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, BOTH 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 MEDINA, joined by JUSTICE LEHRMANN, dissenting.

In *Kassen v. Hatley*, we held that government-employed medical personnel were not entitled to the defense of official immunity when sued individually for the negligent exercise of purely medical judgment. 887 S.W.2d 4, 11 (Tex. 1994). Recognizing that medical decisions were typically unrelated to governmental discretion, we concluded that public-sector patients should have the same rights as private-sector patients when only medical judgment was at issue. *Id.* 11–12. Today, the Court abandons that principle, not because *Kassen* was wrongly decided, but because the Legislature has amended section 101.106 of the Tort Claims Act. TEX. CIV. PRAC. & REM. CODE

§ 101.106. Because this amendment does not speak to the official immunity of physicians accused of malpractice and does not require that we abandon *Kassen*, I respectfully dissent.

I

The Texas Tort Claims Act[1], does not waive the state's immunity generally for the medical malpractice of its doctors. Instead, it waives the state's sovereign or governmental immunity for, among other things, personal injury "caused by a condition or use of tangible . . . property." TEX. CIV. PRAC. & REM. CODE § 101.021(2). Texas courts have struggled with the meaning and application of the quoted phrase since the Act's adoption over forty years ago. *See Texas Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 590 (Tex. 2001) (Hecht, J. concurring) (lamenting that judicial decisions "have done so little to infuse the Act's use-of-property standard with meaning that the task now appears hopeless"). Although the standard lacks clarity, it is clear that medical negligence will sometimes not involve the use of property. Consider the facts in this case.

The asserted medical malpractice concerns a brachial plexus injury to an infant during delivery. The brachial plexus is a network of nerves that conducts signals from the spine to the shoulder, arm, and hand. These nerves were allegedly damaged when one of the infant's shoulders became stuck during delivery and was accidently broken.

The parents' theory was that the doctors ignored numerous warning signs indicating the need for a Caesarean delivery. The parents supported their theory with an expert report that listed the risk

[1] The Tort Claims Act waives the state's sovereign immunity "for certain tort claim involving automobiles, premises defects, or the condition or use of property." *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 657 (Tex. 2007); *see also* TEX. CIV. PRAC. & REM. CODE §§ 101.001(3)(A)-(B), 101.021, 101.022, 101.025.

factors presented in the case. The report concluded that the doctors had "departed from the standard of care by failing to recognize that [the mother and fetus] demonstrated these six significant risk factors for the development of shoulder dystocia leading to an improper attempt at vaginal delivery rather than a Caesarean delivery that would have avoided the shoulder fracture and brachial plexus nerve injury sustained at birth."

The doctors moved to dismiss, contending that the parents should have sued their employer, UTHSC, rather than the doctors individually because a vacuum extractor was used during delivery. To invoke a waiver of governmental immunity conditioned upon a "use of property" there must be a causal link between the property's use and the patient's injury.[2] The court of appeals concluded that there was no such causal link here because neither the pleadings nor the evidence implicated the vacuum extractor as a cause of injury. 216 S.W.3d at 411-13. The court observed that the progress notes, the expert report, and the deposition testimony of the two doctors established that the vacuum extractor was used only to deliver the infant's head. *Id*. at 411. A number of additional maneuvers, involving only the doctors' hands, were used after that to deliver the infant's shoulders at which time the injury occurred. *Id*.

When a governmental employee causes injury, section 101.106 of the Tort Claims Act purports to give the injured person a choice of suing the government, or its employee, or both. TEX. CIV. PRAC.

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[2] *See Tex. Natural Resource & Conservation Comm'n v. White*, 46 S.W.3d. 864, 868, 869 (Tex. 2001) (property's use "must have actually caused the injury"); *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 344 (Tex. 1997) ("personal injury or death must be proximately caused by a condition or use of tangible personal or real property").

& REM. CODE § 101.106. I say purports because the Court holds that this provision is a sham; it does not actually provide the putative plaintiff any choice in the matter. The statute's title and text indicate, however, that the Court is wrong. The statute plainly puts the plaintiff to an election[3] at the time of filing suit with different consequences following the various choices.

Although not pertinent to this appeal, the statute also covers the consequences of a settlement or judgment. *Id.* § 101.106(c), (d). Before its amendment in 2003, section 101.106 applied exclusively to settlements and judgments and provided simply that a plaintiff could not sue the

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[3] § 101.106. **Election of Remedies**

(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.

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

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

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

TEX. CIV. PRAC. & REM. CODE § 101.106.

employee after a judgment or settlement with the government.[4] We characterized the employee's right under the former provision as an immunity from liability. *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 344 (Tex. 1997); *see also Newman v. Obersteller*, 960 S.W.2d 621, 622 (Tex. 1997). The 2003 amendments have expanded the statute's scope but have not changed its character. The statute continues to create immunity from liability but now includes decisions made at the time of filing suit in addition to settlements and judgments.

Under the current statute, a plaintiff who sues only the government is barred from subsequently suing the government's employee "regarding the same subject matter." TEX. CIV. PRAC. & REM. CODE § 101.106(a). The plaintiff may elect to sue both the government and its employee, but the statute grants the government the unconditional right to have its employee dismissed from the suit if the plaintiff makes that election. *Id*. § 101.106(e). If the plaintiff does not want to sue the government, the plaintiff may sue the employee individually in which case the statute bars the plaintiff from subsequently suing the government "regarding the same subject matter unless the governmental unit consents." *Id*. § 101.106(b). Even when the plaintiff sues the employee individually, the employee may obtain his or her dismissal under the conditions set out in section 101.106(f).

Subpart (f) provides that the employee shall be dismissed when the suit "is based on conduct within the general scope of that employee's employment and . . . could have been brought under this

[4] The former provision, titled, "Employees Not Liable after Settlement or Judgment," provided that "[a] judgment in an action or a settlement of a claim under [the Tort Claims Act] bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose action or omission gave rise to the claim." *See id*. § 101.106 (1997) (amended by Act of June 2, 2003, 78th Leg., RS, ch. 204, § 11.05, 2003 Tex. Gen. Laws 886).

chapter against the governmental unit." *Id.* § 101.106(f). There are therefore three conditions for the employee's dismissal under subpart (f): (1) the employee must have been employed by a governmental unit at the time of the incident; (2) the suit must be based on conduct within the scope of that employment; and (3) the plaintiff must have been able to bring the claim against the governmental employer under this chapter. "Under this chapter" refers to chapter 101 of the Civil Practice and Remedies Code, commonly known as the Texas Tort Claims Act. *Id.* § 101.002. Although there is some question about the employment of one of the doctors in this case, the question as to both doctors is whether the plaintiffs' medical malpractice action "could have been brought" against the governmental unit, UTHSC, under the Tort Claims Act.

II

The Court and I disagree about the meaning of the last condition—whether suit "could have been brought under this chapter against the governmental unit." I would hold that this condition refers to those tort claims for which the government has consented to suit under the Tort Claims Act. The Court attributes a broader meaning to the phrase, indicating that it includes all tort claims filed against a governmental employee individually without regard to whether the government has consented to be sued.

The Court reasons that because it is possible to sue the government for medical malpractice under the Tort Claims Act, albeit under limited circumstances, plaintiffs must sue the government, instead of their doctors individually, even when those limited circumstances do not exist. In the Court's view, the statute is not about giving the plaintiff the right to choose the appropriate defendant

but rather about making the government the defendant in all tort cases arising out of its employees' conduct. The Court finds it immaterial that the plaintiffs filed their tort claim against the doctors individually, did not seek to join the government, and presumably do not believe they have an actionable tort claim against the government because governmental immunity has not been waived as to their claim. By ignoring the plaintiffs' election and the reasons for it, the Court effectively reads the "could have been brought" condition out of the statute, holding instead that plaintiffs may sue only the government for the medical malpractice of its publicly-employed physicians. "Whatever merits this holding may have as a rule of law do not include fidelity to language and precedent." *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 14 (Tex. 2000) (Hecht, J. dissenting.)

The Attorney General, as Amicus Curiae in this case, shares my concern about the Court's construction of the statute. He appropriately notes that the phrase "could have been brought" is unique to subpart (f). In contrast, references to the filing of suit are made repeatedly throughout section 101.106. *See, e.g.,* TEX. CIV. PRAC. & REM. CODE § 101.106 (a), (b), (e), (f). The Attorney General submits that the Legislature purposefully chose the term "brought" rather than "filed" to indicate a substantive distinction from the mere physical process reflected in the introductory clause of subpart (f) ("[i]f a suit is filed") and the similar use of the term "filing" or "filed" in subparts (a), (b), and (e). The Attorney General further submits that the Legislature intended for the phrase "could have been brought" to mean something different than could have been filed. To equate "brought" with "filed", argues the Amicus, is to render subpart (f)'s principle condition superfluous. Anyone can physically file a claim against the government, but not every claim filed against the government is actionable.

The Attorney General concludes that the "could have been brought" condition can only refer to actionable claims against the government, that is, tort claims for which the government has consented to be sued.

I agree that the phrase "could have been brought" refers to actionable claims against the government. Unlike the Court, I believe that the "Election of Remedies" provision puts the plaintiff to an election at the suit's outset as its title suggests. And although the statute seeks to shape that election, it does not prohibit plaintiffs from suing governmental employees in their individual capacity.

When a plaintiff elects to sue only the governmental employee as in this case, subparts (b) and (f) are implicated by the plaintiff's choice. TEX. CIV. PRAC. & REM. CODE §§ 101.106(b), (f). Subpart (b) binds the plaintiffs to their election and bars them from suing the government regarding the same subject matter. *Id*. §101.106(b). Subpart (b), however, excepts from its bar certain claims for which the government has given its consent, and subpart (f) explains the procedure to obtain this exception.

Under subpart (f), the plaintiff is given a limited time to reconsider its suit against the employee and decide anew whether the government should have been sued instead. If the government has consented to suit, the plaintiff is well-advised to substitute the government for two reasons. First, the plaintiff cannot prevail on its claim against the employee if the plaintiff's suit "could have been brought against" the government. *Id.* § 101.106(f). And second, the plaintiff cannot sue the

government under subpart (f)'s exception if the claim against the employee is not promptly dismissed.[5] *Id.*

Subpart (f)'s "could have been brought" condition refers back to subpart (b)'s requirement of government consent. A suit that "could have been brought" against the government then is one for which the government has consented to be sued. Together subparts (b) and (f) require proof of the government's consent to suit as a condition for the employee's dismissal.

The government consents to suit "through the Constitution and state laws." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 660 (Tex. 2008). The Tort Claims Act is one such law, providing consent for certain tort claims involving the operation of automobiles, the condition or use of property, and premises liability. TEX. CIV. PRAC. & REM. CODE §§ 101.021, 101.022. The government, however, has not specifically consented to be financially responsible for the medical malpractice of its doctors.

A publicly-employed doctor, who is sued individually for malpractice but seeks to obtain his or her dismissal under subpart (f), must therefore establish the government's consent to be sued for the specific conduct at issue. If this cannot be established, then the government has not consented to suit, and the plaintiff's claim against the employee individually must proceed. Subpart (b) requires nothing less. *See* TEX. CIV. PRAC. & REM. CODE § 101.106(b) (describing the suit against the

[5] If the plaintiff does not dismiss the case against the employee within thirty days of the employee's motion under subpart (f), subpart (b) will bar any subsequent action against the government. TEX. CIV. PRAC. & REM. CODE § 101.106(b), (f).

employee as an "irrevocable election" that "immediately and forever bars" suit against the government unless it "consents").

The trial court therefore correctly denied the motion to dismiss because under the present record the doctors did not establish the government's consent.

III

The Court maintains, however, that requiring the doctors to prove the government's consent as a condition to dismissal under subpart (f) would be inconsistent with a recent case in which we applied another part of the statute. *See Mission Consol. Indep. Sch. Dist.*, 253 S.W.3d at 658-60 (applying § 101.106 (e)). I fail to see the inconsistency. *Mission* involved subpart (e), rather than (f), because the plaintiffs filed suit against the government and its employees. Because the respective subparts apply to distinctly different circumstances, there is no conflict.

In *Mission*, three terminated school district employees sued the district and its superintendent for wrongful termination and various common law claims that did not fit under the Tort Claims Act's limited waiver of immunity. *Id*. at 655. One issue in the case concerned the application of section 101.106(e). The court of appeals concluded that the section did not apply because none of the plaintiffs' claims fit within the Tort Claims Act's waiver of immunity. The court reasoned that none of the claims were, in the words of the statute,"under this chapter." *Id*. at 658.

We disagreed, observing that any tort claim against the government, even those for which immunity had not been waived, falls "under this chapter" because the Tort Claims Act is the only means to sue the government for a tort:

> 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.

Id. at 659. *Mission* then merely followed the rule that a tort claim against the government is "under" the Act even when the Act does not waive immunity.

This rule has never been extended to tort suits against government employees individually, but the Court submits that the circumstances are similar enough that it should be. I disagree. The circumstances are not similar, and the statute treats each situation differently.

Subpart (e) grants the government an unconditional right to have its employee dismissed from the suit when the plaintiff elects to sue both the government and its employee. Contrast that with the conditions attached to the employee's motion to dismiss under subpart (f). Clearly, the government's burden under (e) is much different.

When a plaintiff sues both the government and its employees under (e), the employees have been joined in their official capacity as a matter of law, and the government has the right to have them dismissed. When government employees are sued individually under subpart (f), however, their status is a question of fact. In this instance, the employees themselves must establish their official capacity by proving, among other things, that suit could have been brought against their employer. If the employees cannot carry this burden, the suit against them in their individual capacity must proceed. In contrast, subpart (e) imposes no burden on the government to demonstrate that suit could have been

brought against it under the Tort Claims Act for a simple reason: the plaintiff has already brought suit against the government.

The statute therefore treats employees sued individually differently than it does employees sued together with the government. The Tort Claims Act applies as a legal matter under subpart (e) because the government has been sued, but its application under subpart (f) depends on factual proof. The burden of that proof must fall on the employee, the party who must move to dismiss the case under subpart (f).

The statute carefully distinguishes between suits against the government and suits against government employees individually. When referring to suits filed or brought against the government the statute inserts the phrase "under this chapter" but when referring to suits against the employee individually the phrase is omitted. *Compare* TEX. CIV. PRAC. & REM. CODE §§ 101.106(a),[6] (c),[7] & (e)[8] *with id.* §§ 101.106(b),[9] (d),[10] & (f).[11] Although "under this chapter" appears in subpart (f) when referring to the possibility of a suit against the government, the phrase is not used to describe the suit actually filed against the employee individually. *See id.* § 101.106(f) ("If suit is filed against an

[6] "The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election . . ."

[7] "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 . . ."

[8] "If a suit is filed under this chapter against both a governmental unit and any of its employees . . ."

[9] "The filing of a suit against any employee of a governmental unit constitutes an irrevocable election . . ."

[10] "A judgment against an employee of a governmental unit shall immediately and forever bar . . ."

[11] "If a suit is filed against an employee of a governmental unit based on conduct . . ."

employee of a governmental unit based on conduct . . . and if it could have been brought under this chapter against the governmental unit . . .”). Suits against government employees individually are not “under this chapter” because a plaintiff does not need the government’s consent to seek a personal liability judgment against an individual. Because subparts (e) and (f) apply under different circumstances, our decision in *Mission* is in my view not particularly relevant to the decision in this case.

IV

I further disagree with the Court’s principal assumption that the 2003 amendments were intended to overrule our decision in *Kassen v. Hatley*. The case has no apparent connection to these amendments. *Kassen* is not mentioned in any floor debate, bill analysis, or other piece of legislative history. Ordinarily when the Legislature intends for legislation to supercede one of our decisions, it will at least mention the object of its disagreement with us.

The only support the Court can muster for its unfounded assumption is a law review article, published two years after the amendment and authored by a private party, whom the Court generously describes as a “participant in the legislative process.” ___ S.W.3d at ___. We have repeatedly expressed “our consistent view that ‘[e]xplanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended.’” *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 444 (Tex. 2009) (quoting *In re Doe*, 19 S.W.3d 346, 352 (Tex. 2000) (citations and quotations omitted). In this particular case, the supposition of a private observer apparently carries more weight. If the Legislature intended for this

legislation to prohibit medical malpractice claims against publicly-employed physicians, it has done a masterful job of concealing that intent.

Because the law review article, on which the Court relies, is not particularly convincing, the Court offers another purpose for the legislation. The Court suggests that the 2003 amendment may have been intended to conform the Texas Tort Claims Act to the Federal Tort Claims Act. More specifically, the Court imagines that the 2003 amendment to section 101.106, commonly known as the "Election of Remedies" provision, is Texas' version of the Federal Employees Liability Reform and Tort Compensation Act, commonly known as the Westfall Act. Again, evidence to support its thesis is non-existent.

One need only compare the language of the respective bills to reveal the utter folly of this notion. The Westfall Act provides that the remedy provided by the Federal Tort Claims Act for injury, property loss, or death "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" and expressly "*preclude[s]*" any other action "relating to the same subject matter against the employee or the employee's estate." *See* ___ S.W.3d at ___ n.69 (quoting the Westfall Act, 28 U.S.C. § 2679(b)(1) (emphasis added). In contrast to the exclusive and preclusive nature of the Westfall Act, section 101.106 ostensibly provides a choice of remedies.

In lieu of examining section 101.106's language, the Court assumes that the Texas Tort Claims Act should be like the federal act. There are, however, significant differences between the two. For instance, the Federal Tort Claims Act does not condition the waiver of governmental immunity on the

use of automobiles or the condition or use of real or personal property, as does Texas, but instead broadly permits persons to sue the United States in federal court for money damages

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1). The federal act thus generally waives governmental immunity for the negligence of its employees, which would include medical malpractice. There is no possibility for the disconnect between the doctor's liability and that of the government employer as under Texas law. This difference reasonably explains why our Legislature chose, when amending our Act, to require proof of the government's consent as a condition for the dismissal of the plaintiff's otherwise actionable, common law claim against the doctor individually.

Enamored more with the federal act than our own, the Court has chosen to conform section 101.106 to the federal scheme. Instead of six subparts, dealing with different combinations of defendants and the possibilities of settlement or judgment, the Court concludes that the Legislature intended simply this: If suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment, the suit shall be dismissed on the employee's motion and the governmental unit substituted as the defendant. Because the Westfall Act precludes suit against government employees, the Court concludes our now misnamed election-of-remedies provision should do the same.

Section 101.106's language reveals, however, that our Legislature did not intend to mimic the Westfall Act. While the Legislature intended to encourage suits against the government in lieu of actions against government employees, section 101.106 does not compel it. Instead, it requires that plaintiffs choose their defendants wisely or suffer the consequences. Subpart (f) is the centerpiece of the scheme, creating a new immunity or "official capacity" defense for employees who can establish that the government should be, or should have been, the defendant.

This "official capacity" defense should not be confused with the common law doctrine of official immunity. Official capacity as used in this statute is shorthand for the conduct of a government employee meeting section 101.106(f)'s conditions: a suit "based on conduct within the general scope of that employee's employment [that] could have been brought . . . against the governmental unit[.]" TEX. CIV. PRAC. & REM. CODE § 101.106(f). Official immunity, on the other hand, "protects government officers from personal liability in performing discretionary duties in good faith within the scope of their authority." *Kassen*, 887 S.W.2d at 8. Government medical personnel, such as the doctors here, enjoy immunity from liability when exercising their governmental discretion, but this immunity does not extend to medical discretion. *Id.* at 11–12. The exercise of medical discretion, however, does not disqualify doctors from being employees of a governmental unit for purposes of the "official capacity" defense extended under section 101.106(f). *Murk v. Scheele,* 120 S.W.3d 865, 867 (Tex. 2003) (per curiam).

To establish this defense, the doctors had to prove that: (1) the suit against them was "based on conduct within the general scope of that employee's employment" and (2) the suit "could have been

brought under [the Tort Claims Act] against the governmental unit[.]" TEX. CIV. PRAC. & REM. CODE § 101.106(f). Substituting the federal scheme for our Legislature's, the Court reads the "could have been brought" condition out of the statute or, in the words of our Attorney General, renders the condition "superfluous."

Statutory language should not be read as pointless if it is reasonably susceptible of another construction. *City of LaPorte v. Barfield,* 898 S.W.2d 288, 292 (Tex. 1995). Moreover, when construing a statute, we are to consider the law's objective and the consequences of a particular construction. *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637,642 (Tex. 2004) (citing TEX. GOV'T CODE § 311.023(1), (5)). Consider the consequences of the Court's interpretation—that "could have been brought" refers to nothing more than the physical act of filing suit.

Under that view, the statute nonsensically requires the plaintiff to bring a claim over which the court lacks subject matter jurisdiction. *See, e.g., Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004) (noting that sovereign immunity "defeats a trial court's subject matter jurisdiction unless the state expressly consents to suit"). That suit "could" actually be brought against the government implies a legal possibility, but it is not possible to sue the government without its consent. Worse yet, the claimant is compelled to dismiss an actionable medical malpractice claim against his or her doctor for the non-existent claim against the government. If this were to occur, one might reasonably question the constitutionality of subpart (f), as applied, under our Open Courts provision. TEX. CONST. art. I § 13. We presume, however, that the Legislature intended to comply with the state and federal constitutions, TEX. GOV'T CODE § 311.021(1), and "we are obligated to avoid constitutional problems

if possible." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004). The Court's opinion ignores these rules of statutory construction.

V

Finally, the Court justifies its misconstruction of the statute by suggesting that it would create perverse incentives, conflicts of interest, or opportunities for gamesmanship if the employee were required to establish the government's consent to be sued as a condition for dismissal. As to its gamesmanship charge, the Court suggests that the government might be able to defeat the plaintiff's claim against its employee by merely stipulating to the waiver of governmental immunity after it is too late for the plaintiff to sue under the Tort Claims Act. This is hardly a legitimate concern. The state's immunity is waived "through the Constitution and state laws," not by the stipulations of its functionaries. *See Mission*, 253 S.W.3d at 660. Even if UTHSC were willing to stipulate that the doctor's use of the vacuum extractor caused the infant's brachial plexus injury, a court would not be required to accept its self-serving declaration as fact. That the Court would even consider this a possibility underscores its misunderstanding of the statute and its imagined "perverse" effects.

What could possibly be more perverse than the Court's application of this statute? Under the Court's view, the plaintiffs must give up their common law medical malpractice claim against the doctors for a new suit against the government, a suit which in all likelihood will be dismissed for want of jurisdiction. Since the plaintiffs have not pled a cognizable claim under the Tort Claims Act, why would the government not file a plea to the jurisdiction?

Contrary to the Court's concern, section 101.106 does not foster conflict between the government and its employee because it compels the plaintiff to choose the defendant at the beginning of the case. The plaintiff may sue the government, the government's employee, or both with different consequences attaching to the various elections. When the plaintiff chooses to sue only the employee, subpart (b) bars the plaintiff from suing the governmental unit "regarding the same subject matter unless the governmental unit consents." TEX. CIV. PRAC. & REM. CODE § 101.106(b). Although ostensibly barred under (b), subpart (f) reopens the issue of the government's consent, providing a new opportunity for the plaintiff to sue the government. *Id.* § 101.106(f). Subpart (f) therefore gives the plaintiff a second chance to sue the government, but it only gives the plaintiff thirty days to make that decision.[12] *Id.*

The plaintiffs here have elected to stand on their suit against the doctors and thus are now barred from suing the government. *Id.* § 101.106(b). If the doctors can prove that the Tort Claims Act would have waived the government's immunity but for the plaintiffs election to sue them individually (that suit "could have been brought . . . against the governmental unit"), the doctors will establish their right to be dismissed, but not their employer's liability. *Id.* § 101.106(f). The Court's imagined conflict of interest does not exist because subpart (b) "bars any suit or recovery by the plaintiff against the governmental unit[.]" *Id.* § 101.106(b). Under these circumstances, section 101.106(f) merely provides the employees with an immunity from liability under its "official capacity" defense.

[12] Under § 101.106(b), a plaintiff who sues an employee cannot thereafter sue the governmental employer without its consent. The government consents to its substitution as defendant under § 101.106(f) but that consent terminates 30 days after the filing of the employee's motion to dismiss.

The Court and I agree that the employee may establish a defense or immunity under section 101.106's terms, but we disagree on what those terms entail. In the Court's view, all that is required for the employee's dismissal under subpart (f) is proof of the doctors' employment status and conduct within the scope of that employment. One of the doctors has supplied this proof so I am somewhat puzzled by the Court's decision to remand the claim against him for further proceedings. The statute gives the plaintiff only thirty days to dismiss the employee and substitute the government. Since the time for suing the government has passed, and the plaintiff cannot, according to the Court, sue the employee, what remains to be done? All that occurs to me is that a remand affords the plaintiffs an opportunity to raise any constitutional questions regarding the application of this statute before dismissal. I agree they should have that opportunity, but they would not need it, if the Court merely applied section 101.106 according to its terms.

* * * * *

I recognize that it is our responsibility to accept the Legislature's intent even when that intent is to overrule one of our previous opinions. *Leos v. State Emp. Workers' Comp. Div.*, 734 S.W.2d 341, 343 (Tex. 1987). But we should not loosely ascribe such intent to legislation simply to avoid questions of *stare decisis*. If a majority of the Court now feels that the distinction drawn in *Kassen* between government and medical discretion was in error, we should address the matter directly rather than engage in a distortion of legislative intent.

When we construe a statute, our primary goal is to ascertain and give effect to the Legislature's intent. *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009). When we can, we rely on the primary

source of that intent, the language of the statute. *Phillips v. Bramlett*, 288 S.W.3d 876, 880 (Tex. 2009). The statutory text, title and design of section 101.106 plainly put the plaintiff to an election of remedies. Because the Court's interpretation takes that election away, requiring the plaintiff to sue only the government, I respectfully dissent. I would affirm the court of appeals' judgment.

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David M. Medina
Justice

OPINION DELIVERED: January 21, 2011