

NO. 08-0611

**IN THE
SUPREME COURT OF TEXAS**

WILLIAM EARL BRIGGS

Petitioner

vs.

HUNTSVILLE INDEPENDENT SCHOOL DISTRICT

Respondent

RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF THE CASE

On or about January 26, 2007, an automobile accident occurred between vehicles driven by Petitioner William Earl Briggs (herein referred to as “Briggs”), and Debra Dinkins Ross (herein referred to as “Ross”), an employee bus driver for Huntsville Independent School District (herein referred to as “HISD”). Briggs alleges injuries as a result of the negligence of Ross. Suit was filed on or about August 29, 2007, under Tex. Civ. Prac. & Rem. Code § 101.001 et. seq. (CR 1-5). In his original petition, Briggs filed suit against Ross **“while in the course and scope of her employment with Huntsville Independent School District”** (CR 2) (emphasis added). In said petition, Briggs made no claim at any time against Ross in any individual capacity (CR 1-5). On September 20, 2007, Ross filed her original answer and motion to dismiss (CR 9-11). The motion to dismiss was based on Tex. Civ. Prac. & Rem. Code § 101.106(f). On October 16, 2007, Briggs filed a first amended petition adding HISD as a named defendant (CR 18) and reasserting the claims against defendant Ross **“while in the course and scope of her employment with Defendant Huntsville Independent School District.”** (CR 2) (emphasis added). Therefore, at that time, both Ross and HISD were both named defendants. On October 31, 2007, Briggs filed a second amended petition which dropped the word “Defendant” from the title given to Ross, and brought suit only against **“Defendant Huntsville Independent School**

District.” (emphasis added). However, the allegation of liability against HISD was still based upon Ross' actions within the course and scope of her employment with HISD. (CR 25). In each petition filed by Briggs, the exact same language describing the alleged acts or omissions as the basis for the cause of action was used. In each document, the allegations were based on Ross acting in the course and scope of her employment. Briggs merely moved or removed the term “Defendant” or “Defendants.” In other words, the language in each petition relating to the allegations of “course and scope” was never changed throughout the pendency of this matter.

STATEMENT OF JURISDICTION

Briggs alleges that this Honorable Court has jurisdiction of this appeal on the basis of three statutes:

1. Tex. Gov. Code §22.001(a)(1);
2. Tex. Gov. Code §22.001(a)(3); and
3. Tex. Gov. Code §22.001(a)(6).

It is clear that the construction of a statute is necessary for the determination of this case. However, the construction of this statute was fully and adequately determined by this Honorable Court recently in the case of *Mission Consol. Indep. Sch. Dist. v. Garcia*, *Mission Consol. Indep. Sch. Dist. v. Sotuyo* and *Mission Consol. Indep. Sch. Dist. v. Medina*, 253 S.W.3d 653 (Tex. 2008). It is HISD's position that the interpretation of §101.106 in that case is dispositive of the issues in this case and there is no

need for a re-interpretation or construction of that statute again in this court.

Secondly, Briggs asserts that the Tenth Court of Appeals opinion in this matter “disagrees with” a decision of the Thirteenth Court of Appeals, but the decision referred to is not found in Briggs’ Petition for Review. Therefore, this should not be a basis for jurisdiction.

Finally, Briggs suggests generally that the court of appeals committed an error of law that is important to the state’s jurisprudence in a case of first impression. However, there was no error of law and further, this is not a case of first impression. As noted above, this Honorable Court in *Mission Consol. Indep. Sch. Dist. v. Garcia*, *Mission Consol. Indep. Sch. Dist. v. Sotuyo* and *Mission Consolidated Indep. Sch. Dist. v. Medina*, 253 S.W.3d 653, (Tex. 2008) recently addressed the application of this statute which supports the conclusion that the decision of the court of appeals in this matter is not an error of law.

RESPONSE TO ISSUES PRESENTED

Response to Issue No. 1

The court of appeals did not misapply the law and statutes regarding Tex. Civ. Prac. & Rem. Code § 101.106, as they relate to election of remedies under subsections (b) and (f).

Response to Issue No. 2

The court of appeals’ interpretations of Tex. Civ. Prac. & Rem. Code §101.106, subsections (b) and (f) and its opinion in this matter do not

violate the open courts and due process guarantees of Art. 1, § 13 of the Texas Constitution.

STATEMENT OF THE FACTS

Ross was employed by HISD as a bus driver. An accident occurred between a bus driven by Ross and a car driven by Briggs. On August 29, 2007, suit was filed against *only* Ross, in her capacity as an employee of HISD (CR 1-5). On September 20, 2007, a Motion to Dismiss and Original Answer Subject to Motion to Dismiss under § 101.106(f) was filed on behalf of Ross. (CR 9-11) (the court never ruled on this motion). On October 17, 2007, an amended petition was filed by Briggs *adding* HISD, but not dismissing Ross (CR 18-22). The thirty-day period under § 101.106(f) expired on October 22, 2007. (October 20, 2007 fell on a Saturday). On October 31, 2007, a second amended petition was filed by Briggs, which did not name Ross as a defendant, but only brought suit against HISD (CR 24-28).

SUMMARY OF ARGUMENT

The Tenth Court of Appeals did not misapply the case law and statutes regarding Tex. Civ. Prac. & Rem. Code § 101.106 subsections (b) and (f) as they relate to election of remedies.

The decision of the Tenth Court of Appeals and its interpretation of case law and statutes does not restrict access to the courts in violation of

the open courts and due process guarantees of Art. 1, § 13 of the Texas Constitution.

ARGUMENT

Response to Issue No. 1

The court of appeals did not misapply the law and statutes regarding Tex. Civ. Prac. & Rem. Code § 101.106, as they relate to election of remedies under subsections (b) and (f). In 2003, the Legislature amended Tex. Civ. Prac. & Rem. Code § 101.106 to its current form. Acts 2003, 78 th Leg., ch. 204, § 11.05, effective September 1, 2003. The Tex. Civ. Prac. & Rem. Code § 101.106 provides, in relevant part, as follows:

§ 101.106. Election of Remedies

(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.

(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.*" (Emphasis added.)

Pursuant to Tex. Civ. Prac. & Rem. Code § 101.106(f), a plaintiff must sue the governmental unit within thirty days of the filing of the motion

to dismiss; otherwise, after the thirty days expires, plaintiff's suit is barred against the governmental unit. In other words, once outside the thirty days, the plaintiff has made an irrevocable election and is forever barred from suing the governmental entity. Tex. Civ. Prac. & Rem. Code § 101.106(f) and (b). Subsequent amended pleadings by the plaintiff filed after the filing of a motion to dismiss do not moot the right created by the filing of the motion under Tex. Civ. Prac. & Rem. Code § 101.106(f). *Villasan v. O'Rourke*, 166 S.W.3d 752, 758 (Tex.App-Beaumont 2005, pet. filed).

This court held in *Mission Consol. Indep. Sch. Dist. v. Garcia*, *Mission Consol. Indep. School Dist. v. Sotuyo* and *Mission Consol. Indep. Sch. Dist. v. Medina*, 253 S.W.3d 653, (Tex. 2008), the revisions apparent purpose was to force a plaintiff to decide at the outset whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable, thereby reducing the resources that the government and its employees must use in defending redundant litigation and alternative theories of recovery. Briggs was put to the election described above at the outset of this litigation. In clearly and unequivocally pleading that Ross was within the course and scope of her employment, he made his election. Ross then filed the Motion to Dismiss under § 101.106(f). Briggs failed to follow the proper procedure and therefore, immunity was not waived.

The clear meaning of § 101.106(f) indicates that when suit is filed against the governmental employee for conduct within the general scope of the employee's duties, and the suit could have been brought against the governmental entity, the suit against the employee shall be dismissed, unless plaintiff dismisses the employee and names the governmental entity as a defendant within thirty days of the filing the motion to dismiss under § 101.106(f). Section 101.106(f) empowers the governmental employee to force the plaintiff to amend the suit and name the governmental unit as the sole defendant *within 30 days of the filing of the employee's motion to dismiss*. Tex. Civ. Prac. & Rem. Code § 101.106(f); *Villasan v. O'Rourke*, 166 S.W.3d 752,758 (Tex. App.-Beaumont 2005, pet. filed). Section 101.106(f) contains a specific time period for action and failure to meet this time period results in an irrevocable election by the plaintiff and "forever bars" any suit or recovery against the governmental unit.

Complying with § 101.106(f) is a prerequisite to filing suit against the governmental unit. To rule otherwise would make § 101.106(b) and (f) meaningless. If a plaintiff fails to dismiss the employee as provided by the statute within the thirty days, the language of (b) and (f) mandates: (1) that the employee be dismissed; and (2) that the plaintiff is barred from suing the governmental unit because of immunity. *Newman v. Obersteller*, 960 S.W.2d 621, 622 (Tex. 1997) ("bars any action" is an unequivocal grant of immunity). Some may view such an outcome as harsh; however, this court

has held in the past: "[o]nce the plaintiff invokes the procedural devices of the Texas Tort Claims Act, to bring a cause of action against the State, then he also is bound by the limitations and remedies provided in the statute." *State Dep 't of Highways & Pub. Transp. v. Dopyera*, 834 S.W.2d 50, 54 (Tex. 1992, cert. den.).

The Corpus Christi Court of Appeals recently addressed this issue in a case with remarkably similar facts in *Texas Dept. of Agriculture v. Calderon*, 221 S.W.3d 918 (Tex.App.–Corpus Christi, 2006). In *Calderon*, plaintiff sued a governmental employee as a result of an automobile accident. Suit was filed on September 19, 2003. An answer was filed on November 7, 2003. A motion to dismiss the individual defendant was filed on April 22, 2004. An amended petition naming both the individual defendant and governmental entity was filed on June 18, 2004. On September 29, 2004, the individual defendant was dismissed. On April 15, 2005, the plaintiff filed suit against only the governmental entity. Based upon these facts, the court made three important holdings.

First, the *Calderon* court found that Tex. Civ. Prac. & Rem. Code § 101.106(b) is “an immunity statute,” citing this court in *Newman v. Obersteller*, 960 S.W.2d 621, 622 (Tex.1997), and further determined when analyzing the previous § 101.106, that the words “bars any action” operated as an unequivocal grant of immunity to a governmental employee. *Id.* at 922.

Secondly, the *Calderon* court concluded that the Legislature, through Tex. Civ. Prac. & Rem. Code §101.106(b), created an exception to the Act's limited waiver of governmental immunity by barring a plaintiff from suing a governmental unit whose employee has been sued regarding the same subject matter. The court held, "This exception to the Act's waiver of governmental immunity results in the governmental unit's retention of its immunity from suit under the doctrine of sovereign immunity. Thus, once appellees filed suit against Daniel instead of against the TDA, Tex. Civ. Prac. & Rem. Code §101.106(b) became operative, and the TDA became immune from suit." *Id.* at 924.

Third, the court found that in order for a governmental unit's immunity under § 101.106(b) to be removed by §101.106(f), the plaintiff must comply with the procedural requirements of § 101.106(f). Thus, the plaintiff must file an amended pleading that both dismisses the employee and substitutes the governmental unit as the defendant within thirty days of the employee's motion to dismiss. If the plaintiff timely files such an amended pleading, the governmental unit's immunity from suit derived from § 101.106(b) is removed, and the suit may proceed against the governmental unit alone. If, however, the plaintiff fails to timely file such an amended pleading, § 101.106(f) requires that the suit against the employee be dismissed. In that event, the governmental unit retains its immunity from suit derived from § 101.106(b), and the plaintiff loses the

opportunity to name the governmental unit in place of the employee as the defendant in the lawsuit. *Id.* at 923.

In an effort to avoid the application of the Tort Claims Act, Briggs asserts that he was suing Ross in her individual capacity or that there is some question as to whether she was in the course and scope of her employment with HISD. A review of the three petitions shows that this is not true. Every allegation made against Ross by Briggs states that she was acting in the course and scope of her employment. The act clearly states that there are two elements which must be met under § 101.106(f). The first is that the allegations be “based on conduct within the general scope of that employee's employment.” There is no allegation anywhere from Ross or Briggs that Ross was acting outside the course and scope of her employment. In fact, by filing the motion to dismiss Ross is taking the position that she is within course and scope of her employment with HISD. Briggs takes the position that “course and scope” was not proven. However, the statute does not require **proof** of “course and scope,” only that the allegations “generally fit within the course and scope of the employment.” It is undisputed that Ross is a bus driver for HISD and was driving the bus at the time of the accident.

Further, in the case of *Tejada v. Rowe*, 207 S.W.3d 920 (Tex.App.-Beaumont 2006, no pet.), the court found that § 101.106(f) does not restrict its application to cases in which the governmental unit has been named as

a defendant. Section 101.106(f) requires that the suit against the employee must be dismissed unless the plaintiff files amended pleadings dismissing the employee and substituting the governmental unit within thirty days after the employee files a motion to dismiss. *Id.* The *Tejeda* court based its conclusions, in part, on the pleadings of plaintiff and their conclusion that the pleadings establish that the claim was “based on conduct within the general scope of appellee’s employment.” In the case at bar, the only allegation ever made in Briggs’ various pleadings is that Ross was in the course and scope of her employment. HISD’s Plea to the Jurisdiction was also based on § 101.106(b).

This Honorable Court, in *Waxahachie Indep. Sch. Dist. v. Johnson*, 181 S.W.3d 781 (Tex.App.-Waco, 2005) dealt with the question of whether the application of § 101.106(b) turned on whether the employees were sued in their individual capacity or as employees of the governmental unit. This court determined that § 101.106(b) was to protect government employees from individual liability when a claim based upon the same facts is also made against their government employers. *Id.* This court further held that “because § 101.106(b) omits ‘under this chapter’ it also applies to employees sued in their individual capacities, as employees sued in this capacity are usually sued under common law.” This court stated that “we agree with WISD that under § 101.106(b) whether the

defendant employees were sued in their official or individual capacities is irrelevant.” *Id.* at 787.

Briggs filed an amended petition which effectively dismissed Ross as a defendant from this suit. There was never any ruling on the motion to dismiss filed by Ross. As such, the question of “course and scope” is moot and the first element of the statute has been met.

Briggs takes the position that there is no evidence to support “course and scope.” However, this position ignores the language of the statute which only requires that the actions “generally fit within course and scope of employment”. Even so, in his various petitions, Briggs makes one very consistent allegation. He alleges that Ross (either as a party defendant, or as an employee of HISD) was in the course and scope of her employment at the time of the incident made the basis of this suit. (CR1-4; CR17-22; CR24-29). At no time does he challenge this fact until he raises it in his Response to the Plea to the Jurisdiction filed by HISD. (CR58-63). At no time does he file any alternative pleading stating that Ross was not in the course and scope of her employment.

While it is true that HISD filed a general denial, there was never any specific denial of capacity or other pleading which put Briggs on notice that there was a dispute about Ms. Ross’ status as an employee in the course and scope of her employment. In her motion to dismiss and original answer, Ross pleads that she is an employee of HISD. In moving to

dismiss under §101.106(f), Ross clearly asserts that she is an employee of HISD. Briggs should not be allowed to now assert that Ross was not in the course and scope of her employment in an attempt to avoid the application of the Tort Claims Act.

Briggs also complains that he requested an affidavit regarding the employment of Ross. However, this is an attempt to evade the responsibility of Briggs to properly plead his case. This Honorable Court recently decided the case of *Ramsey v. State* 249 S.W.3d 568, (Tex. App.-Waco 2008, no pet.) and held: "Assertions of fact, not plead in the alternative, in the live pleadings of a party are regarded as formal judicial admissions." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex.2001) (quoting *Houston First Am. Sav. Ass'n v. Musick*, 650 S.W.2d 764, 767 (Tex.1983)); accord *Green v. Ransor, Inc.*, 175 S.W.3d 513, 517 (Tex.App.-Fort Worth 2005, no pet.).

Under *Ramsey*, it is clear that Briggs' unequivocal assertions of fact (i.e., course and scope of employment), which were not plead in the alternative, are to be regarded as judicial admissions against him. Based upon this, Briggs cannot now challenge whether Ms. Ross was in the course and scope of her employment at the time of the incident made the basis of this suit, and the first element of Tex. Civ. Prac. & Rem. Code, Section 101.106(f) has been met.

Secondly, under § 101.106(f), the case must be such that, “it could have been brought under this chapter against the governmental unit.” The question of whether the case could have been brought against the governmental unit has been answered in the fact that Briggs has now dismissed Ross (although not timely) and has brought the claim against HISD (CR 22-28). A review of the three petitions in this matter shows that the allegations which form the basis of Briggs’ claims against HISD are exactly the same allegations as brought against Ross. According to the pleadings filed by Briggs, the claims could have been brought against HISD from the beginning.

Briggs cited cases supporting his position on this issue are distinguishable to the case at bar. Both *Hall v. Provost*, 232 S.W.3d 926 (Tex.App.—Dallas, 2007, no pet.) and *Clark v. Sell*, 228 S.W.3d 873 (Tex.App.—Amarillo, 2007, no. pet.) deal with medical malpractice actions where the issue presented was whether the complaints were within the waiver of immunity under the Tort Claims Act. In both cases, it was asserted by the plaintiff that the case was not brought under the Tort Claims Act because there was no “use of tangible property.” In those cases, the respective courts held that the claims could not have been brought against the entity.

In this case, the Tort Claims Act includes a waiver of immunity for the “use and operation of a motor vehicle.” Briggs clearly pled that he was

damaged through the use and operation of a motor vehicle. The cases cited do not have any effect on the issues in this case. Briggs' only allegation in this matter is that an employee of HISD, acting in the course and scope of her employment, caused him damage. He is bound by those pleadings.

Finally, the court of appeals correctly noted that Briggs was complaining on appeal that **HISD** did not prove entitlement to dismissal under 101.106(f). (Court of Appeals opinion, pg. 10). However, as the court stated, it was not HISD's motion, but Ross' motion to dismiss. HISD had no burden to prove Ross's entitlement to dismissal under 101.106(f). Ross was voluntarily dismissed from the underlying case. Therefore, Ross had no further burden of proof on the issue. HISD had no such burden of proof as the motion to dismiss was not filed by HISD. Briggs' argument is without merit.

Therefore, in failing to dismiss Ross within thirty days of her motion to dismiss, Briggs has failed to bring his claim within the limited waiver of liability provided by statute. Further, he is barred from bringing a claim against HISD.

Response to Issue No. 2

The court of appeals interpretations of Tex. Civ. Prac. & Rem. Code §101.106, subsections (b) and (f) and its opinion in this matter do not violate the open courts and due process guarantees of Art. 1, § 13 of the

Texas Constitution. As early as 1847, this court held that “no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 694 (Tex. 2003) (citing *Hosner v. De Young*, 1 Tex. 764, 769 (1847)). It is not the statute that takes away the right that exists to bring a cause of action. Instead, it grants Briggs a cause of action that otherwise would not exist under common law. *Id.* Furthermore, because the statute is an immunity statute, it must be strictly construed. *Id.*; *Brainard v. State*, 12 S.W.3d 6, 28 (Tex. 1999). Clearly, there is no open courts violation because Briggs cannot be restricted from the court where there was no cause of action under common law. Instead, he failed to strictly follow the immunity statute which allowed entry into the courts. *Id.*

CONCLUSION AND PRAYER

HISD prays that this court deny the petition for review and affirm the judgment of the Tenth Court of Appeals, and for such other and further relief to which HISD may show itself to be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the foregoing was served by certified mail, postage prepaid, return receipt requested, to counsel for Petitioner on October 27, 2008:

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