

Concurring opinion issued December 29, 2011



In The
Court of Appeals
For The
First District of Texas

NO. 01-11-00173-CV

THE CITY OF HOUSTON, Appellant

V.

**GOVERNMENT EMPLOYEE INSURANCE COMPANY
AS SUBROGEE OF JOHN GUNN, Appellee**

**On Appeal from the 113th District Court
Harris County, Texas
Trial Court Case No. 2009-58443**

CONCURRING OPINION

I concur in the judgment. The result is controlled by the forced-election analysis of this court's recent decision in *City of Houston v. Esparza*, No. 01-11-00046-CV, 2011 WL 4925990 (Tex. App.—Houston [1st Dist.] Oct. 7, 2011, no

pet. h.). That opinion explained that when a tort claimant files suit against both a governmental unit and its employee, the election-of-remedies provision of the Tort Claims Act, TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e) is automatically invoked, and that statute forces an immediate election of the governmental unit, rather than the employee, as the defendant in the lawsuit. *See Esparza*, 2011 WL 4925990, at *10.

Although the tort claimant in this case also filed its suit against both a governmental unit and its employee, resulting in the forced election described in *Esparza*, the panel majority characterizes the claimant's subsequent decision to voluntarily dismiss the claim against the individual employee defendant as "a critical procedural distinction" from *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653 (Tex. 2008). The majority further relies on that decision as having the "same irrevocable consequence as a subsection (e) motion" and holds that "GEICO is immediately and forever barred by subsection (a) from bringing common law tort claims against Rogers arising from the car wreck." This superfluous analysis is inconsistent with the forced election explained in *Esparza*, which takes place at the time a suit is filed against a governmental unit and its employee. The claimant's subsequent decision to nonsuit the employee (as opposed to waiting for a motion to dismiss the employee pursuant to subsection (e)) is irrelevant to the analysis.

Accordingly, I concur in the judgment, but I respectfully decline to join in the panel majority's opinion.

Michael Massengale
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Justice Massengale, concurring in the judgment.