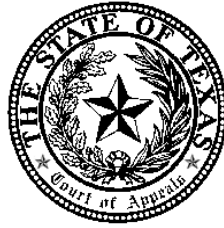


**Motion for Rehearing Overruled; Opinion filed July 28, 2011, Withdrawn; Affirmed and Substitute Memorandum Opinion on Rehearing filed November 17, 2011.**



In The

**Fourteenth Court of Appeals**

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NO. 14-11-00092-CV

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**CITY OF HOUSTON, Appellant**

**V.**

**JOSHUA COOPER, HENRY KANDEH, AND WESLEY ALLEN, Appellees**

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**On Appeal from the 165th District Court  
Harris County, Texas  
Trial Court Cause No. 2010-60337**

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**SUBSTITUTE MEMORANDUM OPINION ON REHEARING**

We overrule the motion for rehearing, withdraw our opinion dated July 28, 2011, and issue the following substitute opinion. In this interlocutory appeal, the City of Houston appeals from the trial court's order denying its plea to the jurisdiction on the

negligence claims of appellees, Joshua Cooper, Henry Kandeh, and Wesley Allen.<sup>1</sup> We affirm.

### **BACKGROUND**

Appellees simultaneously sued the City and its employee, Marcus Littleton, for negligence alleging that Littleton, who was driving a dump truck, “rammed” into the back of the vehicle driven by Allen and in which Kandeh and Cooper were passengers. The City filed a motion to dismiss its employee, Littleton, pursuant to the election-of-remedies provision of the Texas Tort Claim Act (TTCA). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(e) (West 2011). The trial court granted the City’s motion to dismiss Littleton. On the same day that the trial court granted the City’s motion, the City filed a plea to the jurisdiction, contending that appellees’ claims against it should be dismissed pursuant to section 101.106(b) of the election-of-remedies provision. *See id.* § 101.106(b). The trial court denied the City’s plea to the jurisdiction and this appeal followed.

### **STANDARD OF REVIEW**

Governmental immunity from suit defeats a trial court’s subject matter jurisdiction and is properly asserted in a plea to the jurisdiction. *Gatesco, Inc. Ltd. v. City of Rosenberg*, 312 S.W.3d 140, 144 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *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 the trial court’s ruling on a plea to the jurisdiction under a de novo standard. *City of Dallas v. Carbjal*, 324 S.W.3d 537, 538 (Tex. 2010) (per curiam); *Miranda*, 133 S.W.3d at 228.

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<sup>1</sup> *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West 2008) (permitting interlocutory appeals from a court order that grants or denies a plea to the jurisdiction by a governmental unit).

## ANALYSIS

In its sole issue in this appeal, the City asserts that the trial court erred by denying its plea to the jurisdiction. Specifically, the City argues that it is entitled to the dismissal of appellees' claims against it pursuant to section 101.106(b) because appellees made an irrevocable election to sue its employee, thus barring all claims against the City.

Section 101.106(e)—the provision under which the City moved to dismiss Littleton from this case—provides:

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(e). Once the governmental unit files a motion to dismiss the claims against its employee under section 101.106(e), the trial court must grant the motion and dismiss the claims against the employee from the suit. *Waxahachie Indep. Sch. Dist. v. Johnson*, 181 S.W.3d 781, 785 (Tex. App.—Waco 2005, pet. denied). That occurred in this case.

However, the City further sought the dismissal of appellees' claims against itself pursuant to section 101.106(b), which provides:

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.

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

The City argues that the governmental unit has immunity from suit under subsection (b) when a plaintiff files suit simultaneously against the governmental unit and its employee regarding the same subject matter. Specifically, the City relies on *Mission Consolidated Independent School District v. Garcia*, which states 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.” 253 S.W.3d 653, 659 (Tex. 2008). However, this court recently rejected these identical arguments in cases involving the simultaneous filing of suit against the City and its employee. *See Amadi v. City of Houston*, No. 14-10-01216-CV, — S.W.3d —, 2011 WL 5099184, at \*8 (Tex. App.—Houston [14th Dist.] Oct. 27, 2011, no pet. h.) (op. on reh’g en banc); *see also City of Houston v. Rodriguez*, No. 14-11-00136-CV, — S.W.3d —, 2011 WL 5244366, at \*2–3 (Tex. App.—Houston [14th Dist.] Nov. 3, 2011, no pet. h.) (op. on reh’g).

Subsection (b) applies to bar a plaintiff’s recovery against the governmental unit only when the governmental unit has not consented to suit. *Amadi*, 2011 WL 5099184, at \*4. Here, as in *Amadi* and *Rodriguez*, the City consented to suit based on the negligent use or operation of a motor-driven vehicle. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011) (providing for a waiver of immunity for property damage and personal injuries resulting from the negligent operation or use of a motor-driven vehicle or motor-driven equipment); *see also Rodriguez*, 2011 WL 5244366, at \*3; *Amadi*, 2011 WL 5099184, at \*4. Moreover, *Garcia* is distinguishable because, unlike in this case, the governmental unit had not waived its immunity to suit for the plaintiffs’ tort claims. *See Amadi*, 2011 WL 5099184, at \*5.

Therefore, under the plain language of subsection (b), the simultaneous filing of suit against the City and Littleton does not bar appellees’ suit against the City because the City has consented to suit in this case. *See Amadi*, 2011 WL 5099184, at \*8; *see also Rodriguez*, 2011 WL 5244366, at \*3 (applying *Amadi* and holding that subsection (b) did not bar the plaintiff’s claims against the City because the City’s immunity relative to the claims was waived under the TTCA). Because the City was not entitled to dismissal pursuant to section 101.106(b), we overrule its sole issue. Accordingly, we affirm the trial court’s judgment.

/s/ Sharon McCally, Justice

Panel consists of Justices Frost, Jamison, and McCally.