COMMENT

"ELECTION" OF REMEDIES: THE CITY OF HOUSTON, THE SISTER COURTS, AND THE *MISSION* TO INTERPRET THE TORT CLAIMS ACT*

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I. INTRODUCTION

Consider this hypothetical: the Deputy, a city employee operating an automobile within the scope of his employment, negligently collides with Plaintiff and inflicts severe injury. By operation of statute, if Plaintiff elects to sue the City for her injuries, she is forever barred from suing the Deputy.[1] Likewise, if Plaintiff elects to sue the Deputy, she is forever barred from suing the City.[2] The issue presented in this Comment is simple: under Texas law, if Plaintiff elects to sue both the City and the Deputy simultaneously, does she forever bar herself from suing either?

The search for an answer to this seemingly uncomplicated question has placed citizens, government entities, and courts at odds with one another for several years.[3] In 2003, under the guise of tort reform, the Texas Legislature amended the portion of the Texas Civil Practice and Remedies Code commonly known as the Texas Tort Claims Act (TTCA) to include additional safeguards against claimants circumventing its restrictions.[4] One particular

1. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a) (West 2011).

2. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b) (West 2011).

3. *See infra* Part III (illustrating and analyzing the City of Houston and the First and Fourteenth Courts of Appeals' conflicting interpretations of section 101.106).

4. Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 656–57 (Tex. 2008); *see also* Senate Comm. on State Affairs, Bill Analysis, Tex. C.S.H.B. 4, 78th Leg., R.S. (2003) ("The authors' stated intent is to bring more balance to the Texas civil justice system, reduce litigation costs, and address the role of litigation in society."); Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History* (pt. 3), 36 TEX. TECH L. REV. 169, 290 (2005) (noting that prior to the enactment of section 101.106, plaintiffs could "circumvent" the TTCA's restrictions "by filing suit against the employee under other statutes").

provision created by the amendment, entitled "Election of Remedies," has been at the center of controversy since its enactment.[5] Section 101.106 was drafted with the purpose of protecting governmental entities, their employees, and taxpayers by forcing plaintiffs to elect "at the outset" whether to bring suit against the governmental unit or the employee in his or her individual capacity.[6] The provision's malleable clauses have led to numerous conflicting interpretations, hundreds of pages of appellate and amicus briefs, and most recently, a split of authority among the Texas Courts of Appeals.[7]

The provisions relevant to this Comment are 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*.
>
> . . . .
>
> (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.[8]

When the Texas Supreme Court first addressed the amended statute, it recognized the obvious intent of the drafters: to force an "irrevocable" election by which the plaintiff may bring a claim against (a) *only* the governmental unit; (b) *only* the employee; or,

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5. Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 11.05, 2003 Tex. Gen. Laws 847, 886. The amendment became effective on September 1, 2003, and the Thirteenth Court of Appeals file stamped its first appellate brief directly on point in May 2005. Brief of Appellant at 1–2, Mission Consol. Indep. Sch. Dist. v. Garcia, 166 S.W.3d 902 (Tex. App.—Corpus Christi 2005) (No. 13-04-00668-CV), *aff'd in part, rev'd in part*, 253 S.W.3d 653 (Tex. 2008).

6. *Mission*, 253 S.W.3d at 657; *see also* Hull et al., *supra* note 4, at 291–92 (interpreting the "mirror" provisions of section 101.106 to force the plaintiff to "decide whether to sue the governmental unit or its employees").

7. *See, e.g.*, Brief of Amicus Curiae the State of Texas, City of N. Richland Hills v. Friend, 370 S.W.3d 369 (Tex. 2012) (No. 11-0367); Brief of Amicus Curiae the City of Houston, *Friend*, 370 S.W.3d 369 (No. 11-0367); *see also infra* Part III (describing the varied interpretations of section 101.106 by the City of Houston and the First and Fourteenth Courts of Appeals).

8. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2011) (emphasis added).

in the event she files suit against both, (e) *only* the governmental unit by way of dismissing the employee.[9] As Texas courts soon learned, however, the plain language of the statute does not clearly support this application.[10]

The emphasized phrases in the above-quoted provisions are several sources of controversy within the statute.[11] Some of the ambiguities, such as the meaning of "under this chapter" in subsections (a) and (e), were resolved by the Texas Supreme Court in its seminal 2008 case, *Mission Consolidated Independent School District v. Garcia*.[12] Others, such as the meaning of "consent" in subsection (b) or the requirement of a "motion" in subsection (e), have created so great a rift among the lower courts that Texas Supreme Court or legislative intervention is seemingly inevitable.[13]

There is perhaps no greater divide among the courts of appeals than that which has developed between the sister courts in Houston.[14] Not long after the Texas Supreme Court's disposition in *Mission*, the City of Houston began employing a controversial litigation strategy based largely upon the ambiguous provisions of section 101.106.[15] When an injured plaintiff filed suit against both the City and its employee, the City would file a section 101.106(e) motion to dismiss the employee; then, upon procuring the

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9. *Mission*, 253 S.W.3d at 657.

10. *See* Hearing on H.B. 4 Before the S. Comm. on State Affairs, 78th Leg., R.S., at 00:56:54–01:03:40 (May 6, 2003) (statement of Edward Moore, Tex. Trial Lawyers Ass'n) [hereinafter Hearing on H.B. 4], *available at* http://www.senate.state.tx.us/75r/Senate/commit/c570/c570_78.htm ("[I]f somebody . . . happens to file . . . against both the government and the employee, by the explicit language of these provisions, they are barred from recovery, period.") (transcribed by Petitioner's Brief on the Merits at 25–26**,** *Mission*, 253 S.W.3d 653 (No. 05-0734)).

11. *See infra* Part II.B (recounting the Texas Supreme Court's interpretation of "under this chapter" in subsections (a) and (e)); *infra* Part III.B.2 (analyzing the dilemma that arises from the phrase "the filing of a motion" in subsection (e)); *infra* Part III.C (analyzing the First and Fourteenth Courts of Appeals' respective interpretations of "consent" in subsection (b)).

12. *Mission*, 253 S.W.3d at 658–60 ("[W]e have never interpreted 'under this chapter' to only encompass tort claims for which the Tort Claims Act waives immunity."); *see also infra* Part III.B–C (identifying the procedural nuances that distinguished *Mission* from subsequent case law and outlining the contrasting interpretations of section 101.106 by the First and Fourteenth Courts of Appeals that resulted).

13. *See infra* Part III.D.4 (arguing that clarity in section 101.106 jurisprudence must come from the Texas Legislature or Supreme Court).

14. This Comment will routinely reference the First and Fourteenth Courts of Appeals of Texas as the "sister courts." *See* City of Houston v. Esparza, 369 S.W.3d 238, 249 (Tex. App.—Houston [1st Dist.] 2011, pet. filed) (analyzing subsection (b) "consent" in dicta because its "sister court" used that provision to resolve a case on similar facts).

15. *See infra* Part III.A (explaining the City of Houston's litigation strategy to seek dismissal of all claims in the event that a claimant simultaneously brought suit against the government and one of its employees).

employee's dismissal, it would seek its own dismissal pursuant to section 101.106(b).[16] The strategy was undoubtedly founded in a reasonable interpretation of the statute's provisions, but its harsh outcome resulted in multiple appeals and a split in authority between the First and Fourteenth Courts.[17]

This Comment analyzes the sister courts' split in authority in three parts. Part II examines the critical foundation for the debate: the Texas Supreme Court's holding in *Mission.* Part III examines the methodology behind the City of Houston's controversial litigation strategy, its reception by the sister courts in *Amadi v. City of Houston* and *City of Houston v. Esparza*, the practical implications of each of the decisions' rationales, and any potential reconciliation of the subsequent case law. Finally, Part IV concludes with a detailed analysis of the manner in which claimants should utilize section 101.106 to maximize their available claims.

II. *MISSION CONSOLIDATED*

The Texas Supreme Court first deciphered the amended section 101.106 in its widely cited 2008 opinion, *Mission Consolidated Independent School District v. Garcia*.[18] In that case, Mission Consolidated I.S.D. (the ISD) fired Gloria Garcia and her two co-workers (collectively, "Garcia") based on what she alleged was racial and sexual discrimination.[19] In response, Garcia brought claims against both the ISD and its superintendent for various common law torts and violations of the Texas Commission on Human Rights Act (TCHRA).[20] Because Garcia had sued the superintendent in his individual capacity, the ISD filed pleas to the jurisdiction pursuant to TTCA section 101.106(b), contending that it "immediately and forever bar[red] any suit or recovery . . . against [the ISD] regarding [Garcia's termination]."[21]

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16. *See infra* Part III.A (describing the City of Houston's interpretation of the statute and resulting litigation strategy).

17. *See infra* Part III (commenting on the harsh results produced by the City's interpretation of the statute and discussing the First and Fourteenth Courts of Appeals' methods of striking it down). While the legislative history of section 101.106 is sparse, the City of Houston's interpretation was at least reasonably foreseeable to the Legislature, as it was entertained on the floor of the Senate Committee on State Affairs several months prior to its enactment. *See* Hearing on H.B. 4, *supra* note 10 (anticipating the City of Houston's litigation strategy).

18. Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 658–60 (Tex. 2008).

19. *Id.* at 654–55; Brief of Appellant at 33, Mission Consol. Indep. Sch. Dist. v. Garcia, 166 S.W.3d 902 (Tex. App.—Corpus Christi 2005) (No. 13-04-00668-CV), *aff'd in part, rev'd in part*, 253 S.W.3d 653 (Tex. 2008).

20. *Mission*, 253 S.W.3d at 655.

21. *Id.* The ISD argued that because the suits against it and the superintendent

The case introduced to the court two material issues on section 101.106's applicability. The first concerned the meaning of the phrase "under this chapter" and the significance of the fact that subsection (b) does not contain it.[22] The second concerned the relationship between the phrases "forever bars *any* suit" and "unless the government *consents*," in terms of subsection (b)'s breadth.[23] The only major uncertainty in the case surrounded how these issues would impact Garcia's TCHRA claims; the lower courts had ruled against the ISD in unison, but in 2008, the Texas Supreme Court addressed the issue de novo.[24]

A. The "Crystal Hammer" and the "Velvet Tunnel"

The TTCA "does not create a cause of action[, but instead] it merely waives sovereign immunity as a bar to a suit that would otherwise exist."[25] Thus, the TTCA is only applicable when a suit against a governmental entity triggers one of its provisions' limited waivers of immunity.[26] In *Mission*, because Garcia's TCHRA claims could not be pigeonholed into one of the TTCA's provisions, an issue arose as to whether the jurisdictional restrictions of section 101.106 could even attach to them.[27] The lower courts narrowly construed section 101.106's "under this

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both concerned Garcia's termination, they both "regard[ed] the same subject matter," as prohibited by section 101.106(b). *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b) (West 2011).

22. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2011); *Mission*, 253 S.W.3d at 659–60.

23. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2011) (emphasis added); *see Mission*, 253 S.W.3d at 659–60 ("[S]ubsection (b) bars 'any suit' . . . . In this case, the ISD contends, that includes Garcia's suit under the TCHRA.").

24. *Mission*, 253 S.W.3d at 655, 657–58.

25. Hull et al., *supra* note 4, at 287.

26. *Id.* TTCA section 101.021 provides for a waiver of sovereign immunity, and it generally applies when a government employee negligently operates a motor-driven vehicle. *Id.*; *see* Tex. Dep't of Aging & Disability Servs. v. Johnson, No. 01-11-00526-CV, 2012 WL 27728, at *1 (Tex. App.—Houston [1st Dist.] Jan. 5, 2012, pet. filed) (mem. op.) (allowing the guardian of a man who "fell from a fifteen-person passenger van [owned by the governmental unit] onto U.S. Highway 59" to bring suit against the governmental unit and its employee driver); Amadi v. City of Houston, 369 S.W.3d 254, 256, 262 (Tex. App.—Houston [14th Dist.] 2011, pet. filed) (allowing a suit against the City of Houston arising from "negligent operation of a motor vehicle" that it owned). However, section 101.021 is also triggered when a government employee misuses "tangible personal or real property." TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2) (West 2011); *see* City of Houston v. Jenkins, 363 S.W.3d 808, 811–13 (Tex. App.—Houston [14th Dist.] 2012, pet. filed) (holding that allegations of negligent failure to restrain a dog trained to apprehend criminals brought the plaintiff's claim "within the TTCA's waiver of governmental immunity"); John Council, *Appellate Lawyer of the Week: K-9 Controversy*, TEX. LAW., Mar. 5, 2012, *available at* www.law.com/jsp/tx/PubArticleTX.jsp?id=1202544231106 (noting the *Jenkins* court's comparison of police dogs to patrol cars).

27. *Mission*, 253 S.W.3d at 659.

chapter" language to exclude outside statutory waivers of immunity such as the TCHRA,[28] but the ISD passionately disagreed.[29]

In response to its decision, the ISD furiously briefed to the Texas Supreme Court that the court of appeals had built an illogical "crystal hammer"—"useless for the purpose for which it was created"—arbitrarily limiting the scope of tort claims to which the statutory restriction was meant to apply.[30] Garcia, in turn, contended that it was the ISD who sought to expand the statute beyond its legislative purpose.[31] Comparing the ISD's interpretation to a "velvet tunnel," Garcia argued that the ISD desired "to softly lure the Court into the black hole of meaningless interpretations."[32]

While the rhetoric between the ISD and Garcia following the lower court rulings was particularly sharp, it exemplified the ardor on both sides of the debate. The Texas Supreme Court's interpretation of section 101.106 would ultimately align almost perfectly between the parties, irrespective of the poetic quips by its advocates.[33] Nevertheless, this dynamic struggle between legislative intent and the illogical "crystal hammer" lives on today as plaintiffs and municipalities attempt to untangle the statute.[34]

B. SCOTX Weighs In

In its long-anticipated opinion, the Texas Supreme Court established several preliminary points. First, it held that section 101.106 "requir[es] a plaintiff to make an irrevocable

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28. Mission Consol. Indep. Sch. Dist. v. Garcia, 166 S.W.3d 902, 905 (Tex. App.—Corpus Christi 2005), *aff'd in part, rev'd in part*, 253 S.W.3d 653 (Tex. 2008).

29. *See, e.g.*, Petitioner's Brief on the Merits at 10, *Mission*, 253 S.W.3d 653 (No. 05-0734) ("*Seldom Has One Court Been So Wrong*").

30. *Id.* at 24; *see also* BENGT-ARNE VEDIN, THE DESIGN-INSPIRED INNOVATION WORKBOOK 113 (2011) ("[A] crystal hammer that did not do the job of a hammer could never be considered beautiful even though made from a valuable material."). This concept of arbitrariness is a recurring theme in judicial efforts to construe subsection (b). *See infra* Part III.C.2 (discussing how a broad interpretation of "consent" arguably renders subsection (b) meaningless).

31. Respondents' Consolidated Brief on the Merits at 4–5, *Mission*, 253 S.W.3d 653 (No. 05-0734).

32. *Id.* at xii n.1. Counsel for Garcia declined to expand upon the meaning of the phrase "velvet tunnel," and this Comment will likewise decline to "go there." *Id.* For further research on the subject, see JONATHON GREEN, CASSELL'S DICTIONARY OF SLANG 1496 (2d ed. 2005).

33. *See Mission*, 253 S.W.3d at 659–60 (holding that "to the extent subsection (b) applies, it bars *any suit* against the governmental unit regarding the same subject matter," but also holding that subsection (b) did not bar Garcia's TCHRA claims because they established governmental consent).

34. *See infra* Part III.C.2 (describing how the *Amadi* court's interpretation of the phrase "unless the governmental unit consents" arguably renders subsection (b) superfluous).

election at the time suit is filed between suing the governmental unit . . . or proceeding against the employee alone."[35] Second, it acknowledged subsection (b) and held that "[w]hen suit is filed against the employee, recovery against the *governmental unit* regarding the same subject matter is barred unless the governmental unit consents to suit.[36] Third, it noted that under the TTCA's election scheme, recovery against the *employee* is barred in three distinct scenarios: under subsection (a), "when suit is filed against the governmental unit only"; under subsection (e), "when suit is filed against both the governmental unit and its employee"; and under subsection (f), "when suit is filed against an employee whose conduct was within the scope of his or her employment and the suit could have been brought against the governmental unit."[37] At a basic level, the Texas Supreme Court's construction of the relationship between subsections (a), (b), and (e) was the same as that of the court of appeals.[38] However, the Texas Supreme Court's interpretation of the phrases "under this chapter," "any suit," and "consent" would provide key context to their application.[39]

Because the government waives its immunity from common law torts only to the extent prescribed by the TTCA, the Texas Supreme Court concluded that "under this chapter" encompassed *every* common law tort action brought against a governmental unit.[40] As a result, the tort claims alleged against both the ISD and the superintendent would have fallen within the purview of subsection (e) and, had the ISD filed the requisite motion, would have necessitated the superintendent's dismissal.[41] Even had subsection (e) applied, however, the court ruled it to be inapplicable to Garcia's TCHRA claims.[42] The TCHRA provides a

35. *Mission*, 253 S.W.3d at 657.

36. *Id.* (emphasis added).

37. *Id.* (emphasis added). It is important to note that the qualifier "under the [TTCA's] election scheme" is significant because subsection (e) requires the government to file a motion for it to apply, and the failure to do so potentially upsets the election scheme outlined by the court. *See infra* Part III.B.2 (analyzing the section 101.106(e) "motion" dilemma). The third listed scenario concerning the implication of section 101.106(f) is beyond the scope of this Comment and divergence into the subsection is not necessary for its analysis.

38. *See Mission*, 253 S.W.3d at 657–58 (illustrating the court of appeals' interpretation of subsections (a), (b), and (e)).

39. *Id.* at 658–60.

40. TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (West 2011); *Mission*, 253 S.W.3d at 659.

41. *Mission*, 253 S.W.3d at 659. The court made it clear that subsection (e) does not apply because the ISD did not obtain the superintendent's dismissal specifically "under subsection (e)." *Id.*

42. *Id.*

statutory waiver of governmental immunity wholly independent from the Texas Tort Claims Act; therefore, the court held that claims arising under the TCHRA could not be brought "under the [TTCA]" as subsection (e) requires.[43]

Turning its focus to section 101.106(b), the Texas Supreme Court acknowledged the absence of an "under this chapter" limitation, and determined that this unique characteristic of subsection (b) results in its jurisdictional scope expanding beyond the constraints of the TTCA itself.[44] The court reiterated: "by subsection (b)'s literal terms, it applies to 'any suit' brought against the governmental unit," including Garcia's common law tort actions, "provided the other subsection (b) requirements are met."[45] Clearly, "any suit" encompassed all common law claims alleged against the ISD,[46] but the court proceeded to determine whether subsection (b) affected Garcia's claims under the TCHRA.[47] For that analysis, subsection (b)'s "other . . . requirements" would be imperative.[48]

Because Garcia's TCHRA claims fell within the purview of "any suit," the court ruled that they were technically subject to section 101.106(b) and required governmental "consent" in order to survive dismissal.[49] Noting that "consent" in this context is articulated by law rather than by express conveyance, however, the court held that an express statutory waiver of immunity such as the TCHRA was sufficient.[50] In fact, because Garcia's TCHRA claims were not brought "under this chapter" and also established "consent," they effectively bypassed section 101.106 scrutiny entirely.[51] Thus, while the Texas Supreme Court overturned the court of appeals by holding that section 101.106 applied to the remainder of Garcia's claims, it nevertheless ruled

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43. TEX. CIV. PRAC. & REM. CODE ANN. § 101.003 (West 2011); TEX. LAB. CODE ANN. §§ 21.002(8)(D), 21.051 (West 2011); *see Mission*, 253 S.W.3d at 659.

44. *Mission*, 253 S.W.3d at 659–60.

45. *Id.* at 660.

46. *Id.* at 659. By section 101.106(b)'s plain language, all claims against the governmental unit are barred provided that two conditions are met: (1) the claims against the governmental unit "regard[ ] the same subject matter"; and (2) the governmental unit does not consent. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b) (West 2011).

47. *Mission*, 253 S.W.3d at 660.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* The use of the word "bypassed" in this sentence is not to suggest that TCHRA claims do not still have to satisfy section 101.106, but rather that they will always survive its scrutiny. *Id.* This characteristic grants unique value to non-TTCA waivers of immunity in that they may be pled against the governmental unit under any circumstances without jurisdictional ramifications from section 101.106. *See infra* Part IV.A.

that her TCHRA claims survived the ISD's pleas to the jurisdiction.[52]

C. Mission *Debriefed*

To summarize, the Texas Supreme Court in *Mission* resolved two significant issues of section 101.106's statutory construction: (1) "under this chapter" means *any common law tort claim* alleged against the governmental unit;[53] and (2) the scope of subsection (b)'s applicability is limited only by subject matter and "consent"—not by the confines of the TTCA.[54] Section 101.106(e) was inapplicable to the actual facts of *Mission*, but the court nevertheless noted that if applicable, it would have reached the same result.[55]

One crucial takeaway from *Mission* is that none of the claims alleged by Garcia fell within the TTCA's limited waivers of immunity.[56] As a result, the question of whether "consent" can be conveyed by the TTCA itself was neither presented to the court nor discussed.[57] This very issue would not only be presented to lower courts in the years following *Mission*; it would fuel an entire line of opinions by the Fourteenth Court of Appeals.[58] A second crucial takeaway is that the court interpreted section 101.106 as forcing upon the plaintiff an irrevocable

52. *Mission*, 253 S.W.3d at 660.

53. *Id.* at 658–60. To reiterate: the TCHRA is an outside statutory waiver of immunity and *not* a common law tort claim; thus, the "under this chapter" limitation of subsections (a) and (e) renders TCHRA claims beyond their purview. *Id.* at 660.

54. *Id.* at 659–60.

55. *Id.* at 659. That subsection (e) was inapplicable to the facts of *Mission* is a key characteristic because it distinguishes the case from *Esparza*, in which the First Court of Appeals interpreted section 101.106(e) to "override" subsection (b) analysis. *See infra* Part III.B.2 (noting *Esparza*'s implication that when subsection (e) applies, it effectively overrides subsection (b)).

56. *Mission*, 253 S.W.3d at 654 ("In this case, three terminated school-district employees filed suit against the district and its superintendent alleging . . . various common-law claims that do not fit within the [TTCA's] limited waiver of immunity."); *see* Amadi v. City of Houston, 369 S.W.3d 254, 260 (Tex. App.—Houston [14th Dist.] 2011, pet. filed) ("Importantly, none of Garcia's common law tort claims were subject to the waiver of governmental immunity enacted by the Legislature in the TTCA . . . ."); *supra* note 26 and accompanying text (discussing TTCA limited waivers of immunity).

57. *See Amadi*, 369 S.W.3d at 259–60 (emphasizing that the only claims barred in *Mission* were "those claims for which the governmental unit had not consented to suit, *i.e. all* of Garcia's common-law tort claims" (footnote omitted)).

58. City of Houston v. Cooper, No. 14-11-00092-CV, 2011 WL 5595559, at *2 (Tex. App.—Houston [14th Dist.] Nov. 17, 2011, pet. filed); City of Houston v. Johnson, No. 14-11-00220-CV, 2011 WL 5595716, at *2 (Tex. App.—Houston [14th Dist.] Nov. 17, 2011, pet. filed) (mem. op.); City of Houston v. Rodriguez, 369 S.W.3d 262, 266 (Tex. App.—Houston [14th Dist.] 2011, pet. filed); *Amadi*, 369 S.W.3d at 259.

election of one defendant.[59] This characterization of the legislative intent behind the statute may very likely be the means by which the statute's ambiguities are ultimately resolved.[60]

Therefore, despite the court's seminal opinion in *Mission*, multiple issues concerning the application of section 101.106 still lingered. Specifically, the court did not address the breadth of subsection (b) "consent" or the relationship between subsection (e) and subsection (b) dismissals.[61] Based primarily on these ambiguities, the City of Houston developed a controversial litigation strategy[62] that would ultimately bring section 101.106 before the Texas courts of appeals once again.[63] The resulting lines of cases are as irreconcilable as the statute itself.

III. THE CITY OF HOUSTON AND THE SISTER COURTS

A. The City's Interpretation

One efficient quality of post-*Mission* case law is that the fact patterns are nearly always identical.[64] Typically, the injured plaintiff files suit against both the City of Houston ("the City") and its employee.[65] Then, either by section 101.106(e) motion, Rule 11 agreement, or amended petition, the City obtains dismissal of the employee and subsequently seeks its own dismissal under 101.106(b).[66] As the First Court of Appeals once summarized it, the City interprets section 101.106 to require the

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59. *Mission*, 253 S.W.3d at 656–57.

60. *See infra* Part III.D.4 (analyzing the potential means of reconciling the section 101.106 ambiguities).

61. *Mission*, 253 S.W.3d at 656–60.

62. *See infra* Part III.A–C (outlining the City of Houston's interpretation of section 101.106 and evaluating the methods by which both the First and Fourteenth Courts of Appeals have struck it down).

63. *See Amadi*, 369 S.W.3d at 260 ("In contrast [to *Mission*], this case involves claims that *do fit* within the TTCA's limited waiver of immunity."); City of Houston v. Esparza, 369 S.W.3d 238, 245 (Tex. App.—Houston [1st Dist.] 2011, pet. filed) ("The City asserts that . . . the employee is dismissed under subsection (e) and the government is immune under subsection (b).").

64. *Compare* City of Houston v. Rodriguez, 369 S.W.3d 262, 264 (Tex. App.—Houston [14th Dist.] 2011, pet. filed) ("The City filed a motion to dismiss . . . pursuant to section 101.106(e) . . . . The City then filed a plea to the jurisdiction . . . . [pursuant to] section 101.106(b) . . . ."), *with Esparza*, 369 S.W.3d at 242–43 ("The City moved to dismiss Esparza's claims . . . pursuant to section 101.106(e) . . . . It also filed a plea to the jurisdiction . . . [pursuant to] section 101.106(b) of the Act.").

65. *Rodriguez*, 369 S.W.3d at 263; *Esparza*, 369 S.W.3d at 242.

66. *E.g.*, City of Houston v. Washington, No. 14-11-00305-CV, 2011 WL 6808218, at *1 (Tex. App.—Houston [14th Dist.] Dec. 22, 2011, pet. filed) (mem. op.) (amended petition); *Amadi*, 369 S.W.3d at 256 (Rule 11 agreement); *Esparza*, 369 S.W.3d at 242 (section 101.106(e) motion).

plaintiff "to choose between suing either the City or its employee, and a claimant who instead sues both loses the opportunity to sue either."[67]

Ironically, the ISD in *Mission* illustrated this very tactic as an example of abusing the statute.[68] In its reply brief to the court of appeals, the ISD posited that section 101.106 would not allow for an employee to substitute the government in their stead if the government could then simply dismiss itself pursuant to subsection (b).[69] "In such a case," the ISD argued, "a plaintiff really would be without a remedy. . . . [Section 101.106] is a one-suit statute. Not a no-suit statute."[70] Nevertheless, the City has pursued this strategy into the appellate courts and beyond.[71]

The City's interpretation of section 101.106, while punitive toward injured claimants, is not unfounded. Governmental units view the policy behind section 101.106 as curbing "needless expenditure of taxpayer money" where the plaintiff carelessly failed to follow the TTCA's procedures.[72] Thus, while the City's interpretation might reach a "harsh" result, governmental entities like the City of Houston and the Metropolitan Transit Authority of Harris County do not view it as reaching an "absurd" result.[73]

In October 2011, both the First and Fourteenth Courts of Appeals disagreed with the City's interpretation and issued

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67. *Esparza*, 369 S.W.3d at 245.

68. Reply Brief of Appellant at 13, Mission Consol. Indep. Sch. Dist. v. Garcia, 166 S.W.3d 902 (Tex. App.—Corpus Christi 2005) (No. 13-04-00668-CV), *aff'd in part, rev'd in part*, 253 S.W.3d 653 (Tex. 2008).

69. *Id.* ("[The proper interpretation] prevents an employee from utilizing a provision like (e) or (f) to substitute the governmental employer in their place when the governmental employer could simply turn around and file a plea to the jurisdiction to have the case dismissed.").

70. *Id.* The ISD also presented this argument in its brief to the Texas Supreme Court, referring to such an interpretation of the statute as a "bludgeon or a meat grinder or a kill zone." Petitioner's Brief on the Merits at 25–26, *Mission*, 253 S.W.3d 653 (No. 05-0734).

71. Even before the First and Fourteenth Courts' final rulings in *Amadi* and *Esparza*, the City of Houston intervened as amicus curiae in a petition to the Texas Supreme Court for a similar case from Fort Worth. City of Houston, Texas' Amicus Curiae Brief in Support of Petition for Review at 1, City of N. Richland Hills v. Friend, 370 S.W.3d 369 (Tex. 2012) (No. 11-0367). The Supreme Court ultimately resolved *Friend* on alternative grounds and issued no opinion as to the breadth of section 101.106. *Friend*, 370 S.W.3d at 370, 373.

72. Metropolitan Transit Authority's Amicus Curiae Brief at 6, Amadi v. City of Houston, 369 S.W.3d 254 (Tex. App.—Houston [14th Dist.] 2011, pet. filed) (No. 14-10-01216-CV); *see* Hull et al., *supra* note 4, at 290 ("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.").

73. Metropolitan Transit Authority's Amicus Curiae Brief at 6, *Amadi*, 369 S.W.3d 254 (No. 13-10-021216-CV).

opinions to the contrary, sparking a line of cases that unanimously struck down the controversial strategy.[74] The interesting and complex issue of this Comment, however, is not *that* the City's interpretation was struck down, but *why*. The *City of Houston v. Esparza* and *Amadi v. City of Houston* lines of cases both involved the same post-*Mission* fact patterns and legal issues,[75] yet the courts employed remarkably different methodologies to resolve them.[76] The following sections will examine the holdings of *Esparza* and *Amadi*, analyze the consequences of each doctrine, and determine which, if any, is the appropriate manner of construing section 101.106.

B. Subsection (e)—City of Houston v. Esparza

In *City of Houston v. Esparza*, Gloria Esparza simultaneously sued the City and its employee, Manuel Espinoza, alleging that the latter negligently injured her in a car accident.[77] Pursuant to the City's 101.106(e) motion, Espinoza was subsequently dismissed from the suit, and the City filed a plea to the jurisdiction to dismiss itself by operation of 101.106(b).[78] The trial court denied the City's plea, the City appealed, and the First Court of Appeals issued its seminal opinion on October 7, 2011.[79]

1. Interaction among Subsections (a), (b), and (e). In its seventeen-page ruling, the First Court of Appeals placed a new lens over *Mission*'s three scenarios that dismiss the governmental unit under section 101.106.[80] According to its interpretation, subsections (a) and (b) constitute "voluntary elections," through which the claimant, simply by filing suit against either the government or its employee, selects the sole defendant.[81] In other words, if the plaintiff files suit against only

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74. *See infra* Part III.B (First Court of Appeals), *and* Part III.C (Fourteenth Court of Appeals).

75. *See supra* notes 64–66 and accompanying text (outlining the typical post-*Mission* fact pattern); *see also infra* notes 109–11 and accompanying text (observing that the facts of *Amadi* were almost identical to those of *Esparza*).

76. *See infra* Part III.D.1 (concluding that despite their similar fact patterns, the *Esparza* and *Amadi* doctrines are irreconcilable).

77. City of Houston v. Esparza, 369 S.W.3d 238, 242 (Tex. App.—Houston [1st Dist.] 2011, pet. filed).

78. *Id.* at 242–43.

79. *Id.* at 243.

80. *See supra* text accompanying note 37 (discussing the Texas Supreme Court's interpretation of the TTCA's election scheme as barring recovery against government employees in "three distinct scenarios").

81. *Esparza*, 369 S.W.3d at 246.

the employee or only the governmental unit, the plaintiff's election prevails.[82] If, however, the plaintiff files suit against both the employee and the governmental entity, the *Esparza* court classified such a scenario as an "involuntary election."[83] Under those circumstances, the court determined that subsection (e) forces the plaintiff to elect the governmental unit as his only chosen defendant, dismissing the employee and endowing him with immunity pursuant to subsection (a).[84]

Esparza rejects the notion that subsections (b) and (e) "apply without reference to each other."[85] When subsection (e) applies and the employee is dismissed from the suit, subsection (b) no longer bars the suit; thus, subsection (e) effectively overrides (b).[86] Because Esparza simultaneously sued the City and Espinoza, she involuntarily triggered section 101.106(e), overriding any applicability of subsection (b).[87] Once the City filed its 101.106(e) motion, the trial court correctly dismissed Espinoza from the suit.[88] Finally, because section 101.106(b) was then inapplicable, the trial court properly denied the City's motion to dismiss the remaining claims.[89]

2. The 101.106(e) "Motion" Dilemma. The *Esparza* decision makes clear that, regardless of how creatively the plaintiff files suit, subsections (a), (b), and (e) coincide to ensure that he cannot circumvent the statute.[90] However, can the same be said about the

82. *Id.* at 246–47.

83. *Id.* at 247.

84. *Id.* Because the City filed a section 101.106(e) motion in *Esparza*, the court expressly declined to address how this result would change if no such motion were filed. *Id.* at 247 n.10. The potential ramifications of failure to file a section 101.106(e) motion are examined *infra*, at Part III.B.2.

85. *Esparza*, 369 S.W.3d at 248.

86. *Id.* at 253–54 ("Esparza's filing of suit against both Espinoza and the City invoked subsection (e). . . . [But] subsection (b) does not bar Esparza from pursuing her claims against the City, her elected defendant.").

87. *Id.* at 253.

88. *Id.*

89. *Id.* at 253–54. In May 2012, the First Court of Appeals issued two opinions that independently analyzed *Mission* and the City of Houston's accompanying arguments, but nevertheless conformed to its precedent in *Esparza*. City of Houston v. Rodriguez, 371 S.W.3d 492, 494–98 (Tex. App.—Houston [1st Dist.] 2012, pet. filed); City of Houston v. Vallejo, 371 S.W.3d 499, 502–06 (Tex. App.—Houston [1st Dist.] 2012, pet. filed). In both opinions, the concurring Justice suggested that such an independent analysis was unnecessary because *Esparza* is settled law in the First Court. *Rodriguez*, 371 S.W.3d at 499 (Brown, J., concurring); *Vallejo*, 371 S.W.3d at 506 (Brown, J., concurring).

90. *See Esparza*, 369 S.W.3d at 249 ("It likewise discourages a claimant from attempting to circumvent the Act by suing a government employee individually, because a claimant who does so is foreclosed from any future recovery against the governmental unit, whether she prevails against the employee or not.").

government? Section 101.106(e), by its plain language, is clearly contingent upon "the filing of a motion by the governmental unit."[91] This potentially grants the governmental unit a broad power to manipulate the statute simply by refraining from filing the motion.[92]

Recall the hypothetical from the introduction. Under *Esparza*, if the City files a 101.106(e) motion against Plaintiff, the Deputy will be dismissed and the City will remain in the suit because 101.106(b) is no longer applicable.[93] So what is the result if the City refuses to file the 101.106(e) motion? The First Court went to great lengths in *Esparza* to note that subsections (b) and (e) do not operate in isolation from one another,[94] but at least theoretically, one could argue that when the City fails to file a 101.106(e) motion, subsection (e) is never triggered and thus subsection (b) applies.[95] Under this interpretation, governmental entities could completely circumvent the statute by refusing to file the requisite motion.

On January 5, 2012, the First Court of Appeals issued an opinion directly to that point.[96] In *Texas Department of Aging & Disability Services v. Johnson*, the plaintiff's claims arose out of an incident in which a man fell from a moving vehicle as it traveled the highway.[97] The plaintiff brought suit against both the responsible governmental unit—the Texas Department of Aging and Disability Services (DADS)—and its employee, Brittany Porter; however, rather than following the traditional post-*Mission* procedural fact pattern, DADS sought its *own* dismissal pursuant to 101.106(b).[98] The court found DADS's failure to file a 101.106(e) motion immaterial.[99] Relying on its holding in *Esparza*, the First Court of Appeals reasoned that by suing both DADS and its employee simultaneously, the plaintiff *automatically* triggered subsection (e)'s

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91. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e) (West 2011).

92. *See infra* Part III.D.3 (noting that if section 101.106(e) is essential to the applicability of the subsection, then governmental units will wield significant power under *Esparza*).

93. *See supra* text accompanying note 86 (discussing the operation of section 101.106(e) under *Esparza* and its ability to override subsection (b)).

94. *Esparza*, 369 S.W.3d at 248.

95. *But see* Tex. Dep't of Aging & Disability Servs. v. Johnson, No. 01-11-00526-CV, 2012 WL 27728, at *2 (Tex. App.—Houston [1st Dist.] Jan. 5, 2012, pet. filed) (mem. op.) ("[The governmental unit] may not, however, move to dismiss [itself] from the suit solely on the ground that both it and the employee were sued together.").

96. *Id.* at *1–2 (noting that the governmental unit did not file a 101.106(e) motion to dismiss the claims against its employee and describing subsection (e) as "the avenue for election-of-remedies when both the government and the individual are sued for the same tort").

97. *Id.* at *1.

98. *Id.*

99. *Id.* at *2.

involuntary election provision.[100] Thus, the plaintiff's claims were no longer subject to subsection (b)—only subsection (e) was applicable.[101] As a result, the only consequence of DADS's failure to file a 101.106(e) motion was that both defendants remained in the suit, rather than just DADS.[102]

In one sense, *Johnson* reaches the correct result, because it denies governmental entities the power to circumvent the statute by creatively filing its section 101.106 motions.[103] After all, the City of Houston has certainly demonstrated a willingness to manipulate the statute's other deficiencies to its advantage.[104] In another sense, however, the notion that subsections (b) and (e) cannot operate independently from one another finds little direct support in section 101.106's plain language.[105] Perhaps noting that issue, the Fourteenth Court of Appeals elected to address the City's strategy differently: through the application of subsection (b)'s "consent" clause.[106] Regrettably, it too bears an assortment of problems in its practical application.[107]

C. Subsection (b) "Consent"—Amadi v. City of Houston

The City's controversial litigation strategy first reached the Fourteenth Court of Appeals in *Amadi v. City of Houston*.[108] In a

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100. *Id.* (citing City of Houston v. Esparza, 369 S.W.3d 238, 249 (Tex. App.—Houston [1st Dist.] 2011, pet. filed)).

101. *Id.*; *see* City of Houston v. Atkins, No. 01-12-00190-CV, 2012 WL 2357488, at *3 (Tex. App.—Houston [1st Dist.] June 21, 2012, pet. filed) ("In sum, subsection (b) has no application when a plaintiff simultaneously sues the governmental unit and its employee.").

102. *Johnson*, 2012 WL 27728, at *2.

103. *See infra* Part III.D.3 (noting that were it not for the 101.106(e) "motion" dilemma, the *Esparza* decision would conform the statute to *Mission*'s three scenarios). Under *Johnson*, intentionally failing to file a section 101.106(e) motion would not affect subsection (b)'s inapplicability. *Johnson*, 2012 WL 27728, at *2.

104. *See* City of Houston v. Marquez, No. 01-11-00493-CV, 2011 WL 6147772, at *1–2 (Tex. App.—Houston [1st Dist.] Dec. 8, 2011, pet. filed) (mem. op.) ("[T]he City told [Marquez] that if they amended their petition to dismiss Officer Alaniz from the lawsuit, the City would not seek its own dismissal. . . . [Then] the City filed a plea to the jurisdiction, asserting immunity from suit under subsection 101.106(b).").

105. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b) (West 2011) ("forever bars any suit"). The Fourteenth Court of Appeals, for example, has expressly stated that subsection (e) requires a motion and trial court action in order to "effect the dismissal." Tex. Dep't of Aging & Disability Servs. v. Cannon, 383 S.W.3d 571, 578 (Tex. App.—Houston [14th Dist.] 2012, pet. filed).

106. *See infra* Part III.C.1 (outlining the Fourteenth Court of Appeals' interpretation of the subsection (b) "consent" clause as precluding dismissal of the governmental unit under facts similar to *Esparza*).

107. *See infra* Part III.C.2–3 (analyzing the "crystal hammer" and "swinging door" dilemmas).

108. Amadi v. City of Houston, 369 S.W.3d 254, 256 (Tex. App.—Houston [14th Dist.] 2011, pet. filed).

fact pattern almost identical to that of *Esparza*, Jane Amadi sued the City and its employee, Jermaine Owens, alleging that the latter negligently injured her in a car accident.[109] The City never filed a 101.106(e) motion; instead, Amadi nonsuited Owens pursuant to a Rule 11 agreement.[110] Nevertheless, just as it did in *Esparza*, the City then filed a plea to the jurisdiction by operation of 101.106(b), but unlike in *Esparza*, the trial court granted the City's plea to the jurisdiction and dismissed the case.[111]

While the procedural nuance of using a Rule 11 agreement rather than a 101.106(e) motion to dismiss the employee might seem trivial, it is actually the key distinction between *Esparza* and *Amadi*.[112] Because subsection (e), by its plain language, requires the governmental unit to file a motion,[113] a voluntary dismissal such as a Rule 11 agreement seemingly rendered it inapplicable to the controversy.[114] In order to overturn the trial court and avoid the inequitable result associated with the City's interpretation, the court was forced to utilize another section 101.106 ambiguity: the subsection (b) "consent" clause.[115] Doing just that, the Fourteenth Court of Appeals issued its seminal opinion reversing the trial court's dismissal on October 27, 2011.[116]

1. "Consent". The Fourteenth Court agreed with the City to the extent that when a claimant sues a government employee, 101.106(b) is the governing provision.[117] Rather than dismissing

109. *Id.*

110. *Id.* A Rule 11 agreement is an agreement made in compliance with Rule 11 of the Texas Rules of Civil Procedure, which provides that "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." TEX. R. CIV. P. 11.

111. *Amadi*, 369 S.W.3d at 256; City of Houston v. Esparza, 369 S.W.3d 238, 242–43 (Tex. App.—Houston [1st Dist.] 2011, pet. filed).

112. *Amadi*, 369 S.W.3d at 259 (noting that subsection (e) could not apply because Owens was dismissed via a Rule 11 agreement rather than a 101.106(e) motion).

113. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e) (West 2011).

114. *Amadi*, 369 S.W.3d at 259; *see* Hintz v. Lally, 305 S.W.3d 761, 767–68 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (holding that voluntary dismissal of the employee rendered section 101.106(f) inapplicable to the case, because subsection (f) expressly requires dismissal "[o]n the employee's motion"). It is noteworthy that under the *Esparza* line of cases, subsection (e) would still apply even when the employee is voluntarily dismissed. *See* City of Houston v. Gunn, 389 S.W.3d 401, 409 (Tex. App.—Houston [1st Dist.] 2011, pet. filed) (Massengale, J., concurring) ("The claimant's subsequent decision to nonsuit the employee . . . is irrelevant to the analysis.").

115. *Amadi*, 369 S.W.3d at 259, 262.

116. *Id.* at 259, 262.

117. *Id.* at 259.

Amadi's claims pursuant to subsection (b), however, the court emphasized the applicability of its unique exception: "unless the governmental unit consents."[118] In *Mission*, the Texas Supreme Court defined "consent" as satisfied when an outside statute such as the TCHRA waives governmental immunity,[119] but it left open the issue of whether the TTCA itself establishes "consent."[120] Although Amadi's claims did not fall under an outside statute such as the TCHRA,[121] section 101.021 of the TTCA specifically waives immunity when a government employee negligently operates a motor vehicle.[122] As a result, the issue was directly presented to the *Amadi* court.[123]

The City presented two principal arguments in favor of dismissal, both stemming from a single sentence authored by the Texas Supreme Court.[124] In *Mission*, the court stated: "We agree with the ISD that to the extent subsection (b) applies, it bars *any suit* against the governmental unit regarding the same subject matter, not just suits for which the Tort Claims Act waives immunity or those that allege common-law claims."[125] According to the City, the Texas Supreme Court demanded that subsection (b) bar all of Amadi's claims against it.[126] The City also claimed that by including the phrase "bars *any suit* . . . not just suits for which the Tort Claims Act waives immunity," the Texas Supreme Court effectively defeated Amadi's contention that subsection (b) "consent" can be established by the TTCA's limited waivers of immunity such as section 101.021.[127]

The Fourteenth Court of Appeals disagreed. Concerning the City's first argument, the court held that by the Texas Supreme Court's own language in *Mission*, Amadi's claims are only barred "to the extent subsection (b) applies."[128] Thus, if the City "consented" to suit, subsection (b) would not apply.[129] Concerning

118. *Id.* (internal quotation marks omitted).

119. Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 660 (Tex. 2008).

120. *See supra* text accompanying note 57 (noting that the issue of whether the TTCA can establish "consent" was neither presented to the *Mission* court nor discussed).

121. *Amadi*, 369 S.W.3d at 256.

122. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A) (West 2011).

123. *See Amadi*, 369 S.W.3d at 260 ("In contrast [to *Mission*], this case involves claims that *do fit* within the TTCA's limited waiver of immunity.").

124. *Id.* at 259–60.

125. Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 659 (Tex. 2008).

126. *Amadi*, 369 S.W.3d at 259–60.

127. *Id.* at 260.

128. *Id.* (quoting *Mission*, 253 S.W.3d at 659) (internal quotation marks omitted).

129. *Id.* ("[S]ubsection (b), by its plain language, applies only when the governmental unit has not consented to suit."); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b) (West 2011).

the City's second argument, the court distinguished *Mission* on its facts and declined to construe the Texas Supreme Court's holding so narrowly as to *require* an outside statutory waiver of immunity.[130]

Employing the *Mission* rationale that "consent" is conferred "through the Constitution and state laws,"[131] the court determined that because the TTCA expressly waives governmental immunity when liability arises from certain facts, pleading those facts establishes "consent" to suit.[132] Therefore, by alleging that Jermaine Owens negligently operated an automobile, Amadi triggered the "consent" exception to subsection (b) via section 101.021.[133] Because subsection (b) could not then apply, the court concluded that the trial court erroneously dismissed Amadi's claims against the City.[134]

2. Return of the "Crystal Hammer". The *Amadi* court's broad construction of subsection (b) "consent" subjected the holding to criticism that it had "rendered 101.106(b) meaningless."[135] By interpreting "consent" to include the statutory waivers in the TTCA such as section 101.021, the court effectively held that the only suits section 101.106(b) can act to bar are those for which immunity is not waived at all.[136] In those instances, 101.106(b) serves no purpose because governmental immunity already prevents the claimant's suit.[137] This circular reasoning results in a subsection (b) that has absolutely no

130. *Amadi*, 369 S.W.3d at 259–60.

131. *Mission*, 253 S.W.3d at 660.

132. *Amadi*, 369 S.W.3d at 259.

133. *Id.* at 256, 259; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1)(A) (West 2011).

134. *Amadi*, 369 S.W.3d at 262.

135. *Id.* at 261 (quoting the City's brief); *see* Petition for Review at vii, City of Houston v. Gunn, 389 S.W.3d 401 (Tex. App.—Houston [1st Dist.] 2011, pet. filed) (No. 12-0116) ("Houston believes that this construction renders the statute meaningless and conflicts with the holding of this Court. After all, what could be the purpose of statutory immunity conferred by section 101.106(b) if that immunity only bars claims which are already barred by common-law immunity?") (citation omitted).

136. *See Amadi*, 369 S.W.3d at 260 ("Thus . . . subsection (b) operate[s] to bar those claims for which the government unit ha[s] not consented to suit."); City of Houston v. Esparza, 369 S.W.3d 238, 251 (Tex. App.—Houston [1st Dist.] 2011, pet. filed) ("[I]f the Tort Claim Act's limited waivers of immunity constituted 'consent' in and of themselves, as some courts of appeals have indicated, then the 'consent' exception appears to swallow the rule entirely.").

137. *See Esparza*, 369 S.W.3d at 251 ("[S]ubsection 101.106(b) only bars subsequent suits against governmental employers that were already barred through the doctrine of sovereign immunity." (quoting Barnum v. Ngakoue, No. 03-09-00086-CV, 2011 WL 1642179, at *10 (Tex. App.—Austin Apr. 29, 2011, pet. granted) (internal quotation marks omitted))).

purpose: a "crystal hammer" in the election of remedies provision.[138]

One potential purpose for subsection (b) under *Amadi* could have been to force an additional burden of proving "consent" onto the claimant, but the court specifically refuted that theory as well.[139] By filing her claim "under the limited waiver of immunity provided in section 101.021," the court held that Amadi satisfied her burden of production and was under no duty to plead that Owens's acts constituted "consent."[140] Thus, Amadi clearly faced no greater burden of production under 101.106(b) than she would have as part of her prima facie case under section 101.021,[141] and the "crystal hammer" failed to amass utility.

3. The "Swinging Door" Dilemma. While the *Esparza* court made the direct point that its disposition of the City's case discouraged creative pleading by claimants,[142] the *Amadi* court can make no such claim. If subsection (b) applies only where the governmental entity fails to consent, then under the *Amadi* interpretation, a claimant with a viable TTCA action against the government can file suit against just the employee without jurisdictional ramifications.[143]

Recall once again the introduction hypothetical and assume that, as in *Amadi*, the parties stipulate that section 101.021 waives governmental immunity for Plaintiff's claims.[144] If Plaintiff sues only the Deputy, then subsections (a) and (e) are not implicated,[145] and subsection (b) is ineffective because the City "consented" to suit via section 101.021.[146] Provided that the case never settles,[147] or reaches judgment against the Deputy,[148] upon an unfavorable disposition Plaintiff

138. *See supra* note 30 and accompanying text.

139. *Amadi*, 369 S.W.3d at 262.

140. *See id.* ("We conclude that . . . Amadi did not have to plead any legal argument as to the construction of subsection 101.106(b).").

141. *See id.* (holding that Amadi filing her claims pursuant to section 101.021 was sufficient).

142. *Esparza*, 369 S.W.3d at 249.

143. *See id.* at 252 (contending that under *Amadi*, "a car-accident claimant could avoid electing between defendants by first suing the government employee individually and then suing the employer if she were unsuccessful in obtaining a judgment against the employee").

144. *Amadi*, 369 S.W.3d at 256 n.2.

145. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2011).

146. *Amadi*, 369 S.W.3d at 262.

147. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(c) (West 2011).

148. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(d) (West 2011).

could seemingly bring suit against the City and circumvent section 101.106's applicability entirely.[149]

The *Amadi* court went to great lengths in its opinion to describe the legislative intent behind section 101.106.[150] Importing language from *Hintz v. Lally*, the court made clear that "[s]ection 101.106's door swings in just one direction: away from the employee and toward the governmental employer."[151] Thus, "[o]nce the plaintiff makes an 'irrevocable election' by suing only the employer, there is no statutory mechanism to change targets and sue the employee instead."[152] While this "swinging door" analogy does much to explain the interplay between subsections (a) and (e), (just as it illustrated the interplay between subsections (a) and (f) in *Hintz*),[153] the Texas Supreme Court in *Mission* made it quite clear that the legislative intent behind section 101.106 was to remove from Plaintiff the power to "swing" the door as he pleases.[154] Rather than forcing Plaintiff to make a voluntary or involuntary election as in *Esparza*,[155] the *Amadi* interpretation of "consent" empowers Plaintiff to circumvent the statute with nothing more than clever timing in his pleadings.[156]

4. The Esparza *Approach.* Although the First Court of Appeals decided *Esparza* almost a month before the final *Amadi* opinion was published, it commented in great depth on the Fourteenth Court's July 7, 2011 opinion (which was subsequently withdrawn).[157] Contrary to its sister court's position, the *Esparza* court concluded that subsection (b) "consent" requires compliance with the *entire* TTCA, including the election-of-remedies

149. *Esparza*, 369 S.W.3d at 249. This hypothetical ignores the potential applicability of subsection (f), which may provide a safeguard in certain instances. *But see infra* Part III.D.2 (concluding that subsection (f) fails to abate the claimant's advantage from the "swinging door" dilemma).

150. *Amadi*, 369 S.W.3d at 256–57.

151. *Id.* at 258–59 (citing and paraphrasing Hintz v. Lally, 305 S.W.3d 761, 769 (Tex. App.—Houston [14th Dist.] 2009, pet. denied)).

152. *Id.* at 258.

153. *Hintz*, 305 S.W.3d at 769.

154. *See* Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 657 (Tex. 2008) ("By requiring a plaintiff to make an irrevocable election at the time suit is filed between suing the governmental unit under the Tort Claims Act or proceeding against the employee alone, section 101.106 narrows the issues for trial and reduces delay and duplicative litigation costs.").

155. City of Houston v. Esparza, 369 S.W.3d 238, 246–47 (Tex. App.—Houston [1st Dist.] 2011, pet. filed).

156. *Supra* note 143 and accompanying text.

157. *Esparza*, 369 S.W.3d at 249–51.

provision in section 101.106.[158] In support of this position, the court cited *Mission*, wherein the Texas Supreme Court held that the TCHRA waivers established governmental consent "provided the procedures outlined in the statute [had] been met."[159] Analogous to the TCHRA, the *Esparza* court reasoned that the TTCA includes jurisdictional requirements, and that without meeting those requirements, the TTCA cannot convey "consent."[160]

In a subsequent decision, the First Court of Appeals explicitly rejected the argument that TTCA provisions such as section 101.021 can *never* establish subsection (b) consent.[161] In all actuality, however, that argument must be correct. Consider the introductory hypothetical once again: if Plaintiff sues the Deputy, she is immediately and forever barred from suing the City, unless the City consents.[162] For section 101.021 to establish "consent," it must meet the procedural requirements of the TTCA—among them, section 101.106(b).[163] Therefore, under the *Esparza* interpretation, section 101.106(b) requires the governmental unit to have "consented" in order to establish "consent"; this operation of the statute is circular and cannot possibly be satisfied.[164]

Because *Esparza*'s construction of subsection (b) "consent" cannot be met by TTCA causes of action, the decision effectively ratifies the City of Houston's argument that consent must be found in outside statutes such as the TCHRA.[165] Is this the correct result? The *Esparza* court specifically referenced the "crystal hammer" and "swinging door" dilemmas in its critique of the *Amadi* decision (although with less exciting subtitles),[166] and

158. *See id.* at 250–51 ("A claimant who fails to comply with the Act's jurisdictional requirements falls outside the Act's limited waivers of immunity, regardless of whether the claim is one for which immunity is otherwise waived under the Act . . . . The election-of-remedies provision is such a jurisdictional requirement.").

159. *Id.* at 249 (quoting *Mission*, 253 S.W.3d at 660) (internal quotation marks omitted).

160. *Esparza*, 369 S.W.3d at 249 & n.14.

161. City of Houston v. McClain, No. 01-11-00194-CV, 2011 WL 6015697, at *3 (Tex. App.—Houston [1st Dist.] Dec. 1, 2011, pet. filed) (mem. op.).

162. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b) (West 2011).

163. *Esparza*, 369 S.W.3d at 250–51.

164. *Id.* at 249–52; *cf. McClain*, 2011 WL 6015697, at *3 ("We also reject the City's contention that the limited waiver of immunity in section 101.021 cannot constitute 'consent' to suit in cases in which section 101.106(b) applies.").

165. *See* Amadi v. City of Houston, 369 S.W.3d 254, 260 (Tex. App.—Houston [14th Dist.] 2011, pet. filed) ("[T]he city argues that the State must waive immunity from suit through another statute, rather than the TTCA.").

166. *See Esparza*, 369 S.W.3d at 251 (criticizing *Amadi*'s broad definition of "consent" because it "appears to swallow the rule entirely" and does not "reduc[e] the resources that

noted that under its construction of "consent," neither of those issues arise.[167] Whether those two dilemmas reach a more or less favorable result than the 101.106(e) "motion" dilemma is a policy decision, and it must be rendered in the years to come.

D. Can Esparza *and* Amadi *Be Reconciled?*

1. Sibling Rivalry. The key distinction between *Esparza* and *Amadi* is whether subsections (b) and (e) apply without reference to one another.[168] The *Esparza* line of cases clearly holds that when section 101.106(e) is triggered, section 101.106(b) is inapplicable.[169] Were the Fourteenth Court of Appeals to adopt this interpretation, however, its entire analysis of subsection (b) would have been irrelevant to the facts of *Amadi*.[170]

Perhaps noting this reality, the *Amadi* court expressly rejected the notion that subsections (b) and (e) must apply in the alternative.[171] To support its opinion, the court cited *Mission*, wherein the Texas Supreme Court "considered both subsections (b) and (e) in its analysis."[172] This comparison was not entirely appropriate, however, because in *Mission*, the only claims that the Texas Supreme Court analyzed pursuant to 101.106(b) were Garcia's TCHRA claims.[173] Garcia's TCHRA claims were not "under this chapter," so subsection (e) could not apply, and in that narrow circumstance the court proceeded into subsection (b) analysis.[174]

Irrespective of its foundation's adequacy, the Fourteenth Court of Appeals has made it quite clear that both subsections (b) and (e) must be considered when a governmental unit and its

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the government and its employees must use in defending redundant litigation and alternative theories of recovery." (quoting in part Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 657 (Tex. 2008))).

167. *See id.* at 252 ("[U]nder our construction of subsection (b), once a claimant elects to sue a government employee instead of its governmental employer, subsection (b) immediately and forever bars the claimant from bringing common law tort claims regarding that subject matter against the employer." (footnote omitted)).

168. *Compare Esparza*, 369 S.W.3d at 248 ("We reject the City's contention that subsections (b) and (e) apply without reference to each other . . . ."), *with Amadi*, 369 S.W.3d at 260 (disavowing *Esparza*'s interpretation because "the Texas Supreme Court considered both subsections (b) and (e) in its analysis" in *Mission*).

169. *Supra* Part III.B.1.

170. Under *Johnson*, the governmental unit need not file a section 101.106(e) motion for subsection (e) to force an involuntary election. *Supra* text accompanying note 100. Thus, the fact that "the procedure of subsection (e) was not followed" in *Amadi* would not have been adequate grounds for the court to proceed to analyze section 101.106(b). *Amadi*, 369 S.W.3d at 259.

171. *Amadi*, 369 S.W.3d at 260.

172. *Id.*

173. Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 659–60 (Tex. 2008).

174. *Id.*

employee are sued simultaneously.[175] In numerous cases with facts identical to *Esparza*, the presence of a 101.106(e) dismissal has proven inconsequential to the Fourteenth Court's subsection (b) analysis, and the efficiency of the court's opinions on the subject do not indicate an impending change.[176] In light of this stark discrepancy, the *Esparza* and *Amadi* doctrines are irreconcilable; in fact, the only common ground between the two opinions is a blanket opposition to the City's controversial interpretation of the statute.[177] The procedural implications and dilemmas presented by the decisions are vastly different,[178] and it will likely be on these grounds alone that the split in authority is ultimately resolved.

2. Amadi *Favors the Plaintiff.* As previously discussed, the "swinging door" dilemma arguably empowers claimants to evade section 101.106 entirely.[179] The *Esparza* court presented this very argument as support for its narrow construction of subsection (b) "consent," and when faced with an opportunity to refute it, the *Amadi* court punted.[180] Rather than attack the hypothetical scenario, it contended that "[s]uch a scenario is unlikely because the protections provided by subsection (f) would be available to the governmental employee sued in his individual capacity for

175. *See* Fontenot v. Stinson, 369 S.W.3d 268, 275 (Tex. App.—Houston [14th Dist.] 2011, pet. filed) ("Thus, a plaintiff may irrevocably elect to sue both the governmental unit and the employee. And when a plaintiff makes such a choice, subsections (a) and (b) may bar the plaintiff's suit, except to the extent that the Legislature has waived the governmental unit's immunity.").

176. City of Houston v. Stewart, No. 14-11-00648-CV, 2012 WL 589578, at *1–2 (Tex. App.—Houston [14th Dist.] Feb. 23, 2012, no. pet. h.) (mem. op.); City of Houston v. Jenkins, 363 S.W.3d 808, 812–13 (Tex. App.—Houston [14th Dist.] 2012, no. pet. h.); City of Houston v. Sauceda, No. 14-11-00391-CV, 2012 WL 357314 (Tex. App.—Houston [14th Dist.] Feb. 2, 2012, no. pet. h.) (mem. op.); Authorlee v. Metro. Transit Auth. of Harris Cnty., No. 14-11-00413-CV, 2011 WL 6808807, at *2 (Tex. App.—Houston [14th Dist.] Dec. 22, 2011, no pet.) (mem. op.); City of Houston v. Uribe-Mendoza, No. 14-11-00647-CV, 2011 WL 6809864, at *2 (Tex. App.—Houston [14th Dist.] Dec. 22, 2011, pet. filed) (mem. op.); Metro. Transit Auth. of Harris Cnty. v. Atkins, No. 14-11-00494-CV, 2011 WL 6809041, at *2 (Tex. App.—Houston [14th Dist.] Dec. 22, 2011, no pet.) (mem. op.); City of Houston v. Cooper, No. 14-11-00092-CV, 2011 WL 5595559, at *2 (Tex. App.—Houston [14th Dist.] Nov. 17, 2011, pet. filed). By "efficiency," this Comment is referencing the degree to which the language of the foregoing cases is substantially identical.

177. *See supra* text accompanying note 74 (highlighting the fact that the First and Fourteenth Courts "unanimously" ruled against the City's interpretation).

178. *Compare supra* Part III.B.2 (101.106(e) "motion" dilemma), *with* Part III.C.2 ("crystal hammer"), *and* Part III.C.3 ("swinging door").

179. *Supra* Part III.C.3.

180. *See* Amadi v. City of Houston, 369 S.W.3d 260–61 (Tex. App.—Houston [14th Dist.] 2011, pet. filed) (acknowledging the *Esparza* court's concern that a broad definition of consent empowers claimants to circumvent section 101.106, but abstaining from a complete rebuttal because "[s]uch a scenario is unlikely"); City of Houston v. Esparza, 369 S.W.3d 238, 251–52 (Tex. App.—Houston [1st Dist.] 2011, pet. filed).

tort claims arising from the course and scope of his employment."[181]

While section 101.106(f) is largely beyond the scope of this Comment, a brief analysis of the provision is warranted for the purposes of evaluating the *Amadi* court's argument. Subsection (f) provides that:

> 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 . . . .[182]

The Fourteenth Court essentially contended that a claimant could not circumvent section 101.106 because subsection (f) is likely to control where only the employee is sued.[183] That argument collapses upon itself, however. If subsection (f) applies in *every* situation where an employee is sued in his individual capacity, then subsection (b) will always be overridden by (f) and has no purpose.[184] If subsection (f) does *not* apply in every such situation, then in those specific instances the claimant can elude section 101.106 altogether by cleverly filing its pleadings.[185] In either case, section 101.106 does not serve its legislated purpose, and subsection (f) fails to abate the claimant's advantage from the "swinging door" dilemma.[186]

3. Esparza *Potentially Favors the Government.* The *Esparza* rationale embodies an ideal interpretation of section 101.106, absent the lingering uncertainty surrounding

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181. *Amadi*, 369 S.W.3d at 261.

182. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West 2011).

183. *Amadi*, 369 S.W.3d at 261–62; *see* Franka v. Velasquez, 332 S.W.3d 367, 381 (Tex. 2011) ("Properly construed, section 101.106(f)'s two conditions are met in almost every negligence suit against a government employee . . . .").

184. *Cf. Esparza*, 369 S.W.3d at 248 (similarly contending that if subsections (a) and (b) were to apply without reference to each other, then subsection (e) would be "superfluous").

185. *Supra* Part III.C.3.

186. *See* Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 657 (Tex. 2008) ("[Section 101.106's] 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." (footnote omitted)); Hull et al., *supra* note 4, at 290–91 (describing the amended section 101.106 as the remedy to claimants circumventing the TTCA's jurisdictional restrictions).

the 101.106(e) "motion" dilemma.[187] Disregarding this dilemma, the *Esparza* rule unequivocally conforms section 101.106 to the three scenarios set forth in *Mission*.[188] The *Johnson* opinion adequately addresses the conundrum and provides a doctrinal remedy,[189] but the notion that section 101.106(e) involuntarily overrides 101.106(b) without any requisite motion glaringly clashes with the plain language of the statute.[190] If the Texas Supreme Court eventually determines that a 101.106(e) motion is essential to the subsection's applicability, governmental units will wield significant power under *Esparza*.[191]

Ultimately, the driving force behind which interpretation takes hold in the State will be a policy determination made by the Texas Supreme Court or Legislature. One important note, however, is that the City of Houston's legal strategies combined with the filing mistakes of injured claimants have been the primary thrust behind this entire line of case law.[192] The threat of governmental units evading the statute pursuant to the subsection (e) "motion" dilemma seems far more real than the threat of claimants (who have struggled with minimal amounts of statutory interpretation thus far) manipulating the statute pursuant to the "swinging door" dilemma.[193] Any policy decision should be based in large part on this reality.

4. The Future of the Doctrine. A clear solution to this entire debacle of statutory construction would be to amend section

187. *Esparza* is "ideal" in the sense that it does not empower claimants to circumvent section 101.106 through a broad definition of subsection (b) "consent." *Esparza*, 369 S.W.3d at 252.

188. *Id.* at 252–53; *see supra* note 37 and accompanying text (outlining the three scenarios in which recovery against the *employee* is barred).

189. *See supra* note 103 and accompanying text (noting that *Johnson* denies governmental entities the power to circumvent the statute by creatively filing section 101.106 motions).

190. *Supra* note 105 and accompanying text.

191. *Supra* Part III.B.2.

192. In December 2011 alone, the City of Houston was a named party in six appellate court opinions on the relationship between subsections (b) and (e). City of Houston v. Gov't Emp. Ins. Co., No. 01-11-00173-CV, 2011 WL 6938543, at *4 (Tex. App.—Houston [1st Dist.] Dec. 29, 2011, pet. filed); City of Houston v. Gunn, 389 S.W.3d 401, 407–08 (Tex. App.—Houston [1st Dist.] 2011, pet. filed); City of Houston v. Uribe-Mendoza, No. 14-11-00647-CV, 2011 WL 6809864, at *2 (Tex. App.—Houston [14th Dist.] Dec. 22, 2011, pet. filed) (mem. op.); City of Houston v. Washington, No. 14-11-00305-CV, 2011 WL 6808218, at *1–2 (Tex. App.—Houston [14th Dist.] Dec. 22, 2011, pet. filed) (mem. op.); City of Houston v. Marquez, No. 01-11-00493-CV, 2011 WL 6147772, at *1–3 (Tex. App.—Houston [1st Dist.] Dec. 8, 2011, no pet.) (mem. op.); City of Houston v. McClain, No. 01-11-00194-CV, 2011 WL 6015697, at *1, *3 (Tex. App.—Houston [1st Dist.] Dec. 1, 2011, pet. filed) (mem. op.).

193. *See supra* note 104 and accompanying text (emphasizing questionable tactics utilized by the City in *Marquez*).

101.106(e); all that the statute needs is a simple language adjustment. By removing the phrase, "on filing of a motion by the governmental unit," the Texas Legislature could render subsection (e) an "involuntary" election, as the *Esparza* and *Johnson* decisions assert it to be.[194] That amendment, coupled with the *Esparza* court's limited definition of subsection (b) "consent,"[195] would completely conform to *Mission*'s three scenarios[196] and the legislative intent that section 101.106 force an election of one single remedy.[197]

Absent a statutory amendment, however, the split in authority among the courts of appeals will inevitably bring the issue before the Texas Supreme Court.[198] Although there is very little case law with which to predict its ultimate disposition, the court's recent decision in *Franka v. Velasquez* provides some indication that the *Amadi* doctrine will at the very least be modified.[199] In *Franka*, the Texas Supreme Court addressed the interpretation and scope of section 101.106(f).[200]

In its resolution, the Texas Supreme Court in *Franka* stated that where subsection (f) applies,[201] "the plaintiff must promptly dismiss the employee and sue the government instead" and "[t]he immunity issue need not be determined until the governmental

194. *See* Tex. Dep't of Aging & Disability Servs. v. Johnson, No. 01-11-00526-CV, 2012 WL 27728, at *2 (Tex. App.—Houston [1st Dist.] Jan. 5, 2012, pet. filed) (mem. op.) ("[S]ubsection (e) . . . results in an involuntary election."); City of Houston v. Esparza, 369 S.W.3d 238, 249 (Tex. App.—Houston [1st Dist.] 2011, pet. filed) ("[Section 101.106(e)] forces an election between defendants—whether by the claimant's choice or by operation of the statute . . . ."); *supra* Part III.B.2 (discussing the 101.106(e) "motion" dilemma).

195. *See supra* Part III.C.4 (analyzing the *Esparza* court's conclusion that subsection (b) "consent" requires compliance with the entire TTCA, including section 101.106).

196. *See supra* note 37 and accompanying text (outlining the three scenarios in which recovery against the *employee* is barred).

197. *See supra* note 154 and accompanying text (noting the Texas Supreme Court's interpretation of the Legislature's intent; specifically, that the purpose of the statute is to force claimants to make an irrevocable election at the time suit is filed).

198. By January 2012, the City of Houston had filed petitions for review to the Texas Supreme Court in both *Esparza* and *Amadi*. Petition for Review, *Esparza*, 369 S.W.3d 238 (No. 11-1029); Corrected Petition for Review, Amadi v. City of Houston, 369 S.W.3d 254 (Tex. App.—Houston [14th Dist.] 2011, pet. filed) (No. 11-0905).

199. The Texas Supreme Court issued its *Franka* decision over nine months prior to the Fourteenth Court's decision in *Amadi*, but its attempts to reconcile subsections (e) and (f) might be the key to predicting the court's ultimate construction of the statute. *See* Franka v. Velasquez, 332 S.W.3d 367, 380 (Tex. 2011) ("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).").

200. *Id.* at 375–81.

201. Subsection (f) generally applies when a government employee is sued based on conduct within the scope of his employment and the suit could have been brought against the governmental unit. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West 2011).

unit is in the suit."[202] Effectively, the Texas Supreme Court held that when the claimant sues only the government employee (a scenario that would normally trigger subsection (b) analysis), section 101.106(f) can override section 101.106(b).[203] If the notion of "overriding" subsection (b) seems familiar, it should: it is essentially the exact same concept as the *Esparza* court's interpretation of 101.106(e).[204]

While the Texas Supreme Court in *Franka* did not extensively analyze the effects of section 101.106(e), it did emphasize the similarities between subsections (e) and (f).[205] Thus, a strong argument can be made that *Franka* indicates that the Texas Supreme Court will interpret section 101.106(e) analogously to section 101.106(f). If this holds true, then the methodology in several of the Fourteenth Court of Appeals' opinions will be overturned, and this murky region of Texas law will be one step closer to clarity.[206]

IV. A GUIDE TO PREVAILING UNDER SECTION 101.106

Regardless of which doctrine ultimately prevails, neither *Esparza* nor *Amadi* have any relevance when the plaintiff appropriately files his claims.[207] With immense consideration and a careful orchestration of claims and defendants, plaintiffs' attorneys can maximize their clients' available claims rather than face dismissal under section 101.106.[208] The City of Houston has routinely employed the procedural nuances of the statute as the means to deprive injured claimants of any recovery.[209] Thus, this final portion of the Comment will illustrate how, under *any* interpretation of the

202. *Franka*, 332 S.W.3d at 381.

203. *Id.* at 380–81.

204. *Supra* Part III.B.1.

205. *Franka*, 332 S.W.3d at 380.

206. Construing section 101.106(e) as analogous to section 101.106(f) in its ability to "override" subsection (b) would effectively adopt the *Johnson* rationale. Accordingly, the holding in *Amadi* would be inapplicable to its own facts. *See supra* note 170 (noting that if *Johnson* correctly construes section 101.106, then *Amadi*'s divergence into subsection (b) analysis was unnecessary).

207. "Appropriately" is a relative term. Technically, section 101.106 accounts for claimants that file suit against both the governmental unit and its employee. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e) (West 2011). However, both *Amadi* and *Esparza* involved prolonged litigation resulting solely from the plaintiffs' ill-advised decision to file suit against both parties. Amadi v. City of Houston, 369 S.W.3d 254, 256 (Tex. App.—Houston [14th Dist.] 2011, pet. filed); City of Houston v. Esparza, 369 S.W.3d 238, 241 (Tex. App.—Houston [1st Dist.] 2011, pet. filed).

208. *Franka*, 332 S.W.3d at 381; *Esparza*, 369 S.W.3d at 248; *see infra* Part IV.A–B (outlining strategies for prevailing under section 101.106).

209. *Supra* Part III.A.

statute, claimants can best immunize themselves against such an unfavorable "election" of remedies.

A. Statutory (Non-TTCA) Claims

The Texas Supreme Court in *Mission* unambiguously held that any statutory (non-TTCA) waivers of immunity[210] are impervious to section 101.106.[211] For the purposes of subsections (a), (c), and (e), they do not fall "under this chapter," and for the purposes of subsection (b), they establish "consent."[212] As a result, *any statutory (non-TTCA) claims against a government entity can and should be filed*.[213] This strategy applies without regard to other claims in the suit such as those discussed in Part IV.B, because section 101.106 is completely inapplicable to statutory (non-TTCA) claims.[214]

B. Tort Claims

Which party the plaintiff should file its tort claims against depends largely on the nature of the claim and the precedent of the jurisdiction. One bright line rule, however, is that except as provided in Part IV.A,[215] *a plaintiff should never file tort claims against both a governmental entity and its employee.*[216] The controversies in both *Esparza* and *Amadi* could have been avoided had the claimants heeded the plain language of

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210. A statutory (non-TTCA) waiver of immunity is a claim arising from an express statutory remedy outside the Texas Tort Claims Act. For example, in *Mission*, the Texas Supreme Court held that Garcia's TCHRA claims were impervious to 101.106(b) and 101.106(e) because they were "brought pursuant to waivers of sovereign immunity that exist apart from the [TTCA]." Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 659–60 (Tex. 2008). The strategy for filing claims that arise solely under the TTCA is far more intricate. *See infra* Part IV.B.2 (providing multiple strategies depending on whether the jurisdiction applies the *Esparza* or *Amadi* rationale and reiterating that section 101.106 jurisprudence is unsettled).

211. *Mission*, 253 S.W.3d at 659–60.

212. *Id.*

213. *See, e.g.*, *id.* at 659 (explaining that even had subsection (e) applied to the facts of the case, the only claims against the ISD that would have survived dismissal were the plaintiff's non-TTCA statutory claims).

214. *See supra* note 51 and accompanying text (concluding that because Garcia's TCHRA claims were not brought "under this chapter" and also established "consent," they effectively bypassed section 101.106 scrutiny entirely).

215. *See supra* note 210 (defining statutory (non-TTCA) claims).

216. To clarify, this does not mean that the plaintiff may file one tort claim against the government entity and then file a completely different tort claim against the employee. If deemed applicable by the court, subsection (b) bars "any suit . . . against the governmental unit *regarding the same subject matter*." TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b) (West 2011) (emphasis added). Thus, a plaintiff should file all of its tort claims regarding the same subject matter *exclusively* against one party.

section 101.106 and filed their tort claims against only one party.[217] At the current juncture in the law, such a strategic blunder will, at best, result in prolonged litigation and the employee's dismissal from the suit.[218] At worst, a court might incorrectly dismiss the entire suit.[219] With that general rule in mind, this section of the Comment will provide strategies for plaintiffs to maximize their available tort claims under section 101.106 of the TTCA.

1. Claims Not Under the TTCA. When the plaintiff's tort claims *would not* fall under the TTCA[220] if they were filed against the governmental unit, they should be filed against the employee alone.[221] Primarily, this is the proper strategy because filing these claims against the governmental unit would fail as a matter of governmental immunity.[222] Additionally, recall the facts of *Mission*: in that case, Garcia sued both the ISD and its superintendent, H.F. Dyer, for emotional distress and sued Dyer individually for various other torts.[223] Despite the fact that the ISD was most likely immune from Garcia's emotional distress claim, the court noted that had the ISD filed a section 101.106(e) motion to dismiss, "Dyer would [have been] entitled to dismissal of Garcia's suit against him."[224] Filing all non-TTCA claims against the employee avoids any implication of subsections (a) and (e) and thwarts attempts under section 101.106 to dismiss the suit.[225]

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217. Amadi v. City of Houston, 369 S.W.3d 254, 256 (Tex. App.—Houston [14th Dist.] 2011, pet. filed); City of Houston v. Esparza, 369 S.W.3d 238, 242 (Tex. App.—Houston [1st Dist.] 2011, pet. filed).

218. *See supra* Part III.D.3 (arguing that *Esparza* reaches the ideal interpretation were it not for the 101.106(e) "motion" dilemma, but noting that even if *Johnson* remains good law and subsection (e) is automatically triggered, the employee would still be dismissed upon the filing of a motion).

219. *E.g.*, *Amadi*, 369 S.W.3d at 256 (reciting that the trial court granted the City's plea to the jurisdiction pursuant to section 101.106(b)).

220. By "under the TTCA," this Comment is referencing claims for which the Texas Tort Claims Act provides a limited waiver of governmental immunity. An example of a claim filed "under the TTCA" would be a personal injury claim against the government arising out of its employee's negligent use of an automobile in the scope of his employment. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011); *see also* City of Houston v. Jenkins, 363 S.W.3d 808, 813 (Tex. App.—Houston [14th Dist.] Feb. 14, 2012, no pet. h.) (holding that failure to control a dog with dangerous propensities constituted negligent use of tangible personal property pursuant to section 101.021).

221. *See, e.g.*, *Esparza*, 369 S.W.3d at 251.

222. *See id.* ("[P]laintiffs have always been prohibited from suing governmental employers when immunity has not been waived." (quoting Barnum v. Ngakoue, No. 03-09-00086-CV, 2011 WL 1642179, at *10 (Tex. App.—Austin Apr. 29, 2011, pet. granted))).

223. Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 654–55 (Tex. 2008).

224. *Id.* at 659.

225. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2011). Any potential applicability of section 101.106(f) is beyond the scope of this Comment.

2. Claims Under the TTCA. When some of the plaintiff's tort claims, if filed against the governmental unit, *would* fall under the TTCA, the appropriate strategy depends on whether the *Amadi* or *Esparza* interpretation of section 101.106 governs in the jurisdiction of filing.[226] Due to the current split in authority and uncertain resolution, this Comment will present strategies for both doctrines.

a. Esparza. In a jurisdiction that adopts the *Esparza* doctrine, the appropriate strategy depends on the likelihood of collecting judgment from the employee. *If the likelihood of collection is high, the plaintiff should file all tort claims against the employee.* Section 101.106(b) will bar any subsequent action against the governmental unit, but the potential tort claims against the employee are not limited by the constraints of governmental immunity.[227]

Contrastingly, *if the likelihood of collection is low, the plaintiff should file its TTCA claims against the governmental unit and absolutely no claims against the employee.* Such a strategy sacrifices the plaintiff's non-TTCA claims,[228] but it ensures that the plaintiff can recover on the judgments she is awarded.

b. Amadi. In a jurisdiction that adopts the *Amadi* doctrine, the "swinging door" dilemma associated with subsection (b) "consent" presents savvy claimants with a powerful strategic weapon.[229] Thus, under an *Amadi* jurisdiction, the plaintiff should capitalize on the sloppy legislation and *file all tort claims against the employee*.[230] Section 101.106(b) is triggered, but only

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226. *See supra* Part III.D.2–3. Obviously, it is unclear whether *Amadi* or *Esparza* will ultimately "govern" in the City of Houston due to the split in authority. In instances of such uncertainty, this Comment's Author recommends the more conservative strategy. *See* Part IV.B.2.c (suggesting that in unsettled jurisdictions such as Houston, the *Esparza* strategy outlined in Part IV.B.2.a is the more conservative and appropriate approach).

227. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2011).

228. The strategy "sacrifices" non-TTCA claims because governmental immunity is not waived. *See* City of Houston v. Esparza, 369 S.W.3d 238, 251 (Tex. App.—Houston [1st Dist.] 2011, pet. filed) ("[P]laintiffs have always been prohibited from suing governmental employers when immunity has not been waived." (quoting Barnum v. Ngakoue, No. 03-09-00086-CV, 2011 WL 1642179, at *10 (Tex. App.—Austin Apr. 29, 2011, pet. granted))).

229. *Supra* Part III.C.3.

230. This section of the Comment is concerned only with *maximizing* the litigant's available claims. Obviously, there are other considerations to take into account before filing suit, such as the likelihood of collection if a judgment is obtained or the potential transaction costs of substituting the government for its employee upon the filing of a section 101.106(f) motion. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West 2011).

to the extent the government does not "consent."[231] Because of the *Amadi* court's broad construction of the term,[232] the plaintiff's claims that fall under the TTCA meet the "consent" exception to subsection (b) and may be pursued against the governmental unit in the event no judgment is obtained against the employee.

c. The Law is Unsettled. The current state of the law in this area is very unsettled,[233] and in cities such as Houston where the First and Fourteenth Courts of Appeals present conflicting precedent, claimants should err on the side of conservatism.[234] This Comment's Author is largely convinced that the *Esparza* interpretation of "consent" will prevail; however, even if the Texas Supreme Court ultimately adopts *Amadi*, the *Esparza* strategy outlined in Part IV.B.2.a is the more conservative and appropriate approach in the interim.[235]

V. CONCLUSION

Both *Esparza* and *Amadi* represent a judicial response to a problem that arose in 2003.[236] The problem is much larger than one city's controversial interpretation: it is the statute itself.[237] The Texas Legislature revised the TTCA in an attempt to strengthen the Act and compel plaintiffs to elect one exclusive remedy,[238] but the glaring ambiguities in section 101.106 have

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231. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b) (West 2011).

232. *Supra* Part III.C.1.

233. *See supra* Part III.D.1 (commenting on the stark discrepancy between the *Esparza* and *Amadi* doctrines).

234. By "conservative," this Comment is suggesting a strategy that involves the greatest chance of collecting on a judgment.

235. The strategy outlined in Part IV.B.2.a is more "conservative" because it involves the least risk in an uncertain jurisdiction such as Houston—i.e., it pursues the plaintiff's claims against the governmental unit when likelihood of collection from the plaintiff is low. *See supra* Part IV.B.2.a.

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

237. *See supra* Part III.D.4 (arguing that section 101.106 can only truly conform to its legislative intent by amending the statute). *But see* Terry Maxon, *Texas Limits Lawsuits: House, Senate Pass Damage Caps, Tougher Rules for Plaintiffs*, DALL. MORNING NEWS, June 2, 2003, at 3D ("Passage of this bill should help shed the long-standing reputation of our state's legal system as a Wild West embarrassment.") (quoting Jon Opelt, executive director of Citizens Against Lawsuit Abuse) (internal quotation marks omitted).

238. Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 656–57 (Tex. 2008); *see* Giana Ortiz, Comment, *Medical Malpractice Damage Caps—Constitutional Per Se in Texas, But At What Price? A Look at Alternative Patient Compensation Schemes*, 43 HOUS. L. REV. 1281, 1290 (2006) (describing the 2003 modifications to the Texas tort system as "the most far reaching changes to the Texas civil justice system since the creation of the Texas Constitution in 1865" (quoting Michael S. Hull

resulted in a legal environment where it can be interpreted to be both meaningless[239] and a jurisdictional bar to entire suits.[240] While it is ultimately the province of the courts to overturn the unfortunate fates befalling claimants such as Jane Amadi, the Texas Legislature must recognize that their unartful drafting has likely deprived many injured parties of their entire remedy.

When a claimant fails to adhere to clear statutory procedures, there is obviously little merit in opposing the resulting legal ramifications.[241] However, when a lack of compliance results from a statute as unclear as section 101.106, the "harsh" results that governmental entities like the City of Houston have been requesting are completely unwarranted and are rightfully denied by decisions such as *Esparza* and *Amadi*.[242]

The future of Texas jurisprudence hinges upon determining which of the sister courts' methodologies is the correct application of the statute. The pitfalls of each doctrine are deep, and the interests of injured claimants statewide will not truly be protected until a final, decisive interpretation of section 101.106 is issued. For this reason alone, the Texas Supreme Court cannot intervene soon enough.

Brant E. Wischnewsky

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et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History* (pt. 1), 36 TEX. TECH L. REV. 1, 46 (2005))).

239. *Supra* Part III.C.2.

240. *Supra* Part III.B.2.

241. *See supra* notes 72–73 and accompanying text (illustrating the Metropolitan Transit Authority's argument that courts should not interpret section 101.106 to subsidize negligent pleading by claimants).

242. *See supra* Part III.A (noting that in October 2011, both the First and Fourteenth Courts of Appeals unanimously struck down the City of Houston's litigation strategy under section 101.106).