

No. 09-0369

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**IN THE SUPREME COURT OF TEXAS**

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**Glenn Colquitt,**  
*Petitioner,*  
**vs.**  
**Brazoria County,**  
*Respondent.*

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**From the Fourteenth Court of Appeals, Houston**  
**Cause No. 14-08-00210-CV**

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**PETITIONER'S REPLY BRIEF ON THE MERITS**

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**PETITIONER’S REPLY BRIEF ON THE MERITS**

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner Glenn Colquitt files this Reply Brief on the Merits, respectfully showing:

**I. INTRODUCTION**

This Petition for Review challenges the Fourteenth Court of Appeals’s construction of section 101.101(c) of the Civil Practice and Remedies Code which allows “actual notice” of a claim and places no time limits thereon, and section 311.034 of the Government Code, the final sentence of which states: “Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.” The Court of Appeals erred because it construed the two statutes discordantly in that it made the

final sentence of section 311.034 derogate the meaning of section 101.101(c). Specifically, the Court of Appeals concluded that section 311.034's use of "prerequisite to suit" language controlled the actual notice provision of section 101.101(c), improperly placing a prerequisite on actual notice. This is improper statutory construction. This Court should reverse the Court of Appeals, reinstate the district court's decision, and remand this personal injury case, which is now on its second interlocutory appeal, for trial on the merits.

## II. ARGUMENT

Petitioner replies to Respondent Brazoria County's Brief on the Merits points as follows:

- A. **Section 101.101(c) of the Civil Practice and Remedies Code must be read in harmony with section 311.034 of the Government Code. Section 311.034 did not abolish section 101.101(c), and any limitation provisions from section 311.034 cannot properly be read into section 101.101(c).** Responsive to Brazoria County's Reply Issues 1, 2 and 3; Response at pp. 2-5.

As made clear in prior briefing, this proceeding involves both section 101.101(c) of the Civil Practice and Remedies Code and section 311.034 of the Government Code. In a nutshell, the District Court correctly concluded that these are statutes of equal dignity and applied them both. In contrast, the Fourteenth Court of Appeals and the County contend that section 311.034 restricts section 101.101(c).

Brazoria County urges this Court to look to section 311.034 of the Government Code, read it in isolation, and then either disregard or alter section 101.101(c) of the Government Code which has long allowed actual notice. The County argues that section 311.034's

mention of “prerequisite to suit” means that the act of filing a lawsuit can never constitute actual notice of claim under section 101.101(c) because the term “prerequisite” means “a requirement coming before” and a lawsuit cannot precede itself. See Brief at p. 7 (“actual notice of a pre-suit condition cannot be the lawsuit itself; this is a physical impossibility.”).

The County’s argument might have some merit if the Legislature abolished or amended section 101.101(c) of the Civil Practice and Remedies Code when it enacted section 311.034 of the Government Code in 2005. But the Legislature did no such thing, and the legislative history reveals no such intent.<sup>1</sup> Section 101.101(c) of the Civil Practice and Remedies Code remains on the books. It not only allows actual notice of a claim (which the County now concedes), but apart from the 180-day provision, it places no time limitations on when actual notice may occur. Section 101.101(c) thus plainly allows the filing of a lawsuit --or any variety of other events-- to constitute actual notice.

Given the fact the Legislature has not abolished section 101.101(c), the County’s Brief is relegated to arguing that section 311.034 has the effect of altering section 101.101(c) so that there is now a prerequisite to actual notice. In plain language, the County wants to rewrite section 101.101(c) to read:

Actual notice is acceptable, provided the actual notice occurs prior to a lawsuit (i.e., the notice must be “prerequisite to a suit”).

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<sup>1</sup> See House Bill Analysis, House Research Organization, H.B. 2988, May 11, 2005, reproduced as Appendix 6 to Petitioner’s Brief on the Merits.

See Respondent's Brief at 4. This strained reading violates accepted canons of statutory construction, and if accepted, would make no sense or serve any legitimate purpose.

**1. The County uses section 311.034 to rework section 101.101(c); however, Texas law provides the two sections should be harmonized.**

Brazoria County does not attempt to harmonize the two statutes or read them together. Rather, it takes the “prerequisites to a suit” phrase from section 311.034 and applies it to derogate section 101.101(c), thus crippling, if not killing, the well-established concept of actual notice.

The County's approach violates norms of statutory construction. When the Legislature includes a right or remedy in one part of a code –as it plainly did when it enacted the “actual notice” provisions of section 101.101(c)– yet omits it in another part, that may be precisely what the Legislature intended, and the difference must be honored. *PPG Industries, Inc. v. MJB/Houston Ctrs. Partners Ltd. Partnership*, 146 S.W.3d 79, 84 (Tex. 2004). A statute must be read in the context of the statutory landscape, and later enactments do not obliterate earlier laws, unless such a radical intention is expressly stated in the later legislation. No such radical intent is evidenced in the legislative history of section 311.034.<sup>2</sup> “A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it.” *Acker v. Texas Water Commission*, 790 S.W.2d 299, 301 (Tex. 1990), citing *McBride v. Clayton*, 140 Tex. 71, 76, 166 S.W.2d 125, 128 (Tex. Comm'n

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<sup>2</sup> See House Bill Analysis, House Research Organization, H.B. 2988, May 11, 2005. Appendix 6 to Petitioner's Brief on the Merits.

App.1942, opinion adopted).<sup>3</sup> “A legislative enactment covering a subject dealt with by an older law, but not repealing that law, should be harmonized whenever possible with its predecessor in such a manner as to give effect to both.” *Acker*, 790 S.W.2d at 301 (emphasis added), citing *Standard v. Sadler*, 383 S.W.2d 391, 395 (Tex.1964) and *Conley v. Daughters of the Republic*, 106 Tex. 80, 92, 156 S.W. 197, 201 (1913). Texas law and general principles of statutory interpretation dictate that two statutes must be read in harmony so as to complement each other –not cancel one out. TEX. GOV’T CODE § 311.026 (a) (“If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.”); *Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 530-31 (Tex. 2002)(a statutory section “should be construed in a manner that harmonizes rather than conflicts with that law”)(emphasis added). A court does not give a statute a meaning that conflicts with other provisions if it can reasonably harmonize the provisions. *Russell v. Wendy’s International, Inc.*, 219 S.W.3d 629, 638-39 (Tex. App.–Dallas 2007, pet. denied); *Dallas Central Appraisal District v. Tech Data Corp.*, 930 S.W.2d 119, 122 (Tex. App.-Dallas 1996, writ denied).

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<sup>3</sup> “All statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law, and as a part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other statutes and the decisions of the courts.” *McBride v. Clayton*, 140 Tex. 71, 76-77, 166 S.W.2d 125, 128 (1942).

Section 101.101 allows for actual notice of a claim, without any reference to or mention of a lawsuit. It does not specify whether the actual notice must be given before or after suit. It does not specify whether the notice must be in writing. It contains no prerequisites for actual notice. Tex. Gov't Code § 101.101(c). When it passed the relevant sentence of section 311.034 in 2005, the Legislature could have altered subsection (c) of section 101.101 of the Civil Practice and Remedies Code. The Legislature did not do so. Moreover, section 101.101 was judicially applied to allow the filing of a lawsuit to serve as actual notice, see *Cavazos v. City of Mission*, 797 S.W.2d 268, 271 (Tex. App.–Corpus Christi 1990, no writ), and the Legislature is presumed to be aware of this holding when it enacted the final sentence of section 311.034.

Section 311.034 of the Government Code provides that *statutory* prerequisites to a suit are jurisdictional:

Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.

TEX. GOV'T CODE § 311.034. Actual notice –such as is achieved from an original petition or from a police report– is “statutory notice” because it is expressly allowed by section 101.101(c), which contains no temporal limit on temporal notice. Hence Petitioner gave “a statutory prerequisite” notice because his original petition gave “actual notice” of his claim under section 101.101(c). The Fourteenth Court of Appeals did violence to the statutory landscape by not reading the two provisions consistently; worse, it took a limitation from

section 311.034 (i.e., the “prerequisite” language) and injected it into a remedy that did not and does not include any such limitation.

This Court should correct the error and clarify Texas jurisprudence on this important issue.

**2. The County’s position is strained and would make no practical sense**

If one were to accept the appeals court’s approach whereby the concept of “prerequisite to suit” is forced into section 101.101(c), the concept of “actual notice” could be seen to exclude the filing of a lawsuit. The County’s Brief makes this exact argument when it argues the term “prerequisite” means “a requirement coming before” and that a lawsuit cannot precede itself.

If one accepts the proposition that some forms of actual notice are allowed (which the County now does at page 4 of its Brief), yet at the same denies that the act of filing of a lawsuit may constitute actual notice, absurdity and foolishness follow. Such a result counters common sense and does not serve any conceivable public policy. The filing and service of a lawsuit is the ultimate form of notice. “The purpose of the notice provision is to ensure that claims are promptly reported so that a governmental entity may investigate the merits of a claim while the facts are fresh and the conditions are substantially the same.” *Texas Dep’t of Criminal Justice v. Simmons*, 140 S.W.3d 338, 348 (Tex. 2004). “We do not interpret a statute in a manner that will lead to a foolish or absurd result, when another alternative is available.” *Estate of Padilla v. Charter Oaks Fire Ins. Co.*, 843 S.W.2d 196, 199 ( Tex.

App.– Dallas 1992, writ denied), *citing City of W. Tawakoni v. Williams*, 742 S.W.2d 489, 491 (Tex. App.– Dallas 1987, writ denied); *McCulloch v. Fox & Jacobs, Inc.*, 696 S.W.2d 918, 921 (Tex. App.– Dallas 1985, writ ref'd n.r.e.) Statutes must be construed by courts using “the rules of common sense.” *Raines v. Sugg*, 930 S.W.2d 912, 913 (Tex. App.– Fort Worth 1996, no writ). A lawsuit is adequate actual notice, and was recognized as such in *Cavazos*.

**B. The decision below conflicts with *Cavazos v. City of Mission*, 797 S.W.2d 268, 271 (Tex. App.–Corpus Christi 1990, no writ).** Responsive to Respondent’s Brief on the Merits at pp. 3-4.

*Cavazos v. City of Mission* holds that the timely filing of a lawsuit constitutes “actual notice” under section 101.101(c) of the Civil Practice and Remedies Code. 797 S.W.2d at 271. Section 101.101(c) of the Code reads exactly the same today as it did in 1990, when *Cavazos* was decided. The opinion of the Fourteenth Court of Appeals, however, concludes that *Cavazos* is no longer valid due to the enactment of section 311.034. 278 S.W.3d 802. This is the only criticism leveled against *Cavazos* by either the appeals court or by the County. The criticism of the case confirms that the Fourteenth Court of Appeals improperly read section 311.034's provisions into section 101.101(c), thus altering the substance of section 101.101(c). As shown, sections 311.034 and 101.101(c) can, and should, be read together, harmoniously. The District Court did so, and this result should be restored.

- C. **The decision below conflicts with *City of Dallas v. Carbajal*, 278 S.W.3d 802, 805-06 (Tex. App. – Dallas, Jan. 22, 2009, pet. filed May 21, 2009).** Responsive to Respondent’s Brief on the Merits at p. 5.

The fact that a document may still serve as proper “actual notice” under section 101.101(c) is confirmed by the recent decision in *City of Dallas v. Carbajal*, 278 S.W.3d 802, 805-06 (Tex. App.– Dallas, Jan. 22, 2009, pet. filed 5/21/2009). The Dallas Court of Appeals cited and applied sections 101.101 and 311.034 to find that actual notice had been given. *Carbajal* shows that when a document (a police report) provides the necessary elements of notice, it shows that the governmental entity had “subjective awareness” that its fault produced or contributed to the claimed injury.

The County’s Brief at page 5 argues that *Carbajal* is not pertinent because the police report in *Carbajal* “was made the same day as the incident and provided to the City prior to the filing of the lawsuit.” Brief at p. 5. The County acknowledges a police report could serve as actual notice because it came before a lawsuit; i.e., the police report was a “prerequisite” to the lawsuit in the sense that the police report “preceded” the lawsuit. At this point, it becomes clear the County’s argument is more a hyper-technical interpretation than a principled position or valuable policy decision.

If the County’s argument is accepted, a police report can serve as actual notice. This is the result in *Carbajal*. Other documents can serve as actual notice, too. But not a lawsuit. If the “prerequisite to suit” language is improperly forced into section 101.101(c), the filing and service of a lawsuit—which should be seen as the ultimate form of “notice” thanks to the

rules of notice pleading and service of process— cannot be actual notice. With all due respect to the County and the Fourteenth Court of Appeals, this is a distinction that does not make any sense, is counterproductive, and holds the law up for ridicule . A statute should not be interpreted in a manner that will lead to a foolish or absurd result when another alternative is available. *Estate of Padilla*, 843 S.W.2d at 199. Such a construction does not benefit the State in any way, which is the overlying purpose of the Tort Claims Act. If actual notice exists, there is no good reason to have it exclude the filing of a lawsuit. There is no evidence the Legislature intended such an odd result when it amended section 311.034 of the Government Code in 2005.

**D. Petitioner does not allege a new ground on appeal. Rather, actual notice was established in prior proceedings which are memorialized in a published opinion.** Responsive to Respondent’s Brief on the Merits at pp. 5-6.

Brazoria County accuses Petitioner of not making its “actual notice” argument to the trial court. See Respondent’s Brief at p. 5. This is not accurate. The County never raised the position that it lacked actual awareness of Mr. Colquitt’s claim; instead, it relies on the legalistic argument that a lawsuit cannot serve as actual notice under section 311.034.

The trial court was presented with a lengthy and detailed argument about Brazoria County’s awareness of the hazardous condition, which was presented in response to the County’s motion to dismiss for lack of jurisdiction. The trial court found jurisdiction. Thanks to an interlocutory appeal, a published opinion addressing this issue discusses the evidence. *Brazoria County v. Colquitt*, 226 S.W.3d 551, 553-554 (Tex. App.—Houston [1<sup>st</sup>

Dist.] 2007, no pet.)(reviewing the trial court’s decision that it had jurisdiction over Colquitt’s claim against Brazoria County).

The First Court of Appeals affirmed the trial court’s decision to retain jurisdiction of Mr. Colquitt’s claim, noting that there was evidence of Brazoria County’s actual knowledge and awareness of the conditions that caused the incident. *Colquitt*, 226 S.W.3d at 553-554. The evidence used to prove the County knew of the hazardous condition in the equipment room simultaneously proves the County was very well aware that Mr. Colquitt had suffered an injury. For example, “Brandon Griffin, an employee of the Sheriff’s Department. . . escorted Colquitt to the equipment room on the day of the incident . . .” 226 S.W.3d at 553-54. It is either law of the case, or beyond any possible dispute that Brazoria County had actual knowledge and subjective awareness of Mr. Colquitt’s falling through the floor. Brazoria County has never maintained otherwise. It is hard to imagine a case where there could be any more immediate notice or actual awareness of an accident than one where a County employee escorts the plaintiff to the scene of his injury.

In this case, at least two separate items prove Brazoria County had actual knowledge and subjective awareness of Mr. Colquitt’s accident:

1. The fact that a County employee was with Colquitt on the very day that he fell through the floor. 226 S.W.3d 551, 553-554. The prior opinion also indicates that there were affidavits from County employees and pictures of the equipment room where the accident occurred, meaning the County had adequate time to investigate the claim. *Id.*
2. The filing and service of Mr. Colquitt’s lawsuit.

Given the facts, Brazoria County had the requisite actual notice and subjective awareness needed to sustain jurisdiction under the Tort Claims Act. The service of Colquitt's petition simply enhanced the County's already existing actual notice. "The purpose of the notice provision is to ensure that claims are promptly reported so that a governmental entity may investigate the merits of a claim while the facts are fresh and the conditions are substantially the same." *Texas Dep't of Criminal Justice v. Simmons*, 140 S.W.3d 338, 348 (Tex. 2004). These ends have been met many times over in this case. Mr. Colquitt should be allowed to pursue his personal injury claim.

### **III. PRAYER**

The District Court correctly determined that Colquitt's filing and serving his lawsuit within six months of his accident constitutes "actual notice" under section 101.101(c) of the Civil Practice and Remedies Code. The 2005 addition to section 311.034 of the Government Code did not change the law; section 311.034 merely provides that statutory notice requirements are prerequisite to suit. The two statutes are not contradictory.

The District Court's decision should be reinstated because it is legally correct and is sound public policy. The decision of the Fourteenth Court of Appeals does not follow the statutory language, does not follow cited authority, and creates an illogical and purposeless result. Petitioner prays that this Court grant review, and that on consideration, reverse the decision of the Fourteenth Court of Appeals and reinstate the trial court's decision allowing

Mr. Colquitt's personal-injury to proceed on the merits against Brazoria County. Petitioner prays for all relief to which he is entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of Petitioner's Reply Brief on the Merits was mailed certified mail, return receipt requested, to the following counsel of record, this 29<sup>th</sup> day of October, 2009.

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