last in tax revenue raised and total general expenditures. So maybe you'd think Texans would be all the more hostile toward government when it grossly injures its own citizens. You would be wrong.

Imagine your Dad decided to donate his or her body to science, so that medical students could learn to heal the sick. After the educational use concluded, you would receive his cremated remains, so you could arrange a final resting place. Then imagine the state medical school that accepted the body mixed and lost his remains preventing your family from being able to say goodbye or have a gravesite to visit. Worse, imagine the reason the remains can never be returned is that the state employee running the program was selling body parts to out-of-state buyers for personal enrichment.

Actually, all this happened recently at the University of Texas Medical Branch at Galveston. I represent numerous affected families. Calling it a truly regrettable situation in a press release, UTMB admitted that the remains of approximately 70 donors would never be returned to their families, and that its own unforgivable failure of oversight caused the fiasco. If UTMB were a private mortuary, it would be legally liable to provide information to the dozens of families it harmed and reasonably compensate them. Since it is an arm of the state of Texas, however, it gets a free pass.

The reason is because of a long outdated legal doctrine called sovereign immunity. Sovereign immunity dates from the Middle Ages, when the king of England had no equal and could not be sued by subjects brave enough to try. As the great legal scholar Blackstone recorded, the king is not only incapable of doing wrong, but even thinking wrong; he can never mean to do an improper thing. In America, the king's infallibility ended in 1776, but the sovereign immunity of our state and federal governments, inherited from England, lingered on until modern times.

Today, however, most states and the federal government



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have largely abandoned the doctrine and permit their citizens to sue government agencies and employees with only limited exceptions. For example, the North Dakota Supreme Court abolished sovereign immunity in 1994,

they happen to cause personal injury by using what the law calls tangible personal property, meaning a physical object. Thus, a doctor at a state hospital who amputates a patient's healthy leg can be sued because he used surgical

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observing that few legal rules have been so uniformly and soundly criticized.

But Texas is different. Based on a state law enacted in 1969, Texans can only sue state employees or agencies when

implements. But if the same doctor causes the same injury to the same patient by misreading a medical chart and failing to treat the patient's diseased leg, the doctor and hospital are legally immune.

For years, the Texas Supreme Court has virtually begged the Legislature to end this arbitrary and unjust distinction responsible for depriving thousands of Texans of even the possibility of justice. In 2001, Justice Nathan Hecht did so again, candidly acknowledging in an opinion, it is simply impossible for the courts to meaningfully construe and consistently apply the use-of-property standard. But the Legislature has not responded, and previously unaware citizens continue to be told incredulously that their government, like the king, can do no wrong.

In the UTMB cases, where the medical school was contractually bound to return cremated remains, an equally nonsensical rule deprived family members of legal redress: When the state has breached a contract, affected citizens or businesses can have their case heard by an administrative board if their injury is monetary, but if their loss consists of obvious emotional distress, no court or board will hear their claim.

All citizens left stranded by these irrational dividing lines can do is ask the Legislature to pass a specific resolution that applies only to their case and gives them permission to sue. But getting the Legislature to pass a law is well beyond the ability of most people. They can't hire high-priced lobbyists, the legislative session is short and lawmakers are rightfully focused on larger tasks, so sue-the-state resolutions almost never pass. In our case, many state senators and representatives were moved to help, and the Senate passed a resolution permitting suit against UTMB, but it died in a House committee.

Legal immunity inevitably breeds unaccountability and contempt by officials for the people they are supposed to serve. We no longer have a king, and no one else should be above the law either.

Immunity also breeds secrecy. Lawsuits are sometimes the only way to pry information from a company or state agency that would rather sweep something embarrassing under the rug. Because of UTMB's legal immunity, families who tried to help the medical school through their donations will never know what happened to the remains of their loved ones. The Legislature should end the rule that the king can do no wrong and give all Texans injured by their own government their day in court.

Siegel is a lawyer in Houston.

MARTIN J. SIEGEL

BIOGRAPHY

Martin J. Siegel was born and raised in Houston. He earned a B.A., Highest Honors, from The University of Texas at Austin in 1988, where he majored in the Plan II Liberal Arts Honors Program and graduated *Phi Beta Kappa*.

Siegel received his law degree, *Cum Laude*, from Harvard Law School in 1991. Following law school, he served as law clerk to the Honorable Irving R. Kaufman on the United States Court of Appeals for the Second Circuit in New York City.

From 1992 to 1994, Siegel was an associate in the Washington, DC office of Jenner & Block. At Jenner, he worked on appellate, commercial, intellectual property, and environmental matters. He assisted in the Supreme Court briefing for respondents in *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America*, 508 U.S. 439 (1993); represented MCI in patent, antitrust and other matters; and helped develop the evidence for, draft and present a petition for post-conviction relief to the Maryland state trial court on behalf of death row inmate Kevin Wiggins. Although the court denied the petition, the U.S. Supreme Court eventually granted it in a decision vacating the death sentence and setting new standards for counsel in the sentencing phase of capital cases. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

From 1995 to 2000, Siegel served as an Assistant United States Attorney in the Civil Division in the Southern District of New York, where his practice focused on bringing civil rights actions, defending statutes from constitutional challenge, and defending federal agencies and officers from suits based on government action. Civil rights cases brought by Siegel include a complaint under the Voting Rights Act following fraud in a Bronx school board vote, resulting in a new election; some of the first cases in the United States brought under the Freedom of Access to Clinic Entrances Act; an action based on discriminatory zoning in violation of the Americans with Disabilities Act; and an investigation of the New York City Parks Department for employment discrimination. In a case of first impression, Siegel successfully defended provisions of the 1996 immigration and welfare reform laws (invalidating local rules against disclosing the immigration status of aliens to federal law enforcement) from constitutional attack under the 10th Amendment brought by New York City. *See City of New York and Rudolph Giuliani v. United States and Janet Reno*, 179 F.3d 29 (2d Cir. 1999).

In all, Siegel tried eight cases in federal district court and briefed and argued twelve appeals to the Second Circuit. He received the Department of Justice's Director's Award for Superior Performance as an Assistant United States Attorney in 1999 for the successful trial defense of the former chief of the CIA's Technical Services Division in a case involving the agency's experimentation with LSD in the early 1950s.

In 2000-01, Siegel was detailed to serve as Special Counsel on the minority staff of the Senate Judiciary Committee, where his responsibilities included drafting and analyzing legislation on election reform, the McCain-Feingold campaign finance bill, criminal justice, immigration and other issues.

From 2001-06, Siegel was a partner at Watts Law Firm in Houston, where he worked on commercial, franchise, patent, trade secret, false advertising, product liability and personal injury litigation. In 2002, he successfully represented Texas beer distributors against Anheuser-Busch after it wrongfully prevented a \$60 million sale of their distributorship, achieving a highly favorable confidential settlement. In 2003, he helped represent the founder of a securities trading firm forced out of the business he founded before its sale for \$150 million, winning a \$43 million arbitral award. In 2005, he successfully represented Stabar Enterprises, a small Austin pet products company, in multiple lawsuits arising from a licensing dispute with one of the country's largest makers of animal products, securing the dismissal of a related suit against Stabar and a favorable confidential settlement that included the sale of the company's assets.

In 2006, Siegel successfully represented the Texas Democratic Party in its suit to prevent the Republican Party of Texas from replacing Tom DeLay on the general election ballot for Congress following DeLay's withdrawal as a candidate. Siegel wrote the Democratic Party's briefs in the Fifth Circuit on an expedited schedule and co-argued the appeal, resulting in a complete victory for TDP's position under the Constitution's Qualifications Clause and state election law and an order barring the replacement.

In 2007, Siegel opened the Law Offices of Martin J. Siegel to focus on appellate advocacy. He remains of counsel to Watts Law Firm.

In 2004 and 2007, *Texas Monthly* named Siegel a "Texas Super Lawyer Rising Star," an award given to lawyers under 40 chosen by other lawyers throughout the state.

Siegel has written frequently on legal topics. In 2007, he was named to the Board of editors of *Litigation*, the magazine published by the ABA's Section on Litigation. Siegel's writings include:

- *Zealous Advocacy vs. Truth*, 33 LITIGATION 31 (Fall 2006);
- *The Myth of Dem, GOP Justice*, HOUSTON CHRONICLE, September 10, 2006, at E4;
- *We Don't Have Kings in Texas*, HOUSTON CHRONICLE, May 29, 2005, at E4;
- *Congressional Power over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VERMONT L. REV. 373 (Winter 2004);
- *Bryant Case Tosses a Lifeline to the Laws Against Adultery*, LOS ANGELES TIMES, August 13, 2004, at B13;
- *Why Texas Republicans Should Love the Trial Lawyers*, HOUSTON CHRONICLE, April 20, 2003, at 4C; and
- *For Better or For Worse: Adultery, Crime and the Constitution*, 30 J. FAMILY L. 45 (1991-92).

Siegel has also served as an adjunct professor at the University of Houston Law Center, as a guest lecturer there and at business and graduate school classes at Princeton and UCLA, and as a speaker at CLE seminars and workshops in Houston and elsewhere.

APPELLATE AND BRIEF WRITING EXPERIENCE

Martin Siegel has an extensive background in appellate and trial-level briefing and argument cutting across a broad range of substantive and procedural areas, including constitutional law, commercial disputes, product liability, personal injury, federal preemption, consumer protection, jurisdiction, removal and remand, governmental immunities, employment law and others.

Siegel's experience began as a federal appellate law clerk and deepened over years of representation of corporate defendants, the United States and individual plaintiffs. He has briefed and argued appeals in the United States Courts of Appeals for the Second Circuit and Fifth Circuit, the Texas Supreme Court (briefed only), and several state appellate courts, and has assisted with briefs written for the United States Supreme Court.

Some of Siegel's more significant cases include:

- *Texas Democratic Party v. Tina Benkiser, Chairwoman of the Republican Party of Texas*. The Texas Democratic Party sued the Republican Party of Texas to prevent it from substituting a new Congressional candidate for Tom DeLay after his withdrawal from the 2006 election. TDP argued that it was too late to substitute candidates, while RPT claimed replacement was permitted because DeLay had moved to Virginia and was therefore constitutionally ineligible to serve. Siegel handled most of the briefing in the district court, wrote the briefs for TDP in the Fifth Circuit on an expedited schedule and shared oral argument with the party's full-time counsel, obtaining a complete vindication of TDP's position that it had standing to bring the case and that DeLay's replacement would violate the Constitution's Qualifications Clause and state election law. *See* 459 F.3d 582 (5th Cir. 2006).
- *City of New York and Rudolph Giuliani v. United States and Janet Reno*. New York City challenged provisions of the 1996 welfare and immigration reform laws that invalidated local rules against disclosing the immigration status of aliens to federal law enforcement. In a case of first impression, the Second Circuit held that the federal provisions do not violate the Tenth Amendment's bars on interfering with state operations or conscripting state officials to carry out federal tasks. *See* 179 F.3d 29 (2d Cir. 1999). Siegel wrote the federal government's trial and appellate briefs and successfully argued the appeal in the Second Circuit.
- *Grigsby v. ProTrader Group Management LLC, et al.* In this arbitration, Grigsby claimed that the defendants violated securities laws and committed minority shareholder oppression by squeezing him out of the company he co-founded shortly before it was sold for \$150 million. As part of the team representing Grigsby, Siegel briefed and argued summary judgment motions and other issues, including ratification, duties owed under the Texas Revised Partnership Act, the statute of limitations for 10b-5 claims under Sarbanes-Oxley, standards for recovery for shareholder oppression, and others. The arbitrators accepted Grigsby's legal positions and awarded him \$43 million in compensation. Case No. AAA 70 180 00648 02.
- *Barahona v. Toyota Motor Corp., et al.* The plaintiff sued Toyota when his son was rendered a quadriplegic, alleging that the defective design of the Toyota

4

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Echo's seatback caused the injuries. Toyota twice filed writs of mandamus in the Court of Appeals and once in the Texas Supreme Court attacking various discovery and other rulings. Siegel wrote the plaintiff's responses, obtaining denials of Toyota's petitions. *See* 191 S.W. 3d 498 (Tex. App. – Waco 2006, mandamus denied, Case No. 06-0449, TX Sup. Ct., June 5, 2006). Siegel also briefed several *Daubert*, summary judgment and other motions, resulting in rulings favorable to the plaintiff.

- *Ayala v. Ford Motor Co.* In this wrongful death case, Ford argued that it complied with applicable federal safety standards and was therefore not liable under TEX. CIV. PRAC. & REM. CODE § 82.008(a). When the plaintiffs responded that Ford's inadequate disclosures to NHTSA rebutted the presumption of nonliability under § 82.008(b)(2), Ford replied that subsection (b)(2) is impliedly preempted under the reasoning in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), a position the Sixth Circuit and other courts have adopted. Siegel handled the plaintiffs' briefing, and the district court agreed with the plaintiffs that federal law does not conflict with § 82.008(b)(2) and that *Buckman* preemption applies only to fraud-on-the-agency theories of liability, not traditional state product liability claims. Case No. 2-04CV-395 (E.D. Tex. 2005).
- *Rivera v. Heyman, Secretary, Smithsonian Institution, et al.* Siegel represented the Smithsonian in this employment discrimination case raising the novel question whether the Smithsonian, a unique and independent federal trust instrumentality dating to 1836, is subject to § 501 of the Rehabilitation Act, which covers only executive branch employees. Following Siegel's briefing and argument, the district court agreed with the government that the Smithsonian is not in the executive branch and therefore not subject to § 501. As a result of the case, Congress amended the Act to include the Smithsonian. On appeal, which Siegel also briefed and argued, the Second Circuit upheld the remainder of the district court's decision holding that the plaintiff had no additional remedy under § 504 of the Act – a question on which several circuit courts had split – or state and local civil rights laws. *See* 157 F.3d 101 (2d Cir. 1998).
- *Good Samaritan Hospital Regional Medical Center, et al. v. Shalala.* Three hospitals and Medicare providers sued HHS seeking to compel review of a decision not to reopen the hospitals' claims for reimbursement of various significant expenses. Siding with the government after Siegel's briefing and argument, the Second Circuit held that jurisdiction to undertake the requested review was lacking, and that challenged HHS regulations were permissible in

light of the Medicare Act. The Second Circuit reached this conclusion despite Ninth Circuit precedent to the contrary. *See* 85 F.3d 1057 (1996).