

Appellate Docket Number 03-13-00580-CV
Texas Third Court of Appeals

FILED
January 17, 2014
Third Court of Appeals
Jeffrey D. Kyle
Clerk

Response to Appellee Motion for Damages

Marc T. Sewell Petition for Judicial Review
under Local Government Code Sec 211

Vs.

Llano Board of Adjustment (Chairman Mikel Virdell)

Appellant and Filer of this document:

Marc T. Sewell
108 Summit
Llano, TX 78643
Pro Se

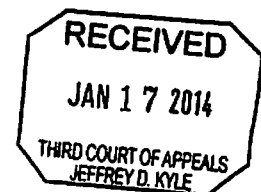
Appellee:

City of Llano
Mikel Virdell Chairman & Mayor
301 West Main
Llano, TX 78643

Appellee Attorney:

Carey L. Bovey
2251 Double Creek Drive
Round Rock, TX 78664

Oral Argument Not Required



TO THE HONORABLE THIRD COURT OF APPEALS:

I respectfully present this paper in response to the Appellee's motion for damages.

I believe my actions are not frivolous because:

1. I cited about 25 statutes and rules, 6¹ of which Mr. Lewis has violated with Mr. Bovey's facilitation and defense. Mr. Bovey has not directly refuted this assertion.
2. The six violations¹ Mr. Lewis perpetrated are either misdemeanors or felonies.
3. Seventy-nine citizens have had their property rights violated by the zoning changes.
4. Neither Mr. Bovey nor Mr. Lewis ever answered the pivotal question "usage changes are text changes and not regulation changes because _____". Had they, we would not be here. Since they have not, they are guilty of 6 law violations¹.
5. I refuted, successfully I believe, all of Mr. Bovey's arguments to my legal references. For example, you won't find Mr. Bovey referencing §110.011(g)² at all because it nullifies his jurisdiction argument.
6. Mr. Bovey expanded the case for obfuscation. My motions and responses were defensive.

The following respond specifically to Mr. Bovey's stated reasons for my actions being frivolous (numbers do not relate to Mr. Bovey's motion so that I may eliminate the duplication and make this more coherent):

¹ Three from my Original Petition for Judicial Review on page 2 and three from my Motion for Sanctions on page 5

² Appendix B - Local Government Code Sec 211.011. Judicial Review on page 15

Bovey #1. Frivolous because I didn't believe it could be reversed – Of course I believed it could be reversed or I wouldn't have done it. I believe my legal arguments are sound and unambiguous. I have standing. The 3rd Court of Appeals has jurisdiction³. I have followed the Rules of Appellate Procedure. Besides, Mr. Bovey presented no motive or proof of this accusation. I am a frugal person. I am retired on fixed income. Why would I waste my time and money if I didn't think I would prevail? How do I benefit from this effort other than a pursuit of lawful government and the protection of property rights in Llano, Texas?

Bovey #2. Frivolous because I ignored well-settled law – The law which Mr. Bovey says I ignored is §211.011⁴. He actually means a noun phrase in §211.011(a)⁴. I have refuted his assertion that §211.011(a)⁴ shows lack of jurisdiction by referencing §211.011(g)⁴ and §211.012⁵, which he never addresses, even in rebuttal. Again, he accuses me of that which he is guilty – it is Mr. Bovey who ignored settled law and extracted a snippet of part of §211.001(a)⁴ to make a false argument. He has also ignored the zoning law about which Mr. Lewis committed perjury.

Bovey #3. Frivolous because I didn't ask for a change in the law - I didn't ask this Court to change the law, but is that frivolous? It didn't even occur to me that this appeal was the appropriate place to request a change in the law. The legislature changes the law.

³ Appendix A – Subject-Matter Jurisdiction of the Courts on page 14

⁴ Appendix B - Local Government Code Sec 211.011. Judicial Review on page 15

⁵ Appendix C - Local Government Code Sec 211.012. Penalty on page 16

However, I had contacted the Attorney General, the Texas Rangers Corruption Unit, and several state legislators regarding this issue and will continue this effort following the completion of this legal action. I have also published the Llano Citizens Bill of Rights to address many of the ethical problems we are having in Llano and will continue promoting this ordinance.

I have read every document and linked document on the Supreme Court and Appeals Court websites, including the Rules of Appellate Procedure and the Texas Statutes. I did not find a requirement that I request a change in the law in order to file a non-frivolous appeal.

Property rights are serious. Zoning laws are serious. I have proven that the City Manager, Brenton Lewis, lied to this Court⁶. My proof, with legal references, remains uncontested by either Mr. Bovey or Mr. Lewis. This was the same lie Brenton Lewis used to deny 79 citizens of their property rights⁷.

A citizen should not have to go through the legal battle and expense I have to question a decision by city government about the use of their property. The *petitioning for a*

⁶ Sewell Response to Appellee Response to my Motion for Sanctions and my Motion for Sanctions

⁷ Sewell Original Petition for Judicial Review

governmental redress of grievances is a First Amendment right. I intend to make the process clearer and more accessible. That said, it is irrelevant to my original request to this court. I don't believe it is a requirement of the appeals process to request changes of existing law. But this diversion was initiated by Mr. Bovey.

Bovey #4. Frivolous because §211.011 is for the board of adjustments – Mr. Bovey has referenced board of adjustments 40 times and yet has not once referenced the qualifying section 211.011(g)⁸. I explained previously⁹ that section 211.011(a)⁸ does specify the board of adjustments but Section 211.011(g)⁸ qualifies that for municipalities, like Llano, where the board of adjustment has the same members as city council and thus, must be treated as equal. Mr. Bovey has not contested nor even mentioned 211.011(g)⁸, or 211.012¹⁰, or any of my other arguments regarding the board of adjustments. It is actually Mr. Bovey who has fixated on one phrase ignoring the qualifying law and context.

Bovey #5. Frivolous because the Court has no jurisdiction - Mr. Bovey continues to expand the subject of this appeal. I appealed a procedural error by the lower court¹¹. The Appeals Court website states that the jurisdiction of the Appeals Court is to “review actions and decisions of the lower courts on questions of law or allegations of procedural

⁸ Appendix B - Local Government Code Sec 211.011. Judicial Review on page 15

⁹ My Response to Appellee Motion to Dismiss

¹⁰ Appendix C - Local Government Code Sec 211.012. Penalty on page 16

¹¹ My Original Brief to this court

error.”¹² This was the basis of my appeal. The district court denied a judicial review (allowed by law to taxpayers) and I am questioning a procedural error (not following the process in said law) by that court. Period. That is all I presented to this Court – a question of law and procedural error by the district court for which the Third Court of Appeals has jurisdiction¹².

Mr. Bovey wants to address the merits of the original complaint of the judicial review and jurisdiction of the lower court to prevent the matter from returning to the lower court. In doing so, he never addresses the issue of this appeal which was “did the district court follow the wrong procedure.” The district court’s issue was *notification* not *jurisdiction*. All the issues Mr. Bovey brings should have been and still could be addressed by the district court should my appeal prevail. Regardless, I have addressed them and he has not refuted my rebuttal.

The Court document on jurisdiction¹² states that jurisdiction is a “crazy quilt” of “more exceptions than rules” and “far more complex than might be immediately apparent.” Mr. Bovey is using this acknowledged complexity to divert attention from the real issues which he cannot refute. He has the audacity to say that the court “clearly has no jurisdiction” when it is clearly the opposite or, at best, complex.

¹² Appendix A – Subject-Matter Jurisdiction of the Courts on page 14

Bovey #6. Frivolous because I didn't cite case law – I admit I am not a lawyer. I admit I do not have Lexus-Nexus, or a legal assistant. It has been a huge task for me just to reference and use the law as written. I believe it would have been presumptuous and rude for a common person like me to tell an Appellate Judge how he should think because I believe another judge opined on a law. Mr Bovey dismissed, as dicta, the Supreme Court's use of §10.001 in *Merrill Dow Pharmaceuticals, Inc. v Havner*¹³ while most legal analysis I have read use this case to demonstrate §10.001's appropriateness. I would never be so audacious as to question the Texas Supreme Court or common legal interpretation. It just wouldn't be proper, appropriate, or respectful and I would probably do it wrong. I did, however, read those interpretations to satisfy myself that my use of §10.001 was valid. I referenced the Texas statutes and rules about 25 times and trust this Court to opine on the validity of my interpretation. I believe this is respectful, acknowledges my position, and is not frivolous.

Bovey #7. Frivolous because it is my interpretation of the law – This is Mr. Bovey's most obscure argument. Of course I am interpreting the law as I read it – *text vs. regulation* for example – and Mr Bovey and Mr. Lewis interpret it differently. This is why we ask judges to validate our interpretations. This is why I asked the district court for a judicial review. Am I missing something? If so, does it constitute frivolity?

¹³ Appellee Response to Appellant Motion for Sanctions on page 6

Bovey #8. Frivolous because I wasted court's time and citizen's money – As I have said repeatedly, my requests of the district and appellate courts were simple and modest and did not require a response or an invoice from Mr. Bovey. Ask any citizen if they would pay \$13,000 to protect the city manager from answering a question on his zoning assertions and you can predict the answer. Especially since, whatever his response, the city would pay nothing.

I offered to resolve this before filing the original request to the district court, before filing the appeal, and again before filing the motion for sanctions. Mr. Bovey didn't even have the courtesy to respond. If he were concerned about time and citizens money, he would have at least asked what I wanted.

After I filed the motion for sanctions, Mr. Bovey could have simply removed or repaired the offensive affidavit without admitting anything. This would have saved the expense of a motion and two responses.

Mr. Bovey and Mr. Lewis chose to spend taxpayer money to defend his knowingly, unlawful advice to the P&Z Commission and to City Council and his perjury. He is responsible for all the wasted time and money for which he accuses me.

Bovey #9. Frivolous because I did not distinguish the *Hargood* Case – I most definitely did address that the district court order was the “final judgment”¹⁴. Mr. Bovey dismisses my assertion because the emails were “outside the record” and yet these are district court emails, solicited by the district court, and continued to be used by the district court. The

¹⁴ Sewell Response to Appellee Motion for Involuntary Dismissal on page 7

district court at any time could have requested that communication be done by another method. My request for a hearing was denied. No other avenue was available to me. It was final.

Emails are a part of the district court record. They show the reason for denial, my further attempts at resolution, and that the order was a final judgment. I addressed the email record in my response¹⁵ and had Mr. Bovey wished to show that they were fabricated, he could have subpoenaed them and challenged their veracity. I am not a lawyer so I was not able to subpoena. Mr. Bovey cited no law that precludes email as part of the court record.

Bovey #10. Frivolous because of bad faith – This is Mr. Bovey’s most insulting attack and, again, one in which he is guilty, not me. The following excerpt from the zoning laws was sent to me by Mr. Lewis, to answer my questions on his actions, prior to the first meeting that violated the zoning laws:

Changes in the ordinance text which do not change zoning regulations and/or zoning district boundaries do not require written notification to individual property owners.

(Ord. No. 735, § 1(30.3), 7-21-1997; Ord. No. 1037, § 1, 5-1-2006; Ord. No. 1152, 12-21-2009)
State law reference - Local Government Code §§ 211.006, 211.007

Mr. Lewis used this definitive, binary statement to justify his assertion that usage changes are text changes and not zoning regulation changes. I have proven that this is false – that

¹⁵ Sewell Response to Appellee Motion for Involuntary Dismissal on page 7

usage changes are really regulation changes¹⁶. Mr. Lewis has had two other opportunities to correct his error before actually violating the law. The yellow highlight and underline are his – not mine - and not from the statute. Mr. Lewis states that he has 20 years experience as a zoning administrator. Mr. Bovey specializes in municipal law. They should know the law and I contend have had 4 discrete opportunities to learn this very basic one. Yet both chose to submit an affidavit to the Third Court of Appeals representing the contrary. This is documented, sworn, signed, deliberate bad faith to the Court and to the citizens of Llano. It actually goes far beyond bad faith to willful disrespect of the Court, the law, and the citizens of Llano. Should this deviant behavior go unrecognized, I fear they will be even more audacious in their violation of the law. They are currently in progress of rewriting the zoning ordinance. This was not requested by the citizens. If they can successfully violate three zoning laws and commit perjury to defend the violations for one section of the zoning ordinance, they will feel emboldened to continue the unlawful behavior.

Until they answer the pivotal question “usage changes are text changes and not regulation changes because _____,” the bad faith rests clearly on the part of Mr. Bovey and Mr. Lewis.

Bovey #11. Frivolous because of multiple motions – My motions were defensive and purely in response to offensive motions by Mr. Bovey and an error by the court. I wrote a

¹⁶ Sewell Motion for Sanctions on pages 2-3 and Sewell Response to Appellee Response to Motion for Sanctions on pages 3-4 and in original Request for Judicial review on page 2

brief that described the procedural error by the district court. The appeals court mistakenly changed my style and told me to file a motion to fix it. It should have stopped here. There was no reason for the City Attorney to be involved and spend any money at all. If my appeal failed, no harm to the city. If my appeal was successful, Mr. Bovey would have had plenty of time to argue about the judicial review. He chose to file a perjurious brief which required my response.

Bovey #12. Frivolous because of my arguments have no basis in law – There is considerable hyperbole in Mr. Bovey’s motion that make unsubstantiated, unreferenced accusations. For example, my “arguments do not have a reasonable basis in law.” To which arguments does he refer? I have referenced laws on judicial review process, jurisdiction, and zoning law which I have articulated and Mr. Bovey has not refuted. The frivolity rests with Mr. Bovey.

I am guilty of not being a lawyer, but I believe my effort was sincere, not frivolous - nor was my objective frivolous. My legal references were sound and I addressed Mr. Bovey’s arguments. I contend that it was Mr. Bovey’s and Mr. Lewis’s actions that should be assessed. Was perjury, lying to the citizens of Llano, and violating property rights more egregious than any of Mr. Bovey’s 12 accusations regarding my performance in this matter? Is using taxpayer funds to defend Mr. Lewis’ transgressions a noble motive? Who conspicuously avoided the pivotal question “usage changes are text changes and not regulation changes because

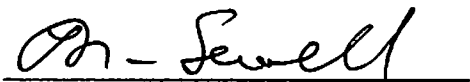
_____”. Who quoted one noun phrase in a statute and ignored the rest? Who violated the law and who supported and defended that? Who insulted this court by perjury and, when caught, used obfuscation, projection, deceit, hyperbole, and circular arguments to cover-up the lie? I have answered these questions with references. It is Mr. Lewis’ and Mr. Bovey’s actions who deserve contempt.

Prayer

I believe I have shown that it is not me, but actually Mr. Bovey who was frivolous, acted in bad faith, and wasted taxpayer funds. I have referenced about 25 statutes and rules, 6 of which were overtly violated by Mr. Lewis. Mr. Lewis committed perjury in this Court and Mr. Bovey facilitated and attempted to defend that perjury. My actions have been in defense of property rights and ethics and in the spirit of Thomas Jefferson: “eternal vigilance is the cost of liberty.”

I humbly and respectfully request that Mr. Bovey’s motion for damages be denied and, because of their audacious disregard for property rights and disrespect for this Court, that Mr. Bovey and Mr. Lewis be assigned the requested damages – not the City of Llano and not me.

Also, I have requested several times that Mr. Bovey provide an itemization of the changes that amount to the over \$13,000 that he is claiming. I respectfully request that the Court instruct him to provide the itemization. No one would pay a bill based on a résumé and a total.

A handwritten signature in cursive script, reading "Marc Sewell", is written above a horizontal line.

Marc Sewell

108 Summit

Llano, TX 78643

Appendix A – Subject-Matter Jurisdiction of the Courts

From the Texas Courts Online

http://www.courts.state.tx.us/pubs/AR2010/jud_branch/2a-subject-matter-jurisdiction-of-courts.pdf

TEXAS JUDICIAL SYSTEM SUBJECT-MATTER JURISDICTION OF THE COURTS

INTRODUCTION

When a question arises in Texas concerning the subject matter jurisdiction of a given court, the inquiry can be far more complex than might be immediately apparent. An understanding of the basic structure of the court system and of the system's general jurisdictional scheme will not necessarily be sufficient to assure a correct answer to the question. Even a cursory glance at the section of this document which addresses specialized jurisdiction of the various levels of courts is enough to make the point vividly. As the court system continues to expand and evolve, additional layers of complexity are appearing. Some threshold jurisdictional issues have been unresolved for almost 30 years. Thus, the jurisdictional scheme of courts in Texas is a **"crazy quilt" of more exceptions than rules.** This document is intended to serve as a resource and a guide.

UPDATES

The 81st Legislature created the following new district courts: **Bexar County** – 436th (10-1-09), 437th (12-15-09), and 438th (9-1-10); **Denton County** – 431st (1-1-11); **Midland County** – 441st (9-1-09); **Rockwall County** – 439th (11-1-10); and **Tarrant County** – 432nd (9-1-09). New county courts at law were created as follows: **Bexar County** – No. 13 (9-1-09), No. 14 (9-1-09), and No. 15 (9-1-09); **Bosque County** – CCL (10-1-09); **Fannin County** – CCL (9-1-09); **Hidalgo County** – No. 7 (9-1-11), and No. 8 (9-1-12); and **Navarro County** – CCL – (1-1-11 or earlier date as determined by commissioners court.

The 280th District Court in **Harris County** is now the designated district court for domestic violence cases in that county. In **Hunt County** and in **Van Zandt County**, the county courts at law now have concurrent jurisdiction with the district court in felony cases for arraignments, pretrial hearings, guilty pleas, jury trials on assignment by district judge, Class A and B misdemeanor cases, family law matters, juvenile matters, probate matters, appeals from the justice and municipal courts, and civil cases in which the matter in controversy does not exceed \$200,000. In **McLennan County**, the district courts now have concurrent jurisdiction with the county court and statutory county courts in misdemeanor cases. In **Tarrant County**, the following district courts are now required to give preference to civil matters: 17th, 48th, 67th, 96th, 141st, 153rd, and 236th. In **Hood County**, an additional Justice of the Peace Court has been established. Effective 1/1/10 the 6th District Court will no longer serve Fannin County. It will continue to serve Lamar and Red River counties. Effective 1/1/10 the 336th District Court will no longer serve Grayson County. It will continue to serve Fannin County.

OVERVIEW

Jurisdiction of the various levels of courts in Texas is established by constitutional provision and by statute. Statutory jurisdiction is established by general statutes providing jurisdiction for all courts on a particular level, as well as by the statutes which establish individual courts.

Thus, to determine the jurisdiction of a particular court, recourse must be had first to the Constitution, second to the general statutes establishing jurisdiction for that level of court, third to the specific statute authorizing the establishment of the particular court in question, fourth to statutes creating other courts in the same county (whose jurisdictional provisions may affect the court in question), and fifth to statutes dealing with specific subject matters (such as the Family Code, which requires, for example, that judges who are lawyers hear appeals from actions by non-lawyer judges in juvenile cases.)

The basic structure of the present court system of Texas was established by an 1891 constitutional amendment. The amendment established the Supreme Court as the highest state appellate court for civil matters, and the Court of Criminal Appeals as the highest state appellate court for criminal matters. There are 14 intermediate courts of appeals. These courts exercise intermediate appellate jurisdiction in civil cases and criminal cases. However, appeals of death sentences in capital cases are taken from the district court directly to the Court of Criminal Appeals.

Appellate courts do not try cases, have jurors, or hear witnesses. Rather, they review actions and decisions of the lower courts on questions of law or allegations of procedural error. In carrying out this review, the appellate courts are usually restricted to the evidence and exhibits presented in the trial court.

Appendix B - Local Government Code Sec 211.011. Judicial Review

TEXAS LOCAL GOVERNMENT CODE

TITLE 7. REGULATION OF LAND USE, STRUCTURES, BUSINESSES, AND RELATED ACTIVITIES

SUBTITLE A. MUNICIPAL REGULATORY AUTHORITY

CHAPTER 211. MUNICIPAL ZONING AUTHORITY

SUBCHAPTER A. GENERAL ZONING REGULATIONS

Sec. 211.011. JUDICIAL REVIEW OF BOARD DECISION. (a) Any of the following persons may present to a district court, county court, or county court at law a verified petition stating that the decision of the board of adjustment is illegal in whole or in part and specifying the grounds of the illegality:

- (1) a person aggrieved by a decision of the board;
- (2) a taxpayer; or
- (3) an officer, department, board, or bureau of the municipality.

(b) The petition must be presented within 10 days after the date the decision is filed in the board's office.

(c) On the presentation of the petition, the court may grant a writ of certiorari directed to the board to review the board's decision. The writ must indicate the time by which the board's return must be made and served on the petitioner's attorney, which must be after 10 days and may be extended by the court. Granting of the writ does not stay the proceedings on the decision under appeal, but on application and after notice to the board the court may grant a restraining order if due cause is shown.

(d) The board's return must be verified and must concisely state any pertinent and material facts that show the grounds of the decision under appeal. The board is not required to return the original documents on which the board acted but may return certified or sworn copies of the documents or parts of the documents as required by the writ.

(e) If at the hearing the court determines that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take evidence as directed. The referee shall report the evidence to the court with the referee's findings of fact and

conclusions of law. The referee's report constitutes a part of the proceedings on which the court shall make its decision.

(f) The court may reverse or affirm, in whole or in part, or modify the decision that is appealed. Costs may not be assessed against the board unless the court determines that the board acted with gross negligence, in bad faith, or with malice in making its decision.

(g) The court may not apply a different standard of review to a decision of a board of adjustment that is composed of members of the governing body of the municipality under Section 211.008(g) than is applied to a decision of a board of adjustment that does not contain members of the governing body of a municipality.

Acts 1987, 70th Leg., ch. 149, Sec. 1, eff. Sept. 1, 1987. Amended by Acts 1997, 75th Leg., ch. 363, Sec. 3, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 646, Sec. 1, eff. Aug. 30, 1999.

Appendix C - Local Government Code Sec 211.012. Penalty

Sec. 211.012. ENFORCEMENT; PENALTY; REMEDIES. (a) The governing body of a municipality may adopt ordinances to enforce this subchapter or any ordinance or regulation adopted under this subchapter.

(b) A person commits an offense if the person violates this subchapter or an ordinance or regulation adopted under this subchapter. An offense under this subsection is a misdemeanor, punishable by fine, imprisonment, or both, as provided by the governing body. The governing body may also provide civil penalties for a violation.

(c) If a building or other structure is erected, constructed, reconstructed, altered, repaired, converted, or maintained or if a building, other structure, or land is used in violation of this subchapter or an ordinance or regulation adopted under this subchapter, the appropriate municipal authority, in addition to other remedies, may institute appropriate action to:

- (1) prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance, or use;
- (2) restrain, correct, or abate the violation;
- (3) prevent the occupancy of the building, structure, or land;

or

- (4) prevent any illegal act, conduct, business, or use on or about the premises.

Appendix D- Certificate of Service

Certificate of Service

I certify that I have served this Response to Mr. Bovey's Response to my Motion for Sanctions for Docket Number 03-13-00580-CV on all other parties—which are listed below—on 1/16/14 as follows:

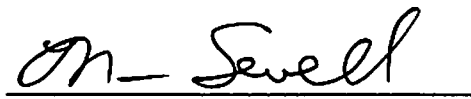
1. Llano City Attorney Carey Bovey **via email**
Law office of Cary L. Bovey, PLLC
2251 Double Creek Drive, Suite 204
Round Rock, TX 78664
(512) 904-9441
cary@boveylaaw.com
2. Llano City Secretary Toni Milam or City Manager Brenton Lewis **in person** for distribution to: Board of Adjustment Chairman/Mayor Mikel Virdell, City Attorney Carey Bovey, City Manager Brenton Lewis
City of Llano
301 West Main
Llano, TX 78643
(325) 247-4158
tmilam@cityofllano.com



Marc T. Sewell
108 Summit
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marcs@simonlabs.com

Appendix E - Certificate of Compliance

I certify that this motion was prepared with Microsoft Office Word 2007, and that, according to that program's word-count function, the sections covered by TRAP 9.4(i)(1) contain 2,854 words.

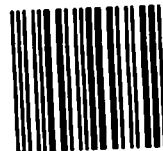
A handwritten signature in black ink that reads "Marc Sewell". The signature is written in a cursive style and is positioned above a solid horizontal line.

Marc Sewell

108 Summit

Llano, TX 78643

Marc Jewell
108 SUMMIT
LLANO, TX 78643



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JAN 16, 1991
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P.O. BOX 12547
AUSTIN, TX 78711