Basics of Section 101.106 of the Texas Tort Claims Act

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A. The Texas Tort Claims Act and Election of Remedies

Sovereign immunity and its counterpart, governmental immunity exists to protect the State and its political subdivisions from lawsuits and liability for money damages. *Reata Constr. Corp. v. City of Dallas,* 197 S.W.3d 371, 374 (Tex. 2006). Such lawsuits "hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purpose." *Id.* At 375. Accordingly, the Supreme Court of Texas has long recognized that "no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent." *Hosner v. DeYoung*, 1 Tex. 764 (1847). Because the Legislature is better suited to balance the conflicting policy issues associated with waiving immunity, the courts look to pertinent legislative enactments to determine the extend to which immunity has been voluntarily relinquished. *See Wichita Falls State Hosp. v. Taylor*, 106 S.W. 3d 692, 695 (Tex. 2003). The courts interpret statutory waivers of immunity narrowly, as the Legislatures intent to waive immunity must be clear and unambiguous. *See* Tex. Gov't Code §311.034.

The Texas Tort Claims Act provides for a limited waiver of immunity for certain suits against governmental entities and further provides for caps recoverable on damages. Tex. Civ. Prac. & Rem. Code §101.023. The Act generally waives governmental immunity to the extend that liability arises from the "use of a motor-driven vehicle of motor-driven equipment" or from "a condition or use of tangible personal or real property." *Id.* §101.021.

After the Tort Claims Act was enacted, plaintiffs often sought to avoid the Act's damages cap or other structure by suing governmental employees, since claims against them were not always subject the Act. *Mission Consol. Indep. School Dist. v. Garcia*, 253 S.W. 3d 653 (Tex. 2008). To prevent such circumvention and to protect governmental employees, the Legislature created an election of remedies provision in 1985. The language originally provided:

> A judgment in an action or settlement of a claim under this chapter bars any action involving the same subject matter by the claiming against the employee of the governmental unit whose act or omission gave rise to the claim.

Act of May 17, 1985 69th Leg.

Employees were thus afforded some protection when claims against the governmental unit were reduced to judgement or settled, but there was still nothing to prevent a plaintiff from pursuing alternative theories against both the employee and governmental through trial or other final resolution. *Garcia,* at 656.

In 2003, as part of a comprehensive effort to reform the tort system, the Legislature amended section 101.106. This section now provides the following:

> (a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any

suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.

(b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.

(c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit or recovery from any employee of the same governmental unit regarding the same subject matter.

(d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.

(e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

(f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

Tex. Civ. Prac. Rem. Code §101.106

The revisions purpose was to force a plaintiff to decide on the outset whether an employee acted independently and is thus solely liable, or acted within the general scope or his or her employment such that the governmental unit is vicariously liable, thereby reduction the resources that the government and it employees must use in defending redundant litigation and alternative theories of recovery. *Garcia,* at 657. State agencies are required to indemnify their employees for litigation expenses if the employee's action were within the course and scope of his or her employment. Tex. Civ. Prac. & Rem. Code §§104.001, 104.002. By requiring a plaintiff to make an irrevocable election at the time the suit is filed between suing the governmental unit under the Texas Tort Claims Act or proceeding against the employee alone. Section 101.106 narrows the issues for trial and reduces delay and duplicative litigation costs. *See Id.*

The Tort Claims Act election of remedies is intended to protect governmental employees by favoring their early dismissal when a claim regarding the same subject matter is also made against the governmental employer. By forcing plaintiffs to make an irrevocable election at the time suit is filed, the Legislature intended to reduce the delay and expense association with

allowing plaintiffs to please alternatively that the governmental unit is liable because the employee acted within the scope of his or her authority but, if not that the employee acted independently and is individually liable.

"Scope of employment is defined in section 101.01(5) of the Civil Practices and Remedies Code as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." Tex. Civ. Prac. & Rem. Code §101.001(5). "An official acts within the scope of her authority if she is discharging the duties generally assigned to her." *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994). Similarly, an employee's conduct is within the scope of employment, even if done in part to serve the purposes of the employee or a third person, if the purpose of serving the employer's business motivates the employee. *Best Steel Bldgs., Inc. v. Hardin*, 553 S.W.2d 122, 128 (Tex. Ci. App – Tyler 1977).

Under the Tort Claims Act's election scheme, recovery against an individual employee is barred and may be sought against the governmental unit only in three instances: (1) when suit is filed against the governmental unit only, *id.* § 101.106(a); (2) when suit is filed against both the governmental unit and its employee, *id.* § 101.106(e); or (3) when suit is filed against an employee whose conduct was within the scope of his or her employment and the suit could have been brought against the governmental unit, *id.* § 101.106(f). When suit is filed against the employee, recovery against the governmental unit regarding the same subject matter is barred unless the governmental unit consents to suit. *Id.* § 101.106(b). *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 657 (Tex. 2008).

B. *Mission Consol. School Dist. v. Garcia,* 253 S.W.3d 653 (Tex. 2008).

In *Mission Consolidated Independent School District v. Garcia,* three terminated employees filed suit against the City of Mission School District and the superintendent alleging discriminatory wrongful discharge against the school district and common-law claims of intentional infliction of emotional distress against the school district and the superintendent. *See Id.* Garcia also brought claims for defamation, fraud, and negligent misrepresentation against the superintendent. *Id.* The court of appeals had held that section 101.106(e) did not apply because none of the claims fit within the Act's limited waiver of immunity, so they were not brought "under this chapter" as set forth in subsection (e). *Id.* At 658.

The Supreme Court disagreed stating that "because the Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be 'under [the Tort Claims Act] for purposes of § 101.106.' " *Id.* at 659. Citing *Newman v. Obersteller,* 960 S.W.2d 621, 622 (Tex.1997).

The Court then examined subsection (e)'s effect and noted that the Superintendent would have been entitled to dismissal of the claims against him had the District moved for dismissal under subsection (e). However, the Superintendent did not move for dismissal under subsection (f). The Court stated however, that had the District obtained the Superintendent's dismissal, the plaintiffs' tort claims against MCISD would have been barred because "all tort theories of recovery alleged against a governmental unit are presumed to be 'under the [Tort Claims Act]'." *Id.* Garcia's

suit under the TCHRA, however, is not "a suit filed under this chapter" and would not come within subsection (e)'s purview because the Tort Claims Act expressly provides that the remedies it authorizes "are in addition to any other legal remedies," and the TCHRA provides a statutory remedy for unlawful discrimination. *Id.* § 101.003. Claims against the government brought pursuant to waivers of sovereign immunity that exist apart from the Tort Claims Act are not brought "under [the Tort Claims Act]." In sum, if subsection (e) were applied to Garcia's suit and Dyer was dismissed, the only claim against the ISD that would survive would be Garcia's TCHRA claim. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 659 (Tex. 2008).

The District argued that section 101.106(b) operates to bar Garcia's entire suit against the ISD because its employee, Dyer, was sued as well, which is all that subsection (b) requires. According to the District, if a plaintiff sues an employee of a governmental unit, whether alone or together with the governmental unit, subsection (b) bars "any suit" against the governmental unit regarding the same subject matter. In this case, the ISD contends, that includes Garcia's suit under the TCHRA. *Id.*

The Court agreed with the ISD that to the extent subsection (b) applies, it bars *any suit* against the governmental unit regarding the same subject matter, not just suits for which the Tort Claims Act waives immunity or those that allege common-law claims. Unlike subsections (a), (c), (e), and (f) of section 101.106, subsection (b) does not contain the limiting phrase "under this chapter." Since the Courts give effect to all words in a statute, "under this chapter" must operate to make the scope of (a), (c), (e), and (f) different from that of (b). *See Spradlin v. Jim Walter Homes, Inc.,* 34 S.W.3d 578, 580 (Tex.2000). Therefore, the Court held, by subsection (b)'s literal terms, it applies to "any suit" brought against the governmental unit, provided the other subsection (b) requirements are met. *Id.*

Subsection (b) expressly operates to bar suit or recovery against the governmental unit "unless the governmental unit consents." Tex. Civ. Prac. & Rem.Code § 101. 106(b). Although the parties agree that the ISD itself did not consent to Garcia's suit, the manner in which the government conveys its consent to suit is through the Constitution and state laws. *See Wichita Falls,* 106 S.W.3d at 695 (citing *Cramer v. Sheppard,* 140 Tex. 271, 167 S.W.2d 147, 153–54 (1943); *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen,* 952 S.W.2d 454, 465–66 (Tex.1997)). The Court went on to state that "in *IT–Davy,* we stated unequivocally 'that it is the Legislature's sole province to waive or abrogate sovereign immunity.'" 74 S.W.3d at 853.

Thus, the Legislature, on behalf of the ISD, has consented to suits brought under the TCHRA, provided the procedures outlined in the statute have been met. Nevertheless, because the Legislature has consented to suit under the TCHRA, section 101.106(b) of the Tort Claims Act would not operate to bar Garcia's suit or recovery against the ISD. In this case, then, the Court held that under either subsections (b) or (e) of section 101.106 of the Tort Claims Act, Garcia's TCHRA claims against the ISD survived. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008).

Following *Garcia*, several courts held that whether an employee was sued in their official or individual capacity was irrelevant under various subsections of the election of remedies statute. *See Tex. Bay Cherry Hill, L.P. v. City of Fort Worth*, 257 S.W. 3d 379, 399-401 (Tex. App- Fort Worth, 2008 no pet.); *Hintz v. Lally*, 365 S.W. 3d 761, 769 (Tex. App. – Houston [14th Dist.] 2010 no pet.); *City of Webster v. Myers*, 360 S.W. 3d 51, 58-60 (Tex. App. – Houston [1st Dist.] 2011,

pet. denied). This then led to the supreme court opinion in *Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011), prior to this decision, the prevailing opinion had been that in regards to subsection (b) and (f), the capacity in which an employee was sued generally made no difference except when an employee is sued under subsection (f).

Section 101.106(f) of the Texas Tort Claims Act provides that a suit against a government employee acting within the general scope of his employment must be dismissed "if it could have been brought under this chapter [that is, under the Act] against the governmental unit". The court of appeals construed the quoted clause to mean that, to be entitled to dismissal, the employee must establish that governmental immunity from suit has been waived by the Act. But as the Supreme Court stated in *Mission Consolidated Independent School District v. Garcia:* "we have never interpreted 'under this chapter' to only encompass tort claims for which the Tort Claims Act waives immunity." Rather, "all [common-law] tort theories alleged against a governmental unit ... are assumed to be 'under [the Tort Claims Act]' for purposes of section 101.106."

C. *Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011).

In *Franka*, parents of newborn infant who suffered injury to his clavicle during delivery brought action against the state university hospital physical and resident who delivered the infant. *Id.* at 370.

Plaintiffs sued the physicians but not the Center (or the District or Hospital). Franka moved to dismiss the action under section 101.106(f) of the Texas Tort Claims Act, which states:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

In their response, plaintiffs acknowledged that Franka was employed by a governmental unit, the Center, and that their suit was based on conduct within the general scope of his employment. But, they argued, to invoke section 101.106(f), Franka had the burden of proving that suit "could have been brought under" the Act, and to discharge that burden, he had to offer evidence that the Center's immunity was waived by the Act. The only basis for such a waiver, they continued, was that their injuries were "caused by a condition or use of tangible personal ... property" under section 101.021 of the Act, and "[n]othing appears in this record to implicate the use or misuse of tangible personal property in causing the orthopaedic and neurological injuries to baby [S.M.A.]." Plaintiffs suggested that the Center stipulate that its immunity from suit was waived. Failing that, they urged that Franka's motion be denied. *Franka v. Velasquez*, 332 S.W.3d 367, 370–71 (Tex. 2011).

Apparently, the trial court never ruled on Franka's motion. More than a year passed, and defendants each filed a motion for summary judgment based on section 101.106(f), differing only as to the circumstances of their employment. Each argued that "suit against [them] could have been brought against the [Center] because the conduct of [defendants] on which the allegations are

based involved the use of tangible property, namely the vacuum extractor". Each attached an affidavit stating that infant's "treatment included the use of tangible property, including a vacuum extractor." And each requested the court to order that "unless [plaintiffs] substitute [the Center] as the defendant, the case will be dismissed in thirty days." Plaintiffs responded that defendants had failed to establish that suit could have been brought against the Center because there was "no evidence that the condition or use of tangible property, the vacuum extractor, was the instrumentality of the harm, and therefore no waiver of immunity". Plaintiffs also argued that defendants had not established that they were government employees as defined by the Act. *Franka v. Velasquez*, 332 S.W.3d 367, 371 (Tex. 2011).

The Court held that Franka, to whom section 101.106(f) does apply, was entitled to dismissal only if the plaintiffs' suit "could have been brought under [the Act] against [the Center]". The court of appeals held that the plaintiffs' suit could not have been brought under the Act unless, as a matter of law, the Act waived the Center's immunity from suit. The Supreme Court disagreed and begin their reasoning by reviewing their most recent cases, which firmly established the rule that any tort claim against the government is brought "under" the Act for purposes of section 101.106, even if the Act does not waive immunity. *See Garcia.* Further the court held that to except section 101.106(f) from this rule would be inconsistent with other provisions of the Act and would create disparities in its operation.

Although the court had not previously applied the same rule to section 101.106(f) before *Franka*, the court held that is how it should be applied. The revised statute lifts the phrase "under this chapter" from the prior statute and repeats it four times. The prior statute referred to "an action or settlement of a claim under this chapter". The current version refers to "[t]he filing of a suit under this chapter" in subsection (a), "[t]he settlement of a claim arising under this chapter" in subsection (c), "a suit ... filed under this chapter" in subsection (e), and "a suit [that] ... could have been brought under this chapter" in subsection (f). The court held that the text gives no hint that any these references has a different meaning; to the contrary, the repetition strongly suggests that the meaning throughout is the same. *Id.*

Construing subsection (f) as the court of appeals did in the *Franka* case was not only inconsistent with *Mission* and the Act as a whole, but the Court held that it created at least a disparity, if not an absurdity, in the statute's operation. If a plaintiff sues only a government employee and not the government, then under subsection (f), according to the court of appeals, the employee need not be dismissed unless a waiver of the government's immunity for the claim is established. But if a plaintiff sues both the government and its employee, then under subsection (e), according to *Mission,* the employee must be dismissed, even if the government's immunity is not waived. There is no reason why an employee should be entitled to dismissal if sued with the government but not if sued alone. The Court held that for consistency both within section 101.106 and throughout the Act, subsection (f) must be governed by the same rule *Mission* applied in construing subsection (e). *Franka v. Velasquez*, 332 S.W.3d 367, 379–80 (Tex. 2011).

In addition, the Court held that the court of appeals construction of 101.106(f) poses serious practical problems. Requiring a government employee to prove that his employer's immunity from suit has been waived in order to obtain dismissal forces the parties to take unexpected positions with collateral risks. Ordinarily, one would expect a government employee to support his

employer's assertion of immunity. Only a perverse statute would incentivize conflict between the two, and there is nothing to indicate that the Legislature had any such intent. The plaintiff, too, is forced into an awkward position, arguing that immunity was not waived, and thereby cutting off that path to liability and recovery. *Franka v. Velasquez*, 332 S.W.3d 367, 380 (Tex. 2011)

The Court held that nothing in section 101.106(f) requires the trial court to rule on whether immunity was waived, either before or after the thirty-day deadline. Even if the plaintiff obtained the trial court's ruling before having to decide whether to dismiss the employee, there would be no assurance that the ruling would be upheld on appeal, especially after the issue was relitigated with the government. If the plaintiff refuses to dismiss the employee, he risks being faced with the government's stipulation that immunity was waived, after the deadline for suing the government has run. If he dismisses the employee and sues the government, he has some advantage in being able to defend the government's assertion of immunity with its employee's contrary statements, but he may not be able to prove waiver, even with such statements. Thus, he will have traded a viable claim against the employee for a barred claim against the government. *Franka v. Velasquez*, 332 S.W.3d 367, 380–81 (Tex. 2011).

The *Franka* court also held that their holding regarding the construction of section 101.106 is consistent with the Legislature's purpose in enacting House Bill 4. Under Texas law, a suit against a government employee in his official capacity is a suit against his government employer with one exception: an action alleging that the employee acted *ultra vires.* With that exception, an employee sued in his official capacity has the same governmental immunity, derivatively, as his government employer. But public employees (like agents generally) have always been individually liable for their own torts, even when committed in the course of employment, and suit may be brought against a government employee in his individual capacity. Generally, however, public employees may assert official immunity "from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority." *Id.*

Before the Tort Claims Act was passed in 1969, if suit against the government was barred by immunity, a plaintiff could sue and recover against a government employee-actor in his individual capacity even though, were he sued for the same conduct in his official capacity, he would be shielded by derived governmental immunity. In waiving governmental immunity, the Legislature correspondingly sought to discourage or prevent recovery against an employee.

As already discussed, the original enactment of the Act in 1969 contained a provision substantively identical to section 101.106 before its revision in 2003. That provision was strikingly similar to language in the 1949 Federal Tort Claims Act. The federal provision was amended in 1961 to make the FTCA the exclusive remedy for motor vehicle accidents involving federal employees acting within the scope of their employment.

House Bill 4's revision of section 101.106 achieves the same end under Texas law as the Westfall Act does under federal law. As it affects government-employed physicians, it is generally consistent with the Legislature's concerns regarding health care costs, also expressed in the bill.

Accordingly, the Court held that for section 101.106(f), suit "could have been brought" under the Act against the government regardless of whether the Act waives immunity from suit. The Court did not clarify whether it meant an employee who was sued for conduct that was within the course and scope of employment, or if this included conduct that the employee committed that was not within the course and scope of employment. According to the dissent in *Franka*, "In the Court's view, the statute is not about giving the plaintiff the right to choose the appropriate

defendant but rather about making the government the defendant in all tort cases arising out an employee's conduct." *Id.*

D. *Texas Adjutant General's Office v. Ngakoue*, 408 S.W.3d 350 (Tex. 2013)

In *Ngakoue,* the court sought to clarify 101.106 with regard to whether the employee was acting within the course and scope of his or her employment. In the lower courts, after *Franka*, some courts refused to dismiss claims asserted against the employee when the conduct involved arose outside the scope of employment, while other courts recognized the issue but found the allegations against the individual insufficient to remove their actions from the scope of employment. *See Klemen v. Elliott*, 260 S.W. 3d 518 (Tex.App.-Houston [1st Dist.] 2008); *Redburn v. Garrett*, 2013 WL 2149699.

In a 5-4 decision, the court attempted to clarify how the various provisions of the election of remedies statute interacts in one another. While they upheld the ruling in the court of appeals, they did so for different reasons expressed in its opinion.

In this case, Michelle Ngakoue sued Franklin Barnum for damages arising out of an automobile accident that occurred in Austin, Texas alleging negligence. Barnum at the time was an employee of the Texas Adjunct General's office (TAGO). Barnum filed a Motion to dismiss under §101.106(f) claiming he was in the scope of employment for TAGO. Ngakoue filed an amended petition within 30 days which added TAGO as a defendant but did not dismiss Barnum from the suit. The trial court eventually denied Barnum's Motion to Dismiss.

TAGO subsequently filed a plea to the jurisdiction and motion to dismiss, claiming that Ngakoue failed to comply with the requirements of subsection (f) by not dismissing Barnum in his amended pleading, and arguing that suit against both Barnum and TAGO should be dismissed as a result of that failure. Specifically, TAGO argued that Barnum should be dismissed pursuant to subsection (f), while TAGO itself should be dismissed pursuant to subsection (b). *See id.* § 101.106(b) ("The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents."). The trial court denied TAGO's plea and motion to dismiss, and both TAGO and Barnum timely appealed. *Texas Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 353 (Tex. 2013).

Here, the Court held that the plaintiff who brings such a suit against an employee is not barred from asserting a claim against the governmental employer and while the Legislature has set out a procedure for the dismissal of a suit against an employee who was acting within the scope of employment, this procedure is immaterial to whether suit may be maintained against the proper defendant—the government. In *Ngokoue*, the employee was entitled to dismissal as a matter of law because the suit against him undisputedly arose from conduct within the general scope of employment, and suit against the governmental unit should proceed because the plaintiff was entitled to, and did, amend his pleadings to assert a TTCA claim against the government. *Texas Adjutant Gen.'s Office v. Ngakoue,* 408 S.W.3d 350, 352 (Tex. 2013).

The Court held that central to the resolution of this case are subsections (b) and (f). Subsection (b) provides that filing any suit against an employee of a governmental unit is an "irrevocable election" that "immediately and forever" bars suit against the governmental unit regarding the same subject matter, "unless the governmental unit consents." Tex. Civ. Prac. &

Rem.Code § 101.106(b). The Court held in *Garcia* that "consent" under subsection (b) includes statutory waivers of immunity, "provided the procedures outlined in the statute [waiving immunity] have been met." *Garcia,* 253 S.W.3d at 660. In that case, the plaintiff's common-law tort claims against the government were barred not because of subsection (b), but because they did not fall within the TTCA's limited waiver of immunity, 253 S.W.3d at 658–59, while the TCHRA claims survived due to the separate waiver of immunity in that statute, *Id.* at 660. *Texas Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 355–56 (Tex. 2013).

The Court held that the bar in subsection (b) is triggered by the "filing of a suit against any employee of a governmental unit." Tex. Civ. Prac. & Rem.Code § 101.106(b). Subsection (f), however, states that "[i]f a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter [the TTCA] against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only." *Id.* § 101.106(f). The Court has recognized that "a suit against a state official is merely 'another way of pleading an action against the entity of which [the official] is an agent.' " *Franka v. Velasquez,* 332 S.W.3d 367, 382 n. 68 (Tex.2011) (quoting *Kentucky v. Graham,* 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)) (alteration in original). Thus, "[a] suit against a state official in his official capacity 'is *not* a suit against the official personally, for the real party in interest is the entity.' " *Id.* (quoting *Kentucky,* 473 U.S. at 166, 105 S.Ct. 3099). "Such a suit actually seeks to impose liability against the governmental unit rather than on the individual specifically named and is, *in all respects other than name,* a suit against the entity." *Id.* (emphasis added) (citations, quotation marks, and alteration omitted). Thus, pursuant to subsection (f), a suit against a government employee acting within the scope of employment that could have been brought under the TTCA—meaning the plaintiff had a tort claim to assert against the government—is considered to have been brought against the governmental unit, *not* the employee. *Texas Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 356–57 (Tex. 2013).

Further, and in conjunction with that purpose, the Legislature's choice of language in subsection (f) affects its interaction with subsection (b). Again, the bar to suit against a governmental unit in subsection (b) is triggered by the filing of a suit *against an employee* of the unit. Tex. Civ. Prac. & Rem. CodeE § 101.106(b). But a suit against an employee in his official capacity is *not* a suit against the employee; it is, in all but name only, a suit against the governmental unit. *Franka,* 332 S.W.3d at 382 n. 68; *see also Univ. of Tex. Health. Sci. Ctr. at San Antonio v. Bailey,* 332 S.W.3d 395, 401–02 (Tex.2011) (holding that a governmental employer may be substituted for the employee under subsection (f) after limitations has run because there is "no change in the real party in interest"). Such a suit therefore does not trigger the bar in subsection (b) to subsequent suits against the governmental unit regarding the same subject matter. *Texas Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 357 (Tex. 2013).

In arguing that the subsection (b) bar was triggered, TAGO relied principally on the second sentence of subsection (f), which provides: "[o]n the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed." Tex. Civ. Prac. & Rem.Code § 101.106(f). TAGO contends, and the dissent would hold, that this provision sets out a specific procedure that must be followed by a plaintiff—dismissal of

the employee and addition of the government as defendant within thirty days of the employee's filing the motion—to avoid the bar in subsection (b). The Court disagreed. This portion of subsection (f) simply provides a procedure by which an employee who is considered to have been sued only in his official capacity will be dismissed from the suit. When such an employee files a motion to dismiss, he is entitled to dismissal, which will occur in one of two ways: (1) via the plaintiff's amended pleading substituting the governmental unit for the employee as the defendant; or (2) absent such an amended pleading, via the trial court's order granting the employee's motion and dismissing the suit against the employee. *Id.* But subsection (f) does not *require* any affirmative action by the plaintiff.

Thus, while the consequence of failing to substitute the government for the employee in response to an employee's subsection (f) motion to dismiss (assuming the employee was sued in his official capacity) is that "suit against the employee shall be dismissed," *id.,* such failure does not bar subsequent suit against the government. In sum, subsection (f) does not require dismissal of the employee by the plaintiff to overcome the bar to suit against the government in subsection (b); rather, subsection (f) provides the TTCA plaintiff a window to amend his pleadings to substitute the governmental unit before the court dismisses the suit against the employee on the employee's motion where appropriate. Tex. Civ. Prac. & Rem.Code § 101.106(f).

If the plaintiff fails to substitute the government, and the employee was sued in his official capacity only, then the case must be dismissed. *Id.* But a suit against the governmental unit for which immunity is otherwise waived may go forward, just as a suit proceeds against the government when an employee is dismissed under subsection (e).

E. *Texas Dep't of Aging & Disability Servs. v. Cannon*, 453 S.W.3d 411 (Tex. 2015)

School resident's estate filed suit against the Department of Aging and Disability Services, which operated a school and several school employees asserting claims for wrongful death and survival and claims under §1983, arising out of a resident's death by asphyxiation while employee's were trying to physically restrain the resident. *Id.*

The Department and the Employee's also filed motion to dismiss the Employees pursuant to subsections 101.106(a) and (e) of the Texas Tort Claims Act. While the motion to dismiss was pending, the Plaintiff amended her petition to add claims under 42 U.S.C. §1983 for violation of the resident's (her son's) Fourth and Fourteenth Amendment constitutional rights against both the Department and the Employee individually. *Id.* In supplemental briefing on the motions to dismiss filed after Cannon amended her petition, the defendants focused solely on subsection (e) as a basis for the Employees' dismissal. *Id.*

Cannon subsequently agreed to dismiss all common-law tort claims, and the trial court dismissed those claims with prejudice. With only section 1983 claims remaining against the defendants, the trial court denied the Department's plea to the jurisdiction and denied the motions to dismiss the Employees. The Department and the Employees filed an interlocutory appeal. Tex. Civ. Prac. & Rem. Code § 51.014(a)(5), (8); *Austin State Hosp. v. Graham,* 347 S.W.3d 298, 300–01 (Tex. 2011) (per curiam).

The court of appeals reversed the trial court's order denying the Department's plea to the jurisdiction, holding that the Department's immunity from suit had not been waived. 383 S.W.3d 571, 575–76. However, the court of appeals affirmed the trial court's order denying the motions to dismiss the Employees under subsection 101.106(e), remanding the case to the trial court for further proceedings on Cannon's section 1983 claims. The court of appeals disagreed with the

Department's contention that the section 1983 claims were not properly "before the court" as a result of the Department's subsection (e) motion. *Id.* at 577–80. More specifically, the court of appeals rejected the Department's argument that, because subsection (e) provides that governmental employees shall be dismissed "immediately" upon the filing of the governmental unit's motion, the Employees were effectively dismissed at the time the motion was filed. *Id.* at 578. Instead, the court held that the Employees remained parties to the suit until the trial court signed an order dismissing them pursuant to subsection (e), permitting Cannon to amend her petition to assert the section 1983 claims. *Id.* at 578–80.

The Department argued, that an amended pleading filed while a subsection (e) motion is pending may not be considered by the trial court in ruling on the motion. Relying heavily on subsection (e)'s inclusion of the word "immediately," the Department contends that "[e]ntitlement to a mandatory, immediate dismissal thus attaches" on the government's filing a subsection (e) motion. The Department therefore concluded that subsequent amendments to a plaintiff's petition cannot defeat that perfected right. The Department recognizes, however, that actual dismissal of government employees requires a court order premised on findings that (1) the plaintiff brought suit under the Tort Claims Act, and (2) the individual defendants are employees of the governmental unit. Cannon responds that, because court action is required to effectuate dismissal of government employees, nothing in subsection (e) precludes a plaintiff from amending her petition before that dismissal in accordance with applicable procedural rules. *See* Tex. R. Civ. P. 63 (allowing parties to amend their pleadings without leave of court more than seven days before trial so long as the amendment does not "operate as a surprise to the opposite party"). Unlike the Department, the Court saw nothing in the language of subsection (e) or the Tort Claims Act that foreclosed Cannon from amending her petition to add these claims.

To that end, the Court agreed with the court of appeals that the Department placed too much stock in subsection (e)'s inclusion of the word "immediately." The court of appeals concluded that such language indicates only that "dismissal by the trial court is mandatory, not discretionary, and [that] there are no further matters the court may entertain relative to the employees before it signs an order of dismissal." 383 S.W.3d at 578. A comparison of the provision to subsection (f) provides context for this conclusion. Subsection (f) may be invoked when a suit that could have been brought under the Act against a governmental unit is filed against the unit's employee based on conduct within the general scope of his employment. *See* Tex. Civ. Prac. & Rem. Code § 101.106(f). Such a suit must be dismissed on the employee's motion "unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed." *Id.* Subsection (e) has no similar grace period, which makes sense because a subsection (e) motion is proper only when the government is already a named party. *Tex. Adjutant Gen.'s Office v. Ngakoue,* 408 S.W.3d 350, 358 (Tex. 2013).

But that does not translate to an absolute right to dismissal upon the motion's filing. Instead, a court order, along with certain findings, is required to effectuate dismissal. Accordingly, the Court here did not construe subsection (e) to conflict with earlier liberal procedural rules governing pleading amendments. The Court held that, when a governmental unit files a motion to dismiss under subsection 101.106(e), the plaintiff is not foreclosed from amending her petition in accordance with applicable procedural rules to assert claims that are not brought under the Tort Claims Act. The Court further held that such claims are properly before the court for its

consideration in ruling on the subsection (e) motion. Because Cannon's section 1983 claims against the individual Employees are not brought under the Tort Claims Act, subsection (e) does not mandate their dismissal. *Texas Dep't of Aging & Disability Servs. v. Cannon*, 453 S.W.3d 411, 419 (Tex. 2015).

F. *Fort Worth Transportation Authority v. Rodriguez,* 547 S.W.3d 830 (Tex. 2018)

In this case, Judith Peterson was walking across a street in downtown Fort Worth when she was struck and killed by a public bus driven by Leshawn Vaughn. Vaughn was an employee of McDonald Transit, Inc. (MTI), a subsidiary of McDonald Transit Associates, Inc. (MTA). Both MTA and MTI are independent contractors that operate Fort Worth's bus transportation system. Peterson's daughter, Michele Rodriguez, brought a wrongful death suit against Vaughn, FWTA, MTA, and MTI (collectively, the "Transit Defendants"). Rodriguez pled a single count of negligence against all defendants collectively, asserting a variety of acts or omissions, including: "making an improper and unsafe turn," "driving at an unsafe and excessive speed," "negligently hiring ... Defendant Vaughn," and "[f]ailing to establish and maintain safe and appropriate bus routes." *Fort Worth Transportation Auth. v. Rodriguez*, 547 S.W.3d 830, 834 (Tex. 2018), *reh'g denied* (June 22, 2018).

As noted above, Vaughn was an independent contractor working for MTI, one of the defendants. Vaughn moved for dismissal stating that she was acting within the course and scope of her employment for the governmental unit through MTI. The trial court dismissed Vaughn, but the court of appeals held that employees of private contractor are not protected by the TTCA's election of remedies provision. The Supreme Court disagreed.

The Court held that MTA and MTI can be liable "only to the extent that [FWTA] would be liable" if FWTA itself operated its own bus transportation system. *See* Tex. Transp. Code § 452.056(d). Therefore, the Court considered FWTA's potential liability with respect to an employee acting within the scope of her employment.

Under the TTCA, a governmental unit is liable for injuries caused by "the wrongful act or omission or the negligence of an employee acting within his scope of employment if: (A) the [injury] arises from the operation or use of a motor-driven vehicle ... ; and (B) the employee would be personally liable to the claimant according to Texas law." Tex. Civ. Prac. & Rem. Code § 101.021(1). Thus, the very language of the statute suggests that an employee is *not* personally liable in this context. *See id.* (" ... and the employee *would be* personally liable to the claimant ....") (emphasis added). The election-of-remedies provision confirms an employee's exemption from personal liability under the TTCA: "The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter." *Id.* § 101.106(a).

This provision was incorporated into the TTCA to prevent plaintiffs from circumventing the TTCA's damages cap by suing government employees, who were, at that time, not protected. *Garcia*, 253 S.W.3d at 656. It was expanded in 2003, as part of a comprehensive effort to reform the tort system, with the apparent purpose of forcing a plaintiff "to decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment, such that the governmental unit is vicariously liable." *Id.* at 657.

The Court further noted that Rodriguez did not allege that Vaughn acted independently and was solely liable. Instead, she has asserted that Vaughn acted within the scope of her employment

such that the Transit Defendants collectively are vicariously liable for her alleged negligence, if proven, under the doctrine of respondeat superior. Under current law, the doctrine of respondeat superior makes a principal liable for the conduct of its employee or agent. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 686 (Tex. 2007) (citing *Baptist Mem. Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex.1998)); *see also Respondeat Superior*, Black's Law Dictionary (10th ed. 2014) ("The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency."). When a plaintiff alleges liability under respondeat superior, a governmental unit's liability is predicated on the liability of its employee. *Bishop v. Tex. A&M Univ.*, 35 S.W.3d 605, 607 (Tex. 2000). Thus, the governmental unit's liability is derivative, or indirect. *DeWitt v. Harris Cty.*, 904 S.W.2d 650, 654 (Tex. 1995) (citing *Marange v. Marshall*, 402 S.W.2d 236, 239 (Tex. Civ. App.—Corpus Christi. 1966)).

The Court went on to state that this was not the first time they have, for the purpose of the TTCA, treated an employee of a private entity as an employee of the government when that employee was performing a governmental function. *See, e.g.*, *Klein v. Hernandez*, 315 S.W.3d 1, 7–8 (Tex. 2010). In *Klein*, the Court held that a resident physician working at a public hospital under an agreement with his private medical school, Baylor College of Medicine, was to be treated as a state employee for the purpose of sovereign immunity when the underlying litigation arose from his work at the hospital. *Id.* In that case, the Court reasoned that the Legislature sought to encourage private medical schools to cooperate with public hospitals through clinical education programs for their residents. *Id.* at 7. Giving effect to this intent, the Court concluded that the Legislature intended to treat these private medical schools like other governmental entities at public hospitals, "extending the same protection and benefits to Baylor and its residents who work at these hospitals." *Id.* at 8.

G. *Garza v. Harrison*, 574 S.W. 3d 389 (Tex. 2019).

In this case, an off-duty law enforcement officer fatally shot a suspect during an attempted arrest outside his primary jurisdiction. The decedent's parents sued the officer in his individual capacity for wrongful death, but the officer asserted that this was an official-capacity suit that must be dismissed under the Act.

As defined in section 101.106(f), a governmental employee is sued in an official capacity when the suit (1) is "based on conduct within the general scope of that employee's employment" and (2) "could have been brought under [the Act] against the governmental unit." Here, the trial court denied the officer's dismissal motion, citing a fact issue as to whether the officer was acting as a peace officer or as a security guard for his landlord at the time of the shooting. The court of appeals affirmed, but applied a textually unsupportable distinction in holding that, as a matter of law, the officer could not have been doing his job as a peace officer because a peace officer operating extraterritorially would merely be authorized—not obligated—to make an arrest under the extant circumstances. *Garza v. Harrison*, 574 S.W.3d 389, 393–94 (Tex. 2019).

The Supreme Court reversed the court of appeals' judgment and render judgment dismissing the suit against the officer. The scope-of-employment inquiry under section 101.106(f) focuses on whether the employee was doing his job, not the quality of the job performance. Even if work is performed wrongly or negligently, the inquiry is satisfied if, when viewed objectively, "a connection [exists] between the employee's job duties and the alleged tortious conduct." A connection exists between the defendant law enforcement officer's job responsibilities and the alleged tort because he was exercising a statutory grant of authority to make a warrantless arrest

for a crime committed in his presence—authority he possessed solely through his governmental employment. *Garza v. Harrison,* 574 S.W.3d 389, 394 (Tex. 2019).

The decedent's parents, Roxana Regalado Harrison and Joseph Santellana (collectively, the plaintiffs), sued Garza and the apartment complex in state court for wrongful death and filed a section 1983 excessive-force complaint against Garza and the City of Navasota in federal court. In the state-court lawsuit, the plaintiffs alleged Garza was working as an employee for the apartment complex at the time of the incident, and in the federal-court lawsuit, the plaintiffs alleged Garza acted under color of state law and in accordance with Navasota Police Department policies, customs, and training that were constitutionally defective.

After engaging in discovery in the state-court action, Garza filed a motion to dismiss based on the election-of-remedies provision in section 101.106(f) of the Tort Claims Act. In response, the plaintiffs did not amend their state-court pleadings to dismiss Garza and name the City of Navasota as a defendant, as section 101.106(f) allows. Instead, they argued section 101.106(f) is inapplicable because Garza was acting in the scope of his employment as a courtesy patrol officer for the apartment complex, not as a peace officer under his commission with the Navasota Police Department.

The only disputed issue before the appeals court was whether Garza was acting in the general scope of his employment as a peace officer when he shot Santellana. The court held that, as a matter of law, Garza was neither performing the duties of his employment nor a task lawfully assigned to him within the meaning of section 101.106(f). In additioan, the court of appeals raised the issue *sua sponte*, and distinguished between "an employee's ***authority*** to perform an action" and "his ***duty*** to perform an action he has been given authority to perform." The court concluded that only the latter—an obligation to act—falls within section 101.106(f)'s scope and Garza had authority, but no duty, to make an arrest under the circumstances presented. *Id.*

The court noted that article 14.03 of the Code of Criminal Procedure may have imbued Garza with authority to arrest Santellana despite being outside the Navasota Police Department's jurisdiction; however, he was not statutorily obligated to do so, and the Navasota Police Department had not specifically assigned that task to Garza. *Id.*

On petition for review to the Suprme Court, the central issue was whether section 101.106(f) extended only to a governmental employee's nondiscretionary duty to act or also encompasses authorized responsibilities, including discretionary authority statutorily conferred by virtue of a peace officer's commission. *Garza v. Harrison*, 574 S.W.3d 389, 396–97 (Tex. 2019). As such, the sole issue on appeal is whether, within the meaning of section 101.106(f), Garza acted "within the general scope of [his] employment" as a peace officer when, while off duty and outside the City's territorial jurisdiction, he confronted and attempted to arrest Santellana. Whether dismissal is required ultimately hinges on the proper construction and application of section 101.106(f).

The Court held that in attempting to arrest a suspect for a crime committed in plain view, city police officers—whether off- or on-duty and whether operating within their primary or extraterritorial jurisdiction—are acting within the general duties of their office, as statutorily conferred by and through their employment with a governmental unit. By engrafting a "duty to act" limitation, the court of appeals misconstrued a peace officer's job "duties" for purposes of section 101.106(f) and applied a standard that is incompatible with an objective scope-of-employment analysis. *Garza v. Harrison*, 574 S.W.3d 389, 401 (Tex. 2019).

As explained in *Laverie v. Wetherbe,* 517 S.W. 3d 748 (Tex. 2017), which was issued after the court of appeals decided this case, the critical inquiry is whether, when viewed objectively, "a connection [exists] between the employee's job duties and the alleged tortious conduct." Simply stated, a governmental employee is discharging generally assigned job duties if the employee was doing his job at the time of the alleged tort. For purposes of section 101.106(f), the employee's state of mind, motives, and competency are irrelevant so long as the conduct itself was pursuant to the employee's job responsibilities. *Garza v. Harrison,* 574 S.W.3d 389, 401 (Tex. 2019).

In so holding, the Court rejected the duty-versus-authority dichotomy the court of appeals employed. Accordingly, the court held that section 101.106(f) of the Civil Practice and Remedies Code cannot reasonably be construed as fencing out job responsibilities and tasks that are within a valid grant of authority to a governmental employee because of the employee's official capacity. "Barring contrary indicators in the Tort Claims Act—and we find none—we must presume the Legislature knew that 'our longstanding approach to the scope-of-employment analysis' focuses on an objective assessment of whether the employee's acts are 'of the same general nature as the conduct authorized or incidental to the conduct authorized to be within the scope of employment.'" *Id.* at 405. A narrow approach limiting the scope of employment for peace officers only to mandates from an employer or strict legal directives in the Code of Criminal Procedure would run counter to the broad construction of section 101.106(f) the Court has articulated in other cases. *Garza v. Harrison*, 574 S.W.3d 389, 404–05 (Tex. 2019).