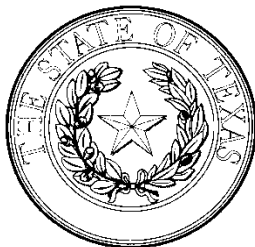


Opinion issued December 8, 2011



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-11-00493-CV

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**CITY OF HOUSTON, Appellant**

**V.**

**FRANCISCO EDUARDO MARQUEZ AND EDNA ARVIZU MARQUEZ,  
EACH INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE  
OF RENE MARQUEZ, DECEASED, AND FRANCISCO MARQUEZ, JR.,  
Appellees**

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**On Appeal from the 152nd District Court  
Harris County, Texas  
Trial Court Case No. 2009-76324**

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**MEMORANDUM OPINION**

In this fatal car wreck case, the City of Houston brings an accelerated appeal from the trial court's denial of its plea to the jurisdiction. *See* TEX. CIV. PRAC. &

REM. CODE ANN. § 51.014(a)(8) (West 2008) (permitting appeal from interlocutory order). The City argues that it was entitled to dismissal from the suit under the election-of-remedies section of the Tort Claims Act. *See id.* § 101.106 (West 2011). Because the outcome is controlled by this court’s recent opinion in *City of Houston v. Esparza*, we affirm. *See City of Houston v. Esparza*, No. 01-11-00046-CV, 2011 WL 4925990 (Tex. App.—Houston [1st Dist.] Oct. 7, 2011, no pet. h.) (op. on rehearing).

### **Background**

Brothers Rene Marquez and Francisco Marquez, Jr. were passengers in a Chevrolet Suburban when it was struck by a police car driven by Houston Police Department Officer C. G. Dexter. Rene died several hours later, and Francisco suffered numerous injuries.

On multiple occasions, the attorney for the Marquez family attempted to obtain information about the collision from the Houston Police Department and the City of Houston. According to the attorney’s sworn affidavit, HPD and the City refused his requests or gave him only limited information. Approximately three months after the incident, HPD provided a “Public Release Information” report to the Marquez family’s attorney. In the report, “DEXTER” was listed along with the Marquez brothers as “COMPLAINANT(S),” although the report did not reflect Officer Dexter’s status as a police officer. The only person identified in the report

as a police officer was “A ALANIZ JR.” The Marquez family’s attorney believed that “DEXTER” was a third party involved in the collision.

Approximately three months after obtaining the “Public Release Information” report, the Marquez family—namely, Francisco Marquez and Edna Marquez individually and as representatives of Rene Marquez’s estate, and Francisco Marquez, Jr.—filed their original petition naming the City and Officer Alaniz as defendants. The petition alleged that Officer Alaniz had been driving the police car. Against the City, the Marquez family alleged vicarious liability for the officer’s negligence under the Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011). The City answered the Marquez family’s petition. Officer Alaniz, though served with the petition, never appeared in connection with the litigation.

Ten days after filing its original answer, the City moved to dismiss Officer Alaniz from the suit pursuant to subsection 101.106(e) of the Civil Practice and Remedies Code, which provides that a governmental unit that is sued under the Tort Claims Act along with its employee may move to dismiss the employee. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e). Through a sworn affidavit, the Marquez family’s attorney stated that the City told him that if they amended their petition to dismiss Officer Alaniz from the lawsuit, the City would not seek its own dismissal. After that conversation, the Marquez family filed an amended petition

naming only the City as a defendant, thereby non-suiting Officer Alaniz. The trial court never ruled on the City's motion under subsection 101.106(e) to dismiss Officer Alaniz.

More than one year after the Marquez family had filed their original petition, the City filed a plea to the jurisdiction, asserting immunity from suit under subsection 101.106(b), which provides that the filing of a suit against any employee of a governmental unit constitutes an irrevocable election and "forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents." TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(b). The City argued that Section 101.106's provisions force a plaintiff to sue either a governmental unit or its employee, and that if a plaintiff sues both, Section 101.106 effectively confers immunity from suit on the governmental unit. The Marquez family argued that only subsection (e) applies when a plaintiff sues both a governmental unit and its employee, and that the Tort Claims Act otherwise permits the suit to continue against the governmental unit after dismissal of the employee.

At first, the trial court sustained the City's plea and dismissed the Marquez family's claims for want of jurisdiction. The Marquez family filed a motion for new trial, reiterating their legal arguments. Following this motion, the trial court entered an order that denied the City's plea to the jurisdiction and granted a new

trial, in effect superseding its prior order. The City filed an interlocutory appeal to challenge the trial court's order denying its plea to the jurisdiction.

### **Analysis**

Governmental immunity from suit defeats a trial court's subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004); *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999). We review de novo a trial court's ruling on a jurisdictional plea. *See Miranda*, 133 S.W.3d at 226.

In its sole issue, the City argues that the trial court erred in denying its plea to the jurisdiction because when the Marquez family simultaneously filed suit against both the City and Officer Alaniz, they triggered the City's immunity from suit under subsection 101.106(b) of the Tort Claims Act. The Tort Claims Act's election-of-remedies provision provides, in relevant part,

(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.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106. The Marquez family argues that the Tort Claims Act itself constitutes legislative “consent” to the lawsuit on behalf of the City, as that word is used in subsection 101.106(b), and that the City’s construction of the election-of-remedies provision would render it a trap for plaintiffs who may not know at the outset of litigation whether a governmental unit or its employee is the more viable defendant.

This court analyzed the election-of-remedies provision in substantially the same procedural setting in *City of Houston v. Esparza*. In *Esparza*, the plaintiff sued the City and its employee, alleging that the employee injured her while driving negligently. 2011 WL 4925990 at \*1. The City moved to dismiss Esparza’s claims against its employee pursuant to subsection 101.106(e). *Id.* It also filed a plea to the jurisdiction, asserting that Esparza’s claims against the City were barred by subsection 101.106(b). *Id.* The trial court granted the motion to dismiss the employee, but it denied the City’s plea to the jurisdiction. *Id.*

On appeal, this court construed subsection (b) to allow a plaintiff to prosecute a claim against a governmental unit when the governmental unit “consents” to the suit, and that the plaintiff obtains “consent,” as that term is used in the statute, when it satisfies the Tort Claims Act’s jurisdictional requirements. *Id.* at \*7. Section 101.106 establishes as a jurisdictional requirement that the plaintiff must elect to sue either the governmental unit or its employee. *Id.* at \*10.

“When a claimant fails to elect between defendants and instead sues both, subsection (e) forces an election upon the claimant: the governmental unit is the proper defendant and the employee must be dismissed.” *Id.* at \*4. This court concluded:

By operation of subsection (e), Esparza’s filing of suit and the City’s motion to dismiss [the employee] resulted in a forced election: whether she intended to or not, Esparza elected to pursue her claims against the City rather than [the employee]. . . . But, so long as she has otherwise complied with the jurisdictional requisites of the Tort Claims Act, subsection (b) does not bar Esparza from pursuing her claims against the City, her elected defendant.”

*Id.* at \*10 (footnote omitted). This court thus affirmed the trial court’s order denying the City’s plea to the jurisdiction. *Id.*

The procedural setting in *Esparza* differs from the present case only insofar as the City obtained a favorable ruling on its motion under subsection (e) to dismiss its employee. In the present case, however, the trial court did not rule on the City’s motion to dismiss Officer Alaniz pursuant to subsection (e), because the Marquez family non-suited Officer Alaniz first. As effectively conceded by the City in supplemental briefing to this court, this procedural distinction makes no difference to our outcome based on the forced-election analysis of *Esparza*. *See id.* at \*10 (“A claimant satisfies the provision by electing—voluntarily or involuntarily—whether she will prosecute her claims against a governmental unit or its employee . . .”). Following this court’s reasoning in *Esparza*, we hold that

because the Marquez family has otherwise complied with the jurisdictional requisites of the Tort Claims Act, they are not barred by Section 101.106 from pursuing their claims against the City, their elected defendant. *Id.*

We overrule the City's sole issue.

### **Conclusion**

We affirm the trial court's order denying the City's plea to the jurisdiction.

Michael Massengale  
Justice

Panel consists of Justices Keyes, Higley, and Massengale.