Opinion issued August 18, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00264-CV

SAMUEL J. PRATER, M.D. AND KRISTA G. HANDYSIDE, M.D., Appellants

V.

TELICIA OWENS, Appellee

On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2012-07534

O P I N I O N

In this interlocutory appeal,[1] appellants, Samuel J. Prater, M.D. and Krista G. Handyside, M.D. (collectively, "the doctors"), challenge the trial court's order

[1] *See* TEX. CIV. PRAC. & REM CODE ANN. § 51.014(a)(5).

denying their motions to dismiss the health care liability claims[2] brought against them by appellee, Telicia Owens, in her suit for negligence and gross negligence. In two issues, the doctors contend that the trial court erred in denying their motions to dismiss.

We reverse and render.

Background

This is the fourth appeal that we have decided in this case.[3] In 2012, Owens brought health care liability claims against certain health care providers who treated her in 2010, including the doctors. In her third amended petition,[4] Owens alleged that on February 6, 2010, she went to the "Emergency Department" at Memorial Hermann Texas Medical Center ("Memorial Hermann"), complaining of a "severe headache." She was diagnosed that day with a "migraine, tension headache, and headache associated with sinuses," but "[n]o diagnostic testing was done to rule out any internal problems." On February 10, 2010, Owens returned to the "Emergency

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2 *See id.* § 74.001(a)(13).

3 *See Univ. of Tex. Health Sci. Ctr. v. Owens*, No. 01-18-00464-CV, 2019 WL 4065289 (Tex. App.—Houston [1st Dist.] Aug. 29, 2019, pet. denied) (mem. op.); *Totz v. Owens*, No. 01-16-00753-CV, 2017 WL 2178890 (Tex. App.—Houston [1st Dist.] May 18, 2017, no pet.) (mem. op.); *Owens v. Handyside*, 478 S.W.3d 172 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).

4 Owens's third amended petition was her live pleading at the time the doctors filed, and trial court ruled on, the doctors' motions to dismiss. She later filed a fourth amended petition.

Department" at Memorial Hermann, complaining of the "same persisting symptoms." Owens was seen by Dr. Handyside, who diagnosed her with a "headache and [sinusitis]." Again, no diagnostic testing was performed. On February 21, 2010, Owens returned to the "Emergency Department" at Memorial Hermann for a third time, complaining of a "headache and blurry vision." At that visit, Owens was treated by Dr. Prater and Dr. Kenneth Totz, an employee of The University of Texas Health Science Center at Houston ("UTHSCH"). Owens was again diagnosed with a "headache," but no diagnostic testing was performed.[5]

According to Owens, "[a]s a result of the negligence" of the doctors in providing her medical care and treatment, she sustained "permanent damage to her optic nerves and is completely blind in both of her eyes." She also "suffered subsequent, continuous and ongoing damages, including pain and mental anguish."

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[5] Subsequently, on February 24, 2010, Owens sought treatment at another hospital where doctors determined that she was suffering from a "head bleed." *See Univ. of Tex. Health Sci. Ctr.*, 2019 WL 4065289, at *1 (internal quotations omitted). At that time, Owens was admitted into the Intensive Care Unit and later discharged. *See id.* Thereafter, on April 22, 2010, Owens went to a third hospital complaining of "sudden blindness," which resulted in "[the] placement of a lumbar shunt." *See id.* (internal quotations omitted). On May 14, 2010, she returned to the third hospital, complaining of problems with her sutures, "shunt leak[age]," blurred vision, and a headache. *See id.* (internal quotations omitted). On May 17, 2010, Owens again returned to the hospital complaining of a headache, chest pain, and neck stiffness. *See id.* (internal quotations omitted). Her shunt was infected, and it was removed. *See id.* (internal quotations omitted). Further, it was determined that Owens was suffering from "MRSA—Methicillin Resistant Staphyloccus Aureus." *See id.* (internal quotations omitted).

Specifically, Owens asserted that the doctors were negligent in "[f]ailing to obtain an accurate assessment of [Owens]"; "[f]ailing to notice [the] signs and symptoms of [c]erebral [v]enous [s]inus [t]hrombosis"; "[f]ailing to accurately diagnose [Owens]"; "[f]ailing to timely diagnose [Owens]"; "[f]ailing to consider [the] possible explanations and respond to [Owens's] severe headaches"; "[f]ailing to consider [the] possible explanations and respond to [Owens's] blurry vision"; "[f]ailing to order appropriate radiologic studies"; "[f]ailing to make a medical diagnosis based on [Owens's] clinical condition"; "[f]ailing to consult with [a] neurologist or another specialist while [Owens] was in [the] Emergency [Department]" at Memorial Hermann; "[f]ailing to develop and carry out a proper treatment plan for [Owens]"; "[f]ailing to admit [Owens] to [the] Neurological [Intensive Care Unit]"; "[f]ailing to order thrombolytic medication necessary to attempt to dissolve thrombosis"; "[f]ailing to adhere to [f]ederal [l]aws . . . regarding emergently treating a patient regardless of [her] inability to pay"; "[f]ailing to order appropriate diagnostic tests and treatments even once cerebral venous sinus thrombosis was suspected as [a] possible cause [of Owens's] symptoms"; and failing to properly manage a patient with [c]erebral [v]enous [s]inus [t]hrombosis." According to Owens, the doctors' "negligence was a proximate cause of [her] injuries and damages."

In his second amended answer, Dr. Prater generally denied the allegations in Owens's petition and asserted that he was an employee of a governmental unit at the time Owens's claims arose. Dr. Prater, thus, "assert[ed] the rights and protections afforded to him pursuant to" Texas Civil Practice and Remedies Code section 101.106.[6] According to Dr. Prater,

> [Owens's] suit [was] based on [Dr. Prater's] alleged conduct while [he was] acting within the general scope of [his] employment with [UTHSCH], a governmental unit of the State of Texas. [Owens's] suit [was] brought against [Dr. Prater] in [his] official capacity, and [it] could have been brought against the governmental unit [under the TTCA].

Dr. Prater then filed a motion to dismiss Owens's health care liability claims against him, under Texas Civil Practice and Remedies Code section 101.106(f), asserting that the Texas Tort Claims Act ("TTCA")[7] provides that the employee of a governmental unit must be dismissed from a suit, and the governmental unit substituted as the defendant in his place, when the suit filed against the employee "is based on conduct within the general scope of that employee's employment" and when the suit "could have been brought under [the TTCA] against the governmental unit."[8] According to Dr. Prater, at the time Owens received the allegedly negligent medical care and treatment by him, he was a third-year medical resident in an

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6 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106.

7 *See id.* §§ 101.001–.109.

8 *See id.* § 101.106(f).

emergency medicine residency program that was sponsored by a governmental unit—UTHSCH—and thus he was an employee "of that governmental unit for purposes of the" TTCA and Texas Civil Practice and Remedies Code section 101.106(f).[9]

In making his argument, Dr. Prater relied on Texas Civil Practice and Remedies Code section 101.004, which he acknowledged went into effect on June 10, 2019. Under section 101.004, "a resident or fellow in a graduate medical training program for physicians that is sponsored by a governmental unit . . . is considered to be an employee of a governmental unit regardless of the method of payment or source of payment of the resident or fellow."[10] According to Dr. Prater, although Texas Civil Practice and Remedies Code section 101.004 went into effect after Owens filed her suit in 2012, it applied to Owens's health care liability claims against him "because it [was] a [l]egislative clarification" of existing law and "it applie[d] to claims that accrued before the [June 10, 2019] effective date." Thus, because Dr. Prater was "acting within the general scope of his employment with [UTHSCH]," and was "discharging the residency program duties generally assigned to him" at the time he provided allegedly negligent medical care and treatment to Owens, he, as a medical resident, was an employee of a governmental unit and was "entitled to

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9 *See id.* § 101.004 ("Status of Medical Residents and Fellows").

10 *See id.*

dismissal of [Owens's] claims [against him] pursuant to [Texas Civil Practice and Remedies Code] [s]ection 101.106(f)."

In her second amended answer, Dr. Handyside generally denied the allegations in Owens's petition and asserted that she was an employee of a governmental unit at the time Owens's claims arose. Dr. Handyside, thus, "assert[ed] the rights and protections afforded to her pursuant to" Texas Civil Practice and Remedies Code section 101.106.[11] According to Dr. Handyside,

> [Owens's] suit [was] based on [Dr. Handyside's] alleged conduct while [she was] acting within the general scope of [her] employment with [UTHSCH], a governmental unit of the State of Texas. [Owens's] suit [was] brought against [Dr. Handyside] in [her] official capacity, and [it] could have been brought against the governmental unit [under the TTCA].

Dr. Handyside filed her own motion to dismiss Owens's health care liability claims against her. She made the same arguments as Dr. Prater as to why she was entitled to dismissal of Owens's claims based on Texas Civil Practice and Remedies Code sections 101.004 and 101.106(f).

The doctors attached various exhibits to their motions to dismiss, including an affidavit by Pamela Promecene, M.D., UTHSCH's "Designated Institutional Official and Assistant Dean for its Graduate Medical Education Office." In her affidavit, Dr. Promecene testified that "[a]ccording to UTHSCH's personnel

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11 *See id.* § 101.106.

records," the doctors were "resident[s] in a graduate medical training program sponsored by UTHSCH" in February 2010. And their "responsibilities as . . . resident physician[s] with UTHSCH included providing medical care and treatment on behalf of UTHSCH, at Memorial Hermann." "UTHSCH controlled the schedule" that the doctors worked, "the facility at which [they] worked," "the type of patients" that they saw, and "the type of medical services" that the doctors were "authorized to render."

The doctors also attached their own affidavits to their respective motions to dismiss. In his affidavit, Dr. Prater testified that he "completed residency training at [UTHSCH]." On February 21, 2010, he was "a full-time [medical] resident for UTHSCH" and was "a resident for UTHSCH at all times while providing medical care to . . . Owens." In his "position as a [medical] resident in the UTHSCH program," Dr. Prater was "required to care for patients at Memorial Hermann . . . including . . . Owens," and "[w]hen [he] provided care for patients at Memorial Hermann," Dr. Prater "did so to fulfill the duties for the UTHSCH residency program" and "as part of [his] assigned rotation." Dr. Prater explained that his "responsibilities as a [medical] resident for UTHSCH included providing medical care and treatment to patients like . . . Owens" and he "specifically provided medical care and treatment to . . . Owens on behalf of UTHSCH, although [he] made independent medical decisions." According to Dr. Prater, "[a]t all times while

providing medical care to . . . Owens," the "details of [Dr. Prater's] residency were directed and controlled by UTHSCH," including his work schedule, "the facility where [he] worked, the type of patients [that he] cared for, and the type of medical services [that he] was authorized to render." "During [his] residency with UTHSCH, whenever [Dr. Prater] provided medical treatment to a patient," he did so "only as a [medical] resident for UTHSCH."

In her affidavit, Dr. Handyside testified that she "completed residency training at [UTHSCH]." On February 10, 2010, she was "a full-time [medical] resident for UTHSCH" and was "a resident for UTHSCH at all times while providing medical care to . . . Owens." In her "position as a [medical] resident in the UTHSCH program," Dr. Handyside was "required to care for patients at Memorial Hermann . . . including . . . Owens." And "[w]hen [Dr. Handyside] provided care for patients at Memorial Hermann," she "did so to fulfill the duties for the UTHSCH residency program" and "as part of [her] assigned rotation." Dr. Handyside explained that her "responsibilities as a resident for UTHSCH included providing medical care and treatment to patients like . . . Owens" and she "specifically provided medical care and treatment to . . . Owens on behalf of UTHSCH, although [she] made independent medical decisions." According to Dr. Handyside, "[a]t all times while providing medical care to . . . Owens," the "details of [Dr. Handyside's] residency were directed and controlled by UTHSCH," including her work schedule,

"the facility where [she] worked, the type of patients [that she] cared for, and the type of medical services [that she] was authorized to render." "During [her] residency with UTHSCH, whenever [Dr. Handyside] provided medical treatment to a patient," she did so "only as a [medical] resident for UTHSCH."

In her response to the doctors' motions to dismiss, Owens argued that the doctors were not entitled to dismissal under Texas Civil Practice and Remedies Code section 101.106(f) because they had waived "all rights afforded to them" under that provision "due to their unexcused delay in asserting them." According to Owens, the doctors filed their original answers in 2012, but they did not file their second amended answers, in which they "assert[ed] the rights and protections afforded to [them] pursuant to" Texas Civil Practice and Remedies Code section 101.106, until November 5, 2020. Although section 101.106(f) "imposes no explicit deadline" to file a motion to dismiss, Owens asserted that the doctors had waived their rights under that provision by failing to timely assert them.

The doctors filed a joint reply to Owens's response, explaining that they had timely sought dismissal of Owens's health care liability claims against them under Texas Civil Practice and Remedies Code section 101.106(f). They observed that for most of the time that Owens's suit was pending, medical residents were not entitled to dismissal under Texas Civil Practice and Remedies Code section 101.106(f) because the Texas Supreme Court, in *Marino v. Lenoir*, 526 S.W.3d 403 (Tex. 2017),

had held that a UTHSCH medical resident was "not entitled to dismissal under [section] 101.106(f)."[12] But in 2019, the Texas Legislature enacted Texas Civil Practice and Remedies Code section 101.004, which superseded the supreme court's ruling in *Marino*. Section 101.004 provides that, for purposes of the TTCA, "a resident or fellow in a graduate medical training program for physicians that is sponsored by a governmental unit" "is considered to be an employee of [the] governmental unit regardless of the method of payment or source of payment of the resident or fellow."[13]

As the doctors explained, Texas Civil Practice and Remedies Code section 101.004 became effective on June 10, 2019, while Owens's "case was on appeal."[14] Owens's case was "remanded to the trial court" on October 9, 2020, and the doctors filed their second amended answers less than a month later. The doctors filed their motions to dismiss under Texas Civil Practice and Remedies Code section

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12 *See Marino v. Lenoir*, 526 S.W.3d 403, 406 (Tex. 2017).

13 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.004.

14 *See Univ. of Tex. Health Sci. Ctr.*, 2019 WL 4065289, at *1–10. In the most recently decided appeal in Owens's case, a notice of appeal was filed on June 1, 2018, and this Court issued its memorandum opinion and judgment on August 29, 2019. The Texas Supreme Court denied Owens's petition for review on August 28, 2020, and the case was remanded to the trial court on October 9, 2020. *See Harris v. Kareh*, No. 01-18-00775-CV, 2020 WL 4516878, at *8 n.17 (Tex. App.—Houston [1st Dist.] Aug. 6, 2020, pet. denied) (mem. op.) ("An appellate court may take judicial notice of its own records in the same or related proceedings involving the same or nearly the same parties.").

101.106(f) less than two months after the case was remanded to the trial court following the most recently decided appeal. In short, the doctors asserted that they had not "waived their right to dismissal by failing to assert that they were" employees of a governmental unit "on a timely basis."

At the hearing on the doctors' motions to dismiss and in subsequent briefing, Owens also asserted that Texas Civil Practice and Remedies Code section 101.004, which became effective June 10, 2019, should not be applied retroactively to her suit. And because the doctors provided Owens with allegedly negligent medical care and treatment in 2010, the doctors were not considered to be employees of a governmental unit at that time and dismissal under Texas Civil Practice and Remedies Code section 101.106(f) was not warranted.

The trial court denied the doctors' motions to dismiss. In its order, the trial court found that "at the time of the incident giving rise to [Owens's] claims, [the doctors] were not considered employees of a governmental unit and thus were not entitled to governmental immunity or dismissal of claims herein under the [TTCA]." And the trial court found that "it was not until [Texas Civil Practice and Remedies Code section 101.004] went into effect on June 10, 2019, that [the doctors] were

considered to be employees of a governmental unit," which was after the doctors and UTHSCH "had actual notice of the claims being asserted by [Owens]."[15]

Standard of Review

We review the trial court's ruling on a motion to dismiss under Texas Civil Practice and Remedies Code section 101.106(f) de novo. *Garza v. Harrison*, 574 S.W.3d 389, 400 (Tex. 2019); *Enriquez v. Morsy*, No. 01-18-00877-CV, 2020 WL 4758428, at *15 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, no pet.) (mem. op.); *see also Enriquez v. Orihuela*, No. 14-18-00147-CV, 2019 WL 6872946, at *9 (Tex. App.—Houston [14th Dist.] Dec. 17, 2019, pet. denied) (mem. op.) ("A motion to dismiss filed by an employee pursuant to section 101.106(f) essentially acts as a challenge to the trial court's subject-matter jurisdiction, which we review de novo."). When issues involve the interpretation of a statute, we also apply a de novo standard of review. *See MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 500 (Tex. 2010); *Johnson v. City of Fort Worth*, 774 S.W.2d 653, 656 (Tex. 1989);

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[15] Because the trial court's dismissal order lists a particular reason for denying the doctors' motions to dismiss, we need not address the waiver argument Owens raised in the trial court and in her appellee's brief. *See Shook v. Gilmore & Tatge Mfg., Co.*, 951 S.W.2d 294, 296 (Tex. App.—Waco 1997, pet. denied) ("[I]f the dismissal order lists a particular reason for the dismissal, then the appellate court's review is limited to whether the dismissal was proper based on the ground specified by the trial court."); *see also RayMax Mgmt., L.P. v. Am. Tower Corp.*, No. 02-15-00298-CV, 2016 WL 4248041, at *3 n.9 (Tex. App.—Fort Worth Aug. 11, 2016, pet. denied) (mem. op.).

City of San Antonio v. Kopplow Dev., Inc., 441 S.W.3d 436, 441 (Tex. App.—San Antonio 2014, pet. denied).

Motions to Dismiss

In their first issue, the doctors argue that the trial court erred in denying their motions to dismiss Owens's health care liability claims against them because, as UTHSCH medical residents, they were employees of a governmental unit, Owens's claims against them are based on conduct within the general scope of the doctors' employment by UTHSCH, and Owens's claims could have been brought under the TTCA against UTHSCH. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.004, 101.106(f).

Sovereign immunity and its counterpart, governmental immunity, exist to protect the State and its political subdivisions from lawsuits and liability for money damages. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008); *Tex. Nat. Res. Conservation Comm'n v. IT–Davy*, 74 S.W.3d 849, 853 (Tex. 2002); *see also Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323–24 (Tex. 2006) ("Sovereign immunity protects the State, its agencies, and its officials from lawsuits for damages."). Although the terms "sovereign immunity" and "governmental immunity" are often used interchangeably, sovereign immunity "extends to various divisions of state government, including agencies, boards, hospitals, and

universities," while governmental immunity "protects political subdivisions of the State, including counties, cities, and school districts." *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist.*, 212 S.W.3d at 324; *see also Odutayo v. City of Houston*, No. 01-12-00132-CV, 2013 WL 1718334, at *2 n.8 (Tex. App.—Houston [1st Dist.] Apr. 18, 2013, no pet.) (mem. op.). We interpret statutory waivers of sovereign immunity and governmental immunity narrowly, as the Texas Legislature's intent to waive immunity must be clear and unambiguous. *See LMV-AL Ventures, LLC v. Tex. Dep't of Aging & Disability Servs.*, 520 S.W.3d 113, 120 (Tex. App.—Austin 2017, pet. denied); *see also* TEX. GOV'T CODE ANN. § 311.034. Without an express waiver of sovereign immunity or governmental immunity, courts do not have subject-matter jurisdiction over suits against the State or its political subdivisions. *See State v. Shumake*, 199 S.W.3d 279, 283 (Tex. 2006); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224–25 (Tex. 2004).

The TTCA provides a limited waiver of immunity for certain suits against governmental units and has an election-of-remedies provision that "requir[es] [a] plaintiff[] to choose between suing the governmental unit under the [TTCA] and suing a responsible employee in [his] individual capacity." *Garza*, 574 S.W.3d at 399; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 ("Election of Remedies"); *see also Morsy*, 2020 WL 4758428, at *14. If a plaintiff chooses to sue only an employee, that employee—if he can meet the requirements of Texas Civil Practice

and Remedies Code section 101.106(f)—can force the plaintiff to dismiss her suit against the employee and to file an amended petition to sue the governmental unit. *Morsy*, 2020 WL 4758428, at *14.

Texas Civil Practice and Remedies Code section 101.106(f) states:

> 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 [the TTCA] against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

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

A. Retroactivity of Texas Civil Practice and Remedies Code Section 101.004

In a portion of their first issue, the doctors argue that they were entitled to dismissal under Texas Civil Practice and Remedies Code section 101.106(f) because the doctors, as medical residents in a residency program sponsored by UTHSCH, were employees of a governmental unit at the time they provided Owens with allegedly negligent medical care and treatment. *See id.* § 101.004. According to the doctors, the trial court erred in not applying Texas Civil Practice and Remedies section 101.004 to conclude that they were "employees of a governmental unit." *See id.*

Texas Civil Practice and Remedies Code section 101.004 provides:

> For purposes of [the TTCA], a resident or fellow in a graduate medical training program for physicians that is sponsored by a governmental unit . . . is considered to be an employee of a governmental unit regardless of the method of payment or source of payment of the resident or fellow.

Id.

The Texas Legislature enacted Texas Civil Practice and Remedies Code section 101.004 in direct response to the Texas Supreme Court's decision in *Marino*. In *Marino*, the supreme court held that a UTHSCH medical resident who was appointed and paid by The University of Texas Medical Foundation (the "Foundation"), a nonprofit governmental corporation, was not entitled to dismissal under Texas Civil Practice and Remedies Code section 101.106(f) because she had failed to establish that the Foundation, by whom she was paid, controlled the details of her employment. 526 S.W.3d at 406–10; *see also Stallworth v. Robinson*, No. 04-21-00205-CV, 2021 WL 5496345, at *3 (Tex. App.—San Antonio Nov. 24, 2021, no pet.) (mem. op.) (explaining under *Marino*, party must show he was "in the paid service of the governmental unit *and* the governmental unit ha[d] an actual right to control the details" of his work (internal quotations omitted)). Because the UTHSCH medical resident in *Marino* did not establish this, the supreme court held that she was not an "employee" of the Foundation—the governmental unit—and

thus she was not entitled to dismissal under Texas Civil Practice and Remedies Code section 101.106(f). *See Marino*, 526 S.W.3d at 410.

Following *Marino*, however, the Texas Legislature enacted Texas Civil Practice and Remedies Code section 101.004, explaining:

> As employees of [the] state government, Texas law provides . . . immunity protection for graduate medical residents of state medical schools. However, due to a 2017 Texas State Supreme Court ruling, state law may now have some ambiguity for the liability protection of all medical residents of [UTHSCH]. [UTHSCH] employs and reimburses its residents through [t]he [Foundation], an extension of [UTHSCH] and a governmental unit. However, regardless of how the residents are reimbursed, they are no less part of [UTHSCH] and state employees.

Senate Comm. on Higher Educ., Bill Analysis, Tex. S.B. 1755, 86th Leg., R.S. (2019). Because of the discrepancies created in Texas law by the supreme court's decision in *Marino*, the Legislature felt it necessary "to clarify that all medical residents and fellows of [UTHSCH] receive the same liability protection as all other state employees or faculty, regardless of whether [UTHSCH] residents are paid through the [F]oundation or directly from [UTHSCH]." *Id.* In short, Texas Civil Practice and Remedies Code section 101.004 was intended to clarify "current law relating to the status of certain [UTHSCH] medical residents and fellows as governmental employees for purposes of the [TTCA]." *Id.* Section 101.004 supersedes the Texas Supreme Court's decision in *Marino* by defining medical residents in government-sponsored training programs as employees of the

sponsoring governmental unit. *See Tex. Dep't of Family & Protective Servs. v. Mitchell*, 510 S.W.3d 199, 202 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (noting Texas Legislature may supersede Texas Supreme Court's decision by statute).

Here, the trial court concluded that Texas Civil Practice and Remedies Code section 101.004 did not apply to Owens's health care liability claims against the doctors—medical residents in a residency program sponsored by UTHSCH—because it "went into effect on June 10, 2019," after Owens had received the allegedly negligent medical care and treatment by the doctors that gave rise to her claims. According to the trial court, the doctors could not be "considered to be employees of a governmental unit" until June 10, 2019.

Texas Constitution Article I, section 16 prohibits ex post facto and retroactive laws. TEX. CONST. art. I, § 16; *see In re M.C.C.*, 187 S.W.3d 383, 384 (Tex. 2006). "A statute is retroactive if it takes away or impairs vested rights acquired under existing law." *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997). But "[t]he prohibition against retroactive application of laws does not apply to procedural, remedial, or jurisdictional statutes, because such statutes typically do not affect a vested right." *Oncor Elec. Delivery Co. LLC v. Dallas Area Rapid Transit*, 369 S.W.3d 845, 851 (Tex. 2012) (internal quotations omitted); *see also Univ. of Tex. Sw. Med. Ctr. v. Estate of Arancibia*, 324 S.W.3d 544, 548 (Tex. 2010); *Tex. Mun.*

Power Agency v. Pub. Util. Comm'n, 253 S.W.3d 184, 198 (Tex. 2007). For this reason, jurisdictional statutes "should be applied as they exist at the time [the trial court's] judgment is rendered." *Tex. Mun. Power Agency*, 253 S.W.3d at 198; *see also Kinney v. BCG Att'y Search, Inc.*, No. 03-12-00579-CV, 2014 WL 1432012, at *4 (Tex. App.—Austin Apr. 11, 2014, pet. denied) (mem. op.).

"Immunity from suit is a matter of jurisdiction." *Oncor*, 369 S.W.3d at 851; *see also EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 749 (Tex. 2020). And the TTCA is a jurisdictional statute. *See City of Webster v. Myers*, 360 S.W.3d 51, 56 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (recognizing Texas Civil Practice and Remedies Code section 101.106 is jurisdictional statute involving waiver of immunity); *Tex. Tech Univ. Health Scis. Ctr. v. Villagran*, 369 S.W.3d 523, 528 (Tex. App.—Amarillo 2012, pet. denied). It "does not create a cause of action; it merely waives sovereign immunity as a bar to suit that would otherwise exist." *Likes*, 962 S.W.2d at 494. And Texas Civil Practice and Remedies Code section 101.004 makes clear that that for purposes of the TTCA, medical residents are entitled to the same immunity from suit as other employees of governmental units covered by the statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.004, 101.106(f); *see also id.* § 101.001(3) (defining "[g]overnmental unit" (internal quotations omitted)). Because section 101.004 is a jurisdictional statute that was in effect at the time the trial court signed its order denying the doctors' motions to

dismiss, we conclude that the trial court erred in declining to apply it to Owens's suit against the doctors. *See Tex. Mun. Power Agency*, 253 S.W.3d at 198.

We sustain this portion of the doctors' first issue.

B. Dismissal Under Texas Civil Practice and Remedies Code Section 101.106(f)

In another portion of their first issue, the doctors argue that the trial court erred in denying their motions to dismiss Owens's health care liability claims against them because they were entitled to dismissal under Texas Civil Practice and Remedies Code section 101.106(f). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f).

Under the TTCA, a defendant employee is entitled to dismissal under Texas Civil Practice and Remedies Code section 101.106(f), if he establishes that, at the time the plaintiff's claims arose, (1) he was an employee of a governmental unit, (2) the plaintiff's suit was based on conduct within the scope of the defendant's employment with the governmental unit, and (3) the suit could have been brought against the governmental unit under the TTCA. *See id.*; *Laverie v. Wetherbe*, 517 S.W.3d 748, 752 (Tex. 2017); *Morsy*, 2020 WL 4758428, at *15; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(2), (3), (5) (defining "[e]mployee," "[g]overnmental unit," and "[s]cope of employment" (internal quotations omitted)).

As to the first two elements, under Texas Civil Practice and Remedies Code section 101.004, a medical resident can establish that he is an employee of a governmental unit if the resident is "in a graduate medical training program for

physicians that is sponsored by a governmental unit." TEX. CIV. PRAC. & REM. CODE ANN. § 101.004. Here, the doctors, along with their motions to dismiss, provided uncontroverted evidence that conclusively proved they were medical residents in a graduate medical training program sponsored by UTHSCH when they provided the allegedly negligent medical care and treatment to Owens. *See Kamel v. Univ. of Tex. Health Sci. Ctr. at Houston*, 333 S.W.3d 676, 681 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) ("It is undisputed that UTHSCH is a governmental entity [for purposes of the TTCA]."). Further, the affidavit from Dr. Promecene as well as the doctors' own affidavits demonstrated that the doctors were acting in the course and scope of their employment as medical residents for UTHSCH at the time they cared for patients at Memorial Hermann, including when they provided the allegedly negligent medical care and treatment to Owens. The doctors thus established that they were employees of a governmental unit and Owens's health care liability claims against them are based on conduct within the general scope of their employment by a governmental unit. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.004, 101.106(f).

As to the third element—whether Owens could have brought her suit against UTHSCH under the TTCA—Owens argues that the doctors failed to satisfy this element because her claims against the doctors could not have been brought against UTHSCH under the TTCA "at the time they were filed" in 2012. This argument

relies on the same faulty premise as the trial court's conclusion that the doctors were not entitled to dismissal because they could not be "considered to be employees of a governmental unit" until June 10, 2019, a premise that we have already rejected. Texas Civil Practice and Remedies Code section 101.106(f) does not impose the time restriction urged by Owens, and to read such a restriction into the statute would contravene the TTCA's jurisdictional purpose. *See Myers*, 360 S.W.3d at 56 (recognizing Texas Civil Practice and Remedies Code section 101.106 is jurisdictional statute involving waiver of immunity); *see also Oncor Elec. Delivery Co.*, 369 S.W.3d at 851 (prohibition against retroactive application of laws does not apply to jurisdictional statutes). Further, we note that the TTCA and Texas Civil Practice and Remedies Code section 101.106(f) do not impose a deadline for filing a motion to dismiss, and Texas Civil Practice and Remedies Code section 101.004 is applicable to Owens's claims against the doctors as long as it was in effect at the time the trial court entered its order denying the doctors' motions to dismiss. *See Tex. Mun. Power Agency*, 253 S.W.3d at 198. Thus, the doctors established that, at the time they filed their motions to dismiss, Owens's claims against them could have been brought under the TTCA against UTHSCH.[16] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f).

[16] We note that Owens actually amended her petition to add UTHSCH as a defendant in her suit in September 2017. *See Univ. of Tex. Health Sci. Ctr.*, 2019 WL 4065289, at *2.

Based on the foregoing, we conclude that the doctors conclusively established that Texas Civil Practice and Remedies Code section 101.106(f) applied to Owens's health care liability claims against them and they were entitled to dismissal of Owens's claims under section 101.106(f). We hold that the trial court erred in denying the motions to dismiss filed by the doctors.

We sustain the remaining portion of appellants' first issue.[17]

Conclusion

We reverse the order of the trial court denying the doctor's motions to dismiss and render judgment dismissing Owens's health care liability claims against the doctors for lack of jurisdiction.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Countiss and Farris.

[17] Due to our disposition, we need not address appellants' second issue. *See* TEX. R. APP. P. 47.1.