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 SECOND AMENDED BRIEF

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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:

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REQUEST FOR ORAL ARGUMENT

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

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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 Second Amended 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 $511,000 RV Park development on subject property **(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 asserting that the State has no immunity to harm the Citizen **(F-69)** and filed 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. The Trial Court granted the Defendants'/Appellees' Plea to the Jurisdiction and dismissed the case.

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:

STATEMENT OF THE FACTS

The Appellant sued the Appellees for property damage allegedly caused by a contractor they hired and sent on to his land allegedly 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 Appellant pleaded that the same thing was done to the Appellant's property four years earlier but that 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)**. The Appellant pled that 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 pled that he became 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)**. The Appellant pled that he 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 he claimed, his wife received a notice of arraignment in the mail **(F-**

112). Appellant pled that he tried four times to settle with GBRA and they would not and in the process of trying to settle it, he claimed 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 claimed in his Petition that he 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 on both the terrorist and disease statements alleged.

Then Appellant claimed in his Petition that he 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, he pled, reminded the Appellant of an earlier attempt of Appellees' to stop his RV Park outside of their authority by allegedly 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 the Appellant pled that the Appellees also had printed on the front page of the Seguin news paper that Appellant was a racist **(F-116)**. The Appellant pled that he perceived this whole thing as the reactivation of Appellees'

attempts to stop his RV Park plans for his property and the Appellant connected all the events under a design or conspiracy claiming in his Petition that Appellees would reactivate their conspiracy when Appellant reactivated his plans to build his RV Park **(F-118)**. The Appellant sued Appellees for the Libel and their alleged attempts to stop his RV Park back in 1994 **(F-134)** and their new attempts of the same allegedly made in 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 real property and personal property rights.

The Appellant sued the Appellees for their alleged 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, discretionary work and official capacity and prayed the court that the Appellant be given 10 days to re-plead 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 had scheduled so Judge Gus J. Strauss signed the Appellant's order which only required Appellant to file in 21 days his First Amended Original Petition to include headings on each paragraph and the maximum damages **(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 "sovereign" and "governmental" 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 lively discussion ensued between the Appellant and the Honorable B.B. Schraub on July

22, 2004. On July 27, 2004, the Honorable B.B. Schraub granted the Appellees their Pleas to the Jurisdiction **(F-228)(A-73)**. The Judge explained his rationale in a cover letter to the Appellant and Appellees **(F-227)(A-74)** limiting his findings to the issue of "governmental immunity" and finding that all Appellees had "governmental immunity" on every issue.

SUMMARY OF THE ARGUMENT

The Parties are here on an appeal of the Appellees'/Defendants' Pleas to the Jurisdiction (original and supplemental). The Appellees claim that GBRA and its employees and Officers have "governmental immunity" to do all 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.

Appellees assert that the Appellant has a burden to show that the state of Texas has waived its "sovereign immunity" in the areas of damage that Appellant has complained of. The Appellees claim that the Appellant failed to establish that his complaints fall into the areas of liability that Texas has given their legislative consent and permission to be sued under. See diagram of compliance required by the state before an injured party can sue them **(A-95)**. Appellees claim Appellant has failed to show that his complaints are within the areas Texas has waived its "sovereign and governmental immunity." Appellees assert that these areas of waiver are contained in the TTCA and CPRC and that Appellant's complaints do not conform to the waivers and therefore Appellant cannot sue GBRA and its employees as a result.

The Appellant has never really argued with the court or the Defendants regarding the Appellant's failure to plead damages within the "waivers of immunity" enumerated under the TTCA and CPRC. Some of these are arguable, especially the "notice of claims" provision. 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. The Appellant claims that since the state of Texas does not have sovereignty nor immunity nor "sovereign or governmental immunity" they cannot waive any of it.

It is a logical law of nature that one cannot waive or give what they do not possess **(A-inside front cover)**. If the state of Texas is not sovereign over its citizens then it cannot obtain that sovereignty by waiving only a part of what they lack entirely. One cannot claim the whole by disclaiming a part of the whole. The Appellant has also shown that sovereignty cannot establish immunity to harm without recourse in courts. The Appellant argues that immunity is only a rule to do good without a law. But once injury occurs, immunity is lost both to the sovereign and the non-sovereign. Sovereignty was just an old ancient monarchial argument

used in an attempt to establish prerogative or immunity to harm “subjects” without recourse in the law or courts of the land.

The Appellant also asserts that the sole purpose and great end of government is the protection of the property of each citizen consisting of their life, liberty, health and possessions. The Appellant proclaims that every person has a right to protect his own life, liberty and possessions. The Appellant declares that law is nothing more than the right of individuals to collectively defend their property by joining in societies under a social contract or constitution.

All know that no one has a right to invade or harm another in his life, liberty or possessions and since they do not have such a right they cannot delegate that to their representatives collectively. Therefore governments can never acquire a right or immunity to harm a citizen or anyone else in their property. All Texas can acquire is limited authority delegated to them from the citizen to protect property.

Therefore, the Appellant’s position is that Texas does not have sovereignty over the citizens of Texas; that immunity to harm does not attach to sovereignty; that authority for Texas to act is not based upon sovereignty in its possession but upon limited authority from the citizens to protect the property of each individual.

Therefore, the Texas Tort Claims Act and its codification in the Civil Practice & Remedy Code are null and void from inception.

The Appellant asserts that he is a citizen of the state of Texas and that he has a social contract with the state of Texas to protect his property. He has brought suit against the state of Texas in the District Court because the state has damaged him directly in his life, lands, reputation and liberty.

The Appellees have asserted that there are other avenues to pursue changes in the law or what they consider the “constitutional law of immunity,” but that is not the pursuit of the Appellant. The Appellant asserts that he has damages and common law issues which the legislature does not have jurisdiction over. The Appellant asserts his object is justice and repair for his damages not academic legal change.

The Appellant’s position is that “sovereign and governmental immunity” is not part of the constitution of Texas nor can it be adopted by common law as the Appellees suggest or wish. The Appellant asserts that Article 16 Section 48 prevents the adoption of any law that was in place at the time of the institution of the Constitution which is repugnant to the same or U.S. Constitution. Placement of “sovereignty” or “immunity” to harm the citizen in the possession of Texas is contradictory to itself at Article 1 Section

2, 13, 17 and 19. The authority to review the repugnance of any common law for adoption comes under the jurisdiction of the Judicial system and to place it in the legislature is a combination of two branches of government in Texas which is in violation of Article 2 Section 1. Even if the legislature was given the charge of the initial determination it is always reviewable and amendable by the Judiciary of Texas.

Finally the Appellant asserts there is no new or good theory to establish the power of government to harm without recourse and that all attempts have failed throughout history. Usurpation, corruption, confusion, greed, and wickedness are its only foundation for “immunity” to harm is only a euphemism for tyranny. Immunity is in direct opposition to both the law of torts and the fundamentals of civil government.

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. Trial Court's grounds for Granting Plea to Jurisdiction:

The Trial Court erroneously found there was a distinction between sovereign and governmental immunity. The Trial Court erroneously found that Stare Decisis is a sufficient foundation for immunity to harm. Appellees' asserted there was some other forum for Appellant's complaints and repair.

1.2. Sovereignty:

What is Sovereignty? Is Sovereignty transferable? Who has Sovereignty? Does Sovereignty survive the move from the state of Nature to government? What is the difference between Sovereignty and Authority? Why is Authority limited? The law of delegated authority limits authority. How is the want of delegated authority perverted? What is the relationship between the state and citizens

and the state and foreigners? What is Immunity? How does Immunity differ from Sovereignty? How could employees of the state have sovereign immunity if the state does not? All distinctions created to protect immunity have failed.

1.3. The Elements of the Appellees' Plea to the Jurisdiction:

This contains all the elements of the Appellees' justification for Dismissal of Appellant's suit.

1.4. The Jurisdiction of the District Court and Judiciary:

Did the Appellant preserve his error and show the Trial court that they held jurisdiction to hear and rule on the case?

1.5. Possible Sources of Immunity:

Is there any source for the state to acquire immunity or sovereignty?

1.6. Adoption of Presumed Existing State Sovereignty & Immunity:

Did the Appellant show that he found the source of immunity was adopted common law and that it was unlawful and contrary to the constitution?

2. Trial Court's grounds for Granting Plea to Jurisdiction:

2.1. Distinction between sovereign and governmental immunity:

The Trial Court made a distinction between sovereign immunity and governmental immunity. This is talked about in legal circles in

terms of government itself as the “sovereign” and the officials or employees having “official” immunity or “governmental” immunity. The Court suggested that sovereign immunity did not include governmental immunity is some way **(A-74)**. This however, is a false distinction as shown exhaustively by Professor Borchard **(A-17-24)**. The Appellant showed that both the government and its employees are in total want of sovereignty and immunity in his exhaustive filings and hearing.

2.2. Never heard of the “King can do no wrong.”

The Trial Court said that they had never heard of the foundation of state sovereignty resting upon ancient monarchial common law where the “King could do no wrong.” **(H-21 line 14-16)** Every authority investigated by the Appellant has shown the roots of Sovereign immunity to rest on the idea that the King or State can do no wrong.

2.3. Sovereignty and Authority:

The Trial Court was confused as to how the State would have power to act if it did not have sovereignty. This was explained by the Appellant **(H-17, line 3 to H-18 line 6)**. The Appellant showed that delegated authority to protect property is all the state can acquire and never acquires sovereignty because that would be the

possession of the lives, liberties and possession of the people. This past, present and future is not alienable from the people.

2.4. Stare Decisis:

The Trial Court then found that tradition was sufficient to establish the law. Even the big supporter of the "devine right of Kings," Thomas Hobbes **(A-26, 4.2.2)** did not believe that time would heal a bad law. Injustice cannot be made just by the passage of time. This too was considered by Professor Borchard **(A-18, 3.4.4)** and by the Arizona Supreme Court **(A-2, 2.1.6)**.

3. Sovereignty:

3.1. 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)** (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).

3.1.1. 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.

3.1.2. Not Transferable:

Men cannot transfer their lives, liberties and possessions to the government they create by their consent for the protection **(F-77)** (John 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. Samuel Rutherford said that men could not transfer their sovereignty to their government or King (Rev. Samuel Rutherford *Lex Rex* 1644 (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) p. 80:

> "It is false that the people doth, or can by the law of nature, resign their whole liberty in the hand of a king. 1. They cannot resign to others that which they have not in themselves, *Nemo potest dare quod non habet*; but **the people hath not an absolute power in themselves to destroy themselves**, or to exercise those tyrannous acts spoken of, * * *." (Bolding added) **(A-33)**

Algernon Sidney was beheaded at age 61 by King Charles the II for fixing sovereignty in the People **(A-47)** in his book *Discourses Concerning Government*.

> "We need not scruple the reception of either, since the late Scots Act tells us, *That kings derive their royal power from God alone; and no difference of religion, &c. can divert the right of succession*.[1] But I know not what we shall do, if we cannot find this man; for *de non apparentibus & non existentibus eadem est ratio*.[2] **The right must fall if there be none to inherit: If we do not know who he is that hath the right, we do not know who is near to him: All mankind must inherit the right, to which everyone hath an equal title; and that which is dominion, if in one, when 'tis equally divided among all men, is that universal liberty which I assert**. Wherefore I leave it to the choice of such as have inherited our author's opinions, to produce this Jew or Turk that ought to be lord of the whole earth, or to prove a better title in some other person, and to persuade all the princes and nations of the world to submit: If this be not done, it must be confessed this paternal right is a mere whimsical fiction, and that no man by birth hath a right above another, or can have any, unless by the concession of those who are concerned."[3]

3.2. 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. The Texas Constitution makes this clear who holds that power (Article 1 Section 2) **(F-81)**:

> "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."

The Supreme Court of Texas in 1924 said that the citizens of Texas are sovereign (Dickson v. Strickland, Secretary of State, et al. (No. 4215) Supreme Court of Texas, Oct. 15, 1924) p. 1019:

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[1] A right established by the Parliament of Scotland in 1681.
[2] Concerning things which do not appear and things which do not exist the reasoning is the same.
[3] Algernon Sidney *Discourses Concerning Government* ed. Thomas G. West (Liberty Fund, Inc. 8335 Allison Pointe Trail, Suite 300, Indianapolis, Indiana 46250-1687) Chap.1 Sec. 3 p.34.

> "When the competency of women to hold office in Texas is challenged, the fundamental inquiry is as to the extent of restrictions on **the people in their sovereign capacity** with respect to freedom of choice of their public servants." (Bolding added.) **(A-9)**

This same court says it with more strength (Dickson v. Strickland) p. 1020 **(A-9-11)**:

> "There we find it recorded that "all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit." The declaration is carried into every Constitution, appearing as section 2 of article 1 of the Constitution of 1876. With the **ultimate political sovereignty of the people so forcefully declared throughout our history**, the court would be unmindful of its high responsibility were it not careful in examining any claim of restriction on the liberty and authority of those who establish governments, and can change them in the mode prescribed by the fundamental law."
>
> "It would be in the power of such convention to take away or destroy individual rights, but such an intention would never be presumed; and to give effect to **a design so unjust and unreasonable would require the support of the most direct, explicit affirmative declaration of such intent**."[4] (Bolding added)

3.3. The State of Nature:

The state of nature has a law (John Locke 271) of nature which is that no man should invade the lives, liberties and possessions (or property) of another person. A similar statement from Locke is at **(F-78)**.

> "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."[5]

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[4] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1020.

[5] 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

Professor Borchard also quoted Lord Macaulay as saying (Yale Law Journal, *Government Liability in Tort*, Edwin M. Borchard, 34 Yale L J: 1, p. 1-2):

> "The primary end of Government is the protection of the persons and property of men." **(A-17)**

This is also the fundamental basis of all tort law which says, "Liability follows negligence or wrongdoing."**(A-7)**, (Molitor v. Kaneland Community Unit Dist. NO. 302, 163 N.E.2d. 89 (Ill. 1959) p. 92.) & **(A-12, 3.1.5)** (Southwestern Law Journal, *The Governmental Immunity Doctrine in Texas – An Analysis & Some Proposed Changes* by Glen A Majure, 23:341 My'69 p. 346) & (Article 1 Section 13).

3.4. Confusion of Sovereignty and Authority:

3.4.1. 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. Rutherford said Sovereignty does not pass from God to the state to do harm **(A-28).**

Most people get sovereignty of the citizens confused with authority for the government to act as the Honorable B.B. Schraub did at the hearing **(H-17 line 1 – H-18 line 6)**.

3.4.2. 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. Locke shows this authority to be limited by the law of nature and the law of delegated authority that says that no one can invade another's property **(F-79)**. Rutherford agreed and said that the power of limitation is all power or sovereignty and is in the people **(A-33)**. Algernon Sidney agreed and said:

> **"If it be grievous to any king to preserve the liberties, lives, and estates of his subjects, and to govern according to their laws, let him resign the crown**, and the people to whom the oath was made, will probably release him. Others may possibly be found who will not think it grievous: or if none will accept a crown unless they may do what they please, **the people must bear the misfortune of being obliged to govern themselves**, or to institute some other sort of magistracy that will be satisfied with a less exorbitant power. (Bolding added)"[6]

3.4.3. 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. (John Locke):

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[6] Sidney, Chap. 3 Sec. 17, p. 416.

> "First, It is not, nor can possibly be absolutely arbitrary over the lives and fortunes of the people: for it being but the joint power of every member of the society given up to that person, or assembly, which is legislator; it can be **no more than those persons had in a state of nature before they entered into society**, and gave up to the community: **for no body can transfer to another more power than he has in himself; and no body has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another"** (Bolding added) **(F-79)**

3.4.4. 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 as noted by Mr. Borchard in the Yale Law Review:

> "But an even greater injustice is done by reason of the maxim that the doctrine of ***respondeat superior*** has no application to the King or Crown - or, with us, **the State - which in theory can neither do nor authorize a wrong,** and that even a superior officer is not liable for the torts of his subordinates, unless he expressly commands the tort - not a common case."[7] **(A-19)**

> "It may be well to recall here that the same argument of *ultra vires* might, if admitted as applicable to the relation between the state and

[7] Yale Law Journal *Government Liability in Tort* Edwin M. Borchard (34 Yale L J:1) p.8.

> its officer committing an illegal act, **serve automatically to absolve the state from all liability**, for it is doubtless true that the state, even admitting the power, never, or very rarely, authorizes a tort.[8] Fortunately, this plea of *ultra vires* has not been admitted in this relation, any more than it has in the case of corporations, including municipal corporations, generally, **yet it has troubled the theory of state responsibility not a little**." **(A-20)**

Then, in Stone v. Arizona Highway Commission 381 P.2d 107, (1963) 113, they found that Respondeat Superior does indeed apply to the state:

> "Under the theory of respondeat superior, the State itself as employer would also be liable."

3.5. 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 as shown exhaustively by philosophers and founders in the Appellant's Second Amended Appendix. The Appellant's Appendix exposing the unlawful fiction of state sovereign immunity is adopted entirely herein.

3.6. Relation of State to Citizens and Foreigners:

3.6.1. Citizens:

The state is a mere agent for the sovereign citizens as shown by Alexander Hamilton **(A-65, 5.1.4.1)** and they can be held liable for

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[8] In *Feather v. Regina* (1865, K. B.) 6 B. & S. 257, 295. 122 Eng. Rep. 1191, 1205, Cockburn, C.J., indeed said: "From the maxim that the King can do no wrong, it follows, as a necessary consequence, that the King cannot authorize a wrong."

damage to citizens because the state has a social contract with the citizen to not harm them and to repair them if they do as again shown by Hamilton **(A-65, 5.1.4.2)**. 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.

3.6.2. 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 as explained in (The Schooner Exchange v. McFadden 11 U.S. (7 Cranch) 116 (1812):

> "The foundation of these concessions is the common consent of the nation states and their coequal dignity. "One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[9]"[10]

3.7. Immunity:

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[9] 11 U.S. (7 Cranch) at 137.

[10] Villanova Law Review – *The American Doctrine of Sovereign Immunity: An Historical Analysis* by Daniel T. Murphy 1968 (Vill L Rev 13:583 Spring '68) p. 586.

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

There is only one real use for something called “immunity.” John Locke showed it 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. Rutherford says that tyranny is no accident when the state is above the law and enjoys immunity **(A-43)**.

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

The question becomes how would a state employee have sovereign immunity of his employer, when the state, has none? The answer is that he has none other than to do good as all men have to avoid the jealous. Further, immunity does not attach itself to sovereignty because we know that in the state of nature no one has a right to harm another with immunity. The people are sovereign and in want of immunity to harm.

3.7.3. Failed theories regarding distinctions:

3.7.3.1. 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 Duke Law Review, *The Role of the Courts in Abolishing Governmental Immunity* (Duke L R 1964:888) p. 889:

> "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-16)**

3.7.3.2. 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 retain immunity. All these Professor Borchard calls artificial **(A-21)**.

3.7.3.3. 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.

3.7.3.4. 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 on where you are in regard to all these arbitrary rules of applying sovereign or governmental immunity.

3.7.3.5. 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.

3.7.4. failed theories to support state immunity:

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

3.7.4.1. 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."[11]

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

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[11] Molitor v. Kaneland Community Unit Dist. No. 302 163 N.E.2d. 89 @ 91 (Ill. 1959) **(A-6)**

Mr. Edwin M. Borchard in the Yale Law Journal in 1924 said 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-24)**

3.7.4.3. 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-7)**.

3.7.5. The 11th & 14th Amendment Dilemma:

3.7.5.1. 14th Amendment v 11th Amendment U.S.C.

This situation identified in the Yale Law Journal 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 he 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."[12]

3.7.5.2. 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.

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

3.7.6. 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."[13]

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. (Stone v. Arizona):

> "* * * The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation."[14] **(A-1)**

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

4. Defendants' Plea to Jurisdiction:

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[13] Rhodes, Comment, *Principles of Governmental Immunity in Texas*, 27 St. Marys L.J. 679, 682 (1996) quoted in O'Connor's *Texas Causes of Action*.
[14] Stone v. Arizona Highway Commission 381 P.2d 107 (1963) p. 109.

4.1. Trial Court without Jurisdiction to hear subject matter not waived by sovereign state claiming governmental immunity CPRC § 101.001.

4.2. No suit against State w/o consent via CPRC or Legislative Act.

4.3. Liability to be determined by Legislature.

4.4. GBRA/State not liable for tortuous or negligent acts of employees absent constitutional or statutory waiver.

4.5. Plaintiff had burden to show State had waived immunity to suit for claims.

4.6. Plaintiff did not plead facts within waiver.

4.7. Immunity is waived only under CPRC § 101.021.
4.7.1. Motor Vehicle driven by employee.

4.7.2. Employee is not contractor.

4.8. Immunity not waived under § 101.056 Discretionary Acts:
4.8.1. Sending contractor to property w/o permission (trespass) is not waived.

4.9. Intentional tort Immunity not waived under § 101.057.
4.9.1. Slander per se fails.
4.9.2. Libel fails.
4.10. Statute of limitations for defamation (1 yr.) from 1988 to 1994.
4.11. Failed to give Notice under CPRC § 101.101:
4.11.1. Notice is prerequisite to determination of waiver / automatic dismissal.
4.11.2. Affidavit to back up failure to Notify.
4.12. Defendants' Conclusion: Plaintiff failed under CPRC notice, discretionary, intentional torts and Limitations.
4.13. 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.

5. Jurisdiction of District Court & Judiciary of Texas:

5.1. Article 1 Section 13:

Article 1 Section 13 requires District (all) courts to be open to all for any property damage from any source including public ministers or servants or government:

> "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."

5.2. Article 2 Section 1:

Article 2 Section 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.

5.3. Texas Rules of Civil Procedure No. 1 – TRCP-1:

This rule guarantees the parties will have access to substantive law by assuring that the court will have subject matter jurisdiction on substantive law rather than jurisdiction to only apply mere statutes and remedial law to the citizen. The Appellant pled this in his Brief on Subject Matter Jurisdiction **(F-94)**.

> "The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction."

5.4. Texas Rules of Civil Procedure No. 13 - TRCP 13:

This rule 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)**.

> "Courts shall presume that pleadings, motions, and other papers are filed in good faith. No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanction order. "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law. A general denial does not constitute a violation of this rule. The amount requested for damages does not constitute a violation of this rule."

5.5. Article 16 Section 48:

Article 16 Section 48 provides the District Court and Texas Judicial system 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."[15] (Bolding added)

Appellant pled this against the false claim of 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)**.

5.6. Repugnant common law untouchable by Legislature:

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 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 the King's courts. **(A-inside back cover)**.

5.7. Judiciary is to protect Citizens from Legislative abuses:

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[15] Constitution of Texas Article 16 Section 48.

Mr. Alexander Hamilton shows founders' idea that courts were to protect the citizen from the abuses of the 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."[16] **(A-65, 5.1.4.2)**

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

5.8. Constitution represents will of sovereign Citizen:

Also in Federalist Letter number 78 Alexander Hamilton said the constitution represented the will of the sovereign citizen over the will of their legislative representatives and agents and anything inconsistent with the constitution 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."[17] **(A-65)**

6. Possible Sources of Governmental Immunity:

6.1. Constitution: Absent and Opposite.

Sovereign or governmental immunity did not come from the present 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, including government officers and employees have special

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[16] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 78, p 467.
[17] Hamilton No. 78 p 467.

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.

6.2. 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 or 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 pled by Appellant in his Response to Defendants' Plea to the Jurisdiction and published in the Seguin Gazette Enterprise **(F-213)**. This was also stated in Southwestern Law Journal (Sw L J 23:341 My'69) 341:

> "The first reported Texas case on point adopted governmental immunity without citation of authority.[18]"

6.3. 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. Arizona decided that sovereignty and governmental immunity could leave the same way, through the courts, without the help of the legislature in (Stone v. Arizona).

> "Upon reconsideration we realize that the doctrine of sovereign immunity was originally judicially created. We are now convinced that

[18] Hosner v. DeYoung, 1 Tex. 764 (1847). **(A-12)**

> a court-made rule, when unjust or outmoded, does not necessarily become with age invulnerable to judicial attack. This doctrine having been engrafted upon Arizona law by judicial enunciation may properly be changed or abrogated by the same process."[19]

The Appellant agrees with Alexander Hamilton that the Constitution is above both the Courts or Judiciary and the Legislature and therefore even the courts cannot determine the amount of sovereignty the state shall have or when it will have it. The only lawful path is to declare state sovereignty and sovereign immunity unconstitutional and untouchable by all.

> "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is **superior to both**; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."[20] **(A-65-66)**

6.4. Acts – Texas Tort Claims Act:

The Texas Tort Claims Act (TTCA) waives a small portion of adopted repugnant common law in violation of Art.16 Sec. 48. The Texas Tort Claims Act **(A-75)** passed in 1969 attempted to obtain all sovereignty and immunity on behalf of the state by their Act of waiving a portion of what they did not possess in the slightest.

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[19] Stone v. Arizona Highway Commission 381 P.2d 107, @ 113 (1963) **(A-3, 2.1.11)**

[20] Alexander Hamilton *The Federalists Papers* ed. Clinton Rossiter (Penguin Books USA Inc. 375 Hudson Street, New York, N.Y. 10014 U.S.A., 1961) No. 78, p 467.

This the Appellant showed to the Trial court in the Hearing on the Plea to the Jurisdiction **(H-15 line 14-23)**.

6.5. Remedial Law – Texas Civil Practice & Remedy Code:

The Texas Civil Practice & Remedy Code (CPRC) codifying the TTCA encompassing all of Appellees' assertions of immunity are all void as they stand in contradiction to the Constitution of Texas and are based upon adopted common law that is repugnant to the constitution in violation of Art. 16 Sec. 48.

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 (Dickson v. Strickland):

> "The Constitution is the supreme law of the state. It is elementary that a statute or principle of the common law in conflict with the Constitution is void. So, if there be any conflict between the common law, * * *, and the Constitution, * * *, it is our duty to give effect to the Constitution."[21]

6.6. 11th Amendment of Federal Constitution:

6.6.1. 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 which they did not have before. It certainly cannot vest all

[21] Dickson v. Strickland, Secretary of State, et al. (No. 4215) (Supreme Court of Texas. Oct. 15, 1924) p. 1021.

the property of the citizens of America into the states in order to acquire sovereignty.

Who could derive that the states had sovereignty over its own citizens to harm them intentionally with immunity from a fair reading of the 11th Amendment to the U.S. Constitution?

> "The Judicial power of the United States shall not extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[22]

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.

6.6.2. 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-62-63)**

This one quote from Hamilton has been used to show that the founders acknowledged that the states were sovereign just like the king or monarchy wherein all property was vested in them. This would be essentially the same as a monarchial state but where an oligarchy ruled rather than a monarch.

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[22] Eleventh Amendment to the U.S. Constitution.

6.6.3. 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-65)**

7. Adoption of presumed existing state Sovereignty:

7.1. Immediately available sovereign immunity in effect:

The only path available for the state to acquire state sovereignty over citizens and sovereign immunity to harm them was 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."[23]

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 put together 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 circumstances, in their judgment, may require; and in all criminal cases the common law shall be the rule of decision.[24]

> 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.[25]

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

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[23] Anson Jones (Rep of Texas Constitution – Declaration of Rights - first two) **(A-88)**.
[24] Anson Jones (Rep of Texas Constitution - Article IV Sec. 13) 13 **(A-84)**.
[25] Anson Jones (Rep of Texas Constitution – Schedule Sec. 1) 16 **(A-86)**.

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.** [26] (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.

> 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.[27] (Bolding added)

"Public ministers" in this Section refers to public servants or officials.[28] 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.

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[26] Anson Jones (Rep of Texas Constitution – Declaration of Rights – Eleventh) 22 **(A-89)**.
[27] 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, 12. **(A-84)**
[28] 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.

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."[29]

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.

7.2. 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. Samuel Adams, *The Christian History of the Constitution of the United States of America - Christian*

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[29] 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 **(A-79)**

Self-Government ed., Verna M. Hall, (The Foundation for American Christian Education Box 27035, San Francisco, California 94127) 367 **(F-82-F-83)**:

> "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**."

James Madison the architect of the U.S. Constitution makes clear that sovereignty in the hands of one, as a King or in many as a legislature is despotic tyranny. The Appellant plead this in his Plaintiff's Brief on Immunity **(F-91)** and quoted the portion of Madison's Federalist # 47. Another quote very similar to it is found in Madison's next letter #48 **(A-69).**

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.

John 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."**[30] **(F-98)**

7.3. Infinitely available:

Samuel Rutherford in 1644 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"[31] **(A-34)**

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.

Samuel Rutherford showed that sovereignty could only be and must be in the citizen or people:

> "7. Sovereignty is not in the community, (saith the P. Prelate). Truly it neither is, nor can be, more than ten, or a thousand, or a thousand thousands, or a whole kingdom, can be one man; for sovereignty is the abstract, the sovereign is the concrete. Many cannot be one king or one sovereign: a sovereign must be essentially one; and a multitude

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[30] John Locke

[31] Samuel Rutherford *Lex Rex*, p. 80.

> cannot be one. But what then? May not the sovereign power be eminently, *fontaliter*, originally and radically in the people? **I think it may, and must be**."[32] **(A-35)**

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.

> "**for prerogative is nothing but the power of doing public good without a rule.**"[33] (Bolding added) **(F-86)**

PRAYER

Conclusion:

Appellant did challenge Defendants' Plea in Trial Court and did show the State is not sovereign over the citizens of it. Appellant did challenge the Appellees' Plea and did show that District Trial Court had jurisdiction over subject matter to hear good faith claims for damages and reversal of bad law if necessary to achieve justice and to assess penalty under the law of torts.

The Appellant has shown herein that the Fourth Court of Appeals has jurisdiction now to reverse bad law regarding state sovereignty and immunity of every kind so that citizens injured by the state may be repaired. The fictitious law of state sovereignty and

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[32] Rev. Samuel Rutherford *Lex Rex* (Crown Rights Book Company, P.O. Box 386 Dahlonega, Georgia 30533, 2004) Question 19, p.86.

[33] Peter Laslett *Locke – Two Treatises of Government* (Cambridge Texts in the History of Political Thought Cambridge University Press 40 West 20th Street, New York, NY 10011-4211, USA) 378
Online: http://www.constitution.org/jl/2ndtr14.htm

governmental immunity came to Texas by the Courts without citing a single precedent, statute or Constitutional Provision and it can leave Texas by the courts without citing a single precedent as other states have done.

The fictitious doctrine of sovereignty and governmental immunity is not touchable by the legislature. The legislature 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 even if they had been given initial determination of what laws were in effect and not repugnant. 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.

Appellant did show in the Trial Court that state and quasi-corporations and their employees and officers are in want of sovereignty and both Sovereign and governmental immunity. Appellant did preserve error at the Trial Court to appeal to this Fourth Court.

Appellant has shown that the Fourth Court of Appeals has full constitutional jurisdiction to find all Immunity of any kind other than extended to foreigners is null and void from inception.

Appellant has shown herein that this case should be remanded to the 25th District Court for trial on the merits on all issues dismissed based upon the fiction that the state of Texas has sovereignty over Texas Citizens. The State of Texas and its many forms and employees is in want of all immunity.

Relief Sought:

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.

Respectfully Submitted,
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Pro Se

_____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing and Appellant's Second Amended Appendix under separate cover was forwarded by certified mail,
return receipt requested # 7002 0510 0001 8079 6518, on this the _____ day of _____ , 2004 to the following:

William S. Helfand &/or Kevin D. Jewell
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