# APPLICATION OF SECTION 101.106 OF THE TEXAS TORT CLAIMS ACT

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**CHAPTER 15**

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Mr. Noga's current practice involves a variety of defense work and focuses on representation of diverse governmental and corporate entities with a particular emphasis on defending Texas municipalities, police and fire departments, and other government agencies in various civil rights, land use and planning, employment and tort actions. Mr. Noga also represents such entities and other clients in civil service and other municipal matters. His experience has led to him being named panel counsel for the Texas Municipal League

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*Guillaume v. Greenville* - Texas Whistleblower Act claim - Won Motion for Summary Judgment
*Jim Sowell Construction Company vs. City of Coppell* - Federal Fair Housing Act claims - won federal trial
*I.H.S. Cedars Treatment Center of Desoto, Texas, Inc., et al. v. Ramos, Jr., M.D., et al. v. Jodi Marie Mason, Individually and as next friend of Ashley Ladon Mansfield, a Minor, and as Next Friend of Courtney Marie Mason, a Minor, and Karen Rudd, Respondents* - Supreme Court of Texas, 2004 Tex. LEXIS 534; 47 Tex. Sup. J. 666 - Argued before the Texas Supreme Court in conjunction with co-defendant's counsel and won case
*Forney Messenger, Inc. and Cary L. Griffin v. City of Forney* - First Amendment retaliation allegations - won federal trial
*Jerry R. Brown v. Dinerstein Management, Inc., et al.* - Premises Liability - won state trial
*Kristen G. Borth v. City of Cedar Hill, Texas* - Employment Discrimination (in testing) against Fire Department - won federal trial
*David Rigney v. City of Rowlett* - Employment termination: Won Motion for Summary Judgment in both state and subsequent federal suits.

**Articles:**
*"Seven Deadly Sins to Avoid in Collective Bargaining"*
Seminar: 2010 - Elected Officials' Conference, Texas Municipal League and Association of Mayors, Council Members and Commissioners (AMCC)
*"Hot Topics in Damages"*
Seminar: 2009 - Suing and Defending Governmental Entities, State Bar of Texas Faculty Member and Member of the State Bar Planning Committee
Seminar: 2009 Workshop, Texas Municipal League Intergovernmental Risk Pool
*"An Illusion of Privacy? Exploring Recent Employee Confidentiality Issues and Related Recent Legislative and Legal Developments"*
Seminar: 2009 - Texas Municipal Human Resources Administration Employment Law Seminar
*"Reemployment & Mitigation in Calculating Back & Front Pay Losses"*
Seminar: 2008 Workshop, Texas Municipal League Intergovernmental Risk Pool
*"Pleas to the Jurisdiction"*
Seminar: 2006 Suing and Defending Governmental Entities, State Bar of Texas
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*"Use of Experts: Qualifying, Damages and Getting Ready for Depositions"*
Seminar: 2005 Workshop, Texas Municipal League Intergovernmental Risk Pool

*"Handling Texas Claims Involving Governmental Entities"*
Seminar: Fee, Smith, Sharp & Vitullo Client Seminar, June, 2005
*"Defending Fair Housing Act Claims and HUD Complaints"*
Seminar: Southwestern Legal Foundation, June, 2002
*"Removal Practice"*
Seminar: Federal Bar Association, March, 2002
*"Defending Fair Housing Act Claims and HUD Complaints"*
Seminar: Southwestern Legal Foundation, June, 2001
*"Fair Housing Act and HUD Litigation"*
Seminar: Southwestern Legal Foundation, June, 2000
*"So You Call Them Junk! Excluding Them, Including Them: The world of Experts"*
Seminar: 1998 Suing & Defending Governmental Entities, State Bar of Texas
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*"The Federal Fair Housing Act and HUD Complaints"*
Seminar: Southwestern Legal Foundation, June, 1998
*"Handling a Trio of Management Issues: Reasonable Accommodation, Leave and Return to Work Under Current Law"*
Seminar: Employment 101, Texas Municipal League, October, 1998
*"Ethical Considerations In Defending Government Entities, Particularly in Employment Cases, Including a Discussion of Spoliation Issues"*
Seminar: Texas City Attorneys' Association, Fall Conference, October, 1998
*"Title IX Exposure of Texas Schools"*
Seminar: State Bar School Law Section - 1997 Summer Retreat
*"Defending Police Excessive Force Cases"*
Seminar: Texas City Attorneys' Association
*"Where's My Dancing Partner?"*
Seminar: Third Party Practice in Texas
*"Frivolous Lawsuits in State and Federal Courts"*
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# MICHAEL MERRICK

Michael Merrick maintains a varied practice as an Attorney with Fee, Smith, Sharp & Vitullo, L.L.P. This variety allows him to represent companies and individuals in a wide array of disputes in federal and state courts throughout Texas.

Prior to joining the firm in 2008, Mr. Merrick practiced with two respected litigation boutiques in Dallas, Texas. Mr. Merrick gained practical litigation experience in the areas of medical negligence, premises liability, construction defect, insurance coverage, municipal defense, Uniform Commercial Code and lien disputes, breach of contract and related business disputes, and commercial collection. Mr. Merrick also gained invaluable appellate experience as briefing counsel in disputes regarding the scopes of the Tort Claims Act and Trust Fund Act.

Mr. Merrick's experience to date has allowed him to quickly assess the claims brought against his clients. He concentrates on implementing strategies that capture and reinforce the "big picture: themes of each lawsuit to obtain the best possible results for clients. Coupled with the solid training he received at Baylor Law School, Mr. Merrick's trial and appellate experience provides clients with effective, no-nonsense representation during each stage of a case, be it during pre-trial discovery, negotiation, mediation, and at trial.

While in law school, Mr. Merrick was a member of the Harvey M. Ritchie Moot Court Society and actively participated in moot court competitions. Mr. Merrick continues to maintain an active lifestyle these days by getting outdoors to swim, scuba, and skydive.

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*City of Paris v. Floyd* — prepared interlocutory appeal requesting reversal of lower court's denial of City's plea to the jurisdiction

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# APPLICATION OF SECTION 101.106 OF THE TEXAS TORT CLAIM ACT

## I. INTRODUCTION

Conceptually, section 101.106 of the Texas Tort Claims Act is a logical extension of the United States Supreme Court's reasoning in Kentucky v. Graham. 473 U.S. 159 (1985). In Kentucky v. Graham, the U.S. Supreme Court pointed out that suits against governmental employees or officials sued in their "official capacity" should be dismissed, as such claims were synonymous with suing the governmental entities themselves. After all, if a plaintiff was complaining about what essentially was an act on behalf of a governmental entity, and in supposed furtherance of governmental business, then suing, for example, a city and its code enforcement officer based on the same underlying events was redundant.

Indeed, since such claims were generally also predicated on some sort of vicarious liability analysis, it made sense for the Graham Court to focus on the overlap between government employer and government employee, and not to distinguish between the two. Recall in this context that we are generally not dealing with an ultra vires situation where the individual employee is acting outside the scope of his or her authority and at odds with the government employer's directives and purpose. See, e.g., City of El Paso v. Heinrich, 284 S.W.3d 366, 372-73 (Tex. 2009). Rather, in section 101.106 cases, as with the Kentucky v. Graham analysis, we are instead typically dealing with a common underlying fact pattern under which a plaintiff seeks to hold both a governmental entity and its employee liable.

As we will see, Texas Courts have taken section 101.106, as handed to them by the Texas Legislature and have utilized this statute to streamline cases, remove duplicative claims and redundant parties, and attempt to effectuate the legislative mandate to force a plaintiff to irrevocably choose to sue either the government entity or the employee, but not both. As this paper discusses, such approach swept aside plaintiffs' attempts to avoid this legislative mandate by alleging "individual" capacity claims, or by trying to argue different legal theories against government employer and employee, despite the same underlying facts. Such judicial approach and related Texas Supreme Court directives gave defense counsel a valuable tool in their strategic and tactical arsenal. However, as is the norm with the passage of time, things change. What once was rather straightforward is now somewhat ambiguous, and Texas courts have started to diverge in application and understanding of section 101.106. Such divergence is primarily linked to whether or not courts consider section 101.106 to be a jurisdictional bar. For this current state of affairs we largely have our friends and colleagues in Houston to thank.

With that backdrop, this paper will provide the practitioner with an overview of the history and scope of section 101.106, its link to the strategic use of Pleas to the Jurisdiction, its treatment by the Texas Supreme Court, and the attempts by lower courts to apply section 101.106.

## II. SECTION 101.106 AND ITS HISTORY

### A. Section 101.106 and its Purpose

Historically, and typically today, the government was deemed immune from suit. As noted in a Mel Brooks' comedy, "It's good to be King." However, in Texas, the Tort Claims Act later afforded claimants a limited waiver of sovereign or governmental immunity—the key word being "limited."

Claimants have since gone to great lengths to avoid the Tort Claims Act's restrictions since its inception. A preferred method was to sue an employee of the governmental entity instead of the entity itself. Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 656 (Tex. 2008). In 1985 the Legislature added a provision to the Tort Claims Act that prevented claimants from suing governmental employees after settlement or a final adjudication of claims against the employer when the claims involved the same underlying conduct. Act of May 17, 1985, 69th Leg., R.S. ch. 959, § 1, 1985 Tex. Gen. Laws 3242 (current version at Tex. Civ. Prac. & Rem. Code Ann. § 101.106 (Vernon 2011)). Claimants, however, remained undaunted. They continued to sue both the governmental entity and employee, and in many instances they alleged that the employee had been acting outside the course and scope of his employment. Garcia, 253 S.W.3d at 656.

The result of this artful pleading was a demonstrable increase in litigation costs for governmental entities. Id. The Legislature attempted to resolve this issue by amending section 101.106 in 2003. These amendments were designed to force claimants to make an important (and irrevocable) decision at the outset of the case. Id. at 657. The claimants had to decide whether the government employee acted independently or within the general scope of his employment. Id. The employee who acted independently would be solely liable for the claim, whereas the employee who acted within the scope of his employment invoked vicarious liability for the governmental entity. Id. Forcing such choice effectively reduced the resources the entity and its employees had to expend by minimizing redundant litigation and alternative theories of recovery. Id.

That amended provision is entitled "Election of Remedies." Tex. Civ. Prac. & Rem. Code Ann. § 101.106. Under this section, a claimant's filing of suit acts as a binding and irrevocable election between

pursuing his tort claims against the governmental entity and pursuing them against the employee individually. Id. Section 101.106 states:

> (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 an 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 against 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[1] 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.

Id.

This election-of-remedies provision imposes "irrevocable consequences" on a claimant's decision regarding whom to sue, such that a claimant "must proceed cautiously before filing suit and carefully consider whether to seek relief from the governmental unit or from the employee individually." Garcia, 253 S.W.3d at 657.

### B. Pleas to the Jurisdiction

Tactically, section 101.106 arguments stem from concepts of sovereign or governmental immunity and are typically raised in a Plea to the Jurisdiction and Motion to Dismiss.

Sovereign immunity is a doctrine intended primarily to allow proper expression of legislatively delegated governmental policy decisions and actions, and also to protect the public treasury provided by taxpayers. As such, the doctrine generally shields the state, its agencies, and its officials from lawsuits for damages. Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 374 (Tex. 2006); Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 690, 696 (Tex. App.—Houston [1st Dist.] 2009, no pet.). Governmental immunity is a related concept that protects subdivisions of the state, such as counties, cities, and school districts, from lawsuits for damages. Harris County Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 842 (Tex. 2009). For the purposes of this paper, we will refer to both concepts collectively as "sovereign immunity" unless otherwise noted.

Sovereign immunity is a "double shield" that encompasses two distinct concepts: (1) immunity from suit and (2) immunity from liability. Travis County v. Pelzel & Assocs., 77 S.W.3d 246, 248 (Tex. 2002); Leach v. Tex. Tech Univ., 335 S.W.3d 386, 392 (Tex. App.—Amarillo 2011, pet. denied). This paper's primary focus is on the former concept. Immunity from suit bars legal actions against a governmental entity unless the legislature expressly gives its consent to suit. Fed. Sign v. Texas S. Univ., 951 S.W.2d 401, 405 (Tex. 1997). One statute that creates a limited waiver of this immunity is the Tort Claims Act. See

[1] The Tort Claims Act defines "scope of employment" as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in an about the performance of a task lawfully assigned to an employee by competent authority." Tex. Civ. Prac. & Rem. Code Ann. § 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. Civ. App.—Tyler 1977, writ ref'd n.r.e.).

Tex. Civ. Prac. & Rem. Code Ann. §§ 101.001-.109. The Tort Claims Act "is the only, albeit limited, avenue for common law recovery against the government," and governs all tort claims asserted against a governmental entity. Garcia, 253 S.W.3d at 659.

Immunity from suit deprives a court of subject matter jurisdiction and is properly raised in a plea to the jurisdiction. City of Waco v. Lopez, 259 S.W.3d 147, 150 (Tex. 2008).[2]

A plea to the jurisdiction challenges the trial court's authority to entertain the subject matter of the cause of action. City of Mont Belvieu v. Enter. Prods. Operating, L.P., 222 S.W.3d 515, 518 (Tex. App.—Houston [14th Dist.] 2007, no pet.). Subject matter jurisdiction is a question of law. Id. Courts may not weigh the merits of the claim, but must consider only the claimant's pleadings and the evidence pertinent to the jurisdictional inquiry. See Tex. Natural Res. Conservation Comm'n v. White, 46 S.W.3d 864, 868 (Tex. 2001); Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554-55 (Tex. 2000). The party asserting the plea must show that, even if all of the allegations in the claimant's pleadings are taken as true, an incurable jurisdictional defect appears on the face of the pleadings, rendering it impossible for claimant's petition to confer jurisdiction on the trial court. City of Mont Belvieu, 222 S.W.3d at 518.

If the claimant fails to plead sufficient facts affirmatively demonstrating the trial court's jurisdiction, but the pleadings do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the claimant should be afforded the opportunity to amend. Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226-27 (Tex. 2004); County of Cameron v. Brown, 80 S.W.3d 549, 555 (Tex. 2002). However, if the pleadings affirmatively negate the existence of jurisdiction, a court may grant the plea to the jurisdiction without allowing the claimant an opportunity to amend. Id.

If the plea to the jurisdiction challenges the existence of jurisdictional facts, a court may consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised. Miranda, 133 S.W.3d at 226-27. If the evidence creates a fact question regarding the jurisdictional issue, then the court must deny the plea to the jurisdiction. Id. at 227-28.

Section 101.106 should be used in this context. It is requirements (arguably) appear to create a jurisdictional threshold, and it is intended to secure prompt dismissal of certain claims which do not pass that threshold.

## III. THE SUPREME COURT OF TEXAS MOLDS SECTION 101.106

### A. The Court Considers the 2003 Amendments to the Tort Claims Act

Mission Consolidated Independent School District v. Garcia was the first notable decision that addressed the 2003 amendments to the Tort Claims Act. 253 S.W.3d 653 (Tex. 2008). In Garcia, three long-time employees of the Mission Consolidated Independent School District ("MCISD") filed identical lawsuits against the District and the District's Superintendent (these lawsuits were consolidated on appeal). Id. at 654-55. The plaintiffs sued MCISD for discriminatory wrongful discharge in violation of the Texas Commission on Human Rights Act ("TCHRA"). Id. at 655. The plaintiffs sued MCISD and the Superintendent for intentional infliction of emotional distress. Id. Finally, the plaintiffs sued the Superintendent individually for defamation, fraud, and negligent misrepresentation. Id.

MCISD filed pleas to the jurisdiction contending that the plaintiffs' decision to sue both it and the Superintendent barred a recovery from MCISD under section 101.106 of the Tort Claims Act. Id. The trial court denied MCISD's pleas, and the court of appeals affirmed, each concluding that no subsection of section 101.106 applied. Id. at 657. The court of appeals reasoned that subsection (a) of section 101.106 applied only when the governmental unit alone is sued, and that subsection (b) applied only when the employee alone is sued. Id. at 657-68. Subsection (e) appeared to apply, as both the employee and governmental unit were sued simultaneously, but the court of appeals further construed subsection (e), specifically the phrase "suit[s] . . . filed under this chapter," to mean that section 101.106 applied only if the suit was one for which the Tort Claims Act actually waived immunity. Id. at 658. Accordingly, section 101.106 did not apply because the THCRA and intentional infliction of

[2] Immunity from liability, on the other hand, is an affirmative defense that protects a governmental entity from judgments, even if the legislature has expressly given its consent to suit. *Kinnear v. Tex. Comm'n on Human Rights*, 14 S.W.3d 299, 300 (Tex. 2000); *Fed. Sign*, 951 S.W.2d at 405. "Express consent" for all intent and purposes means a waiver of immunity through clear and unambiguous language. *Harris County Hosp. Dist.*, 283 S.W.3d at 842-43 (citing Tex. Gov't Code Ann. § 311.034 (Vernon 2007) ("[A] statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language.")); *cf. Tooke v. City of Mexia*, 197 S.W.3d 325, 337 (Tex. 2006) (when an entity's enacting statute provides that an entity may "sue and be sued," whether the phrase reflects legislative intent to waive immunity must be determined from the language's context). The courts recognize that there is a "heavy presumption in favor of immunity." *Nueces County v. San Patricio County*, 246 S.W.3d 651, 653 (Tex. 2008) (quoting *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007)).

emotional distress claims against MCISD were not ones for which the Act waived immunity. Id.

The Supreme Court granted MCISD's petitions to determine the scope of section 101.106's election-of-remedies scheme. Id. at 655. The Court first noted that the Tort Claims Act provided a limited waiver of immunity. Id. This waiver was most often visible where the claims arose from the "use of a motor-driven vehicle or motor-driven equipment" or from "a condition or use of tangible personal or real property." Id. at 655-56 (quoting Tex. Civ. Prac. & Rem. Code Ann. § 101.021).[3] The Court next noted that, in instances where it did provide a limited waiver of immunity, the election-of-remedies scheme barred a claimant from seeking a recovery against an individual employee in three instances: "(1) when suit is filed against the governmental unit only; (2) when suit is filed against both the governmental unit and its employee; 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. at 657 (internal citations omitted). When suit was filed against the employee, recovery against the governmental entity regarding "the same subject matter" was barred unless the government had consented to suit. Id. (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.106(b)).

The Court then took note of the reasoning of the court of appeals. The court of appeals had held that section 101.106(e) could 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 Court disagreed. It reminded the parties (and lower courts) that it had never interpreted the phrase "under this chapter" to only encompass tort claims that were subject to the Act. Id. Indeed, the Act was the only avenue for common-law recovery against the government, so all tort theories alleged against a governmental entity, whether or not it had been sued alone, were assumed to be under the Act for purposes of section 101.106. Id. at 659. Thus, section 101.106(e) applied to the plaintiffs' tort claims.[4]

The Court then examined subsection (e)'s effect on an as-applied basis. It noted that the Superintendent would have been entitled to a dismissal of the claims against him had MCISD moved for dismissal. Id. However, MCISD did not move for dismissal and the Superintendent did not seek his own dismissal under subsection (f). Id. Had MCISD obtained the Superintendent's dismissal, though, 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. (quoting Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e)). Of course, the Court noted that the claims under the TCHRA would not come within subsection (e)'s purview because the Act's remedies "are in addition to any other legal remedies," and the TCHRA provides a statutory remedy for unlawful discrimination. Id. (quoting Tex. Civ. Prac. & Rem. Code Ann. § 101.003). This meant that the only claim that would survive application of section 101.106(e) would be the TCHRA claim.

The Court further noted that MCISD had presented section 101.106(b) as a basis for dismissal on the ground that it barred the entire lawsuit. Id. MCISD contended that subsection (b) barred "any suit" regarding the same subject matter if the claimant brought suit against an employee of the governmental entity. Id. MCISD reasoned, then, that the entire lawsuit against it—including the TCHRA suit—was barred because the Superintendent had been sued, as well. Id.

The Court agreed that, to the extent subsection (b) applied, it barred any suit against a governmental entity regarding the same subject matter, even those suits for which the Tort Claims Act did not apply. Id. at 659. Subsection (b) did not contain the limiting phrase "under this chapter" found in subsections (a), (c), (e), and (f), so by its literal terms it applied to "any suit," "provided the other subsection (b) requirements are met." Id. (emphasis added). The Court disagreed, however, with MCISD's contention that subsection (b) barred the entire lawsuit. The plain language of subsection (b) created an exception, for instance where "the governmental unit consents" to the suit. Id. (quoting Tex. Civ. Prac. & Rem. Code Ann. § 101.106(b)). Governmental entities convey their consent to suit "through the Constitution and state laws," so any clear and unambiguous waiver of immunity, like the one found in the TCHRA, would prevent subsection (b) from acting as a bar to suit on that particular claim. Id. Thus, the Court held that suit on the TCHRA claim could proceed.

### B. The Court Expands its Review to Subsection (f)

Garcia and later cases applying that decision culminated in the Supreme Court's January 21, 2011 opinion in Franka v. Velasquez. 332 S.W.3d 367 (Tex.

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[3] The Court also noted that the Tort Claims Act's waiver of immunity was even narrower for school districts, encompassing only tort claims involving the use or operation of motor vehicles. *Id.* at 656 (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.051).

[4] *See, e.g., Singleton v. Casteel*, 267 S.W.3d 547, 553-54 (Tex. App.—Houston [14th Dist.] 2008, pet. denied), where the plaintiff's argument that his claims against police officers for intentional tort were not ones for which the Tort Claims Act waived immunity (and thus were not "filed" under the Act) was deemed without merit and the intentional tort claims against the officers dismissed under section 101.106(e).

2011). At issue in Franka was whether a government employee must establish that the employing entity's immunity from suit had been waived before the employee could secure dismissal under section 101.106(f). In Franka, parents brought medical malpractice claims against two physicians for injuries their newborn child sustained during delivery.[5] Id. at 369. The delivery occurred at University Hospital, a public teaching hospital owned and operated by the Bexar County Hospital District, although the physicians were employed by UTHSCSA. Id. at 370. The physicians moved for summary judgment pursuant to section 101.106(f). Id.

In response, the plaintiffs acknowledged the physicians' employment status and that the suit was based on conduct within their general scope of employment. Id. The plaintiffs contested dismissal, however, on the ground that the physicians had the burden of proving the suit "could have been brought under" the Tort Claims Act. To discharge that burden, the physicians had to offer evidence that UTHSCSA's immunity had been waived. Id. The only basis for a waiver, plaintiffs argued, was that the injuries had been "caused by a condition or use of tangible personal . . . property" under section 101.021, and that nothing appeared to implicate the use or misuse of tangible personal property in the case. Id.

The trial court denied the motion for summary judgment and the court of appeals affirmed. Id. at 371. For the court of appeals,

> [t]he raising of a fact issue as to whether the suit "could have been brought under this chapter against the government unit" should be sufficient to enable a trial court to dismiss employees under section 101.106(f) . . . is untenable in view of its potential result. If the employees were dismissed and immunity was ultimately held not to have been waived, the plaintiffs would be left without a remedy. Just as a plea to the jurisdiction cannot be granted, thereby resulting in the dismissal of a lawsuit, when a fact issue exists, a trial court also is not permitted to dismiss employees from a lawsuit under section 101.106(f) if a fact issue exists with regard to whether the governmental unit's immunity is waived. When such a fact issue exists, the employees have failed to establish that the suit "could have been [brought] under this chapter against the governmental unit."

Id. (quoting Franka v. Velasquez, 216 S.W.3d 409, 413 (Tex. App.—San Antonio 2006), rev'd, 332 S.W.3d 367 (Tex. 2011)). Thus, the court of appeals reasoned that suit could not have been brought under the Tort Claims Act unless, as a matter of law, the Act waived UTHSCSA's immunity from suit. Id. at 375.

The Supreme Court disagreed. Instead, it explained that for purposes of section 101.106(f), suit "could have been brought" under the Tort Claims Act against the government unit regardless of whether the Act waived governmental immunity from suit. Id. Further, government employees did not have to prove the government unit had waived immunity before they could obtain dismissal of a tort action based upon conduct that was within the general scope of their employment. Id. The Court then reversed and remanded the case to the trial court. Id.

Before it reversed and remanded the case, the Court offered four reasons to support its holding. First, this construction was consistent with legislative changes effected via House Bill 4. Id. at 382-85. Second, the Court cited with approval to its prior holding in Garcia, which addressed the scope of section 101.106(e). Id. at 378. It noted that it had never interpreted the phrase "under this chapter" to only encompass tort claims for which the Tort Claims Act waives immunity, so all tort theories alleged against a governmental unit, no matter how it is sued, are assumed to be "under [the Tort Claims Act]" for purposes of section 101.106. Id.

Third, the Court noted that other sections of the Act made it plain that suits brought "under" the Act included suits for which immunity had not been waived. Id. at 379. Section 101.102 ("Commencement of Suit"), for example, was a venue provision that addressed where suits brought "under this chapter" must be filed. Id. If the Act applied only to suits for which immunity had been waived, the Court questioned whether suits for which there was no waiver of immunity under the Act could be brought anywhere. Id. These examples served to illustrate "that suit is brought under the Act when it is filed, not when waiver of immunity by the Act is established." Id. at 380 (emphasis added). Accordingly, subsection (f)

[5] The baby's fetal heart rate had slowed, and the physicians thought it best to attempt delivery facilitated by a vacuum extractor, an instrument that attaches to the top of a baby's head, helping move it through the birth canal. The head appeared and the extractor was removed, but delivery of the baby's front shoulder was obstructed, a relatively infrequent but well-recognized obstetric emergency known as shoulder dystocia. The physicians attempted to free the baby's shoulder with their hands, but just as it appeared, the physicians heard a snap that they knew meant a bone had broken. The baby's left clavicle was fractured, and he suffered injury to his brachial plexus, requiring surgery several months later. *Franka*, 332 S.W.3d at 370.

was governed by the same rule the Court applied in Garcia.[6] Id.

Fourth, the Supreme Court noted that the court of appeals' ruling would pose practical problems. Id. One such problem would be that it would "incentivize conflict" between the employee and government unit on the issue of whether the unit has waived immunity. Id. Certainly the unit would argue against such a waiver. See id. The claimant, similarly, may be forced into arguing the same position, effectively forcing him to abandon a potential path to recovery. Id. The construction applied by Garcia ensured that, where the two conditions of subsection (f) were met (that is, action within the general scope of employment and the claim "is in tort and not under another statute that independently waives immunity), the suit "is considered to be against the employee in the employee's official capacity only," and he must promptly dismiss the employee and sue the unit.[7] Id. Thus, "[t]he immunity issue need not be determined until the governmental unit is in the suit and the issue can be fully addressed."[8] Id.

### C. Conflicts with Other Statutes

The Texas Supreme Court then tackled the effect of the election-of-remedies scheme on limitations in University of Texas Health Science Center at San Antonio v. Bailey. 332 S.W.3d 395 (Tex. 2011). There, the plaintiffs brought a medical malpractice claim against a physician employed by UTHSCSA, a governmental unit. Id. at 397. They did not sue UTHSCSA. Id. Several weeks after limitations had run, the physician filed a motion to dismiss based on subsection (f). Id. The motion asked the court to order the plaintiffs to substitute UTHSCSA as the defendant. Id. The plaintiffs contended that they had sued the physician in his individual capacity, even though his actions occurred within the general scope of his employment. Id. Nevertheless, the court subsequently ordered the suit against the physician dismissed with prejudice unless the plaintiffs amended their pleadings to substitute in UTHSCSA. Id.

The plaintiffs complied. Id. After answering, UTHSCSA filed a motion for summary judgment contending that limitations had run and that the relation-back doctrine did not apply. Id. at *399. The Supreme Court agreed that the relation-back doctrine did not apply. Id. at *401. However, the Court noted that any discussion of limitations and the doctrine was unnecessary because the plaintiffs effectively sued UTHSCSA when they sued the physician. Id. Section 101.106(f) provided that when a government employee has been sued for conduct within the scope of his employment, and the employer could have been sued under the Act—in tort, that is—"the suit is considered to be against the employee in the employee's official capacity only." Id. (quoting Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f)). So while the plaintiffs may have intended to sue the physician in his individual capacity, subsection (f) did not allow them that choice. Id. It also did not matter whether they were aware of the physician's employment at the time of suit; only the fact of his employment, eventually established, was important. Id. Substitution of UTHSCSA was not automatic—the physician had to file a motion—but subsection (f) did not require a motion for the employee "to be considered to have been sued in his official capacity." Id. Accordingly, the suit "was, in all respects other than name, a suit against" UTHSCSA, so when it was substituted in there was no change in the real party in interest. Id. at *402. Consequently, UTHSCSA could not prevail on its limitations defense. Id.

The Supreme Court also addressed related procedural problems caused by Section 101.106 application in Austin State Hospital v. Graham. 347 S.W.3d 298 (Tex. 2011) (per curiam). In Graham, the plaintiff brought health care liability claims against a state hospital and two physicians. Id. at 299. The hospital moved to dismiss the claims against the

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[6] "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 [*Garcia*], 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." *Id.*

[7] The Court also noted that its construction of subsection (f) did foreclose suit against a governmental employee in his individual capacity if he was acting within the course and scope of his employment. *Id.*

[8] The Court subsequently reversed and remanded a number of cases on the same date that it issued *Franka*. *See, e.g., Nealon v. Williams*, 332 S.W.3d 364 (Tex. 2011) (per curiam); *Escalante v. Rowan*, 332 S.W.3d 365 (Tex. 2011) (per curiam); *Leonard v. Glenn*, 332 S.W.3d 403 (Tex. 2011) (per curiam). Each case involved physicians who had moved for dismissal of health care liability claims under section 101.106(f). *Id.* In each case the Court noted its holding in *Franka* that, "for purposes of [subsection (f)], a tort action is brought 'under' the [Tort Claims Act], even if the government has not waived its immunity for such actions." *Id.* The courts of appeals acknowledged this change in jurisprudence on remand. *See, e.g., Illoh v. Carroll*, No. 14-09-01001-CV, 2012 WL 1570991, at *3 (Tex. App.—Houston [14th Dist.] May 3, 2012, no pet. h.) ("Nevertheless, in *Franka*, the supreme court disagreed, concluding that for purposes of section 101.106(f), a tort action "could have been brought under" the [Tort Claims Act] even if the tort action does not fall within the [Tort Claims Act's] limited waiver of immunity.")

physicians under section 101.106(e). Id. The physicians also moved to dismiss under section 101.016(a) and (e). Id. The plaintiff then non-suited the hospital, asserting that its motion to dismiss was thereby mooted. Id. The hospital and physicians objected, arguing that the non-suit could not be used to defeat the hospital's statutory right to an immediate dismissal of the physicians. Id.

The trial court denied the physician's motion and did not rule on the hospital's motion. Id. The hospital and physicians appealed, and the court of appeals concluded that it lacked jurisdiction over the appeal. Id. at 300. The Supreme Court, after finding that an appeal could be taken under the circumstances, held that the non-suit could not preclude a ruling on the hospital's motion to dismiss. Id. at 301. The language of section 101.106(e) was mandatory in that, upon the filing of a motion by the governmental unit, the employees "shall immediately be dismissed." Id. (quoting Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e) (emphasis added)). The non-suit could not "prejudice the right of an adverse party to be heard on a pending claim for affirmative relief." Id. (quoting Tex. R. Civ. P. 162). Accordingly, the doctors were entitled to an immediate dismissal once the hospital filed its motion. Id.

## IV. THE LOWER COURTS AND SUPREME COURT PRECEDENT

### A. Initial Applications of Precedent

The Texas Supreme Court's analysis in Garcia served as the template for subsequent appellate decisions that addressed the scope of section 101.106. For instance, the Fort Worth Court of Appeals in Texas Bay Cherry Hill, L.P. v. City of Fort Worth confronted whether a Tort Claims Act suit against a governmental unit barred a same-subject-matter suit against an employee in both the employee's official and individual capacities. 257 S.W.3d 379 (Tex. App.—Fort Worth 2008, no pet.). In Cherry Hill the owner of an apartment complex being targeted for redevelopment by the City brought suit against the City and a City Council member, alleging that they conspired to diminish the complex's value by disparaging Plaintiff and tortiously interfering with its business relationships. Id. at 387. The City filed a plea to the jurisdiction and motion to dismiss the City Council member pursuant to section 101.106(a) and (e). Id. at 397. The trial court granted the plea and motion, dismissing the City Council member. Id. at 387.

The plaintiff appealed, contending the trial court erred because the Council member had been sued in her individual—as opposed to official—capacity, and because the claims were not brought under the Tort Claims Act.[9] Id. at 399. The Court of Appeals, applying Garcia, disagreed, finding that (1) whether a claimant sues a governmental employee in her official or individual capacity is irrelevant, and (2) all tort theories alleged against a governmental entity are assumed to be claims under the Tort Claims Act for purposes of section 101.106. Id. (citing Garcia, 253 S.W.3d at 656-60).

Taking the last point first, the Court examined the Garcia opinion and strictly applied its holding that "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].'" Id. at 400. It did not matter if a claimant failed to invoke or refer to the Tort Claims Act in its pleadings so long as the tort claims were directed against the governmental entity. Id. Thus, subsection (e) compelled dismissal of the owner's claims against the City Council member "assuming the other requirements of section 101.106" had been met. Id.

The Court next examined whether the capacity in which the employee had been sued mattered under section 101.106(a) and (e). The plaintiff argued that it did, as suit against a governmental employee in her individual capacity seeks to impose personal liability on the employee, as opposed to liability on the governmental entity itself. Id. (citing Hidalgo County v. Gonzalez, 128 S.W.3d 788, 793 (Tex. App.—Corpus Christi 2004, no pet.)). The Court disagreed. It first noted that subsection (a) expressly provided that "[t]he 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. (quoting Tex. Civ. Prac. & Rem. Code Ann. § 101.106(a) (emphasis in original)). The Court found the inclusion of the phrase "under this chapter" significant as it was omitted from subsection (b),[10] which applies to suits against an employee in both the employee's official capacity and individual capacity. Id. at 400-01. The phrase also modified "suit . . . against a governmental unit," as opposed to "suit . . . against any individual employee." Id. Further, giving the words "any suit" their plain meaning, the Court had

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[9] A related issue on appeal was whether the Council member was an "employee" under the Tort Claims Act. *Id.* at 398. The Court of Appeals concluded that she met the Tort Claims Act's definition of "employee." *Id.* at 398-99.

[10] "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." Tex. Civ. Prac. & Rem. Code Ann. § 101.106(b).

to conclude that any same-subject-matter suit against an employee was barred, regardless of capacity. Id. at 401. The inclusion of the modifier "individual" before the word "employee" reinforced this reading. Id. Finally, the allegations arose from the same alleged facts, so the suit involved the same subject matter, so the Court affirmed the trial court's judgment. Id.

Many other cases illustrate just how settled application of subsection (e) became since Garcia. For example, in the case of City of Webster v. Myers, the plaintiff sued the City and seven City employees, alleging conspiracy against the employees and City and multiple constitutional violations against the City. 360 S.W.3d 51, 53 (Tex. App.—Houston [1st Dist. 2011, pet. denied). The City moved to dismiss its employees under section 101.106(e) because the conspiracy claim qualified as a claim "under" the Tort Claims Act. Id. at 58. The plaintiff responded that he sued the employees in their individual capacities, and that he only alleged constitutional claims against the City that do not fall under the Act. Id.

The Court first recognized that subsection (e) did not require dismissal of an employee where the plaintiff sued the employee for common law tort claims and sued the governmental unit only for statutory claims, but only if the tort and statutory claims were based on distinct conduct. Id. at 59 (citing Kelemen v. Elliott, 260 S.W.3d 51, 522 (Tex. App.—Houston [1st Dist.] 2008, no pet.). Here, however, the claims seeking damages for alleged constitutional violations were "under" the Act for purposes of section 101.106. Id. at 60 (citing City of Arlington v. Randall, 301 S.W.3d 896, 903 (Tex. App.—Fort Worth 2009, pet. denied). Further, the plaintiff's claims, although framed as constitutional, were supported by allegations that the City had adopted and ratified the employees' tortious acts, so it was clear that common factual allegations were involved, that his claims fell under the Act, and that dismissal pursuant to subsection (e) was proper. Id. at 60.

Another notable case is City of Houston v. Government Employee Insurance Company, No. 01-11-00173-CV, 2011 WL 6938543 (Tex. App.—Houston [1st Dist.] Dec. 29, 2011, no pet.), where the plaintiff initially filed suit against both the City and its employees following a motor vehicle collision. The plaintiff then amended its petition and omitted the employee as a defendant. Id. at *1. The City then filed a plea to the jurisdiction asserting that the remaining tort claim was barred by section 101.106(b) because the plaintiff had included the employee in its initial pleading. Id.

The Court noted that subsection (b) could not serve as a basis for dismissal of the City. Id. at *6. Subsection (b) applied in instances where the claimant filed suit against the employee individually. Id. The plaintiff had filed suit against both the City and employee and then voluntarily dismissed its claims against the employee. Id. The voluntary dismissal was, in effect, a dismissal under subsection (e) that pre-empted the City's need to file such a motion. Id. Accordingly, the plaintiff's voluntary decision to dismiss its claim against the employee had the same irrevocable consequence as a subsection (e) motion, and the plaintiff was not barred by subsection (b) from pursuing its claims against the City, its elected defendant, "if it has otherwise complied with the jurisdictional requisites of the Tort Claims Act." Id. at *7-8.

### B. Courts Question Whether the Election-of-Remedies Scheme is Jurisdictional in Nature

While the Supreme Court's opinion in Garcia addressed some of the uncertainty regarding subsection (e) of the Tort Claims Act, this opinion did not, however, resolve uncertainty involving subsection (f). In 2010, for example, the San Antonio Court of Appeals addressed an as-applied challenge in University of Texas Health Science Center at San Antonio v. Webber-Eells, 327 S.W.3d 233 (Tex. App.—San Antonio 2010, no pet.). In that case, a husband and wife had initially filed suit against a physician in federal court for negligent medical treatment. Id. at 236. The physician filed a motion to dismiss pursuant to section 101.106(f), asserting that his conduct was within the general scope of his employment with University of Texas Health Science Center at San Antonio ("UTHSCSA"), a governmental entity, and that suit could have been brought against UTHSCSA. Id. The plaintiffs contended that the alleged negligent acts were not caused by the use of tangible personal property (as required by the Tort Claims Act for there to be a waiver), so as a fallback they filed an amended complaint approximately 30 days later that named UTHSCSA as a conditional defendant. Id. They did not remove the physician from their petition. Id.

The federal court granted the physician's motion, concluding that tangible personal property—surgical instruments—caused the injuries complained of. Id. UTHSCSA subsequently filed its own motion to dismiss on the ground that the Eleventh Amendment barred the claims. Id. The court also granted this motion, so the claimants filed their suit against UTHSCSA in state court. Id. UTHSCSA filed a plea to the jurisdiction in response, arguing that the claimants had failed to timely amend their federal court pleadings within 30 days after the employee moved for dismissal pursuant to section 101.106(f). Id.

The trial court denied the plea. Id. UTHSCSA appealed. Id. The plaintiffs challenged the appeal, arguing that they substantially complied with section 101.106(f) when they conditionally substituted UTHSCSA in their amended complaint. Id. at 239.

The Court of Appeals disagreed, pointing out that the cases cited by the claimants involved notice provisions that were not jurisdictional and where substantial compliance was sufficient. Id. In contrast, section 101.106 involved governmental immunity, which is jurisdictional in nature. Id. at 240 (citing Tex. Dep't. of Agriculture v. Calderon, 221 S.W.3d 918, 921-22 (Tex. App.—Corpus Christi 2007, no pet.), disapproved on other grounds by Franka, 332 S.W.3d at 367; Phillips v. Dafonte, 187 S.W.3d 669, 672-74 (Tex. App.—Houston [14th Dist.] 2006, no pet.)) (a claimant's "choices and procedural actions impact the immunity of either the governmental unit or the employee of the governmental unit; therefore, section 101.106 is a jurisdictional statute involving the waiver of immunity.") Accordingly, subsection (f) had to be strictly construed and applied. Id.

The Court noted that a strict application was also necessary to prevent alternative pleadings and any duplication of the issues (which the conditional pleadings appeared to invite). Id. Section 101.106 also strongly favored dismissal of the employee, so claimants who refused to make the irrevocable election prior to filing suit were subject to a stricter standard. See id. at 242 (citing Waxahachie Ind. Sch. Dist. v. Johnson, 181 S.W.3d 781, 785 (Tex. App.—Waco 2005, pet. denied)). There, "dismissal of the employee is mandatory if the governmental unit files a motion seeking" the dismissal. Id. (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e)). However, if the employee sought dismissal, the claimant retains control over the election but must make the election within thirty days of the date the employee files his motion to dismiss. Id. (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.106(f)). Subsection (f) was unambiguous that the election had to occur within 30 days after the employee filed his motion. Id. at 243 ("[T]he Legislature clearly did not intend to allow a plaintiff to await a trial court's ruling before making that decision.").

### C. Courts Disagree Over How, or Whether, the "Consent Exception" in Subsection (b) Applies to Subsection (e)

With Eells (and other opinions) as backdrop, a clear split between the courts of appeals regarding the interplay between subsections (b) and (e) later arose. One side of the divide is clearly personified in the First District Court of Appeals' decision in City of Houston v. Esparza, No. 01-11-00046-CV, 2011 WL 4925990 (Tex. App. [1st Dist.] Oct. 7, 2011, pet. filed). There, the plaintiff sued the City and a City employee for negligent operation of a motor vehicle. Id. at *1. The City moved to dismiss the claims against the City employee pursuant to subsection (e). Id. It then filed a plea to the jurisdiction, asserting that the plaintiff's claims against the City were barred by subsection (b). Id. The trial court granted dismissal of the employee but denied the City's plea. Id. The City appealed, contending that the election-of-remedies scheme required the plaintiff to choose between suing either the City or its employee. Id. at *3. The plaintiff, because she sued both, lost the opportunity to sue either, so the employee gets dismissed under subsection (e) and the City is immune under subsection (b). Id.

The plaintiff responded that, if her suit was initially against both the City and the employee, then subsection (e), and not subsection (b), applied. Id. She further responded that, even if subsection (b) applied, her claims fell within a "consent" exception because the Tort Claims Act waived immunity for such motor vehicle claims. Id. The City did not challenge that the Act did waive immunity for such claims. Id. Rather, it replied that "consent" within the meaning of subsection (b) was not found within the Act itself, because to do so would render subsection (b) meaningless, but that it must be found in an independent statutory waiver outside the Act. Id.

The Court disagreed. It examined section 101.106 as a whole and reviewed the plain language of its provisions. Id. at *5. It found that section 101.106 operated in two ways. First, the statute barred common law tort claims against a governmental entity or its employee where the claimant voluntarily elected to sue one but not the other. Id. (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.106(a) & (b)). Second, the statute forced the claimant into an involuntary election if she failed to make an election at the outset or, under certain circumstances, elected incorrectly. Id. (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e) & (f)). Accordingly, the Court rejected the City's contention that subsections (b) and (e) applied without reference to each other when the claimant sues both the unit and the employee. Id. at *6. The Court noted

> [T]he statutory scheme requires that the trial court dismiss the employee upon the governmental unit's motion, leaving the governmental unit to defend suits that otherwise comport with the Tort Claims Act's jurisdictional constraints.[11] This construction is compelled by the statute's plain language and structure and is consistent with the Texas Supreme Court's jurisprudence. If, as the City argues, subsections (a) and (b) apply independently

[11] Thus, as a tactical point, assume the plaintiff would have alleged an intentional tort against the governmental employer and employee. The employee could be dismissed under section 101.106(e) and the government could then file a Plea to the Jurisdiction under section 101.057 of the Tort Claims Act.

> to any suit brought against a governmental unit and its employee simultaneously and mandate dismissal of both the governmental unit and its employee in such cases, then subsection (e), which dictates the dismissal of the employee in such cases, would be superfluous, and its language, which does not mention dismissal of the governmental unit, would be incongruent.

Id. (internal citations omitted) (emphasis added)

The Court then proceeded to argue against the existence of a broad "consent" exception like the one the City favored. Id. at *7-9. The Court noted that subsection (b)'s consent exception permitted suit against a governmental entity "only if the claimant has complied with all of the authorizing statute's jurisdictional requirements for bringing suit." Id. at *7 (citing Garcia, 253 S.W.3d at 660). The election-of-remedies provision was plainly a jurisdictional constraint. Id. (citing Franka, 332 S.W.3d at 371). It expressly conferred immunity on the un-elected defendant for all claims brought under the Act, regardless of whether the Act otherwise waived immunity for the claims at issue. Id. (citing Garcia, 253 S.W.3d at 659-60; Franka, 332 S.W.3d at 371 n.9). Thus, once the claimant had made a (voluntary or involuntary) election, she could never satisfy the Act's jurisdictional prerequisites for bringing suit against the un-elected defendant. Id.

The Court, however, recognized that other courts of appeals had adopted a contrary position. Id. (citing City of N. Richland Hills v. Friend, 337 S.W.3d 387, 392–93 (Tex. App.—Fort Worth 2011, pet. granted); Barnum v. Ngakoue, No. 03–09–00086–CV, 2011 WL 1642179, at *11 (Tex. App.—Austin April 29, 2011, pet. filed) (subsection (b) "consent exception" applied)).[12] The Court disagreed with these holdings on four grounds. First, the Court did not read Garcia as holding that the "consent" exception in subsection (b) was satisfied absent compliance with all of the jurisdictional requirements of the Tort Claims Act. Id. at *8. Second, if the Act's limited waivers of immunity constituted "consent" in and of themselves, then the exception appears to swallow the rule entirely. Id. Third, the opposing formulation failed to treat subsections (a) and (b) as mirror provisions, and giving effect to a broad exception would not give full effect to subsection (a). Id. at *9. Finally, the Court's construction of subsection (b) was consistent with previous decisions that construed the subsection in relation to subsection (f). Id. (citing Huntsville Ind. Sch. Dist. v. Briggs, 262 S.W.3d 390, 391 (Tex. App.—Waco 2008, pet. denied); Calderon, 221 S.W.3d at 920). In these cases,

> courts of appeals applied section 101.106(b) to bar common law tort claims against a governmental unit when the claimant brought claims regarding the same subject matter against a governmental employee and failed to comply with section 101.106(f)'s procedures for dismissing an employee and suing the governmental unit, even though the claims were pled as falling within the Act's limited waivers of immunity.

Id. Accordingly, the Court affirmed the trial court's order denying the City's plea to the jurisdiction. Id. at *10.

In contrast, the Fourteenth District Court of Appeals disagreed with the First District's reasoning, though the results were similar. See Amadi v. City of Houston, No. 14-10-01216-CV, 2011 WL 5099184 (Tex. App.—Houston [14th Dist.] Oct. 27, 2011, pet. filed) (op. on reh'g en banc). In Amadi, the plaintiff simultaneously sued the City and a City employee for negligent use or operation of a motor-driven vehicle. Id. at *1. The City moved to dismiss the claims against the City employee pursuant to subsection (e). Id. It then filed a plea to the jurisdiction on the ground that the claims against it should be dismissed pursuant to subsection (b). Id. The trial court denied the plea. Id.
The City contended on appeal that it was entitled to a dismissal because the plaintiff made an irrevocable election to sue the employee, thus barring all claims against the City. Id. Essentially, the City contended that the plaintiff forfeited her claims when she filed suit simultaneously against both the governmental unit and the employee because the unit may seek permanent dismissal of the employee pursuant to subsection (e) and permanent dismissal of the claims against itself pursuant to subsection (b). Id. The City supported this contention by citing to Garcia, "in which the Supreme Court concluded that subsection (b) applies even when suit is filed against both the employee and governmental unit." Id. The City specifically relied on the Supreme Court's explanation that "to the extent subsection (b) applies, it bars any suit against the governmental unit regarding the same subject matter, not just for suits for which the [Tort Claims Act] waives immunity or those that allege common-law claims." Id. (quoting Garcia, 253 S.W.3d at 660.)
The Court disagreed and affirmed the trial court's judgment. First, it noted that the City had complied with subsection (e) when it filed its motion to dismiss the claims against the employee, so dismissal of those

[12] Please note that the Supreme Court of Texas granted the City of North Richland Hills' petition for review on January 27, 2012. The authors are hopeful that the Court will resolve the split between the courts of appeals and provide further guidance on the interplay, if any, between subsections (b) and (e).

claims was mandatory. Id. Next, the Court acknowledged Supreme Court's purportedly broad language in Garcia that subsection (b) "bars any suit . . . not just suits for which the [Act] waives immunity." Id. at *3 (quoting Garcia, 253 S.W.3d at 659). Nevertheless, the Court focused on the plain language of subsection (b), which acted as a bar to a same-subject-matter suit against the governmental unit unless the governmental unit had consented to suit. Id. at *4. The Court noted that it would have ignored the "unless the governmental unit consents" language had it determined subsection (b) required dismissal of the plaintiff's claims against the City even though they fell within the Act's waiver of immunity. Id.

The Court reasoned the City had consented to suit in this instance because the Tort Claims Act provided for a waiver of immunity for the negligent use or operation of motor-driven vehicles. Id. (citing Tex. Civ. Prac. & Rem. Code Ann. § 101.021). In contrast the First District would have looked simply at the jurisdictional requirements of section 101.106. Further, Garcia was distinguishable because, unlike in the present case, immunity for the specific common-law tort claims asserted in Garcia had not been waived under the Act. Id. at *5 (citing Garcia, 253 S.W.3d at 659–60); see also Friend, 337 S.W.3d at 392 (recognizing that Garcia stands for the proposition that subsection (b) bars all claims against a governmental unit except claims for which immunity is waived, such as certain tort claims under the Tort Claims Act). Accordingly, the simultaneous filing of suit against both the City and the City employee did not bar the suit against the City because it had consented to suit. Id. at *8; see also City of Houston v. Rodriguez, No. 14-11-00136-CV, 2011 WL 5244366, at *3 (Tex. App.—Houston [14th Dist.] Nov. 3, 2011, pet. filed) (op. on reh'g).[13]

### D. Possible Constitutional Arguments Regarding the Open Courts Provision and Subsection (f)

The San Antonio Court of Appeals recently addressed the possibility that section 101.106(f) may violate the open courts provision of the Texas Constitution in Rossett v. Wilson. No. 04-10-00583-CV, 2011 WL 1851414 (Tex. App.—San Antonio May 11, 2011, pet. denied). In Rossett, the plaintiffs brought medical negligence claims against five physicians and a nurse practioner. Id. at *1. The health care providers subsequently moved to dismiss the claims pursuant to section 101.106(f) and established via affidavit that they were employed by a governmental unit and had been acting within the course and scope of their employment. Id. The plaintiffs did not amend their petition, instead contending that (1) section 101.106(f) was unconstitutional because it violated the open courts provision of the Texas Constitution, and (2) the providers had failed to establish that the lawsuit could have been brought against the employer. Id. The trial court denied the motion to dismiss based on the latter ground. Id.

The Court of Appeals applied the recently-issued Franka opinion and found the medical negligence claims had been brought under the Tort Claims Act. Id. at *2-3. The Court, however, noted that the trial court never reached the open courts argument, so it remanded the cause to the trial court for consideration.[14] Id. at *3. Further, the Court ordered the trial court to grant the motions absent a ruling that subsection (f) was unconstitutional. Id.

### E. The Order of Filing and its Effect on the Relief Requested

In Alexander v. Walker, 355 S.W.3d 709, 710 (Tex. App.—Houston [1st Dist.] 2011, pet. filed), the plaintiff sued county peace officers in state court for various tort claims. Several weeks later, she sued Harris County in federal court for the same claims, based on vicarious liability, and alleging claims under 42 U.S.C. Sections 1983 and 1988. Id. The officers moved for summary judgment in the state court proceeding, contending that section 101.106(e)

[13] The Fourteenth District recognized that its holding potentially conflicted with *Huntsville Independent School District v. Briggs*, 262 S.W.3d at 391, and *Texas Department of Agriculture v. Calderon*, 221 S.W.3d at 920, both of which the First District cited in support of its holding in *Esparza*. The Fourteenth District noted that both cases differed procedurally because the governmental units argued the claims were barred for failure to comply with the procedures set forth in subsection (f), so subsection (b) acted as a bar to suit. *Id.* at *3. The Court made no comment regarding the relationship between subsections (b) and (f), but it did disagree with *Briggs* and *Calderon* for failing to consider whether the phrase "unless the governmental unit consents" in subsection (b) prevented dismissal. *Id.* at *3-4. **Such comments create ambiguity for future cases.**

[14] The Court did note that the *Franka* opinion acknowledged a possible conflict between subsection (f) and the open courts provision. *Id.* The *Franka* court stated: "We recognize that the open courts provision of the Texas Constitution prohibits the Legislature from unreasonably abrogating well-established common-law claims, but restrictions on government employee liability have always been part of the tradeoff for the Act's waiver of immunity, expanding the government's own liability for its employees' conduct, and thus a reasonable exercise of the police power in the interest of the general welfare." *Franka*, 332 S.W.3d at 385.

mandated their dismissal because the plaintiff had sued both Harris County and the officers. Id. The trial court denied the motion, and the officers filed an interlocutory appeal, contending that section 101.106(a) barred any suit against them in state court. Id. at 710-11. They argued the federal suit against Harris County constituted an irrevocable election in favor of proceedings against the employer and barred suit against the officers. Id.

The Court disagreed. To the Court, the plain language of subsection (a) suggested the Legislature intended for the election to occur when the plaintiff first filed suit. Id. at 713 (citing Garcia, 253 S.W.3d at 657). Thus, under subsection (a) (and subsection (b), as well), the mere act of filing suit against either the employee or government unit constituted an "irrevocable election" that "immediately and forever bars" suit against the other regarding the same subject matter, unless, in the case of subsection (b), the unit consents. Id. Thus, subsection (a) was inapplicable to the case because the plaintiff made the irrevocable election to sue the officers before she sued Harris County.[15] Id. at 714. Subsection (b), however, applied to bar suit against Harris County, unless it consented to suit. Id.

Not surprisingly, the Fourteenth District Court of Appeals disagreed with the First District's holding. See Fontenot v. Stinson, No. 14-10-01232-CV, 2011 WL 6098259 (Tex. App.—Houston [14th Dist.] Dec. 8, 2011, pet. filed). On nearly identical facts, the Court found that the First Court's reasoning conflicted with the Supreme Court's holding in Garcia. Id. at *6. To the Court, Garcia held "that the plaintiff's common law claims against a governmental unit were barred under subsection (b) in a case in which the plaintiffs sued both the governmental unit and its employee." Id. Thus, a governmental unit could seek dismissal under subsection (b) even if the plaintiff initially sued both the unit and its employee. Id. The Court found no reason why the Garcia analysis should not be applied to a suit involving subsection (a). Id.

The plaintiff in Fontenot argued that the Court's holding would render subsection (b) meaningless "because it is tantamount to saying that she made two irrevocable elections, or that she revoked her irrevocable election to sue Fontenot by filing suit against Harris County." Id. The Court disagreed, saying

> [W]e conclude that under binding precedent from the Supreme Court, subsections (a) and (b) can both apply in a single suit or to a plaintiff's claims in separate suits against a governmental unit and its employee. Thus, a plaintiff may irrevocably elect to sue both the governmental unit and the employee. And when a plaintiff makes such a choice, subsections (a) and (b) may bar the plaintiff's suit, except to the extent that the Legislature has waived the governmental unit's immunity.

Accordingly, when Stinson filed suit against Harris County, the filing constituted an irrevocable election against Harris County and immediately and forever barred any suit or recovery against Fontenot regarding the same subject matter. This conclusion is not altered by the fact that her suit against Harris County was the second-filed suit.

Id. at *6-7. (internal citations omitted)

### F. Ultra Vires Claims

The Fourteenth District Court of Appeals addressed what appears to be an issue of first impression after Franka, namely: whether section 101.106 bars ultra vires claims against governmental employees. Lazarides v. Farris, No. 14-11-00404-CV, 2012 WL 1301235 (Tex. App.—Houston [14th Dist.] April 17, 2012, no pet. h.). There, after bringing suit against a city building official in his individual capacity, the plaintiff amended his pleadings and brought ultra vires claims against the official in his official capacity.[16] Id. at *7. The building official sought dismissal of the suit pursuant to section 101.106(b). Id. at *11. The official contended that the amended suit against him in his official capacity was really a suit against the governmental unit. Id. Thus, the original pleadings against him in his individual capacity barred the later pleadings because the plaintiff made an irrevocable election at the outset. Id.

The Court disagreed. Id. Relying on Franka, the Court held that ultra vires claims were not barred under section 101.106(b). Id. (quoting Franka, 332 S.W.3d at 382 ("Under Texas law, a suit against a government employee in his official capacity is a suit against his governmental employer with one exception: an action

[15] The Court opined that subsections (e) and (f) are statutory exceptions to subsections (a) and (b) that apply when a plaintiff has failed to make the election prior to filing suit. *Id.* The Court did not consider the effect subsections (e) or (f) may have on the proceedings as the officers did not contend on appeal that they applied. *Id.*

[16] An *ultra vires* claim is one in which the plaintiff seeks relief in an official-capacity suit against a government actor who allegedly has violated statutory or constitutional provisions by acting without legal authority or by failing to perform a purely ministerial act. *Id.* (citing *Heinrich*, 284 S.W.3d at 372-73). Under *Heinrich*, governmental immunity does not bar *ultra vires* claims, but the only remedies available are prospective declaratory and injunctive relief. *Id.*

alleging that the employee acted ultra vires.")). Thus, such ultra vires claims were not against the governmental unit and were not barred under the Tort Claims Act's election-of-remedies scheme. Id.

## V. TACTICAL CONSIDERATIONS

For attorneys defending governmental entities we offer the following tactical considerations. First, and most obvious, when a claimant sues both your governmental client and its employee, immediately file a Section 101.106(e) Motion (which motion must be made by the governmental unit) and seek mandatory dismissal of the employee. If the claims against your governmental entity would also be barred—that is, under section 101.057 of the Tort Claims Act, if intentional torts are alleged—be ready to immediately file thereafter a plea to the jurisdiction on behalf of your entity. The authors have attached sample pleas to the jurisdiction and motions to dismiss in the Appendices to this paper.

However, if only the governmental employee is sued, move to dismiss under section 101.106(f) and wait to see whether the claimant amends to dismiss and name the governmental entity as a defendant on or before 30 days from the filing of your motion. In either case, the employee is dismissed and you can analyze whether any later claims against the entity come within the "consent" language of section 101.106(b). Keep in mind that under section 101.106(f), the suit is considered an "official" capacity suit, against the entity, for purposes of limitations. Nonetheless, keep in mind the case law holding that if a claimant does not timely substitute the entity then section 101.106(b) should afford the entity a basis for dismissal through a plea to the jurisdiction. See Briggs, 262 S.W.3d at 395. Argue a jurisdictional approach to section 101.106, that failure to comply with its provisions serves as a jurisdictional bar, regardless of whether the theory of liability against the entity fits within the Tort Claims Act or another statute. The Fourteenth District in Houston may not agree with you, but the First District, and perhaps other Texas courts, will.

Finally, keep in mind that nonsuits cannot be considered to avoid a section 101.106 motion. Also keep in mind the possible tactical utility of section 101.106(c), as to partial settlements, and section 101.106(d), as to prior judgments against the employee. If opposing counsel is not on the ball these provisions may prove very helpful in arguing dismissal.

## VI. CONCLUSION

The nuances attendant to the future application of section 101.106 are numerous, and it will be interesting to see what results from future judicial interpretation of the "consent exception" in subsection 101.106(b). Defense counsel should tailor any related future arguments to steer the trial courts toward the "jurisdictional bar" approach adopted by the First District Court of Appeals so as to prevent erosion of the Act and its underlying legislative intent. When the defense has a tool as useful and as decisive as section 101.106, counsel need to jealously protect that tool and remain alert to insure the statute is applied consistent with its purpose. That purpose is to serve as a jurisdictional bar to certain claims.

The authors sincerely hope that this paper and the analysis and authorities herein prove useful to the practitioner. The authors are available should the reader care to further discuss this topic or the authorities referenced herein.

**APPENDIX A**

CAUSE NO. 12-000001

| | | |
|---|---|---|
| JOHN DOE, | § | IN THE COUNTY COURT |
| Plaintiff, | § | |
| | § | |
| vs. | § | |
| | § | AT LAW NUMBER ONE |
| BILL SMITH and | § | |
| CITY OF ANYWHERESVILLE, | § | |
| TEXAS, | § | |
| Defendants. | § | ANY COUNTY, TEXAS |

DEFENDANT CITY OF ANYWHERESVILLE'S PLEA TO THE JURISDICTION
AND MOTION TO DISMISS DEFENDANT BILL SMITH

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the City of Anywheresville, Texas ("City"), one of the Defendants herein, and pursuant to Section 101.106(e) of the Texas Civil Practice & Remedies Code, respectfully moves this Court for mandatory dismissal with prejudice of the claims against co-defendant Bill Smith ("Smith"), and in support thereof would respectfully state and show this Court as follows:

I. INTRODUCTION

Plaintiff John Doe ("Plaintiff") has filed an Original Petition against the City, movant herein, and its employee, Police Officer Smith, co-defendant. In his Original Petition, a copy of which is attached for the Court's convenience as Exhibit "A," Plaintiff refers in the factual allegations to "Defendant" in the singular. It appears that he is referring to actions of Smith, a police officer with the City, since paragraph 9 of the Original Petition refers to "Defendant's" actions as a "peace officer," and references his "official authority" and performance of a traffic stop. (Ex. A, ¶ 9.) In this context, Plaintiff later alleges a claim for "defamation by slander". (Ex. A, ¶¶ 13-18.) Plaintiff also files a claim for "respondeat superior" against movant City, which employs Smith as a police officer. (Ex. A, ¶¶ 19-21.) The factual allegations are common against both defendants herein.

In light of these common allegations and the respondeat superior theory advanced by Plaintiff herein, it is respectfully presented that, per statute, this Court has no discretion, but must dismiss Smith as employee of movant City pursuant to the specific terms of section 101.106(e) of the Tort Claims Act and related Texas Supreme Court and courts of appeals decisions interpreting that provision. The plain language of section 101.106(e) reads as follows:

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.

Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e) (Vernon 2007) (emphasis added). The following portions of this Plea and Motion to Dismiss identify and discuss the pertinent legislative background and case interpretations for this court.

II. ARGUMENT AND AUTHORITIES

A. Co-defendant police officer Smith must be dismissed according to the mandatory provisions of section 101.106(e)

Given the pleading allegations herein, as discussed in the Introduction to this Motion to Dismiss and as evidenced and judicially admitted in Exhibit A, this court is required to dismiss co-defendant Smith from this lawsuit under the provisions of section 101.106(e) of the Tort Claims Act. The Fort Worth Court of Appeals has specifically followed this application and has addressed the same issue as presented herein, applying section 101.106(e) as compelling dismissal of claims against a co-defendant governmental employee. Tex. Bay Cherry Hill, L.P. v. City of Fort Worth, 257 S.W.3d 379 (Tex. App.—Fort Worth 2008, no pet.). Coincidentally, that case also involved

allegations of defamation by the municipal employee, as herein, which were nonetheless dismissed by the court. Please note that for the Court's convenient reference, a complete copy of this appellate opinion is attached hereto as Exhibit "B." In Cherry Hill, the Fort Worth Court of Appeals noted that in 2003, as part of a comprehensive effort to reform the tort system, the Texas Legislature amended section 101.106. Id. at 400. In reviewing the application of section 101.106, the Court used as guidance the Texas Supreme Court decision in Mission Consolidated Independent School District v. Garcia, 253 S.W.3d 653 (Tex. 2008). Movant notes that an additional copy of the Texas Supreme Court decision is attached hereto for the court's convenient reference as Exhibit C.

The Fort Worth Court of Appeals followed the Texas Supreme Court's analysis in Garcia by noting that the statutory revisions now in place and codified in section 101.106 were designed to force a plaintiff to decide at the outset whether to sue an employee or a governmental unit who employs the allegedly offending employee. Cherry Hill, 257 S.W.3d at 400. There is a sound public policy and legislative purpose underlying forcing an "irrevocable election" upon the plaintiff and his counsel.

By requiring a plaintiff to make an irrevocable election at the time suit is filed between suing the governmental unit under the Tort Claims Act or proceeding against the employee alone, section 101.106 narrows the issues for trial and reduces delay and duplicative litigation costs. The Act's election scheme 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.

Id. (internal citations omitted)

Even more importantly for purposes of the case at hand, the Fort Worth Court of Appeals held that it does not matter at all whether the governmental employee was being sued in his individual or official capacity, as either type of claim was barred. In that regard the Fort Worth Court of Appeals held:

In other words, a suit under the Tort Claims Act against a governmental unit bars a same-subject-matter suit against an employee in both the employee's official and individual capacities. We therefore hold that Cherry Hill's assertion that it sued Haskin (a co-defendant city council member) only in her individual capacity does not bar dismissal under subsection (e).

Id. at 401 (emphasis added). In so holding, the Court ruled that: "Thus, subsection 101.106(e) compels dismissal of Cherry Hill's claims against [the individual employee] . . ." in cases such as the one at bar. Id.

In its Cherry Hill decision, the Court also pointed out that section 101.106(a) was very clear in expressly providing that

[t]he 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. (emphasis in original). The Court again emphasized that section 101.106 applied to bar suits against an individual employee whether in the employee's official capacity or in an individual capacity. Id. As the Court noted, the city employee sued for the same subject matter was "entitled to dismissal of the claims against her upon filing of the City's motion to dismiss." Id.

As noted, the Court relied upon the Texas Supreme Court's decision in Garcia, and therefore held that the trial court did not err by granting the City's plea to the jurisdiction and motion to dismiss as to the claims against its individual employee. The same result should apply herein, and case law indicates the court has no discretion but must dismiss claims against a governmental employee co-defendant. See Villasan v. O'Rourke, 166 S.W.3d 752, 758 & 761-62 (Tex.App.—Beaumont 2005, pet. denied) (subsequent attempts to amend pleadings after a motion to dismiss is filed do not prevent dismissal of the individual employee under section 101.106).

B. Garcia: Texas Supreme Court lays the foundation

Although the Fort Worth Court of Appeals' decision is on point and controlling in this matter, movant wishes to note that the Court relied upon the opinion the Texas Supreme Court issued in Garcia. The Garcia Court set forth the analysis the lower courts must follow when applying section 101.106. By doing so, the Supreme Court held that the section 101.106 election-of-remedies scheme governs all suits against a governmental unit, and the Texas Supreme Court applied that section to bar any and all common-law recoveries against the employee. Garcia, 253 S.W.3d at 655-59. The Court also noted the application of immunity and pointed out that the whole purpose of section 101.106 was to force a plaintiff to decide at the outset whether an employee acted independently or potentially within the scope of his or her employment. Id. Finally, the Court noted that plaintiff was required to make this irrevocable election at the time suit is filed. Id. However, if the plaintiff does not do so, and is not cautious, the government is entitled to mandatory dismissal of its employee upon its motion, as herein. This is because "the decision regarding

whom to sue has irrevocable consequences," so the "plaintiff must proceed cautiously before filing suit and carefully consider whether to seek relief from the governmental unit or from the employee individually." Id. In cases where the plaintiff takes a shotgun approach and sues both, he is subject to application of section 101.106(e) and its requisite, mandatory dismissal of the governmental employee upon the filing of a motion by the governmental unit.

The Texas Supreme Court has also made it abundantly clear that it has never interpreted the related phrase "under this Chapter" (referring to the Tort Claims Act) to only encompass claims for which the Tort Claims Act waives immunity. Id. The Court, in fact, emphasized that it had actually held to the contrary in Newman v. Obersteller, 960 S.W.2d 621, 622-23 (Tex. 1997), to apply section 101.106 to bar intentional tort claims against an employee even though the Tort Claims Act may have expressly excluded intentional torts. Id. The Court also referenced its earlier decision in Harris County v. Sykes, 136 S.W.3d 635, 640 (Tex. 2004), as consistent precedent for upholding the type of dismissal the City seeks herein. Thus, there is nothing in the 2003 amended version of the Tort Claims Act and section 101.106 that would indicate any narrower application of the phrase "under this Chapter" than in the Court's prior interpretations of the Act, and "[a]ll 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 section 101.106." Id. (citations omitted).[1]

III. CONCLUSION

As evident from the authority cited above, movant City of Anywheresville respectfully notes that this Court has no discretion but must dismiss with prejudice the claims against co-defendant Smith. Because such dismissal of the claims against Smith, the City's employee, are required by statute, this Court respectfully does not have subject matter jurisdiction over the claims against Smith, and the City's Plea to the Jurisdiction and attendant Motion to Dismiss Defendant Smith as a party to this suit must be granted.

WHEREFORE, PREMISES CONSIDERED, the City of Anywheresville, Texas, movant herein, respectfully prays that Plaintiff John Doe take nothing by way of his action, that this Court grant this Plea to the Jurisdiction and Motion to Dismiss any and all of Plaintiff's claims against Co-Defendant Bill Smith, with prejudice to the re-filing of same, and that this Court grant such other and further relief to which Defendant City is justly entitled.

Respectfully submitted,

FEE, SMITH, SHARP & VITULLO, L.L.P

_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been provided to all counsel of record via facsimile and first class mail on _____, 20__.

_____

DARRELL G-M NOGA

[1] As an aside, for some reason Mission Consolidated Independent School District failed to seek dismissal of the co-defendant employee, so the Court was limited to pointing out that if section 101.106(e) had been applied, then the employee would have been dismissed. *Id.* Therefore, the more directly applicable fact pattern to the present suit is in *Cherry Hill*, where the City filed the required plea to the jurisdiction and motion to dismiss the individual employee.

## APPENDIX B

CAUSE NO. 12-00001

| | | |
|---|---|---|
| JOHN DOE | § | COUNTY COURT AT LAW |
| | § | |
| Plaintiff | § | |
| | § | |
| V. | § | COURT NUMBER ONE |
| | § | |
| CITY OF ANYWHERESVILLE, TEXAS AND BILL SMITH, | § | |
| | § | |
| Defendants. | § | ANY COUNTY, TEXAS |

DEFENDANT CITY OF ANYWHERESVILLE, TEXAS' SUBSECTION 101.106(e) PLEA TO THE JURISDICTION AND MOTION TO DISMISS DEFENDANT BILL SMITH

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the City of Anywheresville, Texas ("City"), one of the Defendants herein, and, pursuant to subsection 101.106(e) of the Texas Civil Practice & Remedies Code (the Texas Tort Claims Act), respectfully moves this Court for mandatory dismissal with prejudice of the Plaintiff's claims against Co-Defendant Bill Smith, and in support thereof would respectfully state and show this Court as follows:

I. INTRODUCTION

On March 1, 2012, Plaintiff John Doe filed an Original Petition against the City of Anywheresville, Texas, movant herein, and Co-Defendant Bill Smith, its former employee, related to an alleged March 1, 2010 automobile collision between a vehicle operated by Plaintiff and one operated by Co-Defendant Smith. In his Original Petition, a copy of which is attached for the Court's convenience as Exhibit "A," Plaintiff asserts claims of negligence and reckless conduct against Co-Defendant Smith in his capacity as a police officer for the City. Plaintiff further seeks to hold the City vicariously liable for Co-Defendant Smith's operation of a motor vehicle at the time of the 2010 incident, alleging that Smith's acts or omissions occurred while Smith was in the course and scope of his employment with the City. In Sections IV and VI of the Original Petition, Plaintiff judicially admits that Co-Defendant Smith's actions during the subject incident were "in the course and scope of (Smith's) employment with Defendant City" (Ex. A, § VI). It is thus undisputed that Plaintiff's claims against Co-Defendant Smith arise out of his status and actions as the City's employee during the alleged automobile collision. Plaintiff also invokes "governmental liability" against the City (Ex. A, § VI), which he expressly predicates on Co-Defendant Smith's actions, so that Plaintiff's factual allegations are common against both Defendants herein.

In light of these common allegations and the judicial admission by Plaintiff that Co-Defendant Smith was acting within the course and scope of his employment during the alleged automobile collision at issue, and given related Texas Supreme Court directives and the plain language of the Tort Claims Act, this Court has no discretion but must dismiss Smith as a Defendant in this proceeding. Texas Supreme Court and courts of appeals decisions interpreting the relevant provisions of the Tort Claims Act make this result crystal clear. Section 101.106(e) of the Tort Claims Act provides the Court with no discretion in this regard and reads as follows:

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.

Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e) (Vernon 2007) (emphasis added). This Plea and Motion identify and discuss in more detail the pertinent legislative background and case interpretations which are binding upon this Court.

II. Arguments and Authorities

A. Co-defendant Smith must be dismissed pursuant to subsection 101.106(e)

The allegations and language of subsection 101.106(e) require this Court to dismiss Co-Defendant Smith. In 2008 the Fort Worth Court of Appeals addressed the same issue as presented herein. It concluded that section 101.106(e) compelled dismissal of claims against the co-defendant governmental employee sued along with her government employer in circumstances where the underlying facts were common, as is presented in this proceeding.

See Tex. Bay Cherry Hill, L.P. v. City of Fort Worth, 257 S.W.3d 379 (Tex. App.—Fort Worth 2008, no pet.). For the Court's convenient reference, a complete copy of this opinion is attached hereto as Exhibit "B."

In the Cherry Hill case, the Fort Worth Court of Appeals noted that, in 2003, as part of a comprehensive effort to reform the tort system, the Legislature amended section 101.106. See id. In reviewing the application of section 101.106, the court used as guidance the Texas Supreme Court decision in Mission Consolidated Independent School District v. Garcia, 253 S.W.3d 653 (Tex. 2008). A copy of this opinion is also attached hereto as Exhibit "C."

The Fort Worth Court of Appeals followed the Texas Supreme Court's analysis in Garcia by noting that the statutory revisions now in place and codified in section 101.106 were designed to force a plaintiff to decide at the outset whether to sue an employee or a governmental unit who employs the allegedly offending employee. There is a sound public policy and legislative purpose underlying this "irrevocable election" forced upon plaintiffs and their counsel.

By requiring a plaintiff to make an irrevocable election at the time suit is filed between suing the governmental unit under the Tort Claims Act or proceeding against the employee alone, section 101.106 narrows the issues for trial and reduces delay and duplicative litigation costs. The Act's election scheme 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.

Cherry Hill, 257 S.W.3d at 398 (internal citations omitted) (emphasis added). Furthermore, the Court of Appeals held that it does not matter at all whether the governmental employee was being sued in his individual or official capacity (here Plaintiff only appears to intend official capacity), as either type of claim was barred. In that regard the Court of Appeals held:

In other words, a suit under the Tort Claims Act against a governmental unit bars a same-subject-matter suit against an employee in both the employee's official and individual capacities. We therefore hold that Cherry Hill's assertion that it sued Haskin (a co-defendant city council member) only in her individual capacity does not bar dismissal under subsection (e).

Id. (emphasis added). In so holding, the Court of Appeals ruled that: "Thus, subsection 101.106(e) compels dismissal of Cherry Hill's claims against [the individual employee]" in cases such as the one at bar. Id. (emphasis added).

In the Cherry Hill decision, the Court of Appeals also pointed out that subsection 101.106(a) of the Tort Claims Act was very clear in expressly providing that "[t]he 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. (emphasis in original). The Court of Appeals again emphasized that section 101.106 applied to bar suits against an individual employee whether in the employee's official capacity or in an individual capacity. As the Court of Appeals emphatically held, the city employee sued for the same subject matter was "entitled to dismissal of the claims against [him or] her upon filing of the City's motion to dismiss," as is done herein. Id.

As previously noted, the Fort Worth Court of Appeals relied upon the Texas Supreme Court's 2008 decision in Garcia, and therefore held that the trial court did not err by granting the City's plea to the jurisdiction and motion to dismiss as to the claims against its individual employee. The same result should apply herein, as case law indicates the court has no discretion but must dismiss claims against a governmental employee co-defendant. See, e.g., Villasan v. O'Rourke, 166 S.W.3d 752, 761-62 (Tex.App.—Beaumont 2005, no pet.) (holding that subsequent attempts to amend by a plaintiff's attorney, after a motion to dismiss has been filed, do not prevent dismissal of the individual employee which is a right created and granted to governmental employees under Section 101.106).

B. Garcia: Texas Supreme Court lays the foundation

Although the Fort Worth Court of Appeals decision is on point in this matter, movant City wishes to emphasize that the Court of Appeals relied upon the Texas Supreme Court's controlling opinion in Garcia, attached hereto as Exhibit C.

The Texas Supreme Court's decision set forth the analysis lower courts must follow in applying section 101.106, as sought herein. In doing so, the Texas Supreme Court held that the election scheme set up in section 101.106 of the Tort Claims Act governs all suits against a governmental unit, and the Texas Supreme Court applied that section to bar any and all common law recovery against the employee. In related discussion, the Supreme Court noted the application of immunity and pointed out that the whole purpose of section 101.106 was to force a plaintiff to decide at the outset whether an employee acted independently or potentially within the scope of his or her employment. As consistent with prior rulings of Texas courts, the Texas Supreme Court noted that a plaintiff was required to make this irrevocable election at the time suit is filed. Garcia, 253 S.W.3d at 655.

If the plaintiff does not do so, the government is entitled to mandatory dismissal with prejudice of its employee upon its motion, as herein. The Texas Supreme Court noted that, "[b]ecause the decision regarding whom to sue has

irrevocable consequences, a plaintiff must proceed cautiously before filing suit and carefully consider whether to seek relief from the governmental unit or from the employee individually." Id. In cases where plaintiffs take a shotgun approach and sue both, they are subject to application of subsection 101.106(e), which the Texas Supreme Court confirmed requires mandatory dismissal of the governmental employee on the filing of a motion by the governmental unit, as herein. As the Texas Supreme Court noted, "[a]ll 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 section 101.106." Id.

As an aside, in Garcia, for some reason the school district actually failed to seek its co-defendant employee's dismissal, unlike the case herein. Thus, the Texas Supreme Court was limited to pointing out that if subsection 101.106(e) had been applied, then the employee would have been dismissed. Therefore, the more directly factually applicable situation to the case at hand is presented in the Cherry Hill proceeding, which applied the reasoning in Garcia to a procedural situation akin to this case. Accordingly, the Court must dismiss the claims that Plaintiff brings against Co-Defendant Smith.

III. CONCLUSION

As evident from the pertinent legal authority and mandatory statutory provisions of subsection 101.106(e) discussed above, movant City of Anywheresville, Texas respectfully notes that this Court has no discretion but must dismiss with prejudice the claims against the City's former employee, Co-Defendant Bill Smith, as done by the Court of Appeals in the Cherry Hill case, and as directed by the Texas Supreme Court's interpretation of section 101.106. Because such dismissal of the claims against Co-Defendant Smith are required by statute, this Court respectfully does not have subject matter jurisdiction over the claims against Co-Defendant Smith, and the City's Plea to the Jurisdiction and attendant Motion to Dismiss with prejudice must be granted.

WHEREFORE, PREMISES CONSIDERED the City of Anywheresville, movant herein, respectfully prays that Plaintiff takes nothing by way of his action, and respectfully requests that this Court grant this Plea to the Jurisdiction and Motion to Dismiss, dismiss any and all of Plaintiff's claims against Co-Defendant Bill Smith with prejudice to the re-filing of same in whole or in part, and grant such other and further relief to which Defendant of Anywheresville, Texas is justly entitled.

Respectfully submitted,

By: _____

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been provided to all counsel of record on the ___ day of _____, 20__ via facsimile and first class mail.

_____
DARRELL G-M NOGA