IN THE SUPREME COURT OF TEXAS

NO. 07-0131

JOHN CHRISTOPHER FRANKA, M.D., AND NAGAKRISHNA REDDY, M.D., PETITIONERS,

v.

STACEY VELASQUEZ AND SARAGOSA ALANIZ, INDIVIDUALLY AND AS NEXT FRIENDS OF THEIR MINOR CHILD, SARAGOSA MARIO ALANIZ, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued September 10, 2008

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE WAINWRIGHT, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT joined.

JUSTICE MEDINA filed a dissent, in which JUSTICE LEHRMANN joined.

JUSTICE GUZMAN did not participate in the decision.

Section 101.106(f) of the Texas Tort Claims Act provides that a suit against a government employee acting within the general scope of his employment must be dismissed "if it could have been brought under this chapter [that is, under the Act] against the governmental unit".[1] The court of appeals construed the quoted clause to mean that, to be entitled to dismissal, the employee must

[1] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

establish that governmental immunity from suit has been waived by the Act.[2] But as we stated in *Mission Consolidated Independent School District v. Garcia*: "we have never interpreted 'under this chapter' to only encompass tort claims for which the Tort Claims Act waives immunity."[3] Rather, "all [common-law] tort theories alleged against a governmental unit . . . are assumed to be 'under [the Tort Claims Act]' for purposes of section 101.106."[4] Accordingly, we reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings.

I

Dr. John Christopher Franka and Dr. Nagakrishna Reddy, petitioners here, delivered S.M.A, the son of Stacey Velasquez and Saragosa Alaniz, respondents, at University Hospital, a public teaching hospital owned and operated by the Bexar County Hospital District, doing business as the University Health System.[5] The Hospital is staffed with medical faculty, residents, and students of the University of Texas Health Science Center at San Antonio.[6] Franka was a faculty member employed by the Health Science Center, and Reddy was a resident in the Center's program.

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[2] 216 S.W.3d 409, 413 (Tex. App.–San Antonio 2006) ("a trial court . . . 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").

[3] 253 S.W.3d 653, 658 (Tex. 2008) (citing *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 640 (Tex. 2004), *Dallas Cnty. Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 344 (Tex. 1998), and *Newman v. Obersteller,* 960 S.W.2d 621, 622-623 (Tex. 1997)).

[4] *Mission*, 253 S.W.3d at 659 (citing *Newman,* 960 S.W.2d at 622).

[5] The District does business as the University Health System. Its history is summarized on the System's website at http://www.universityhealthsystem.com/about-university-health-system/our-history/.

[6] *See Murk v. Scheele*, 120 S.W.3d 865, 866 (Tex. 2003) (per curiam) ("University Hospital [is] a public teaching hospital for indigent patients that is owned and operated by the Bexar County Health District and staffed with medical faculty, residents, and students of the University of Texas Health Science Center . . . .").

S.M.A.'s fetal heart rate had slowed, and Franka and Reddy thought it best to attempt a vaginal 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. Franka and Reddy tried to free the baby's shoulder with their hands, but just as it appeared, Reddy heard a snap that she 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.

Velasquez and Alaniz, individually and on behalf of S.M.A., sued Franka and Reddy but not the Center (or the District or Hospital). Franka moved to dismiss the action under section 101.106(f) of the Texas Tort Claims Act, which states:

> If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.[7]

In their response, plaintiffs acknowledged that Franka was employed by a governmental unit, the Center, and that their suit was based on conduct within the general scope of his employment. But, they argued, to invoke section 101.106(f), Franka had the burden of proving that suit "could have been brought under" the Act, and to discharge that burden, he had to offer evidence that the Center's

[7] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

immunity was waived by the Act. The only basis for such a waiver, they continued, was that their injuries were "caused by a condition or use of tangible personal . . . property" under section 101.021 of the Act,[8] and "[n]othing appears in this record to implicate the use or misuse of tangible personal property in causing the orthopaedic and neurological injuries to baby [S.M.A.]." Plaintiffs suggested that the Center stipulate that its immunity from suit was waived. Failing that, they urged that Franka's motion be denied.

Apparently the trial court never ruled on Franka's motion. More than a year passed, and defendants each filed a motion for summary judgment based on section 101.106(f), differing only as to the circumstances of their employment. Each argued that "suit against [them] could have been brought against the [Center] because the conduct of [defendants] on which the allegations are based involved the use of tangible property, namely the vacuum extractor". Each attached an affidavit stating that S.M.A.'s "treatment included the use of tangible property, including a vacuum extractor." And each requested the court to order that "unless [plaintiffs] substitute [the Center] as the defendant, the case will be dismissed in thirty days." Plaintiffs responded that defendants had failed to establish that suit could have been brought against the Center because there was "no evidence that the condition or use of tangible property, the vacuum extractor, was the instrumentality of the harm, and therefore no waiver of immunity". Plaintiffs also argued that defendants had not established that they were government employees as defined by the Act.

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[8] *Id*. § 101.021 ("A governmental unit in the state is liable for . . . personal injury . . . caused by the wrongful act or omission or the negligence of an employee acting within the scope of his employment . . . by a condition or use of tangible personal . . . property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.").

The trial court denied defendants' motions, and they appealed.[9] The court of appeals affirmed, holding that a government employee is not entitled to dismissal under section 101.106(f) until he has established that his employer's immunity from suit has been waived by the Act.[10] In its view, the argument that

> the raising of a fact issue as to whether the suit "could have been brought under this chapter against the governmental 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

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[9] Plaintiffs have not questioned the court of appeals' jurisdiction over this interlocutory appeal. "A person may appeal from an interlocutory order of a district court, county court at law, or county court that . . . denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state . . . ." TEX. CIV. PRAC. & REM. CODE § 51.014(a). For two reasons, we think defendants' motions for summary judgment were based on an assertion of immunity.

First, in *Newman v. Obersteller*, we held that section 51.014(a) allowed a school district employee to appeal the denial of his motion for summary judgment seeking dismissal under former section 101.106 because "section 101.106 is an immunity statute." 960 S.W.2d 621, 623 (Tex. 1997). At that time, section 101.106 provided simply: "A judgment in an action or settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim." Act of May 17, 1985, 69th Leg. R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3305, recodifying former TEX. REV. CIV. STAT. ANN. art. 6252-19, § 12(a), Act of May 14, 1969, 61st Leg., R.S., ch. 292, § 12(a), 1969 Tex. Gen. Laws 874, 877 ("The judgment or settlement in an action or claim under this Act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of a unit of government whose act or omission gave rise to the claim."). We reasoned that the phrase, "bars any action", was "an unequivocal grant of immunity", and that allowing an interlocutory appeal from a refusal to enforce the bar "protects public officials asserting an immunity defense from the litigation process." *Newman*, 960 S.W.2d at 622. The phrase is not used in current section 101.106(f), but four other subsections speak of a bar from suit or recovery, and we think the character of the statute as one conferring immunity remains unchanged. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(a)-(d).

Second, section 101.106(f) states that a suit to which it applies "is considered to be against the employee in the employee's official capacity only." *Id.* § 101.106(f). We have held that "[w]ith the limited *ultra vires* exception . . . , governmental immunity protects government officers sued in their official capacities to the extent that it protects their employers." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 380 (Tex. 2009). By moving for summary judgment on section 101.106(f), defendants were asserting claims of governmental immunity.

[10] 216 S.W.3d 409, 413 (Tex. App.–San Antonio 2006).

> 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."[11]

We granted defendants' petition for review.[12]

II

A threshold issue is whether Franka and Reddy are "employee[s] of a governmental unit" to whom section 101.106(f) applies. In this Court, plaintiffs do not contest Franka's employee status[13] because section 101.001(2) of the Act defines an employee as "a person . . . in the paid service of a governmental unit . . . [but not] an independent contractor . . . or a person who performs tasks the

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[11] *Id*. (internal citation omitted).

[12] 51 Tex. Sup. Ct. J. 771 (Apr. 18, 2008). We have jurisdiction of this interlocutory appeal because the court of appeals' decision conflicts with *Harris Cnty. v. Sykes*, 136 S.W.3d 635 (Tex. 2004), *Dallas Cnty. Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339 (Tex. 1998), and *Newman v. Obersteller,* 960 S.W.2d 621, 622-623 (Tex. 1997), the cases that provided the basis for our decision in *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653 (Tex. 2008). *See* TEX. GOV'T CODE § 22.001(a)(2) ("The supreme court has appellate jurisdiction . . . extending to all questions of law arising in . . . a case in which one of the courts of appeals holds differently from a prior decision of . . . the supreme court on a question of law material to a decision of the case . . . ."); *id*. § 22.001(e) ("For purposes of Subsection (a)(2), one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants."); *see also City of San Antonio v. Ytuarte*, 229 S.W.3d 318, 319 (Tex. 2007) (per curiam) ("In 2003, the Legislature redefined and broadened our conflicts jurisdiction to eliminate the previous requirement that the rulings in the two cases be 'so far upon the same state of facts that the decision of one case [was] necessarily conclusive of the decision in the other.' *Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex. 1998).").

[13] Respondents' Brief on the Merits 8 ("Velasquez/Alaniz do not contest, for the purpose of this appeal, that UTHSC is a "Governmental Unit" . . . [or] that Dr. Franka was an employee of UTHSC but do contest Dr. Reddy's alleged employee status.").

details of which the governmental unit does not have the legal right to control."[14] The Center is a governmental unit,[15] and Franka was a paid member of its faculty.[16]

Reddy, however, was a resident under a three-party "Graduate Medical Education Agreement", in which she, the Center, and the District, also a governmental unit,[17] agreed that the District would compensate her but would have no legal right to control the details of her work.[18]

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[14] TEX. CIV. PRAC. & REM. CODE § 101.001(2).

[15] *See id.* § 101.001(3) ("'Governmental unit' means . . . (B) a political subdivision of this state, . . . and (D) any . . . institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution."); *see also Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 354 & n.5 (Tex. 2004) (holding that University of Texas Southwestern Medical Center at Dallas, part of University of Texas System, of which University of Texas Southwestern Medical Center at San Antonio is another part, TEX. EDUC. CODE § 65.02(a)(7), is a governmental unit under the Tort Claims Act).

[16] *See Murk v. Scheele*, 120 S.W.3d 865, 867 (Tex. 2003) (per curiam) (a UT Health Science Center faculty member, practicing at the District's hospital but paid by the Center and subject to its regimens and review, was the Center's "employee" for purposes of the Tort Claims Act, even though he was required to exercise some independent medical judgment and not every detail of his work was controlled by the Center).

[17] *See* TEX. CIV. PRAC. & REM. CODE § 101.001(3), *supra* note 15; *Harris Cnty. Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009) (citing *Martinez v. Val Verde Cnty. Hosp. Dist.*, 140 S.W.3d 370, 371 (Tex. 2004)); *cf. Bexar Cnty. Hosp. Dist. v. Crosby*, 327 S.W.2d 445, 446 (1959) (describing the Bexar County Hospital District as "a political subdivision of the State" created under the constitutional and statutory provisions at issue in the District's declaratory judgment suit against other governmental entities (see TEX. CONST. art. IX, §4 and Act of May 26, 1953, 53rd Leg., R.S., ch. 266, 1953 Tex. Gen. Laws 691, codified formerly as TEX. REV. CIV. STAT. ANN. art. 4494n and now as TEX. HEALTH & SAFETY CODE §§ 281.001-124)); *see also, e.g.*, TEX. GOV'T CODE §§ 403.1041(5), 534.002(1)(A); TEX. HEALTH & SAFETY CODE §§ 241.003(6), 285.072 (a contractor managing or operating a hospital under contract with a hospital district is considered a governmental unit for purposes of Chapters 101 (the Tort Claims Act), 102, and 108 of the Civil Practices and Remedies Code); and TEX. LOC. GOV'T CODE §§ 271.003(4); 271.009(1); 271.091(1), 271.111(10), and 271.151 (contract claims against local governmental entities) (3)(C).

[18] Specifically, the agreement stated: "The parties [*i.e.*, the Center, Reddy, and the District] understand that the Resident [*i.e.*, Reddy] performs tasks, namely the practice of medicine, the details of which the [District] does not have legal right to control and no such control is assumed by this Agreement." *Cf. Murk v. Scheele,* 120 S.W.3d 865, 867 (Tex. 2003) (per curiam) ("The Act's definition of 'employee' does not require that a governmental unit control *every* detail of a person's work. . . . [A] physician [in the "paid service" of a governmental unit and] whose practice is controlled by [that] governmental unit is not precluded from being an 'employee' within the meaning of the Act simply because he or she must exercise some independent medical judgment.").

Because Reddy was not both paid by and subject to the legal control of the same governmental unit,[19] she states that she "does not claim to be a § 101.001(2) employee."[20]

Instead, Reddy argues that section 312.007(a) of the Texas Health & Safety Code makes her a government employee for purposes of section 101.106(f) of the Act. Section 312.007(a) states:

> **A** medical and dental unit, supported medical or dental school, or coordinating entity is a state agency, and a director, trustee, officer, intern, **resident**, fellow, faculty member, or other associated health care professional or employee **of a medical** and dental **unit**, supported medical or dental school, or coordinating entity **is an employee of a state agency for purposes of** . . . **determining the liability, if any, of the person for the person's acts or omissions while engaged in the coordinated or cooperative activities of the unit**, school, or entity.[21]

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[19] Although Reddy does not assert that the Center had the legal right to control her work, the agreement provided that the Center would "establish and maintain an organized educational program, which provides guidance and supervision of the Resident, facilitating the Resident's professional and personal development while ensuring safe and appropriate care for the patients, in accordance with the institutional policies and procedures of the [Accreditation Council for Graduate Medical Education]." The agreement further provided that the Center would "evaluate the Resident on a regular basis to assess the Resident's level of advancement, practice privileges, duty hour schedule, and the nature of supervision necessary by attending teaching staff." *Cf. St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 542-544 (Tex. 2003) (plurality op.); *id.* at 544 (O'Neill, J., joined by Phillips, C.J., concurring) (concluding that the evidence did not show that a resident was under the control of the sponsoring hospital).

[20] Petitioners' Reply to Respondents' Brief on the Merits 4; *id*. at 6 ("As a result of this unique three-party arrangement, residents could not be deemed an employee of either entity under the Tort Claims Act's general definition of 'employee' as a person who is both paid by and subject to the control of a governmental entity."). We express no opinion on the validity of Reddy's reasoning.

[21] TEX. HEALTH & SAFETY CODE § 312.007(a) (emphasis added); *see also* (b) ("A judgment in an action or settlement of a claim against a medical and dental unit, supported medical or dental school, or coordinating entity under Chapter 101, Civil Practice and Remedies Code, bars any action involving the same subject matter by the claimant against a director, trustee, officer, intern, resident, fellow, faculty member, or other associated health care professional or employee of the unit, school, or entity whose act or omission gave rise to the claim as if the person were an employee of a governmental unit against which the claim was asserted as provided under Section 101.106, Civil Practice and Remedies Code.").

Reddy was a resident of a "medical unit".[22] Recently, in *Klein v. Hernandez*, we held that a resident covered by this section is a government employee for purposes of determining liability under the Act.[23] Since a liability determination may depend on whether the defendant is immune, we agree with Reddy that section 312.007(a), if applicable, would make her a government employee under section 101.106(f).

But plaintiffs argue that Reddy has failed to show that section 312.007(a) applies in this case. Section 312.003 states:

> This chapter [including section 312.007] applies only if a medical and dental unit and a supported medical or dental school agree, either directly or through a coordinating entity, to provide or cause to be provided medical, dental, or other patient care or services or to perform or cause to be performed medical, dental, or clinical education, training, or research activities in a coordinated or cooperative manner in a public hospital.[24]

Reddy acknowledges that the applicability of section 312.007(a) is conditioned on the existence of an agreement prescribed by section 312.003, and she argues that the "Graduate Medical Education Agreement" is such an agreement on its face. But the agreement does not include a supported medical or dental school, and even if that is not required, as one court has held,[25] an issue we do not

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[22] Section 312.002(4) of the Texas Health & Safety Code provides that "[i]n this chapter: . . . '[m]edical and dental unit' has the meaning assigned by Section 61.003, Education Code." Section 61.003(5) of the Texas Education Code, in turn, defines "medical and dental unit" to include the University of Texas Medical School at San Antonio, where Reddy had her residency, which is part of the Center, *id*. § 65.02(a)(10) ("The University of Texas System is composed of . . . The University of Texas Health Science Center at San Antonio, including . . . The University of Texas Medical School at San Antonio . . . .").

[23] 315 S.W.3d 1, 8 (Tex. 2010).

[24] TEX. HEALTH & SAFETY CODE § 312.003.

[25] *See Bustillos v. Jacobs*, 190 S.W.3d 728, 735 (Tex. App.–San Antonio 2005, no pet.) (holding that an agreement by "a medical or dental unit" to provide medical training and patient care in a public hospital is sufficient to satisfy section 312.003, without joinder of "a supported medical or dental school").

decide, there is nothing in the record to indicate whether or how the agreement furthers the purpose of chapter 312, which is

> to authorize coordination and cooperation between medical and dental units, supported medical or dental schools, and public hospitals and to remove impediments to that coordination and cooperation in order to:
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> (1) enhance the education of students, interns, residents, and fellows attending a medical and dental unit or a supported medical or dental school;
>
> (2) enhance patient care; and
>
> (3) avoid any waste of public money.[26]

Further, section 312.004 authorizes medical and dental units, medical and dental schools, coordinating entities, and public hospitals to contract among themselves for, among other things, "the clinical education of . . . residents",[27] but section 312.005(a) provides that "[t]o be effective, a contract under Section 312.004 must be submitted to the [Texas Board of Health]."[28] Reddy argues that an agreement that satisfies section 312.003 need not be made under section 312.004, and therefore need not be approved by the Texas Board of Health, but she cites no authority, and nothing in the statutory text supports her argument. The record does not reflect whether the "Graduate

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[26] TEX. HEALTH & SAFETY CODE § 312.001(b).

[27] *Id.* § 312.004(c) ("A medical and dental unit, a supported medical or dental school, and a coordinating entity may contract with the owner or operator of a public hospital for the clinical education of students, interns, residents, and fellows enrolled at the unit or school."); *see also id.* § 312.004(a) ("Medical and dental units, supported medical or dental schools, coordinating entities, and public hospitals may make and perform contracts among each other for the coordinated or cooperative clinical education of the students, interns, residents, and fellows enrolled at the units or schools.").

[28] *Id.* § 312.005(a).

Medical Education Agreement", or even the program it facilitated, was approved by the Board; for all we know, the program could have been disapproved by the Board.

In sum, we cannot determine from the summary judgment record that Reddy established as a matter of law that she was an employee of a governmental unit for purposes of section 101.l06(f).

III

Franka, to whom section 101.106(f) does apply, was entitled to dismissal only if the plaintiffs' suit "could have been brought under [the Act] against [the Center]".[29] The court of appeals held that the plaintiffs' suit could not have been brought under the Act unless, as a matter of law, the Act waived the Center's immunity from suit.[30] We disagree. We begin by reviewing our cases, which firmly establish the rule that any tort claim against the government is brought "under" the Act for purposes of section 101.106, even if the Act does not waive immunity. Next, we show that to except section 101.106(f) from this rule would be inconsistent with other provisions of the Act and would create disparities in its operation. We then consider the practical problems that would result from the court of appeals' construction. Finally, we consider the policies that underlie the statute as we construe it.

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[29] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

[30] 216 S.W.3d 409, 412 (Tex. App.–San Antonio 2006).

A

We first considered whether a suit for which the Act has not waived immunity is nevertheless "under" the Act for purposes of section 101.106 in *Newman v. Obersteller*.[31] At that time, section 101.106 stated simply:

> A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim.[32]

A high school student and his parents sued his coach and the school district for intentional infliction of emotional distress,[33] alleging that the coach and other school employees had berated, harassed, and intimidated him, once locking him in a locker room by himself.[34] The trial court dismissed the case against the school district based on its assertion of immunity, presumably because the Act does not waive immunity for intentional torts,[35] but refused to dismiss the case against the coach.[36] The court of appeals dismissed the coach's interlocutory appeal for want of jurisdiction, holding that section 101.106 was not a grant of immunity to government employees, the denial of which was

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[31] 960 S.W.2d 621, 622 (Tex. 1997).

[32] Act of May 17, 1985, 69th Leg. R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3305, recodifying former TEX. REV. CIV. STAT. ANN. art. 6252-19, § 12(a), Act of May 14, 1969, 61st Leg., R.S., ch. 292, § 12(a), 1969 Tex. Gen. Laws 874, 877 ("The judgment or settlement in an action or claim under this Act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of a unit of government whose act or omission gave rise to the claim.").

[33] *Newman*, 960 S.W.2d at 622.

[34] *Newman v. Obersteller*, 915 S.W.2d 198, 203 (Tex. App.–Corpus Christi 1996), *rev'd*, 960 S.W.2d 621 (Tex. 1997).

[35] TEX. CIV. PRAC. & REM. CODE § 101.057(2) ("This chapter does not apply to a claim . . . arising out of assault, battery, false imprisonment, or any other intentional tort . . . .").

[36] *Newman*, 960 S.W.2d at 622.

subject to interlocutory appeal, but merely a procedural limitation.[37] We reversed, holding that the statute's "bar" of an action against a government employee in effect conferred immunity on the employee.[38] We also rendered judgment against the plaintiffs, holding that the dismissal of their claim against the school district barred their action against the coach.[39] The rule of *Newman* is that a tort claim against the government is "under" the Act even though the Act does not waive immunity from suit.

We followed the rule in *Dallas County Mental Health and Mental Retardation v. Bossley*[40] and again in *Harris County v. Sykes*.[41] In *Bossley*, the plaintiffs sued a mental health treatment facility and its employees for allowing their son to escape, resulting in his death.[42] The trial court dismissed the case, holding that the facility was immune from suit and that suit against the employees was consequently barred by section 101.106, but the court of appeals reversed.[43] We held that the trial court was correct.[44] In *Sykes*, the plaintiff sued the county and its jailor, alleging that while incarcerated in the county jail, he had negligently been assigned a bed near an inmate with

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[37] *Newman*, 915 S.W.2d at 200-201.

[38] *Newman*, 960 S.W.2d at 622.

[39] *Id.* at 623.

[40] 968 S.W.2d 339, 343-344 (Tex. 1998).

[41] 136 S.W.3d 635, 640 (Tex. 2004).

[42] *Bossley*, 968 S.W.2d at 340-341.

[43] *Id*. at 341.

[44] *Id*. at 343-344.

tuberculosis.[45] The trial court dismissed the case as the trial court in *Bossley* had done, but the court of appeals reversed with respect to the jailor.[46] We held that the dismissal of the county barred suit against the jailor.[47]

We elaborated on the rule in *Mission Consolidated Independent School District v. Garcia*,[48] construing a new version of section 101.106, completely revised and greatly expanded in 2003 by House Bill 4, a comprehensive tort reform measure.[49] The revised provision—in which "under this chapter" is used in subsections, (a), (c), (e), and (f)—reads as follows:

> (a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.
>
> (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.
>
> (c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.
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> (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.

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[45] *Sykes*, 136 S.W.3d at 637.

[46] *Id*. at 637-638.

[47] *Id*. at 640-641.

[48] 253 S.W.3d 653, 658 (Tex. 2008).

[49] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 11.05, 2003 Tex. Gen. Laws 847, 886.

> (e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.
>
> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.[50]

In *Mission*, three former employees of the school district sued the district and its superintendent: the district for wrongful termination in violation of the Texas Commission on Human Rights Act,[51] both the district and superintendent for intentional infliction of emotional distress, and the superintendent for defamation, fraud, and negligent misrepresentation.[52] The district sought dismissal under section 101.106(b), asserting that the plaintiffs' suit against the superintendent barred suit against it on the same claims without its consent.[53] The trial court refused to dismiss the case against the district, and the court of appeals affirmed.[54]

The plaintiffs argued that because they had sued both the district and the superintendent, section 101.106(e) applied, rather than 101.106(b), and because the Act did not waive the district's immunity from suit on either of their claims against it, those claims were not "under" the Act, and

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[50] TEX. CIV. PRAC. & REM. CODE § 101.106.

[51] TEX. LAB. CODE §§ 21.001-21.556.

[52] 253 S.W.3d at 655.

[53] *Id*.

[54] *Id.*

therefore dismissal of the superintendent was not required.[55] We concluded that the plaintiffs' argument misconstrued subsection (e), and that correctly construed, the end result under either subsection (b) or (e) would be the same. We analyzed subsection (e) as follows:

> The court of appeals reasoned that none of Garcia's claims were brought "under this chapter" because they did not fit within the Tort Claims Act's waiver, and therefore section 101.106(e) did not apply. However, we have never interpreted "under this chapter" to only encompass tort claims for which the Tort Claims Act waives immunity. To the contrary, in *Newman v. Obersteller,* we held that former section 101.106's limiting phrase "under this chapter" operated to bar an intentional tort claim against an employee after a final judgment on a claim involving the same subject matter had been rendered against the governmental unit, even though the Act by its terms expressly excluded intentional torts from the scope of the Act's immunity waiver. *See also, e.g., Sykes,* 136 S.W.3d at 640 (applying section 101.106 to bar the plaintiff's claim against a governmental employee even though immunity was not waived under the Tort Claims Act for suit against the governmental unit); *Dallas County Mental Health & Mental Retardation v. Bossley,* 968 S.W.2d 339, 344 (Tex. 1998) (dismissing suit against employee when both the employee and the governmental unit were sued based on negligence theories that were not within the Act's limited waiver). Although these cases construed the prior version of section 101.106, there is nothing in the amended version that would indicate a narrower application of the phrase "under this chapter" was intended. Because the Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be "under [the Tort Claims Act]" for purposes of section 101.106. *See Newman,* 960 S.W.2d at 622.
>
> Having concluded that Garcia's tort claims are not excluded from section 101.106(e)'s application, we examine subsection (e)'s effect if it were applied to this case. Under subsection (e), Dyer would be entitled to dismissal of Garcia's suit against him upon the ISD's filing of a motion. The ISD has not sought Dyer's dismissal, however, and Dyer has not sought his own dismissal under subsection (f). But if the ISD had obtained Dyer's dismissal from the suit under subsection (e), all of Garcia's tort claims against the ISD would be barred because, as we have said, all tort theories of recovery alleged against a governmental unit are presumed to be "under the [Tort Claims Act]." Garcia's suit under the TCHRA, however, is not "a

[55] *Id.* at 658.

> suit filed under this chapter" and would not come within subsection (e)'s purview because the Tort Claims Act expressly provides that the remedies it authorizes "are in addition to any other legal remedies," and the TCHRA provides a statutory remedy for unlawful discrimination. *Id.* § 101.003. Claims against the government brought pursuant to waivers of sovereign immunity that exist apart from the Tort Claims Act are not brought "under [the Tort Claims Act]." In sum, if subsection (e) were applied to Garcia's suit and Dyer was dismissed, the only claim against the ISD that would survive would be Garcia's TCHRA claim.[56]

Likewise, only the TCHRA claim survived under section 101.106(b). Because subsection (b) does not contain the "under this chapter" limitation, any suit against a government employee bars suit "against the governmental unit regarding the same subject matter unless the governmental unit consents".[57] While the school district had not itself consented to be sued by the plaintiffs, the TCHRA provided consent for wrongful termination claims, because "the government conveys its consent to suit . . . through the Constitution and state laws."[58] "Thus," we concluded, "the Legislature, on behalf of the [school district], has consented to suits brought under the TCHRA, provided the procedures outlined in the statute have been met."[59]

The rule that a tort suit against the government, as distinct from a statutory claim, is brought "under" the Act for purposes of section 101.106, even though the Act does not waive immunity, is firmly grounded in our cases. More importantly, as *Mission* illustrates, with the 2003 revisions to

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[56] *Id*. at 658-659 (footnote and some citations omitted).

[57] *Id*. at 659-660.

[58] *Id*. at 660.

[59] *Id*.

section 101.106, the rule has become necessary for harmonizing the several subsections of the statute.

B

Although we have not applied the same rule to section 101.106(f) before today, the statutory text suggests we should. The revised statute lifts the phrase "under this chapter" from the prior statute and repeats it four times. The prior statute referred to "an action or settlement of a claim under this chapter". The current version refers to "[t]he filing of a suit under this chapter" in subsection (a), "[t]he settlement of a claim arising under this chapter" in subsection (c), "a suit . . . filed under this chapter" in subsection (e), and "a suit [that] . . . could have been brought under this chapter" in subsection (f).[60] The text gives no hint that any these references has a different meaning; to the contrary, the repetition strongly suggests that the meaning throughout is the same.

Two other sections of the Act also make plain that suits brought "under" the Act include those for which immunity is not waived. Section 101.103(a) requires the attorney general to "defend each action brought under this chapter".[61] One would hardly suppose that the attorney general would be relieved of this responsibility whenever he thought, as he regularly does, his client's immunity remained intact despite the plaintiff's allegations. Section 101.102, entitled "Commencement of Suit", provides that "[a] suit under this chapter shall be brought in state court in the county in which the cause of action or a part of the cause of action arises."[62] If this applies only to suits for which

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[60] TEX. CIV. PRAC. & REM. CODE § 101.106.

[61] *Id.* § 101.103(a).

[62] *Id.* § 101.102(a).

immunity is waived, can suits for which immunity is not waived, of which there are many, be brought anywhere? One would hardly think so. These examples serve to illustrate the obvious: that suit is brought under the Act when it is filed, not when waiver of immunity by the Act is established.

Construing subsection (f) as the court of appeals did in this case is not only inconsistent with *Mission* and the Act as a whole, it creates at least a disparity, if not an absurdity, in the statute's operation. If a plaintiff sues only a government employee and not the government, then under subsection (f), according to the court of appeals, the employee need not be dismissed unless a waiver of the government's immunity for the claim is established. But if a plaintiff sues both the government and its employee, then under subsection (e), according to *Mission*, the employee must be dismissed, even if the government's immunity is not waived. There is no reason why an employee should be entitled to dismissal if sued with the government but not if sued alone.

For consistency both within section 101.106 and throughout the Act, subsection (f) must be governed by the same rule *Mission* applied in construing subsection (e).

C

The court of appeals' construction of section 101.106(f) poses serious practical problems.

Requiring a government employee to prove that his employer's immunity from suit has been waived in order to obtain dismissal forces the parties to take unexpected positions with collateral risks. Ordinarily, one would expect a government employee to support his employer's assertion of immunity. Only a perverse statute would incentivize conflict between the two, and there is nothing to indicate that the Legislature had any such intent. The plaintiff, too, is forced into an awkward

position, arguing that immunity was not waived, and thereby cutting off that path to liability and recovery.

Moreover, the employee, the plaintiff, and the employer could all be whipsawed by the trial court's ruling that immunity was waived. Since the government was not a party to the case at the time, it would not be bound by the ruling and would be free to seek a redetermination and to appeal. Exhibit A in support of its arguments that immunity was not waived would be the plaintiff's own assertions. And in response, the plaintiff would cite the employee. The immunity issue would thus be encased in confusion and cynicism.

The predicament for the plaintiff would be even trickier. He would be required to decide within thirty days of the employee's motion to dismiss whether to acquiesce and sue the government instead. Nothing in section 101.106(f) requires the trial court to rule on whether immunity was waived, either before or after the thirty-day deadline. Even if the plaintiff obtained the trial court's ruling before having to decide whether to dismiss the employee, there would be no assurance that the ruling would be upheld on appeal, especially after the issue was relitigated with the government. If the plaintiff refuses to dismiss the employee, he risks being faced with the government's stipulation that immunity was waived, after the deadline for suing the government has run. If he dismisses the employee and sues the government, he has some advantage in being able to defend the government's assertion of immunity with its employee's contrary statements, but he may not be able to prove waiver, even with such statements. Thus, he will have traded a viable claim against the employee for a barred claim against the government.

Section 101.106(f) leaves the timing of a motion to dismiss to the employee. Delay poses an additional problem for the plaintiff. If he does not notify the government of his claim as required by section 101.101, believing that he has a stronger claim against the employee actor, the government may wait until after the six-month deadline for that notice and then stipulate that immunity was waived, leaving the plaintiff with no cause of action at all. To avoid this result, the plaintiff may notify the government of his claim, but his doing so may be taken as an indication of his position that immunity has been waived, undercutting any later argument that it was not.

These problems, though thorny, may not always occur and may not be insuperable when they do, but they arise at all only under the court of appeals' construction of section 101.106(f). They do not exist if subsection (f) is construed the same way *Mission* construed subsection (e). Properly construed, section 101.106(f)'s two conditions are met in almost every negligence suit against a government employee: he acted within the general scope of his employment,[63] and suit could have been brought under the Act — that is, his claim is in tort and not under another statute that independently waives immunity. In such cases, the suit "is considered to be against the employee in the employee's official capacity only",[64] and the plaintiff must promptly dismiss the employee and sue the government instead. No party is forced into awkward or conflicting positions. The immunity issue need not be determined until the governmental unit is in the suit and the issue can be fully addressed.

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[63] Whether an employee's intentional tort is within the scope of employment is a more complex issue. *See generally* RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006).

[64] TEX. CIV. PRAC. & REM. CODE § 101.106(f).

This construction of section 101.106(f) does, however, foreclose suit against a government employee in his individual capacity if he was acting within the scope of employment. This changes, among other things, the rule in *Kassen v. Hatley*, which has allowed malpractice suits against physicians employed by the government, even though acting within the scope of employment.[65] Recovery for the negligence of a government physician acting in the course of employment would be limited to that afforded under the Act. At least one participant in the legislative process that resulted in the enactment of House Bill 4 has written that this change was precisely the intent of the revisions to section 101.106.[66] In any event, our construction of section 101.106 is compelled by its text and by the rule of *Mission*, *Sykes*, *Bossley*, and *Newman*.[67]

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[65] 887 S.W.2d 4, 11 (Tex. 1994).

[66] "Under prior law, many plaintiffs avoided the TTCA's cap on damages, notice provision, and case law interpreting use and misuse of tangible personal property by suing government employees individually. Texas case law had generally held that individual employees were not afforded the defenses and protections contained in the TTCA. Accordingly, by filing suit against the employee under other statutes, a plaintiff could circumvent the TTCA.

"Section 11.05 of H.B. 4 created a new 'Election of Remedies' section under the TTCA. The section effectively requires plaintiffs to sue the governmental unit rather than an employee of the governmental unit.

* * *

"The net effect of the various new provisions of the TTCA is that a plaintiff will only be able to pursue the governmental entity and not its employees. The amendment also solves the problems Texas courts faced in trying to determine if employees of governmental units were entitled to the defense of official immunity. . . .

"In *Kassen*, the Texas Supreme Court held that health care providers are entitled to official immunity if their acts are governmental in nature and not purely medical. The court's 1994 holding has forced lower courts to conduct a complicated analysis of each fact pattern in each case. Consequently, *Kassen* did not remove the threat of potential lawsuits against employees of a governmental unit. . . . H.B. 4 addressed those concerns by requiring that lawsuits be brought against the governmental unit instead of its employees. As a result, the need for determining if official immunity applies is eliminated."

Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. 169, 290-293 (2005) (footnotes omitted).

[67] Two courts of appeals appear to have recognized that *Mission* requires the construction of section 101.106(f) we adopt. *Castro v. McNabb*, 319 S.W.3d 721, 731-732 (Tex. App.–El Paso 2009, no pet.); *Kelemen v. Elliott*, 260 S.W.3d 518, 524 (Tex. App.–Houston [1st Dist.] 2008, no pet.). We disapprove the cases that have adopted a different

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Our construction of section 101.106 is also consistent with the Legislature's purposes in enacting House Bill 4.

Under Texas law, a suit against a government employee in his official capacity is a suit against his government employer[68] with one exception: an action alleging that the employee acted *ultra vires*.[69] With that exception, an employee sued in his official capacity has the same

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construction. *See McFadden v. Oleskey*, No. 03-09-00187-CV, 2010 Tex. App. LEXIS 6806, at *24, 2010 WL 3271667, at *8 (Tex. App.–Austin Aug. 19, 2010, no pet.); *Illoh v. Carroll*, 321 S.W.3d 711, 716-717 (Tex. App.–Houston [14th Dist.] 2010, pet. filed); *Menefee v. Medlen*, 319 S.W.3d 868, 875-877 (Tex. App.–Fort Worth 2010, no pet.); *Reedy v. Pompa*, 310 S.W.3d 112, 119 (Tex. App.–Corpus Christi-Edinburg 2010) (petition granted Jan. 21, 2011); *Lieberman v. Romero*, No. 05-08-01636-CV, 2009 Tex. App. LEXIS 8414, at *4-5, 2009 WL 3595128, at *2 (Tex. App.–Dallas Nov. 3, 2009) (mem. op.) (petition granted Jan. 21, 2011); *Terry A. Leonard, P.A. v. Glenn*, 293 S.W.3d 669, 681-682 (Tex. App.–San Antonio 2009) (petition granted Jan. 21, 2011); *Escalante v. Rowan*, 251 S.W.3d 720, 727-729 (Tex. App.–Houston [14th Dist.] 2008) (petition granted Jan. 21, 2011); *Lanphier v. Avis*, 244 S.W.3d 596, 600 (Tex. App.–Texarkana 2008, pet. filed); *Hall v. Provost*, 232 S.W.3d 926, 928-929 (Tex. App.–Dallas 2007, no pet.); *Turner v. Zellers*, 232 S.W.3d 414, 417-419 (Tex. App.–Dallas 2007, no pet.); *Kanlic v. Meyer*, 230 S.W.3d 889, 893-894 (Tex. App.–El Paso 2007, pet. filed); *Clark v. Sell ex rel. Sell*, 228 S.W.3d 873, 874-875 (Tex. App.–Amarillo 2007) (petition granted Jan. 21, 2011); *Sheth v. Dearen*, 225 S.W.3d 828, 830 (Tex. App.–Houston [14th Dist.] 2007, no pet.); *Tex. Dep't of Agric. v. Calderon*, 221 S.W.3d 918, 922-923 (Tex. App.–Corpus Christi-Edinburg 2007, no pet.); *Walkup v. Borchardt*, No. 07-06-0040-CV, 2006 Tex. App. LEXIS 10333, at *1-2, 2006 WL 3455254, at *1 (Tex. App.–Amarillo Nov. 30, 2006, no pet.); *Tejada v. Rowe*, 207 S.W.3d 920, 925 (Tex. App.–Beaumont 2006, pet. filed); *Williams v. Nealon*, 199 S.W.3d 462, 466-467 (Tex. App.–Houston [1st Dist.] 2006) (petition granted Jan. 21, 2011); *Phillips v. Dafonte,* 187 S.W.3d 669, 676-677 (Tex. App.–Houston [14th Dist.] 2006, no pet.).

[68] *Texas A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 844 (Tex. 2007) ("It is fundamental that a suit against a state official is merely 'another way of pleading an action against the entity of which [the official] is an agent.' *Kentucky v. Graham,* 473 U.S. 159, 165, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (quoting *Monell v. Dep't of Social Servs. of City of New York,* 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)); *see also Tex. Dep't of Pub. Safety v. Petta,* 44 S.W.3d 575, 581 (Tex. 2001). A suit against a state official in his official capacity 'is *not* a suit against the official personally, for the real party in interest is the entity.' *Graham,* 473 U.S. at 166, 105 S.Ct. 3099 (emphasis in original). Such a suit actually seeks to impose liability against the governmental unit rather than on the individual specifically named and 'is, in all respects other than name, . . . a suit against the entity.' *Id.; see also Tex. Natural Res. Conservation Comm'n v. IT-Davy,* 74 S.W.3d 849, 855-56 (Tex. 2002).").

[69] *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372, 373 (Tex. 2009) ("[S]uits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money. To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act. . . . But the *ultra vires* rule is subject to important qualifications. Even if such a claim may be brought, the remedy may implicate immunity.").

governmental immunity, derivatively, as his government employer.[70] But public employees (like agents generally[71]) have always been individually liable for their own torts, even when committed in the course of employment,[72] and suit may be brought against a government employee in his individual capacity.[73] Generally, however, public employees may assert official immunity[74] "from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority."[75] Of course, determining whether actions and decisions are discretionary "is admittedly problematic".[76] Importantly, for government employees with medical responsibilities, we held in *Kassen* that government discretion does not include medical

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[70] *Id.* at 380 ("With the limited *ultra vires* exception . . . , governmental immunity protects government officers sued in their official capacities to the extent that it protects their employers."); *Koseoglu*, 233 S.W.3d at 844 ("When a state official files a plea to the jurisdiction, the official is invoking the sovereign immunity from suit held by the government itself.").

[71] *E.g. Miller v. Keyser*, 90 S.W.3d 712, 717 (Tex. 2002); *Leonard v. Abbott*, 366 S.W.2d 925, 928-929 (Tex. 1963).

[72] *House v. Houston Waterworks Co.*, 31 S.W. 179, 181 (Tex. 1895) ("It is well settled that a public officer or other person who takes upon himself a public employment is liable to third persons in an action on the case for any injury occasioned by his own personal negligence or default in the discharge of his duties." (internal quotation marks and citation omitted)).

[73] *Heinrich*, 284 S.W.3d at 373 n.7 ("State officials may, of course, be sued in both their official and individual capacities.").

[74] *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422-424 (Tex. 2004) (discussing the history of official immunity in Texas law, noting that it has been accorded officials, law enforcement and emergency officers, and physicians, and holding that board of adjustment members can assert it). We have not held that every government employee may assert official immunity, but I am not aware of a case denying it.

[75] *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

[76] *Kassen v. Hatley*, 887 S.W.2d 4, 9 (Tex. 1994).

discretion.[77] Thus, official immunity does not protect a physician sued in his individual capacity from liability for medical decisions and actions.

Before the Tort Claims Act was passed in 1969, if suit against the government was barred by immunity, a plaintiff could sue and recover against a government employee-actor in his individual capacity even though, were he sued for the same conduct in his official capacity, he would be shielded by derived governmental immunity. The employee's official immunity would not bar suit or recovery if his conduct were non-discretionary, medical, or not done in good faith. Under the Act, a waiver of governmental immunity does not preclude an assertion of official immunity,[78] but a successful assertion of official immunity results in a waiver of governmental immunity.[79]

In waiving governmental immunity, the Legislature correspondingly sought to discourage or prevent recovery against an employee. As already discussed, the original enactment of the Act in 1969 contained a provision substantively identical to section 101.106 before its revision in 2003. That provision was strikingly similar to language in the 1949 Federal Tort Claims Act.[80] The federal provision was amended in 1961 to make the FTCA the exclusive remedy for motor vehicle accidents

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[77] *Id*. at 11-12.

[78] *DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995) ("Whether the Texas Tort Claims Act waives sovereign immunity in a given case does not affect whether the governmental employee may assert official immunity as a defense."); TEX. CIV. PRAC. & REM. CODE § 101.026 ("To the extent an employee has individual immunity from a tort claim for damages, it is not affected by this chapter.").

[79] *Dewitt*, 904 S.W.2d at 654 (section 101.121 of the TTCA "predicate[s] the governmental unit's respondeat superior liability upon the liability of its employee").

[80] 28 U.S.C. § 2676 ("The judgment in an action under [the Federal Tort Claims Act] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."). We noted the similarity in *Thomas v. Oldham*, 895 S.W.2d 352, 356 (Tex. 1995).

involving federal employees acting within the scope of their employment,[81] but through the years, judicial application of official immunity was not entirely uniform.[82] In 1988, the United States Supreme Court held in *Westfall v. Erwin* that for a federal employee to be immune from suit on a common law tort, he must show not only that he was acting within the scope of employment but also that he was performing a discretionary function.[83] Congress viewed the second requirement as exposing employees to unwarranted liability[84] and quickly passed the Federal Employees Liability Reform and Tort Compensation Act, commonly known as the Westfall Act, which provided immunity to all employees acting within the scope of employment,[85] "'return[ing] [them] to the

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[81] *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425 (U.S. 1995) (citing Pub. L. 87-258, § 1, 75 Stat. 539).

[82] *See, e.g.*, *Barr v. Matteo*, 360 U.S. 564, 574-575 (1959) (Justice Harlan, joined by Justices Frankfurter, Clark, and Whittaker, concluded that, under the circumstances in the record, the alleged libel could not be said to be an inappropriate exercise of discretion by an agency head; it would be unduly restrictive to hold a public statement of agency policy, on a matter of wide public interest, by a policy-making executive official, was not an action in the line of duty, and the "fact that the action was within outer perimeter of the petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice"), and *Poolman v. Nelson*, 802 F.2d 304, 308 & n.2 (8th Cir. 1986) (holding that a Farmers Home Administration county supervisor was immune from a would-be borrower's suit over alleged misrepresentations because those actions fell "within the outer perimeter" of the county supervisor's authority, citing, *inter alia*, *Barr*, 360 U.S. at 571).

[83] 484 U.S. 292, 296-297 (1988); *see also* H.R. REP. No. 100-700, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946 ("[I]n Westfall, the Supreme Court added an additional requirement for immunity when a Federal employee is sued in his personal capacity. Now, the Federal employee not only must have been acting within the scope of employment (the original standard), but also must have exercised governmental discretion in acting.").

[84] *See* H.R. REP. No. 100-700, at 2 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946 ("[N]early all actions against Federal employees in their personal capacity were unsuccessful because those employees were acting in the course and scope of employment, and therefore were immune from personal liability").

[85] 28 U.S.C. § 2679 ("(b)(1) The remedy against the United States provided by [the Federal Tort Claims Act] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred. (2) Paragraph (1) does not extend or apply to a civil

status they held prior to the *Westfall* decision.'"[86] The Westfall Act made whatever remedy the FTCA provided against the United States a claimant's exclusive remedy for a government employee's conduct in the scope of employment.

House Bill 4's revision of section 101.106 achieves the same end under Texas law as the Westfall Act does under federal law. As it affects government-employed physicians, it is generally consistent with the Legislature's concerns regarding health care costs, also expressed in the bill.[87] We recognize that the Open Courts provision of the Texas Constitution "prohibits the Legislature from unreasonably abrogating well-established common-law claims",[88] 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,[89] and thus "a reasonable exercise of the police power in the interest of the general welfare."[90] In any event, no constitutional challenge is made in this case.

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action against an employee of the Government — (A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.").

[86] *Gutierrez de Martinez*, 515 U.S. at 426 (quoting H.R. REP. No. 100-700, at 4 (1988)).

[87] Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.11, 2003 Tex. Gen. Laws 847, 884.

[88] *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 202 (Tex. 2002).

[89] *See Thomas v. Oldham*, 895 S.W.2d 352, 357-358 (Tex. 1995).

[90] *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995).

Accordingly, we hold that for section 101.106(f), suit "could have been brought" under the Act against the government regardless of whether the Act waives immunity from suit. We reverse the judgment of the court of appeals and remand to the trial court for further proceedings.

Nathan L. Hecht
Justice

Opinion delivered: January 21, 2011