

No. 4-04-00582-CV

IN THE COURT OF APPEALS FOR THE
FOURTH COURT OF APPEALS DISTRICT
SAN ANTONIO, TEXAS

RONALD F AVERY

APPELLANT

VS.

GUADALUPE-BLANCO RIVER AUTHORITY

MR. WILLIAM E. WEST JR.; MR. DAVID WELSCH

APPELLEES

ON APPEAL FROM THE 25TH JUDICIAL DISTRICT COURT

GUADALUPE COUNTY, TEXAS

THE HONORABLE B. B. SCHRAUB, JUDGE PRESIDING

APPELLANT'S BRIEF

Ronald F. Avery
Pro Se
1955 Mt. Vernon
Seguin, Texas 78155
Phone & Fax: 830/372-5534
E-Mail: ronavery@ev1.net
October 4, 2004
ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNCEL

Pursuant to Rule 38.1 (a) of the Texas Rules of Appellate Procedure, the Appellant, Ronald F. Avery, certifies to the best of his knowledge, the following is a complete list of all persons or entities with an interest in this appeal:

1. Appellant - Ronald F. Avery - Pro Se.

1955 Mt. Vernon
Seguin, Texas 78155

2. Appellee - Guadalupe-Blanco River Authority (GBRA).

Guadalupe-Blanco River Authority
933 E. Court Street
Seguin, Texas 78155

3. Appellee - Mr. William E. West Jr. (General Manager of GBRA).

4. Appellee - Mr. David Welsch (Project Manager of GBRA).

The Attorney of record for Appellees is:

William S. Helfand SBOT# 09388250
Chamberlain, Hrdlicka, White, Williams & Martin
Attorneys at Law
1200 Smith Street Suite 1400
Houston, Texas 77002
Ph: 713/658-1818
Fax: 713/658-2553

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 9.4 (g) and 39.1 of the Texas Rules of Appellate Procedure, Appellant requests oral argument.

TABLE OF CONTENTS

IDENTITY OF PARTIES AND COUNSEL	i
TABLE OF CONTENTS	ii
INDEX OF AUTHORITIES:	iii
STATEMENT OF THE CASE	iv
POINT OF ERROR AND SUBSIDIARY ISSUES PRESENTED	vi
STATEMENT OF FACTS	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	7
PRAYER	31
APPENDIX (under separate cover)	

INDEX OF AUTHORITIES

TEXAS CONSTITUTIONAL:

Art. 1 Sec. 2,	9, 2
Art. 1 Sec. 3,	
Art. 1 Sec. 13,	18
Art. 1 Sec. 17,	
Art. 1 Sec. 19,	
Art. 2 Sec. 1,	18
Art. 16 Sec. 48.	19

REPUBLIC OF TEXAS CONSTITUTIONAL:

Art. IV Sec. 3	26
Art. IV Sec. 13.	24
Schedule Section 1.	25
Declaration of Rights - 1 st & 2 nd	24
Declaration of Rights - Eleventh.	25
Preamble - Bill of Rights.	

REPUBLIC OF TEXAS DECLARATION OF INDEPENDENCE:

Opening Statement	26
-------------------	----

COMMON LAW:

Stone v. Arizona 381 P.2d 107, @ 113 (1963)	16
Muskopt v. Corning 359 P.2d 457 @ 458 (1961)	
Moltor v. Kaneland 163 N.E.2d. 89 @ 90 (Ill. 1959)	9, 15
Hosner v. DeYoung	

LAW PERIODICALS AND COMMENTARIES:

Villanova Law Review Vill L Rev 13:583	
Duke law Review Duke L R 1964:888	13
Yale Law Review 34 Yale L J: 1	15
Southwestern Law Journal (Sw L J 23:341 My'69) p. 341.	9, 21
St. Mary's Law Journal/O'Connor	16

FOUNDERS:

Samuel Rutherford	1644	28
Thomas Hobbes	1651	
John Locke	1689	8, 12, 28
Samuel Adams	1776	27
Alexander Hamilton	1789	20, 23

RULES:

TRCP NO. 1	18
TRCP NO. 13	19

SEE OTHER CASES IN APPENDIX:

REFERENCE CONVENTIONS:

1. The note (F-12) refers to page 12 of the clerk's Files;
2. The note (H-12) refers to page 12 of the Hearing transcript;
3. The note (A-12) refers to page 12 of the separate Appellant's Appendix.

STATEMENT OF THE CASE

The Appellant, Ronald F. Avery, sued the Appellees for real property damage (F-103) caused by their contractor and trespass (F-102). The Appellant sued the Appellees for multiple counts of Slander per se (F-131, 133) and Libel (F-116, 134). Appellant further alleged that Appellees had violated state law (F-102) and did all including harassing Appellant (F-120) and using his outrage and criminal prosecution of Appellant to stop Appellant's development of subject property for a \$511,000 RV Park (F-113). Appellant alleged that defendants had reactivated an old design to stop Appellant's RV Park (F-114, 118, 121).

Defendants answered with Special Exceptions (F-61) claiming "sovereign and governmental immunity." Appellant Responded showing that the State has no immunity to harm the Citizen (F-69) and filled Supporting Briefs on Immunity (F-73), Subject Matter Jurisdiction (F-93) and Perversion of Justice (F-96). Defendants missed the hearing on their motion (F-100) and Plaintiff filed his First Original Amended Petition (F-102) and Defendants filed their

Plea (F-179) and Supplemental Plea to the Jurisdiction (F-219) reasserting that Appellant had failed to prove government had waived its immunity to the areas of his claims. Appellant filed his Response to said Pleas (F-189). The Parties are here on appeal of the Pleas to the Jurisdiction.

ISSUES PRESENTED

APPELLANT’S ONLY POINT OF ERROR:

The Trial Court, by its granting the Appellees’ Plea to the Jurisdiction on July 27, 2004, erred in dismissing the Appellant’s claims against the Appellees.

SUBSIDIARY ISSUES in ARGUMENT:

1.	Questions on appeal:.....	7
2.	Sovereignty:.....	8
3.	Defendants’ Plea to Jurisdiction:.....	17
4.	Jurisdiction of District Court & Judiciary of Texas:..	18
5.	Possible Sources of Governmental Immunity:.....	20
6.	Adoption of presumed existing state Sovereignty:.....	23
7.	Conclusion:.....	28

STATEMENT OF THE FACTS

The Appellant sued the Appellees for property damage caused by a contractor they hired and sent on to his land without Appellant's permission (F-103). Appellant alleged The Guadalupe-Blanco River Authorities (GBRA) contractor drove a tracked bulldozer over Appellant's concrete curbs, gutters and asphalt paving damaging them (F-103). The same thing was done to the Appellant's property four years earlier but GBRA had gotten a "Right of Entry Agreement" to enter the property first and the Appellant had added a provision that GBRA would pay for the damages which they did (F-139-144). But the second time, GBRA sent their contractor without a "Right of Entry Agreement" or permission and when damage was done and reported, they refused to pay for it (F-107).

The Appellant was very upset and threw an "oil field" drill bit through the window at GBRA and immediately called the police on himself and waited for their arrival and showed them the letters that were exchanged and how GBRA would not pay for what they had paid for before (F-108). Appellant was not arrested but given a warning ticket (F-109) and released and he never heard about it again for a whole year, after which time, his wife received a notice of arraignment in the mail (F-112). Appellant tried four times to settle with GBRA and they would not and in the process of

trying to settle it he learned that Appellees had called Homeland Security (F-124) and discussed the matter and told Appellant's two friends that they were advised to charge Appellant under "domestic terrorism." Appellant also learned that Appellees had told his two friends they thought Appellant had a "chemical imbalance" from a disease (F-133) like "diabetes." Appellant sued Appellees for Slander per se.

Then Appellant learned that Appellees told Appellant's two friends that if Appellant would drop the construction of his \$511,000 RV Park on the same property they damaged that they would drop the Criminal Mischief complaint (F-113). This reminded the Appellant of an earlier attempt of Appellees' to stop his RV Park outside of their authority by calling the County Health Department and telling them to deny the Appellant's already approved Septic System Permits (F-115). At about this same time in 1994 Appellees also had printed on the front page of the news paper that Appellant was a racist (F-116). The Appellant perceived this whole thing as the reactivation of Appellees' attempts to stop his RV Park plans for his property and connected all the events under a design or conspiracy that would reactivate when Appellant reactivated his plans to build his park (F-118). Therefore, Appellant sued Appellees for the Libel and their attempts to stop his park back in

1994 (F-134) and their new attempts of 2003 and 2004. The Appellant surmised in his Petition that when the Appellant had abandoned his plans, Appellees were cooperative and when Appellant had reactivated his plans to build the RV Park, the Appellees abused his property and property rights.

Therefore, the Appellant sued the Appellees for their design and conspiracy to stop the construction of Appellant's RV Park plans and make him react in ways that they could benefit from (F-130). The Appellant sued the Appellees for a maximum of \$6,000,000 inclusive of punitive damages (F-135).

The Appellees filed Special Exceptions claiming Sovereign Immunity for all their intentional torts and discretionary work and official capacity and prayed the court that the Appellant be given 10 days to replead in conformity to the Texas Tort Claims Act and the Texas Civil Practice and Remedy Code chapters 101-110 (F-61). Appellant filed his Response (F-69) and three briefs on Sovereign Immunity (F-73), Subject Matter Jurisdiction (F-93), and Perversion of Justice (F-96). The Appellees failed to show up at the first hearing they scheduled so Judge Gus J. Strauss signed the Appellant's order which only required Appellant replead with headings and maximum damages in 21 days (F-100). Appellant did so but the same day he filed it, the Appellees had mailed their Plea

to the Jurisdiction (F-179). The Appellant filed his Plaintiff's Response to Defendants' Plea to the Jurisdiction (F-189).

The Appellees filed their Supplemental Plea to the Jurisdiction the morning of the hearing on their original Plea to the Jurisdiction (F-219). This supplemental document, as well as all their pleadings repeated the same things concerning their claim of immunity under the Texas Tort Claims Act and the Texas Civil Practice and Remedy Code (CPRC). The Appellees recited the notice provisions, the intentional tort immunity, the motor vehicle provisions and personal property provisions of the CPRC.

The Appellant reviewed the Supplemental Plea to the Jurisdiction and gave the Appellees a copy of his charts he submitted to the court at the hearing that morning (F-205-210). A great discussion occurred between the Appellant and the Trial Court Judge on July 22, 2004. On July 27, 2004, the Honorable B.B. Schraub granted the Appellees their Supplemental Plea to the Jurisdiction (F-228). The Judge explained his rationale in a cover letter to the Appellant and Appellees (F-227) limiting his findings to the issue of "governmental immunity" and finding that all Appellees had "governmental immunity."

SUMMARY OF THE ARGUMENT

The Parties are here on an appeal of the Defendants' Pleas to the Jurisdiction (original and supplemental). The Defendants claim that the GBRA and its employees and Officers have "governmental immunity" to do the things they did to the Appellant under the Texas Tort Claims Act (TTCA) and the resulting codification of the Act in the Texas Civil Practice and Remedy Code (CPRC) mainly in chapters 101 through 110 of same. They believe that the Appellant has failed to conform to the provisions of the TTCA and CPRC and therefore cannot sue GBRA and its employees as a result, regardless of Appellant's real claims for damages.

The Appellant has never really argued with the court or the Defendants regarding the Appellant's failure to comply with all the provisions under the TTCA and CPRC. Some of these are arguable, especially the notice of claims. However, it is the position of the Appellant both at the Trial Court and at Appellate Court that GBRA and the State of Texas nor any quasi-municipal corporation or any other arm of the state has governmental or sovereign immunity to harm its citizens without recourse in the courts of Texas and since they have none they cannot waive any of it either therefore the Texas Tort Claims Act and its codification in the Civil Practice & Remedy Code are null and void from inception.

ARGUMENT

TO THE HONORABLE COURT OF APPEALS:

Now comes Appellant, Ronald F. Avery, and respectfully submits Appellant's Argument. This is an appeal from the 25th Judicial District Court, Honorable B. B. Schraub, Presiding, in Cause No. 04-0499-CV, in which Ronald F. Avery was the Plaintiff and Guadalupe-Blanco River Authority (GBRA), William E. West Jr., and David Welsch were the Defendants.

1. Questions on appeal:

- 1.1. Did Defendant prove GBRA acting as a quasi-municipal Corporation on behalf of the State and its employees have sovereignty and sovereign immunity in order to obtain the granting of a Plea to the Jurisdiction, dismissing Appellant's suit?
- 1.2. Did Appellant challenge the elements of sovereignty and sovereign and governmental immunity and prove the State and all its forms and employees are not sovereign and are in want of governmental immunity?
- 1.3. Did the Appellant challenge the Defendants' Plea to the Jurisdiction and show the District Court had Jurisdiction and could rule on all matters before it according to the law?
- 1.4. Did the Appellant preserve error at the District Court?

2. Sovereignty:

2.1. What is sovereignty?

The fundamentals of government in the Kingdom of Heaven have been promulgated and unaltered since 1689 upon the publishing of John Locke's First & Second Treatise of Civil Government. To alter these principles of civil government is to commit individual and social suicide. Sovereignty actually flows from property granted to all men by God. This property consists of life, liberty and possessions (**F-77 Locke**).

2.1.1. Ownership of Property:

Therefore, sovereignty is really the ownership of the Property within a nation and when men get together they can form government by consent (**F-211**). All men are individually sovereign in a state of nature and they never lose this even after forming a nation.

2.1.2. Not Transferable:

Men cannot transfer their lives, liberties and possessions to the government they create by their consent for the protection (**F-77 Locke**) of the property of each citizen. John Locke called the three attributes of life, liberty and possessions or estate all property. Locke said a hundred years before our U.S. Constitution that the sole purpose of government was the protection of the property of each citizen.

2.2. Who has Sovereignty then?

The citizens who create government are the possessors of sovereignty and can unmake government at their will which is an attribute of sovereignty. Art. 1 Sec. 2 of Texas Constitution makes this clear who holds that power:

"All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient."

2.3. The State of Nature:

The state of nature has a law of nature which is that no man should invade the lives, liberties and possessions (or property) of another person.

"The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, Which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."¹

This is also the fundamental basis of all tort law which says, "Liability follows negligence or wrongdoing." **(A-10, 16)**

2.4. Confusion of Sovereignty and Authority:

¹ John Locke, *Two Treatises of Government* ed. Peter Laslett (Cambridge Texts in the History of Political Thought Cambridge University Press 40 West 20th Street, New York, NY 10011-4211, USA) 271

2.4.1. Sovereignty belongs to citizen only:

Sovereignty is not available to the state or any of its mechanisms consisting of employees, officials, agents or contractors or any of their smaller corporations such as counties, cities, villages, school districts and water districts or River Authorities.

2.4.2. Authority is limited:

State can only obtain authority to protect property of its citizens. This authority is delegated to government and all its branches by the citizens who have a God given right to protect their property. This right they delegate to government so that the many can protect the one. This authority is limited by the law of nature and the law of delegated authority.

2.4.3. The Law of Delegated Authority:

This law says that no one can delegate to their representative any more power than they hold in themselves. And since we know that we do not have a right to invade another's property, we cannot delegate that power to our representatives. Therefore, government never acquires the authority to invade the property of its citizens or any one else.

2.4.4. A perversion of want of authority used by state:

The state has used this idea of limited authority in a perverted way to avoid its liability when it does invade the property of citizens. It results in the vacating of the *respondeat superior* principle that makes corporations responsible for some of the acts of its employees. Because they say, "Since the state cannot "authorize" torts or wrongful acts, it cannot be held liable for them either." What human or human agency has power or authority to authorize torts? Therefore, torts do not exist or at least no one or any group is liable for them because no one can approve torts. Obviously, this is a perversion of the understanding of authority and responsibility.

2.5. Where the state harms liability follows:

The state has escaped the laws of torts and the laws of civil government so that it may harm and avoid liability. But the law of nature and the law of torts and the rules of civil government are the same.

2.6. Relation of State to:

2.6.1. Citizens:

The state is a mere agent for the sovereign citizens and they can be held liable because they have a contract between the citizen and the state. We can sue our real estate agent when he messes up

our land sale and that is because we have an agreement to terms of performance and expectations and solutions.

2.6.2. Foreigners:

Foreigners do not have a social contract with the state and therefore there is no agreement on the terms of the contract. It is a matter for two equal agents of the sovereigns to work out i.e., their respective governments. This is why sovereign immunity only works on foreigners.

2.7. Immunity:

2.7.1. As Agency to do good not Sovereignty to harm:

There is only one real use for something called "immunity." John Locke showed to be "nothing but the power of doing public good without a rule." (F-86) There are two Biblical examples (F-83-84) of the only use for "immunity." Its use is to avoid the claims of the jealous who are not injured. When real injury is done immunity leaves.

2.7.2. Employees in want of immunity when the government has none:

The question becomes how would an employee have sovereign immunity of his employer, the state, has none? The answer is that he has none other than to do good as all men have to avoid the jealous.

2.7.3. Failed theories regarding distinctions:

2.7.3.1. discretion v. ministerial;

All discretion has been shown to be for the good of the citizen to "mitigate the severity of the law" (F-88) to preserve a citizen or to help a citizen in a handicapped situation. The distinction is made between discretionary acts and ministerial acts to avoid liability for employees. But this is shown to be arbitrary and unjust in many cases.

"Therefore, the unpredictable and often inequitable consequences resulting from the "governmental-proprietary" dichotomy, "discretionary-ministerial" distinction and other judicial attempts to designate areas of governmental tort liability and immunity have been increasingly lamented from the bench as well as the bar." (A-20-21)

2.7.3.2. governmental v. proprietary;

The use of this distinction of "governmental v. proprietary" activities conducted by the government ignores the obvious fact that if it is government it is government. Here, the attempt is to say, that the acts of government, as a business, do not have certain immunities whereas, acts for all the citizens retains immunity.

2.7.3.3. County v. city;

This is a case where a distinction is made between a "voluntary" municipal corporation for the purpose of government and "advantage of a few citizens," like a city, can not have immunity but an

"involuntary" division of the state like a county can retain sovereign immunity to harm citizens without recourse.

2.7.3.4. Municipal Corporation v. State;

This distinction is similar but deems the city to waive more immunity where as the state retains more immunity for the same reasons listed above. However, it just depends are where you are in regard to all these arbitrary rules of applying sovereign or governmental immunity.

2.7.3.5. Public v. governmental:

This is a distinction being made between the government acting as a business to achieve some public good as opposed to the usual governmental actions for the public good.

2.7.4. failed theories to support state immunity:

The following notions are used by those who support sovereign immunity for government to harm citizens without recourse:

2.7.4.1. Protect the tax payers;

This defense asserts that the paying of damage claims to those the government harmed is harming the tax payer directly. No mention is made that the injured party is also a tax payer and that taxes should go for the sole purpose of government, the protection of property.

"Later decisions following the Kinnare doctrine have sought to advance additional explanations such as the protection of public funds and public property, and to prevent the diversion of tax moneys to the payment of damage claims."²

2.7.4.2. Impossible to manage public affairs if liable for damages to citizens;

Mr. Edwin M. Borchard in the Yale Law Journal in 1924 that it was not discernable why governments cannot perform their functions without immunity to harm citizens without recourse:

"Just why public functions cannot be performed properly unless the city is immune from responsibility for the torts of its officers is not apparent." (A-29)

2.7.4.3. Payment of damages to citizens harmed is not fulfillment of public purpose and drain on useful funds.

A quote from the Molitor v. Kaneland case in 1959 demonstrates that this is no more than a false tautology that assumes the answer in the question (A-11).

2.7.5. Catch 22's;

2.7.5.1. 14th Amendment v 11th Amendment U.S.C.

This situation is almost laughable if citizens were not suffering from it.

"The Supreme Court no longer seems to regard as important the point once raised that if the act sought to be enjoined is not the state's act, then the Fourteenth Amendment and the due process clause is not involved, whereas if it is the state's act, then the Eleventh Amendment interposes to deny jurisdiction."³

² Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 91 (Ill. 1959) (A-10)

³ Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.21 (A-26)

2.7.5.2. Suit against both government and employee in Texas - dismissal of either one is dismissal of the other.

This tangled mess is found under CPRC § 101.106 (e),(f) Election of Remedies.

2.7.6. All anomalies above based upon misplaced sovereignty and attempt to cover up want of state sovereign immunity to harm citizens.

O'Connor's Texas Causes of Action says it well on page 621:

"Texas law of governmental immunity is a confusing maze of common-law principles and statutes."⁴

So from 1847 to 1924 to 1996 sovereign immunity is a mess. Why is that? This branch of the law is unlike any other in respect to the lack of principles of law. The reason is simple. Sovereignty has been misplaced in the government rather than the people where it is mandated by the constitution of Texas.

"* * * The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation." **(A-4)**

And what is that rotten foundation? It is that the government has assumed the role of King, where in the state can do no wrong and it cannot be sued in its own courts. A person that believes all sovereignty rests in the state is called a statist and they have been around for as long as Monarchist who also believed that all

⁴ Rhodes, Comment, *Principles of Governmental Immunity in Texas*, 27 St. Marys L.J. 679, 682 (1996).

property could be vested in the King as well as in a state. Both are completely in error.

3. Defendants' Plea to Jurisdiction:

- 3.1. Trial Court without Jurisdiction to hear subject matter not waived by sovereign state claiming governmental immunity CPRC § 101.001.
- 3.2. No suit against State w/o consent via CPRC or Legislative Act.
- 3.3. Liability to be determined by Legislature.
- 3.4. GBRA/State not liable for tortuous or negligent acts of employees absent constitutional or statutory waiver.
- 3.5. Plaintiff had burden to show State had waived immunity to suit for claims.
- 3.6. Plaintiff did not plead facts within waiver.
- 3.7. Immunity is waived only under CPRC § 101.021.
 - 3.7.1. Motor Vehicle driven by employee.
 - 3.7.2. Employee is not contractor.
- 3.8. Immunity not waived under § 101.056 Discretionary Acts:
 - 3.8.1. Sending contractor to property w/o permission (trespass) is not waived.
- 3.9. Intentional tort Immunity not waived under § 101.057.
 - 3.9.1. Slander per se fails.
 - 3.9.2. Libel fails.
- 3.10. Statute of limitations for defamation (1 yr.) from 1988 to 1994.
- 3.11. Failed to give Notice under CPRC § 101.101:
 - 3.11.1. Notice is prerequisite to determination of waiver / automatic dismissal.
 - 3.11.2. Affidavit to back up failure to Notify.

- 3.12. Defendants' Conclusion: Plaintiff failed under CPRC notice, discretionary, intentional torts and Limitations.
- 3.13. Defendants' assertions are all nested under the TTCA and the CPRC except for the limitations item 3.10 which was not dismissed upon limitations but upon governmental immunity to intentional torts which defamation is considered to be.

4. Jurisdiction of District Court & Judiciary of Texas:

- 4.1. Art. 1 Sec. 13 requires District (all) courts to be open to all for any property damage from any source including public ministers or servants or government.

Article 1 Section 13 provides that all courts shall be open:

"All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."

- 4.2. Art. 2 Sec. 1 requires that the Judiciary not combine with the legislative branch and to abandon its jurisdiction over laws in the presents of damage to citizens.

"The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

For the Texas Judiciary to cede jurisdiction to the Texas Legislature over matters of the adoption of repugnant common law for the state to become the king is the exercise of power by the Legislature that properly belongs to the Judiciary.

- 4.3. TRCP 1 Subject matter jurisdiction on substantive law rather than mere statute and remedial law.

The Appellant plead this in his Brief on Subject Matter
Jurisdiction (**F-94**).

4.4. TRCP 13 Provides Courts with jurisdiction over all
good faith pleadings for extension, modification and
reversal of bad law.

The Appellant plead this in his Brief on Subject Matter
Jurisdiction (**F-94**).

4.5. Art. 16 Sec. 48 Provides Court with common law
jurisdiction to determine if any law existing at time
of constitution is repugnant to same:

All laws and parts of laws now in force in the State of Texas, **which
are not repugnant to the Constitution of the United States, or to this
Constitution**, shall continue and remain in force as the laws of this
State, until they expire by their own limitation or shall be amended
or repealed by the Legislature.⁵ (Bolding added)

Appellant plead this against the false claim want of
jurisdiction in favor of state sovereign immunity in his Response
to Defendants' Plea to the Jurisdiction (**F-191**)

Appellant also brought this up at the hearing on the Plea to the
Jurisdiction (**H-10 Line 19-24**).

4.6. If common law is determined by the courts to be
repugnant the legislature cannot touch it at all to
amend or repeal.

When the judiciary rules on the repugnancy of a common law in
effect at the time of the constitution the legislature cannot
assert, assume, amend, extend, waive, or abolish it. The

⁵ Constitution of Texas Article 16 Section 48.

Legislature may not touch repugnant common law. Nor does the Legislature have jurisdiction to determine the repugnancy of ancient monarchial sovereign immunity to harm the subjects without recourse in his courts.

4.7. Alexander Hamilton Federalist Letter # 78 shows founders' idea that courts were to protect citizen from legislature:

"It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." (A-53)

Mr. Hamilton did not qualify his remark with the exception of sovereign immunity.

4.8. Alexander Hamilton Federalist Letter # 78 said constitution represented the will of the citizen and anything inconsistent with it should be found void.

"or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." (A-53)

5. Possible Sources of Governmental Immunity:

5.1. Constitution: Absent and Opposite.

Sovereign or governmental immunity did not come from present the constitution of Texas as is clear from Art. 1 Sec. 2, 3, 13, 17, 19 and Art. 16 Sec. 48. The provisions in these articles show that the citizen is the maker and abolisher of all governments, none have special privileges, all courts will be open to all harm from any

source, no property may be taken for public use, and no life, liberty or possessions may be taken without due course of law.

5.2. Case Law or Adopted common law:

Sovereign immunity entered Texas through the court system with Hosner v. DeYoung, 1 Tex. 764 (1847). It was said in this case that a mandamus was not a proper tool to use against the government its employees and that citizens cannot sue the government in her own courts. This ruling was made without a single cite to any precedent. This perversion (**F-198**) was plead by Appellant in his Response to Defendants' Plea to the Jurisdiction and published in the Seguin Gazette Enterprise (**F-213**).

"The first reported Texas case on point adopted governmental immunity without citation of authority."^{6,7}

5.3. If it came by courts it can leave by the courts:

Sovereign immunity came into many states the same way it did in Texas, by the courts. The Arizona decided that sovereign and governmental immunity could leave the same way through the courts without the help of the legislature.

Upon reconsideration we realize that the doctrine of sovereign immunity was originally judicially created. We are now convinced that a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack. This doctrine having

⁶ Homer v. DeYoung, 1 Tex. 764 (1847). (**A-16**)

⁷ Southwest Law Journal (Sw L J 23:341 My'69)

been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process."⁸

5.4. Act: TTCA waiving a small portion of adopted common law in violation of Art.16 Sec. 48.

The Texas Tort Claims Act **(A-60)** passed in 1969 attempted to obtain all sovereignty and immunity on behalf of the state by their Act of waiving what they did not possess in the slightest. This the Appellant showed to the Trial court in the Hearing on the Plea to the Jurisdiction **(H-15 line 14-23)**.

5.5. Remedial Law: CPRC codifying the TTCA encompassing all of Defendants' assertions of immunity but the statute of limitations on defamation occurring from 1988 to 1994:

Refer to section three in this argument for a complete listing of each item of the Plea on appeal. It is the Appellant's position that none of those elements of immunity apply and they are all void from inception or passage.

5.6. 11th Amendment of Federal Constitution:

5.6.1. Cannot grant powers of sovereignty or immunity to the states that created it.

The federal constitution cannot grant powers of any kind to the states. It certainly cannot vest all the property of the citizens

⁸ Stone v. Arizona Highway Commission 381 P.2d 107, @ 113 (1963) **(A-7)**

of America into the states required to possess sovereignty. The federal constitution limited the federal jurisdiction of its own courts from hearing matters against a state by a citizen of another state or foreign state. This certainly doesn't grant sovereignty to the states over its own citizens to harm them without recourse.

5.6.2. Misuse of Alexander Hamilton's fed. Let. #81 on 11th Amendment.

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without *its consent*." (A-50)

This one quote from Hamilton has been used to show that the founders acknowledged that the state they had created was sovereign just like the king wherein all property was vested in them.

5.6.3. Alexander Hamilton's fed. Let. #78 on Citizen v. State Sovereignty.

Hamilton's view of the sovereignty of the citizen over the state can be seen easily and more belligerently asserted:

"There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. **To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master;** that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid" (A-53)

6. Adoption of presumed existing state Sovereignty:

6.1. Immediately available sovereign immunity in effect:

The only path available at all was to acquire sovereign immunity through the common law. Was there any state sovereignty and sovereign immunity immediately available that was in effect that could be adopted by the state in 1846? It is clear that no such thing was in effect prior to the Texas state constitution that was not purged by the Republic of Texas Declaration of Independence and Constitution. It is clear that the Constitution of 1836 sees the citizen as sovereign not the state:

First. All men, when they form a social compact, have equal rights, and no man or set of men are entitled to exclusive public privileges or emoluments from the community.

Second. All political power is inherent in the People, and all free governments are founded on their authority, and instituted for their benefit; and they have at all times an inalienable right to alter their government in such manner as they may think proper.⁹

On the subject of the adoption of common law of England, the prior constitution i.e., of the Republic of Texas, acknowledged that the state cannot just adopt all common law because some of it is repugnant to the progress mankind has made in the fundamentals of civil government. Article IV Section 13 and Schedule Section 1 of the Constitution of the Republic of Texas are almost identical to the present constitution at Article 16 Section 48.

The Congress shall, as early as practicable, introduce, by statute, the common law of England, with such modifications as our

⁹ Anson Jones (Rep of Texas Constitution - Declaration of Rights - first two) **(A-62)**.

circumstances, in their judgment, may require; and in all criminal cases the common law shall be the rule of decision.¹⁰

That no inconvenience may arise from the adoption of this Constitution, it is declared by this Convention that all laws now in force in Texas, and not inconsistent with this Constitution, shall remain in full force until declared void, repealed, altered, or expire by their own limitations.¹¹

Were the courts open to suits against the "public ministers" in the Republic of Texas just prior to Texas becoming a state in the union? Yes, they were open and they were so, for citizens suing their public ministers or servants. As is evident in Declaration Eleven of the Texas Constitution of 1836, we see that all Courts will not be closed to any one with any injury from what ever source be it another citizen, or his own government and/or government officials/ministers.

Eleventh. Excessive bail shall not be required, nor excessive fines imposed, or cruel or unusual punishments inflicted. **All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law.**¹²
(Bolding added)

On the subject of District Court Jurisdiction we find that the Republic of Texas Constitution required that the court be open to any citizen with any damage including actions against government and government officials and employees.

¹⁰ Anson Jones (Rep of Texas Constitution - Article IV Sec. 13) 13 (A-61).

¹¹ Anson Jones (Rep of Texas Constitution - Schedule Sec. 1) 16 (A-61).

¹² Anson Jones (Rep of Texas Constitution - Declaration of Rights - Eleventh) 22 (A-61).

In all admiralty and maritime cases, in all cases affecting ambassadors, **public ministers**, or consuls, and in all capital cases, **the district courts shall have exclusive original jurisdiction** and original jurisdiction in all civil cases when the matter in controversy amounts to one hundred dollars.¹³ (Bolding added)

"Public ministers" in this Section refers to public servants or officials.¹⁴ This is clear evidence of what was considered acceptable and unacceptable common law in Texas prior to the present state Constitution. So we adopted something that was not in effect at the time of the state constitution in violation of Art. 16 Sec. 48.

The Unanimous Declaration of Independence by the Delegates of the People of Texas asserts its common law perception of the sole purpose of government.

"When a Government has ceased to protect the lives, liberty, and property of the People from whom its legitimate powers are derived, and for the advancement of whose happiness it was instituted, and so far from being a guarantee for the enjoyment of their inestimable and inalienable rights becomes an instrument in the hands of evil rulers for their oppression...civil society is dissolved into its original elements...the first law of nature, the right of self preservation, the inherent and inalienable right of the People to appeal to first principles, and take political affairs into their own hands in extreme cases enjoins it as a right towards themselves, and a sacred obligation to their posterity, to abolish such Government, and create another in its stead, calculated to rescue them from impending dangers, and to secure their welfare and happiness."¹⁵

¹³ Republic of Texas Constitution - Article IV Sec. 3. Anson Jones, *Memoranda and Official Correspondence Relating to the REPUBLIC OF TEXAS - ITS HISTORY AND ANNEXATION 1836 TO 1846* (D. Appleton and Company, 346 & 348 Broadway, New York, 1859) 12.

¹⁴ Black's Law Dictionary 6th Ed. - Minister. Person acting as agent for another in performance of specific duties or orders. In England, holder of government office.

¹⁵ Unanimous Declaration of Independence by the Delegates of the People of Texas Anson Jones, *Memoranda and Official Correspondence Relating to the REPUBLIC OF TEXAS - ITS HISTORY AND ANNEXATION 1836 TO 1846* (D. Appleton and Company, 346 & 348 Broadway, New York, 1859)

Therefore there was no ancient common law of sovereign immunity immediately in effect just prior to the state constitution. The Republic of Texas purged all that from existence and shows that citizens could indeed sue Texas and its public ministers in District Court.

6.2. Remotely available - Samuel Adams.

The Appellant can show that there was not any state sovereign immunity around for the adoption in the more remote period of the founding of the United States.

"In short, it is the **greatest absurdity** to suppose it in the power of one, or any number of men, at the entering into society, to renounce their essential natural rights, or the means of preserving those rights; when the grand end of civil government, from the very nature of its institution, is for the support, protection, and defense of those very rights; the principal of which, as is before observed, are **Life, Liberty, and Property**. If men, through fear, fraud, or mistake, should in terms renounce or give up any essential natural right, **the eternal law of reason and the grand end of society would absolutely vacate such renunciation**. The right to freedom being the **gift of God Almighty, it is not in the power of man to alienate this gift and voluntarily become a slave.**"¹⁶

It is evident from the above quote that most of the founding fathers had adopted John Locke and Samuel Rutherford and Algernon Sidney as to who held sovereignty and if there was any such thing on earth as the privilege to harm without recourse.

¹⁶ Samuel Adams, *The Christian History of the Constitution of the United States of America - Christian Self-Government* ed., Verma M. Hall, (The Foundation for American Christian Education Box 27035, San Francisco, California 94127) 367 (F-10-11)

Locke referred to that description of harm without recourse to the courts as a state of war continued by perversion:

"nay, where an appeal to the law, and constituted judges, lies open, but the remedy is denied by a manifest perverting of justice, and a barefaced wresting of the laws to protect or indemnify the violence or injuries of some men, or party of men, there it is hard to imagine any thing but a state of war." (F-98)

6.3. Infinitely available - Samuel Rutherford in 1644: Samuel Rutherford maintained that the people made the Kings and removed the monarchs and that at all times the fountain power of sovereignty was with them and it never transferred to the state no matter be it of one or few or many.

"* * * for the **fountain-power** remaineth most eminently in the people, 1. Because they give it to the king, *ad modum recipientis*, and with limitations; therefore it is unlimited in the people, and bounded and limited in the king, and so less in the king than in the people. * * * But the most eminent and **fountain-power** of royalty remaineth in the people as in an immortal spring" (A-38)

Samuel Rutherford in 1644 showed that no king ever had sovereignty and that no state can acquire it for the same reason. Therefore the state does not have sovereignty and without sovereignty there is no immunity. If immunity is the light, sovereignty is the candle. When the candle is extinguished there is not light. The same applies to sovereign and governmental immunity. Locke showed us well what the foundation of prerogative, discretion and immunity are. They are for the good only of the citizen and when harm rises, immunity sets.

7. Conclusion:

- 7.1. Appellant did challenge Defendants' Plea and did show the State is not sovereign over citizen.
- 7.2. Appellant did challenge the Defendants' Plea and did show that District Trial Court had jurisdiction over subject matter to hear claims for damages and assess penalty under the law of torts etc.
- 7.3. The Fourth Court of Appeals has jurisdiction now to reverse bad law regarding state sovereign immunity of every kind.
- 7.4. Fictitious law of state sovereignty and governmental immunity came to Texas by the Courts without citing a single precedent and it can leave Texas by the courts without citing a single precedent as other states have done.
- 7.5. Fictitious law of Sovereignty and governmental immunity is not touchable by the legislature which has no jurisdiction to review common law questions including those of repugnancy of common law existing at time of Constitution for adoption and modification by legislature.
- 7.6. The Texas Judiciary commenced at the District level is the only lawful jurisdiction and authorized power in Texas to rule on the matter of state sovereignty and governmental immunity as it is adopted common law.
- 7.7. Appellant did show that state and quasi-corporation and its employees and officers are in want of sovereign or governmental immunity at Trial Court.
- 7.8. Appellant did preserve error of the Trial Court to appeal to this Fourth Court.
- 7.9. Appellant has shown that Fourth Court of Appeals has full constitutional jurisdiction to find all sovereign Immunity of any kind other than extended to foreigners is null and void from inception and remand this case to the 25th District Court for trial on the

merits for all issues dismissed on fiction of sovereign or governmental immunity.

PRAYER

The Appellant prays that the Court of Appeals reverse the Order of the Trial Court granting a dismissal of the Appellant's law suit based upon Appellees' Plea and Supplemental Plea to the Jurisdiction by signing said Order on July 27, 2004, and that this cause be remanded to the Trial Court for further proceedings.

Further, the Appellant prays for any other relief that he may be entitled to and if there is some deficiency in the form of this Brief, Appellant further prays that he be given opportunity to correct it.

Respectfully Submitted,
Ronald F. Avery
Pro Se

1955 Mt. Vernon
Seguin, Texas 78155
830/372-5534

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded by certified mail, return receipt requested # 7002 0510 0001 8079 6563, on this the _____ day of _____, 2004 to the following:

William S. Helfand
Chamberlain, Hrdlicka, White, Williams & Smith
Attorneys at Law
1200 Smith Street, Suite 1400
Houston, Texas 77002
