FRANKA V. VELASQUEZ: WHAT IS THE PROGNOSIS FOR NEGLIGENT CAUSES OF ACTON AGAINST TEXAS GOVERNMENT EMPLOYEES?

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On January 21, 2011, four sets of plaintiffs awaited their diagnoses.[1] Those plaintiffs included the parents of a child whose shoulder was injured during delivery,[2] a patient whose pancreas was injured during a diagnostic procedure,[3] a patient whose doctor negligently failed to diagnose his cancer,[4] and a patient whose arm was permanently paralyzed after being overly-medicated.[5] These plaintiffs waited patiently to determine if they had a viable cause of action against their medical providers who were employed by the State of Texas.[6]

The Texas Supreme Court announced its diagnosis in *Franka v. Velasquez*.[7] The court held that because the suit "could have been brought" against the governmental unit, the suits against the government employees must be dismissed pursuant to Section 101.106(f) of the Texas Civil Practice and Remedies Code.[8] The irony, though, is that none of these plaintiffs could have prevailed in their suits against the governmental unit because the Texas Legislature has not waived sovereign immunity for medical malpractice suits based on the negligent conduct of government

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[1] The four cases discussed, *Clark v. Sell ex rel. Sell*, 332 S.W.3d 366, 367 (Tex. 2011) (per curiam), *Escalante v. Rowan*, 332 S.W.3d 365, 366 (Tex. 2011) (per curiam), *Franka v. Velasquez*, 332 S.W.3d 367, 369–70 (Tex. 2011), and *Nealon v. Williams*, 332 S.W.3d 364, 365 (Tex. 2011) (per curiam), were each disposed of with the Texas Supreme Court's decision in *Franka*. *See Franka*, 332 S.W.3d at 385.

[2] *Franka.* 332 S.W.3d at 369–70.

[3] *Nealon.* 332 S.W.3d at 365.

[4] *Escalante*, 332 S.W.3d at 365–66.

[5] *Clark*, 332 S.W.3d at 366.

[6] *See Clark*, 332 S.W.3d at 366–67; *Escalante* 332 S.W.3d at 366; *Franka*, 332 S.W.3d at 370; *Nealon*, 332 S.W.3d at 365.

[7] 332 S.W.3d at 369.

[8] *See id.*

employees.[9] After *Franka*, these patients are left without any remedy because they cannot sue the government employee, nor can they sue the governmental unit. Can this be constitutional under the Texas Open Courts provision?

This Comment will analyze *Franka v. Velasquez* and whether Section 101.106(f) of the Texas Civil Practice and Remedies Code, which the Texas Supreme Court interpreted to effectively grant immunity to negligent government employees, is constitutional under the Open Courts provision of the Texas Constitution.[10] Section I will discuss sovereign and official immunity in Texas before *Franka* as well as provide the background on how these common law doctrines permit suits against government employees. Section II will discuss government employee immunity under Section 101.106(f). Section III will discuss the constitutionality of Section 101.106(f) under the Open Courts provision and lay out arguments and criticisms for both sides of the issue.

I. SOVEREIGN IMMUNITY AND OFFICIAL IMMUNITY IN TEXAS AND AS APPLIED IN *FRANKA V. VELASQUEZ*

A. Sovereign and Governmental Immunity:

Sovereign immunity prohibits a citizen's lawsuit against a governmental unit without the consent of the state.[11] Sovereign immunity is based on the feudal fiction that "the King can do no wrong."[12] While all sovereigns have at least abandoned the fiction that their officials can do no wrong, the Texas

[9] *See id.* at 389 (Medina, J., dissenting).

[10] The Texas Supreme Court in *Thomas v. Oldham* examined the constitutionality of the prior version of TEX. CIV. PRAC. & REM. CODE ANN. Section 101.106(f) (West 2011). 895 S.W.2d 352, 357–58 (Tex. 1995). The Texas Supreme Court did not examine the constitutionality of Section 101.106(f) in *Franka* because the issue was not raised by either party. *See* 332 S.W.3d at 385. Although the issue of constitutionality was not raised in *Franka*, the Court could have examined the constitutionality of Section 101.106(f) in *Nealon*, where the issue was raised. 332 S.W.3d at 365 (Tex. 2011). The Texas Supreme Court, however, reversed the appellate court in light of the Texas Supreme Court's decision in *Franka* and chose not to answer this question at that time. *Id.*

[11] Herring v. Hous. Nat'l Exch. Bank, 269 S.W. 1031, 1032 (Tex. 1925) ("It is an attribute of sovereignty, and it is well established and generally conceded that the sovereignty cannot be sued in its courts without its consent.").

[12] Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 695 (Tex. 2003) (citation omitted).

Supreme Court, like most jurisdictions, has decided to preserve this doctrine.[13] Sovereign immunity and governmental immunity are no longer founded on the notion of a king's infallibility; rather, sovereign immunity relies on the need to protect the public treasury.[14] Sovereign immunity not only protects the state but also all the arms of the state government, including agencies, universities, and hospitals.[15] Governmental immunity provides a similar protection to the political subdivisions of a state, including counties, cities, and school districts.[16] Sovereign and governmental immunity only extends to a government employee when the employee is sued in his official capacity and only when the employee's actions were not *ultra vires*.[17] Sovereign and governmental immunity is proper in those cases because a suit against a government employee or official in his official capacity is considered to be a suit against the state.[18] At common law, sovereign and governmental immunity does not extend to a government employee sued in his individual capacity.[19]

[13] *See* Hosner v. DeYoung, 1 Tex. 764, 769 (1847); *see also Wichita Falls State Hosp.*, 106 S.W.3d at 695.

[14] *Wichita Falls State Hosp.*, 106 S.W.3d at 695 (citing Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 417 (Tex. 1997) (Enoch, J., dissenting), *superseded by statute on other grounds by* Act of May 30, 1999, 76th Leg., R.S., ch. 1352, 1999 Tex. Gen. Laws 4578, 4583 (codified at Tex. Gov't Code §§ 2260.001–.108), *as recognized in* Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 593 (Tex. 2001)).

[15] *See* Kassen v. Hatley, 887 S.W.2d 4, 13 (Tex. 1994) (applying sovereign immunity to a state hospital); State Dep't of Highways & Pub. Transp. v. Dopyera, 834 S.W.2d 50, 54 (Tex. 1992) (applying sovereign immunity to a state agency); Sparks v. Tex. S. Univ., 824 S.W.2d 328, 330 (Tex. App.—Houston [1st Dist.] 1992, no writ) (applying sovereign immunity to a state university).

[16] Travis Cent. Appraisal Dist. v. Norman, 342 S.W.3d 54, 58 (Tex. 2011). The terms sovereign immunity and governmental immunity are often used interchangeably; the two are similar but different in scope. *Id.*; *Wichita Falls State Hosp.*, 106 S.W.3d at 694 n.3. *See also, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (West 2011); TEX. GOV'T CODE ANN. § 2007.004 (West 2008); City of Jefferson v. Vallery, 159 S.W.3d 772, 773–74 n.1 (Tex. App.—Texarkana 2005, no pet.) ("Although the City couches its argument in terms of 'sovereign immunity,' we will refer to the City's claimed immunity as governmental.")

[17] Franka v. Velasquez, 332 S.W.3d 367, 382–83 (Tex. 2011). *See* Tex. A&M Univ. Sys. v. Koseoglu, 233 S.W.3d 835, 844 (Tex. 2007) ("It is fundamental that a suit against a state official is merely 'another way of pleading an action against the entity of which [the official] is an agent.'"(alteration in the original) (quoting Kentucky. v. Graham, 473 U.S. 159, 165 (1985))).

[18] Cloud v. McKinney, 228 S.W.3d 326, 333–34 (Tex. App.—Austin 2007, no pet.).

[19] *See Franka*, 332 S.W.3d 367, 383 (Tex. 2011) ("Before the Tort Claims Act was passed in 1969, if suit against the government was barred by immunity, a plaintiff could sue and recover

For an individual to sue the state, the state must first waive its sovereign immunity.[20] Because sovereign and governmental immunity are common law doctrines, theoretically the judiciary can waive or modify the scope of the immunity.[21] In fact, courts in other jurisdictions have abrogated sovereign immunity through judicial proclamation.[22] The Texas Supreme Court, however, has reserved this matter for the legislature, finding that the legislature is best situated to "balance the conflicting policy issues associated with waiving immunity."[23] Through the Texas Torts Claims Act,

against a government employee-actor in his individual capacity even though, were he sued for the same conduct in his official capacity, he would be shielded by derived governmental immunity."); House v. Hous. Waterworks Co., 31 S.W 179, 181 (Tex. 1895) ("It is well settled that a public officer or other person who takes upon himself a public employment is liable to third persons in an action on the case for any injury occasioned by his own personal negligence or default in the discharge of his duties." (citation omitted)).

[20] *See* Herring v. Hous. Nat'l Exch. Bank, 269 S.W. 1031, 1033 (Tex. 1925).

[21] *See* Reata Const. Corp. v. City of Dall., 197 S.W.3d 371, 375 (Tex. 2006) ("Recognizing that sovereign immunity is a common-law doctrine, we have not foreclosed the possibility that the judiciary may modify or abrogate such immunity by modifying the common law."). The Court cited Justice Hecht's concurring opinion in *Tex. Dep't of Criminal Justice v. Miller* which states:

> The common-law rule of immunity in Texas was the judiciary's to recognize, and it is ours to disregard . . . . The Court has often said that it should defer to the Legislature for any waiver of governmental immunity. I have joined in that view and continue to endorse it, but defer does not mean abdicate.

51 S.W.3d 583, 592–93 (Tex. 2001) (Hecht, J., concurring) (footnotes omitted).

[22] *See, e.g.*, Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692, 695 n.4 (Tex. 2003) (citing Evans v. Bd. of Cnty. Comm'rs, 482 P.2d 968, 972 (Colo. 1971) (en banc), *superseded by statute*, Colorado Governmental Immunity Act, ch. 323, 1963 Colo. Sess. Laws 1204, *as recognized in* Padilla v. Sch. Dist. No. 1, 25 P.3d 1176, 1179–80 (Colo. 2001) (en banc); Molitor v. Kaneland Cmty. Unit Dist. No. 302, 163 N.E.2d 89, 95–96 (Ill. 1959), *superseded by statute*, Local Governmental and Governmental Employees Tort Immunity Act, 1965 Ill. Laws 2982, *as recognized in* Murray v. Chi. Youth Ctr., 864 N.E.2d 176, 185 (Ill. 2007); Nieting v. Blondell, 235 N.W.2d 597, 603 (Minn. 1975); Pruett v. City of Rosedale, 421 So. 2d 1046, 1052 (Miss. 1982), *superseded by statute*, Act of May 15, 1984, ch. 495, 1984 Miss. Laws 640, *as recognized in* Jackson v. Daley, 739 So. 2d 1031, 1040 (Miss. 1999); Bulman v. Hulstrand Constr. Co., 521 N.W.2d 632, 639–40 (N.D. 1994); Mayle v. Pa. Dep't of Highways, 388 A.2d 709, 709–10 (Pa. 1978), *superseded by statute*, Act of September 28, 1978, ch. 23, 1978 Pa. Laws 788, *as recognized in* Kapil v. Ass'n of Pa. State Coll. & Univ. Faculties, 470 A.2d 482, 484 (Pa. 1983); McCall v. Batson, 329 S.E.2d 741, 742–43 (S.C. 1985), *superseded by statute*, South Carolina Tort Claims Act, no. 463, 1986 S.C. Acts 3001, *as recognized in* Adkins v. Varn, 439 S.E.2d 822, 823–24 (S.C. 1993).

[23] *Wichita Falls State Hosp.*, 106 S.W.2d at 695. *See also* Tex. Dep't of Transp. v. York, 284

the legislature has waived its sovereign and governmental immunity for negligence causes of action in only three situations: (1) when the accident involves the use of a motor-driven vehicle; (2) when the negligent act involves a condition or use of tangible property; and (3) when there is a premises defect of a condition of real property.[24] The State of Texas and its political subdivisions are not liable for the negligent acts of its agents or officers unless the employee's actions fall into one of the three waived categories.[25]

Although the "use of tangible property" may seem like an open door for suits based on negligent conduct, the Texas Supreme Court has made it clear that the "use of tangible property" must be the proximate cause of the injury.[26] To establish proximate cause, it is not sufficient to establish that

S.W.3d 844, 846 (Tex. 2009) ("The State of Texas is protected from suits for damages by sovereign immunity, unless waived by statute."); Gen. Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 594 (Tex. 2001) ("Immunity from suit bars a suit against the State unless the *Legislature expressly gives consent*." (emphasis added) (citations omitted)); Lowe v. Tex. Tech Univ., 540 S.W.2d 297, 298 (Tex. 1976) ("We adhere to our decisions in the past that the waiver of governmental immunity is a matter addressed to the Legislature."); Tex. Highway Dep't v. Weber, 219 S.W.2d 70, 71 (1949) ("In the absence of a constitutional or statutory provision therefor [sic], the state is not liable for the torts of its officers or agents.").

[24] A governmental unit in the state is liable for:

> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> > (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
> >
> > (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011). *See* Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 225 (Tex. 2004); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.057(2) (West 2011) (stating that the Texas Torts Claims Act does not waive immunity for intentional torts).

[25] *See supra* note 24 and accompanying text.

[26] In *Dall. Cnty. Mental Health & Mental Retardation v. Bossley*, the Court held that a door left unlocked by the staff of the mental institution was not the proximate cause of the plaintiff's suicide. 968 S.W.2d 339, 343 (Tex. 1998). The Court cites to *Union Pump Co. v. Albritton* for the test the Court used to determine proximate cause. 898 S.W.2d 773, 776 (Tex. 1995). The

the government employee used a piece of tangible property in committing his negligence.[27]

B. Official Immunity

While sovereign and governmental immunity are limited common law defenses generally only available to the State, its entities, and the political subdivisions, official immunity, another common law doctrine, applies to state employees sued in their individual capacity.[28] Official immunity protects the government employee, who makes a reasonable decision in the public interest, from civil lawsuits second-guessing the reasonableness of those decisions in hindsight.[29] Official immunity precludes liability for an employee who: (1) acts within the scope of his or her employment; (2) in performance of a discretionary duty; and (3) acts in good faith.[30] The Texas Supreme Court defined a discretionary duty as an action that involves

Court states that although the doors permitted the escape and made the suicide possible, the unlocked doors were too attenuated to be the proximate cause of the death. *Dall. Cnty. Mental Health*, 968 S.W.2d at 343. *See also* Dall. Cnty. v. Posey, 290 S.W.3d 869, 872 (Tex. 2009) (per curiam) (holding that exposed wires on a corded telephone were only a condition of the property used by the deceased to commit suicide and not the cause of the injury, and thus the county's failure to keep the property in better condition did not require the county to waive its immunity).

[27] *See supra* note 26 and accompanying text.

[28] DeWitt v. Harris Cnty., 904 S.W.2d 650, 653 (Tex. 1995); Kassen v. Hatley, 887 S.W.2d 4, 8 (Tex. 1994). *See* Cloud v. McKinney, 228 S.W.3d 326, 333–34 (Tex. App.—Austin 2007, no pet.) ("[Governmental employees] sued in their individual capacity, however, may not rely on the defense of sovereign immunity but may raise the defense of official immunity.").

[29] *See* Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417, 424 (Tex. 2004) ("Denying the affirmative defense of official immunity to public officials . . . 'would contribute not to principled and fearless decision-making but to intimidation.'" (quoting Wood v. Strickland, 420 U.S. 308, 319 (1975))); *Kassen*, 887 S.W.2d at 8 ("The public would suffer if government officers, who must exercise judgment and discretion in their jobs, were subject to civil lawsuits that second-guessed their decisions . . . . Official immunity increases the efficiency of employees because they need not spend time defending frivolous charges." (citations omitted)); City of Fort Worth v. Robinson, 300 S.W.3d 892, 897 (Tex. App.—Fort Worth 2009, no pet.); *see also Cloud*, 228 S.W.3d at 335 (Tex. App.—Austin 2007, no pet.) ("Official immunity . . . shields public employees from personal liability in order to encourage governmental employees to vigorously perform their jobs." (citation omitted)).

[30] *See* Wadewitz v. Montgomery, 951 S.W.2d 464, 465–66 (Tex. 1997) ("Official immunity is an affirmative defense. A governmental employee has official immunity for the performance of discretionary duties within the scope of the employee's authority, provided the employee acts in good faith." (citing City of Lancaster v. Chambers, 883 S.W.2d 650, 653–54 (Tex. 1994)).

"personal deliberation, decision and judgment."[31] Discretionary duties can be defined as duties that are not ministerial, which the Texas Supreme Court defines as duties that involve "such precision and certainty as to leave nothing to the exercise of discretion or judgment . . . ."[32]

In *Kassen v. Hatley*, the Texas Supreme Court confronted the issue of whether official immunity applies to physicians employed as government employees.[33] The Texas Supreme Court held that official immunity does not apply to state-employed medical personnel if the character of the discretion is *medical* and not governmental.[34] In cases where the division of medical and governmental discretion is not clear, the court adopted a seven-factor test to better identify governmental discretion.[35] In general, a breach of the ordinary, prudent standard of medical care is not colored as governmental discretion.[36] In refusing to extend official immunity to cover

[31] *City of Lancaster*, 883 S.W.2d at 654.

[32] Rains v. Simpson, 50 Tex. 495, 501 (1878).

[33] *Kassen*, 887 S.W.2d at 9.

[34] *Id.* at 11.

[35] The Texas Supreme Court adopted the RESTATEMENT OF TORTS (SECOND) § 895D and recommended that courts consider the following factors:

> 1. the nature and importance of the function that the employee is performing,
>
> 2. the extent to which passing judgment on the exercise of discretion by the employee will amount to passing judgment on the conduct of a coordinate branch of government or an agency thereof,
>
> 3. the extent to which the imposition of liability would impair the employee's free exercise of discretion,
>
> 4. the extent to which financial responsibility will fall on the employee,
>
> 5. the likelihood that harm will result to the public if the employee acts,
>
> 6. the nature and seriousness of the type of harm that may be produced, and
>
> 7. the availability to the injured party of other remedies and forms of relief.

Kassen, 887 S.W.2d at 12, n.8.

[36] *Kassen*, 887 S.W.2d at 11 (discussing that a doctor has a duty to exercise ordinary care to treat patients, and holding that doctors would not be immune from tort liability when exercising medical discretion). *See also* Mussemann v. Villarreal, 178 S.W.3d 319, 325 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (holding official immunity does not apply to doctors who were negligent in treating a pregnant woman and delivering the child); Gross v. Innes, 930 S.W.2d 237, 241 (Tex. App.—Dallas 1996, writ dism'd w.o.j.) ("[T]he fact that [medical personnel] did not have the option to refuse treating [a patient] is not a governmental factor

a doctor's medical negligence, the court explained, "We reject this approach because it applies official immunity too broadly. Such a blanket policy of official immunity does not promote the doctrine's purposes, and *denies compensation to malpractice victims*."[37]

C. Sovereign Immunity and Official Immunity in Franka v. Velasquez

Neither sovereign immunity[38] nor official immunity[39] covers the conduct of the government employees sued in *Franka*. Dr. John Franka was a faculty member employed at the University of Texas Health Science Center ("UTHSC"), a public teaching hospital.[40] Dr. Nagakrishna Reddy was a medical resident, working and studying at UTHSC.[41] Both doctors delivered the son of Stacey Velasquez and Saragosa Alaniz, the plaintiffs in this case.[42] While attempting to deliver the baby, the baby's heart rate slowed.[43] The doctors attempted a vaginal delivery and tried to expedite the delivery by using a vacuum extractor.[44] After the head appeared, the doctors removed the vacuum extractor, but the baby's shoulder remained obstructed.[45] Franka and Reddy used their hands to free the baby's shoulder.[46] However, in the process, the baby's left clavicle fractured.[47] Because of the break, the baby required surgery several months later.[48] The parents sued the doctors in their individual capacity but did not sue

coloring medical discretion . . . .").

[37] *Kassen*, 887 S.W.2d at 11 (emphasis added).

[38] *See supra* note 26 and accompanying text (discussing that a flaw or defect in the property in question is required to fit within the sovereign's waiver of immunity); *see also* Franka v. Velasquez, 332 S.W.3d 367, 370 (Tex. 2011) (plaintiff stating that nothing in the record implicates the use or misuse of the property as a proximate cause of the injury).

[39] *See supra* notes 35–36 and accompanying text (discussing that official immunity does not apply to doctors exercising medical discretion); *see also Franka*, 332 S.W.3d at 370 (detailing the actions taken within the medical discretion of the defendant doctors that were the proximate cause of the plaintiff's injuries).

[40] *Franka*, 332 S.W.3d at 369–70.

[41] *Id.*

[42] *Id.* at 369.

[43] *Id.* at 370.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

UTHSC.[49]

The district court and the Fourth Court of Appeals of Texas held there is no waiver of sovereign immunity under these facts since the vacuum tube was not the proximate cause of the injury.[50] Also, the government employees could not rely on official immunity because their decisions were medical in nature and not acts of governmental discretion.[51] Because both of these common law doctrines were inapplicable, the government employees could only rely on what at the time was interpreted as a limited grant of statutory immunity under the Texas Torts Claims Act.[52] Under Section 101.106(f) of the Texas Civil Practice and Remedies Code:

> 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 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.[53]

The defendants argued that because the vacuum tube extractor, a piece of tangible property, could have been the cause of the injury, the suit could have been brought against the State of Texas.[54] The Fourth Court of Appeals of Texas affirmed the district court's finding that the baby's fractured clavicle was the result of medical negligence and not by a defect in the vacuum extractor.[55] The court of appeals reiterated the longstanding proposition that the state's sovereign immunity is not waived for acts of

[49] *Id.*

[50] *See* Franka v. Velasquez, 216 S.W.3d 409, 411–13 (Tex. App.—San Antonio 2006), *rev'd*, 332 S.W.3d 367 (Tex. 2011).

[51] *Franka*, 332 S.W.3d at 383. *See also* Kassen v. Hatley, 887 S.W.2d 4, 11 (Tex. 1994).

[52] *See Franka*, 216 S.W.3d at 411; *see also* Reedy v. Pompa, 310 S.W.3d 112, 117 (Tex. App.—Corpus Christi 2010), *rev'd per curiam*, 332 S.W.3d 402 (Tex. 2011).

[53] TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West 2011) (emphasis added).

[54] *Franka*, 216 S.W. 3d at 411.

[55] *See id.* at 412.

medical negligence.[56] Thus, the court of appeals held that because the legislature did not waive sovereign immunity for medical negligence, the suit could not have been brought against the governmental unit.[57] Since the suit could not have been brought against the governmental unit, immunity under Section 101.106(f) is not triggered.[58] The Texas Supreme Court, however, would later reverse the Fourth Court of Appeals in *Franka*,[59] and the court's interpretation would serve to greatly expand the scope of immunity for government employees in Texas.[60]

II. GOVERNMENTAL EMPLOYEE IMMUNITY UNDER THE TEXAS TORTS CLAIMS ACT AFTER *FRANKA V. VELASQUEZ*

A. The History and Purpose of Texas Civil Practice and Remedies Code Section 101.106(f)

The purpose of the Texas Torts Claims Act ("TTCA") is to provide a limited waiver of immunity for certain suits and caps on recovery.[61] However, over time the Texas Legislature amended the act to create new statutory immunities for government employees who were not already immunized by sovereign immunity or official immunity.[62] The purpose of

[56] *Id.* ("'Because medical negligence is the basis for [the] claims against the doctors, the doctors cannot meet the second requirement of section 101.106(f). That is, the doctors have not shown that [the] claims could have been brought against [UTHSC] under the Texas Tort Claims Act.'" (alterations in original) (quoting Williams v. Nealon, 199 S.W.3d 462, 466 (Tex. App.—Houston [1st Dist.] 2006), *rev'd per curiam*, 332 S.W.3d 364 (Tex. 2011))). *See also* Phillips v. Dafonte, 187 S.W.3d 669, 676–77 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (holding dismissal not proper under Section 101.106(f) where substance of claims was intentional or negligent failure to communicate diagnosis); Villasan v. O'Rourke, 166 S.W.3d 752, 760–61 (Tex. App.—Beaumont 2005, pet. denied) (noting a governmental agency is generally immune from medical negligence complaints, and complaint alleging negligent exercise of medical discretion against government-employed medical professional should be made against medical professional alone and not the governmental agency).

[57] *See Franka*, 216 S.W.3d at 412–13.

[58] *See id.*

[59] Franka v. Velasquez, 332 S.W.3d 367, 385 (Tex. 2011).

[60] *See id.* at 388 (Medina, J., dissenting) (disagreeing with the majority for broadening the immunity given to government employees).

[61] *See* Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 655 (Tex. 2008).

[62] *See* Michael S. Hull et al., *House Bill 4 and Proposition 12: An Analysis with Legislative History, Part Three*, 36 TEX. TECH L. REV. (SUPPLEMENTAL) 169, 293–94 (2005).

statutory immunity for government employees is to limit harassing litigation against state officials.[63] To accomplish this, the plaintiff must make an irrevocable election—file a lawsuit against the governmental unit or the government employee.[64]

Originally, the TTCA did not immunize government employees, and plaintiffs typically sued both the governmental unit and government employees in their individual capacity.[65] Then, in 1985 the Texas Legislature amended the TTCA by adding Section 101.106(f), which provided: "A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim."[66] While this amendment reduced duplicative litigation, it only barred suits against government employees when claims were reduced to a judgment.[67]

The Legislature amended Section 101.106 in 2003 as part of its comprehensive tort reform efforts.[68] The amended section is now titled "Election of Remedies" and provides:

> (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

[63] *Id.* at 292. However, Hull goes so far as to describe that the net effect of Section 101.106 is that "a plaintiff will only be able to pursue the governmental entity and not its employees." *Id.* at 292. The *Franka* dissent takes issue with this proposition, rejecting the notion that the Legislature intended to go so far, saying, "[E]vidence to support its thesis is non-existent." 332 S.W.3d at 392. This is a fair assessment. Hull does not provide any support for his conclusion on the net effect of Section 101.106. Moreover, the plain language of the statute tends to run against this conclusion. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West 2011).

[64] Hull et al., *supra* note 62, at 291.

[65] *See id.*

[66] Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3305.

[67] *Id. See also* Thomas v. Oldham, 895 S.W.2d 352, 355 (Tex. 1995).

[68] Hull et al., *supra* note 62, at 291–92 (explaining the legislative history of the amendment).

> recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.
>
> (c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.
>
> (d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.
>
> (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.
>
> (f) 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 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.[69]

Describing Section 101.106(f) as an "election" is a bit of a mischaracterization. In Sections 101.106 (a)–(e), the plaintiff has the option to sue and recover from the government employee or the governmental unit, just not both.[70] However, Section 101.106(f) is not a true election, at least for the plaintiff.[71] While subsections (a)–(e) purport to give the plaintiff an election, subsection (f) determines if a plaintiff can sue

[69] TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2011).

[70] *See id.* § 101.106 (a)–(e).

[71] *See* Univ. of Tex. Health Sci. Ctr. v. Bailey, 332 S.W.3d 395, 401 (Tex. 2011).

a government employee.[72] If the plaintiff intends to file suit, the plaintiff cannot sue the government employee if: (1) the employee acted within the scope of the employee's general scope of that employment; and (2) the suit "could have been brought under this chapter against the governmental unit . . . ."[73] Upon the government employee's motion to opt out of the lawsuit, the defendant has 30 days to add the governmental unit.[74] The government employee defendant must choose to be sued or not be sued, and the plaintiff must choose to pursue his lawsuit against the governmental unit or drop it entirely, both of which are really false choices.[75] Given that Section 101.106(f) does not provide the plaintiff with an election, like the other subsections, but instead grants immunity, the next question is what situations trigger immunity under subsection (f)?

B. What Is an Action Within the General Scope of Employment?

The TTCA explicitly defines who is a government employee.[76] Government employees are those persons who are "in the paid service of a governmental unit."[77] Under the TTCA, an employee does not include "an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control."[78] The TTCA broadly defines governmental unit to include all agencies, departments, and political subdivisions of the state.[79] A person acts within the scope of his employment if the person is discharging duties generally assigned to him.[80]

[72] TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f). *See also Univ. of Tex. Health Sci. Ctr.*, 332 S.W.3d at 401.

[73] TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f). *See also* Franka v. Velasquez, 332 S.W.3d 367, 369 (Tex. 2011).

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

[75] *See id.*; *see also Franka*, 332 S.W.3d. at 394–95 (Medina, J., dissenting).

[76] TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(2).

[77] *Id.*

[78] *Id.*

[79] TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(A)–(B).

[80] Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417, 424 (Tex. 2004) (citing City of Lancaster v. Chambers, 883 S.W.2d 650, 658 (Tex. 1994)).

C. What Is a Suit That "Could Have Been Brought Under This Chapter Against the Governmental Unit?"

The next prong of Section 101.106(f) involves determining whether the suit "could have been brought under this chapter against the governmental unit . . . ."[81] In *Franka*, the court reaffirmed that all tort suits against a governmental unit are considered to be "under this chapter."[82] Although it is settled law that all tort suits against governmental units are considered to be under the Act,[83] the issue in *Franka* was whether a government employee must show the suit could *successfully* be brought against the governmental unit to qualify for the statutory immunity under Section 101.106(f).[84] Prior to the Texas Supreme Court's decision in *Franka*, every Texas court of appeals that ruled on this issue interpreted "could have been brought under this chapter against the governmental unit" to mean the suit must be one where the state has waived its sovereign immunity.[85] In those

[81] TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f). *See also* Franka v. Velasquez, 332 S.W.3d 367, 369 (Tex. 2011).

[82] *Franka*, 332 S.W.3d at 379. Suits outside of tort are not considered to be "under this chapter." *See* Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 659–60 (Tex. 2008) (A suit brought under the Texas Commission for Human Rights Act is not considered to be under the Texas Torts Claims Act).

[83] *Franka*, 332 S.W.3d at 375.

[84] *See id.*

[85] *See* McFadden v. Oleskey, No. 03-09-00187-CV, 2010 WL 3271667, at *7 (Tex. App.—Austin Aug. 19, 2010, no pet.) (not designated for publication), *overruled by Franka*, 332 S.W.3d at 382 n.67; Illoh v. Carroll, 321 S.W.3d 711, 717 (Tex. App.—Houston [14th Dist.] 2010), *rev'd per curiam*, 351 S.W.3d. 862 (Tex. 2011); Menefee v. Medlen, 319 S.W.3d 868, 877 (Tex. App.—Fort Worth 2010, no pet.), *overruled by Franka*, 332 S.W.3d at 382 n.67; Reedy v. Pompa, 310 S.W.3d 112, 119 (Tex. App.—Corpus Christi 2010), *rev'd per curiam*, 332 S.W.3d 402 (Tex. 2011); Lanphier v. Avis, 244 S.W.3d 596, 607 (Tex. App.—Texarkana 2008, pet. dism'd), *overruled by Franka*, 332 S.W.3d at 382 n.67; Hall v. Provost, 232 S.W.3d 926, 929 (Tex. App.—Dallas 2007, no pet.), *overruled by Franka*, 332 S.W.3d at 382 n.67; Kanlic v. Meyer, 230 S.W.3d 889, 894 (Tex. App.—El Paso 2007, pet. denied), *overruled by Franka*, 332 S.W.3d at 382 n.67; Clark v. Sell *ex rel.* Sell, 228 S.W.3d 873, 875 (Tex. App.—Amarillo 2007), *rev'd per curiam*, 332 S.W.3d 366 (Tex. 2011); Tejada v. Rowe, 207 S.W.3d 920, 925 (Tex. App.—Beaumont 2006, pet. denied), *overruled by Franka*, 332 S.W.3d at 382 n.67; Franka v. Velasquez, 216 S.W.3d 409, 412 (Tex. App.—San Antonio 2006), rev'd, 332 S.W.3d 367; Williams v. Nealon, 199 S.W.3d 462, 467 (Tex. App.—Houston [1st Dist.] 2006), *rev'd per curiam*, 332 S.W.3d 364 (Tex. 2011). In *Franka*, the Texas Supreme Court recognized two cases that "adopted the court's reasoning in *Mission*," but these cases did not determine whether a negligence suit "could have been brought" under the Act. 332 S.W.2d at 382 n.67. *See also*

cases, the courts reasoned that because the state had waived its sovereign immunity, the suit "could have been brought" against the governmental unit instead of the government employee, and thus immunity under Section 101.106(f) was triggered.[86] Conversely, these courts reasoned that if sovereign immunity was not waived, the suit could not have been brought against the governmental unit because the suit would later be dismissed.[87]

The Texas Supreme Court, however, disagreed with those cases[88] and broadly interpreted "could have been brought."[89] In *Franka*, the court held that a suit "could have been brought" against the governmental unit even when sovereign immunity is not waived.[90] The Texas Supreme Court reasons that even though the suit will be dismissed because the state has not waived sovereign immunity, a suit can still be brought, albeit unsuccessfully.[91] Justice Medina's dissent describes the majority's meaning of "could have been brought" as nothing more than the physical act of filing suit.[92] Thus, after *Franka*, for a government employee to assert immunity under Section 101.106(f), he only needs to show the conduct was in the scope of his employment, and the plaintiff could have simply filed his tort cause of action against the governmental unit.[93]

Although the court in *Franka* makes repeated references and comparisons to the Westfall Act, the federal statute that can shield federal government employees from suit, the Texas scheme does not mimic the federal statute.[94] Under the Westfall Act, when the Attorney General of the

Castro v. McNabb, 319 S.W.3d 721, 732 (Tex. App.—El Paso 2009, no pet.) (holding a declaratory judgment for violation of the Texas Commission on Human Rights Act could not have been brought under this chapter); Kelemen v. Elliott, 260 S.W.3d 518, 524 (Tex. App—Houston [1st Dist.] 2008, no pet.) (holding that the plaintiff failed to establish that the government employee's conduct was within the scope of his duties).

[86] *See, e.g.*, *Castro*, 319 S.W.3d at 732; *Kelemen*, 260 S.W.3d at 524.

[87] *See, e.g.*, *Menefee*, 319 S.W. at 877; *Reedy*, 310 S.W.3d at 119; *Lanphier*, 244 S.W.3d at 607; *Hall*, 232 S.W.3d 926; *Kanlic*, 230 S.W.3d at 894; *Clark*, 228 S.W.3d at 875; *Tejada*, 207 S.W.3d at 925; *Franka*, 216 S.W.3d at 412; *Williams*, 199 S.W.3d at 467.

[88] *Franka*, 332 S.W.3d at 382 n.67.

[89] *See id.* at 385.

[90] *Id.*

[91] *See id.* at 380.

[92] *Id.* at 393 (Medina, J., dissenting).

[93] *Id.*

[94] *Id. Compare* 28 U.S.C. § 2674 (2006) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a

United States believes the defendant acted within the scope of his office or employment, the United States shall be *substituted* as a defendant and sovereign immunity waived.[95] While Section 101.106(f) requires a plaintiff to make a substitution, it does not contemplate that the plaintiff will actually be able to maintain the lawsuit against the governmental unit.[96] Sovereign immunity in Texas is not automatically waived.[97] Unlike a suit against the United States, the TTCA only permits suits against a governmental unit in three limited scenarios.[98] Therefore, the Westfall Act is distinguishable from the Texas immunity scheme.

D. Ramifications of the Texas Supreme Court's Interpretation in Franka v. Velasquez

The *Franka* Court's construction effectively immunizes the conduct of any government employee performing his duties so long as the defendant makes a motion to dismiss.[99] Unless sovereign immunity is already waived, the plaintiff has no cause of action against the government employee or the governmental unit, which effectively leaves the tort victim without any

private individual under like circumstances . . . ."), *and* 28 U.S.C. § 2679 (2006) ("Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant."), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West 2011) ("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.").

[95] 28 U.S.C. § 2679.

[96] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f).

[97] *See supra* note 23 and accompanying text.

[98] Through the Texas Torts Claims Act, the Legislature has waived its sovereign and governmental immunity for negligence causes of actions in only three situations: (1) when the accident involves the use of a motor-driven vehicle; (2) when the negligent act involves a condition or use of tangible property; and (3) when a there is a premises defect of condition of real property. *See supra* note 24 and accompanying text.

[99] *See Franka*, 332 S.W.3d at 395 (Medina, J., dissenting) ("The statutory text, title and design of section 101.106 plainly put the plaintiff to an election of remedies. Because the Court's interpretation takes that election away, requiring the plaintiff to sue only the government, I respectfully dissent.").

remedy.[100]

For example, Velasquez, the plaintiff, sues Dr. Franka, the defendant, who is a government employee, for negligence.[101] The first prong of Section 101.106(f)—the conduct is within the general scope and employment of the governmental employee[102]—is satisfied because the delivery was within Dr. Franka's scope of employment.[103] Moving to the second prong, could the suit have been brought against the governmental unit?[104] Under the Texas Supreme Court's interpretation of "could have been brought," which effectively means could have been filed, the answer is yes; the plaintiff could have brought or *filed* his suit against the governmental unit even though the Legislature has not waived sovereign immunity.[105] Therefore, Dr. Franka, the defendant, can assert immunity under Section 101.106(f) and can move to dismiss the suit.[106] Realizing this mistake, if the plaintiff stepped back in time and decided to sue the University of Texas Health Sciences Center, what would be the outcome? The hospital says the Legislature has not waived sovereign immunity in this case since none of three waivers under the TTCA are triggered, and again the plaintiff can recover nothing.[107] Thus, if the employee's negligence is within the scope of his employment, government employees have immunity under Section 101.106(f), forcing plaintiffs to bring suit against the governmental unit.[108] Unless one of the three waivers under the TTCA somehow already applies, the plaintiff is left without any remedy.[109]

The court's construction not only nullifies the second prong of Section 101.106(f), it drastically limits the scope of subsections (a)–(e) as well since there is no longer an election of remedies if the plaintiff can only bring suit against one party—the governmental unit.[110] If the government employee's

[100] *See id.* at 381 (majority opinion) ("Recovery for the negligence of a government physician acting in the course of employment would be limited to that afforded under the Act.").

[101] *Id.* at 370.

[102] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f) (West 2011).

[103] *Franka*, 332 S.W.3d at 370.

[104] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f).

[105] *See Franka*, 332 S.W.3d at 385.

[106] *Id.*

[107] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011).

[108] *See id.* § 101.106(f).

[109] *See Franka*, 332 S.W.3d at 393–94 (Medina, J., dissenting).

[110] *See id.* at 392–93.

conduct is within his scope of employment, Section 101.106(f) will always require substituting the government employee with the governmental unit even though sovereign immunity is not waived.[111] Thus, there really is no longer an irrevocable election for the plaintiff to make under subsections (a), (b), or (d) if the government employee possesses immunity under subsection (f) and must be dismissed.[112] Similarly, a bar after the settlement under subsection (c) is no longer necessary since an immune defendant has no need to settle.[113] Also, subsection (e) would be redundant.[114] If a plaintiff sued the governmental unit and government employee at the same time, it still results in the government unit being sued without the government employee because the employee could also be dismissed under subsection (f).[115] The court's construction effectively takes away any actual election the plaintiff may have under subsections (a)–(e) and simply decrees governmental employees are entitled to immunity under Section 101.106 if the conduct is within the scope of their employment.[116]

Additionally, the court's interpretation of Section 101.106(f) in *Franka* may entirely supplant the common law doctrine of official immunity in Texas.[117] Official immunity only immunizes conduct when: (1) the conduct is within the government employee's scope of employment; (2) in performance of a discretionary duty; and (3) the employee acts in good faith.[118] If Section 101.106(f) only requires the conduct to be (1) within the government employee's scope of employment, then common law official immunity is essentially a dead doctrine in Texas and is encompassed by statutory immunity under Section 101.106(f).[119]

The Texas Supreme Court's interpretation of "could have been brought" greatly expands the scope of government employee immunity under Section

[111] *See id.* at 386–87 ("When a governmental employee causes injury, section 101.106 of the Tort Claims Act purports to give the injured person a choice of suing the government, or its employee, or both. I say purports because the Court holds that this provision is a sham; it does not actually provide the putative plaintiff any choice in the matter." (citation omitted)).

[112] *See id.*

[113] *See id.*

[114] *See id.*

[115] *See id.*

[116] *See id.*

[117] *See id.* at 393.

[118] *See supra* Part I.B.

[119] *See Franka*, 332 S.W.3d at 393 (Medina, J., dissenting).

101.106(f).[120] By interpreting "could have been brought" to merely mean filed,[121] essentially all government employees performing acts within their duty are immunized and must be substituted with the governmental unit,[122] which likely retains its sovereign immunity.[123] Unlike the Westfall Act, the governmental unit is not automatically substituted for the defendant, and sovereign immunity is not automatically waived, which means plaintiffs like the Velasquezes are left without any remedy unless somehow the facts fall into one of the three waiver scenarios already under the TTCA.[124]

III WILL SECTION 101.106(F) SURVIVE AN OPEN COURTS CHALLENGE?

This Comment raises the question as to whether it is constitutional to leave those who have been harmed by a government employee's negligent conduct without any remedy. Specifically, this Comment examines whether abrogating a common law cause of action against government employees through statutory immunity can survive a constitutional challenge under the Open Courts provision of the Texas Constitution. In *Franka*, the majority recognized that there may be an Open Courts challenge to its interpretation of Section 101.106(f).[125] While the court did provide some insight on how it may answer this question, it did not rule on the constitutionality of Section 101.106(f).[126]

A. Texas Supreme Court Precedent on the Open Courts Provision

Texas's Open Courts provision has been described as a due process guarantee[127] and is found in Article I, Section 13 of the Texas

[120] *Id.* at 385 (majority opinion).

[121] *Id.* at 380.

[122] *Id.* at 381.

[123] *See supra* note 23–24 and accompanying text.

[124] *Franka*, 332 S.W.3d at 392 (Medina, J., dissenting) ("In lieu of examining section 101.106's language, the Court assumes that the Texas Tort Claims Act should be like the federal act. There are, however, significant differences between the two.").

[125] *Id.* at 385 (majority opinion).

[126] *Id.*

[127] LeCroy v. Hanlon, 713 S.W.2d 335, 343 (Tex. 1986) (Gonzalez, J., dissenting); Sax v. Votteler, 648 S.W.2d 661, 664 (Tex. 1983).

Constitution.[128] The Open Courts provision provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law."[129] In general, the Open Courts provision provides individuals a right to redress their grievance and have their day in court.[130] There are at least three separate guarantees the Open Courts provision provides: (1) the legislature must ensure the courts are physically open and operating;[131] (2) citizens must have the ability to access the court unimpeded by financial barriers;[132] and (3) the legislature may not abrogate well-established common law causes of action unless the reason for the restriction *outweighs* the citizens' right to redress.[133]

[128] TEX. CONST. art. I, § 13. Although courts have interpreted the open courts provision to be a due process guarantee, the Texas Constitution contains a separate due process provision. TEX. CONST. art I. § 19 ("No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."). *See LeCroy*, 713 S.W.2d at 340 (majority opinion) ("Besides the open courts provision, every Texas constitution has also included a separate due process provision, presently Article I, [Section] 19."). Therefore, the open courts provision must provide additional rights to those in the due process provision. *Id. See also Sax*, 648 S.W.2d at 664 (finding that the open courts provision is an additional right beyond the equal protection provision of the Texas Constitution).

[129] TEX. CONST. art. I, § 13. The Open Courts provision can be directly traced to Chapter 40 of the Magna Carta, which provides, "To none will we sell, to none deny or delay, right or justice." *LeCroy*, 713 S.W.2d at 339 (citing GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 3 (1977); FRANK M. STEWART AND JOSEPH L. CLARK, THE CONSTITUTION AND GOVERNMENT OF TEXAS 5 (1936)). The open courts provision has been in every Texas Constitution and has contained the identical language. *LeCroy*, 713 S.W.2d at 339. *See also* Kathryn Kase, Note, *Constitutional Law—Open Courts—$500,000 Cap on Non-Economic Damages for Medical Malpractice Inconsistent with Open Courts Guarantee in Texas Constitution*, 20 ST. MARY'S L.J. 397, 423 (1989) (stating that the Texas Constitution's Open Courts provision provides additional rights not found in the United States Constitution).

[130] *LeCroy*, 713 S.W.2d at 341.

[131] *See* Tex. Ass'n. of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 448 (Tex. 1993); H. Runge & Co. v. Wyatt, 25 Tex. 291, 294 (Supp. 1860) (holding the Legislature could not force plaintiffs to sue in a county where there were no tribunals established).

[132] *See LeCroy*, 713 S.W.2d at 342 (holding the Legislature could not place a tax on suits for purposes of generating revenue); Dillingham v. Putnam, 14 S.W. 303, 305 (Tex. 1890) (holding the Legislature cannot make a right to appeal contingent on paying a supersedes bond without reference to appellant's ability to pay).

[133] Trinity River Auth. v. URS Consultants, Inc., 889 S.W.2d 259, 261 (Tex. 1994). The unreasonable restriction guarantee was first seen in *Hanks v. City of Port Arthur*. 48 S.W.2d 944

Under the third guarantee, the Texas Supreme Court has recognized that not only does this guarantee prohibit the legislature from restricting the right to sue, it also prohibits the Legislature from arbitrarily or unreasonably abolishing the right to sue.[134] For example, in *Sax v. Votteler*, a doctor mistakenly removed Sax's fallopian tubes instead of her appendix.[135] Dr. Voteller continued to treat Sax after the surgery, and her parents did not sue on her behalf until almost three years later.[136] However, the defendants filed a motion for summary judgment, claiming that Sax's cause of action was barred by the two-year statute of limitations and Texas law did not toll limitations for a minor.[137] To determine if this statute violated the Open Courts provision, the court said the litigant must show: (1) abrogation of a common law cause of action, and (2) the restriction is unreasonable in substituting other remedies or the restriction is unreasonable when balanced against the purpose of the statute.[138] Looking at the first prong, the court stated that it is settled law that a minor has a common law cause of action for the infliction of a wrongful injury against a

(Tex. 1932). In *Hanks*, the City of Port Arthur had a statute that only permitted a plaintiff to sue the municipality over defective property if the plaintiff gave notice of the defect at least 24-hours prior to being injured by the defective property. 48 S.W.2d at 945. The court reasoned this violated the Open Courts provision, saying, "Can it be 'due process' to say that, although she did not see the defect, and did not know of its existence, yet, before she can recover for the city's wrongful act (if it was wrongful), she must have notified the city of the defect twenty-four hours before she received her injuries . . . Would that be reasonable? Is the requirement of a thing impossible from an infant, or one incapacitated for any other reason, due process? We think not; and yet it is a condition precedent to a recovery . . . ." *Id.* at 947–48.

[134] Lebohm v. City of Galveston, 199, 275 S.W.2d 951, 955 (Tex. 1955). *See also* Lucas v. United States, 757 S.W.2d 687, 696 (Tex. 1988) (Gonzalez, J., dissenting) ("It is of course obvious that an entire abrogation of access results in an entire denial of redress. Thus, to that extent, the right of access and redress are inextricably intertwined.").

[135] 648 S.W.2d 661, 663 (Tex. 1983).

[136] *Id.*

[137] *Id.*

[138] *Id.* at 665-66. *See also* Diaz v. Westphal, 941 S.W.2d 96, 100 (Tex. 1997); Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120, 121 (Tex.1996) (per curiam). The open courts provision does not apply to remedies provided by statute. *See* Rose v. Doctors Hosp., 801 S.W.2d 841, 845 (Tex.1990) (explaining that since the remedy for wrongful death came from a statute and not common law, the open courts provision did not apply to plaintiffs); Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 356 (Tex. 1990) (stating that the Open Courts provision is not applicable because there is no wrongful death cause of action under common law).

negligent tortfeasor.[139] Looking at the second prong, the court found the limitations statute, which intended to lower insurance rates, was unreasonable when applied to minors, who could not always bring a suit within limitations.[140] The court reasoned that a child is under legal disability until she reaches the age of majority and cannot sue even if she desires to do so.[141] Unless the child's guardian files suit, the child will lose the cause of action if she does not reach the age of majority before limitations has lapsed.[142]

Similarly, in *Nelson v. Krusen,* the Texas Supreme Court held that the same statute was unconstitutional because it permitted limitations to lapse when the plaintiff did not know or could not reasonably know he was injured.[143] Again, the court reasoned the restriction was unreasonable because it would require the plaintiff to do the impossible—sue before he had any reason to know he had a reason to sue.[144]

The Texas Supreme Court has ruled on whether the prior version of Section 101.106(f) violated the Open Courts provision in *Thomas v. Oldham.*[145] *Thomas* is a consolidation of two cases.[146] In both cases, the

[139] *Sax*, 648 S.W.2d at 666.

[140] *Id.* at 667 ("Additionally, we recognize that the length of time that insureds are exposed to potential liability has a bearing on the rates that insurers must charge. We cannot agree, however, that the means used by the legislature to achieve this purpose . . . are reasonable when they are weighed against the effective abrogation of a child's right to redress." (internal citation omitted)).

[141] *Id.* at 666.

[142] *Id.* at 667 ("The child, therefore, is effectively barred from any remedy if his parents fail to timely file suit.").

[143] Nelson v. Krusen, 678 S.W.2d 918, 922–23 (Tex. 1984). *See also* Neagle v. Nelson, 685 S.W.2d 11, 12 (Tex. 1985) ("The open courts provision of our Constitution protects a citizen, such as Neagle, from legislative acts that abridge his right to sue before he has a reasonable opportunity to discover the wrong and bring suit."). *Contra* Yancy v. United Surgical Partners Int'l, Inc., 236 S.W.3d 778, 785 (Tex. 2007) (holding that because there was no fact issue showing that Yancy "did not have a reasonable opportunity to discover the alleged wrong and bring suit within the limitations period," the open courts provision did not apply, and thus, did not save the time-barred negligence claim); Jennings v. Burgess, 917 S.W.2d 790, 794 (Tex. 1996) ("We do not reach the open courts challenge because the Burgesses had a reasonable opportunity to discover the alleged wrong and bring suit."); Morrison v. Chan, 699 S.W.2d 205, 207 (Tex. 1985) (holding that because Gray discovered the injury within the limitations period, the statute barring her claim did not violate the open courts provision).

[144] *Nelson*, 678 S.W.2d at 922.

[145] 895 S.W.2d 352, 357–58 (Tex. 1995).

[146] *Id.* at 354–55.

plaintiffs brought claims against a municipality and government employee.[147] Both plaintiffs prevailed on their claims against the municipality and government employee, and the trial courts found the municipalities and governmental employees to be jointly and severally liable.[148] The municipalities paid the statutory limit.[149] However, the damages exceeded the statutory limit, and the plaintiffs attempted to collect the remaining amount of the judgment against the government employee.[150] In one of the consolidated cases, the court of appeals held that after a judgment has been imposed against a governmental unit any claims against the employee are barred under Section 101.106(f).[151] On appeal, the plaintiffs challenged the constitutionality of Section 101.106(f) on a theory that prohibiting recovery from both government employees and the governmental unit violated the Open Courts provision.[152] The Texas Supreme Court disagreed, holding it is not a violation of the Open Courts provision because the plaintiff "may still opt to pursue the full common law remedy against the responsible employee, foregoing or postponing any attempt to recover from the government."[153] Thus, the Texas Supreme Court's holding that the prior version of Section 101.106(f) was constitutional was based on the condition the plaintiff had a choice as to which remedy to pursue.[154]

[147] *Id.*

[148] *Id.*

[149] *See id.*

[150] *See id.* at 354–55 & n.1; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.023(a) (West 2011) ("Liability of the state government under this chapter is limited to money damages in a maximum amount of $250,000 for each person and $500,000 for each single occurrence for bodily injury or death and $100,000 for each single occurrence for injury to or destruction of property.").

[151] *See id.* at 355. The court of appeals in *Oldham v. Thomas* held that the judgment rendered against the City barred the concurrent judgment against Oldham. *Id.* at 354. The court of appeals in *Gibson v. Spinks*, the other consolidated case addressed in *Thomas*, held that section 101.106 does not bar the rendition of concurrent judgments against a governmental unit and its employee. *Id.* at 355.

[152] *Id.* at 357.

[153] *Id.* at 357–58.

[154] *See id.*

B. Application of the Open Courts Test to Section 101.106(f).

A statute violates the Open Courts provision when: (1) there is an abrogation of a common law cause of action[155] and (2) there is no reasonable substitution of remedies[156] or the restriction is unreasonable when balanced against the purpose of the statute.[157] To be reasonable, the Texas Supreme Court in *Texas Association of Business v. Texas Air Control Board*, *Lucas v. United States*, and *Sax* states the reason for the restriction and exercise of police powers must *outweigh* the litigant's constitutional right of redress.[158]

In applying the Open Courts test to Section 101.106(f), the first prong is certainly satisfied. There is an abrogation of common law causes of action against the government employee but not against the governmental unit.[159] There is no common law cause of action against the governmental unit because the governmental unit retains sovereign immunity under common law.[160] Thus, Section 101.106(f) implicates the first prong of the Open Courts test as it applies to government employees. Under the second prong, it is unclear, given the dicta in *Franka*, how the court will interpret the reasonableness of the abrogation.[161] This Comment will lay out the

[155] *See* Travelers Indem. Co. of Ill. v. Fuller, 892 S.W.2d 848, 853 (Tex. 1995).

[156] *See* Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 523 (Tex. 1995) ("At common law, a person could be, and many were, severely injured, even up to the point of paralysis or amputation of a limb, and yet recover *nothing.* Workers covered by the Act receive lifetime medical benefits, wage replacement during convalescence, impairment benefits, and long-term wage replacement if they suffer a moderately severe physical impairment. We conclude that these benefits, which are available without regard to the employer's negligence and without reduction for the employee's negligence, adequately replace the common law negligence cause of action." (emphasis in original)).

[157] *See* Lebohm v. City of Galveston, 275 S.W.2d 951, 955 (Tex. 1955). In determining whether a statute is unconstitutional, a court must begin with a presumption of compliance with the constitutions of this state and the United States, the entire statute is intended to be effective, a just and reasonable result is intended, a result feasible of execution is intended; and public interest is favored over any private interest. TEX. GOV'T CODE ANN. § 311.021 (West 2005).

[158] *See* Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 450 (Tex. 1993); Lucas v. United States, 757 S.W.2d 687, 691–92 (Tex. 1988); Sax v. Votteler, 648 S.W.2d 661, 665–66 (Tex.1983).

[159] *See Lucas*, 757 S.W.2d at 690 ("'[I]t must be shown that the litigant has a cognizable common law cause of action that is being restricted.'") (quoting *Sax*, 648 S.W.2d at 666).

[160] *See supra* Part I.A.

[161] *See* Franka v. Velasquez, 332 S.W.3d 367, 385 (Tex. 2011).

possible arguments and criticisms for whether Section 101.106(f) is a reasonable restriction.

1. Section 101.106(f) May Be a Reasonable Abrogation of a Common Law Remedy.

In *Franka*, the majority indicates how it may apply the Open Courts test. Under the second prong, the majority in dicta indicates that Section 101.106(f) may be a reasonable restriction and exercise of police power in the interest of the general welfare.[162]

The majority states, "restrictions on government employee liability have always been part of the tradeoff for the Act's waiver of immunity, expanding the government's own liability for its employees' conduct" and then cites to *Thomas.*[163] In *Thomas,* sovereign immunity had been waived since the accidents involved a vehicle operated by a government employee, and the plaintiff retained the option to recover from the government employee instead of the governmental unit.[164] In *Franka*, however, there is no tradeoff or alternative remedy under the new statutory scheme for the plaintiffs.[165] Section 101.106(f) simply eliminates all suits against government employees when the negligent conduct is within the scope of their employment and provides for no new waiver of sovereign immunity against the governmental unit.[166] Does the Open Court's provision permit such *quid pro quo*—an abrogation of a plaintiff's otherwise viable cause of action against a government employee for limited waivers of sovereign immunity not applicable to the plaintiff's suit?

Justice Gonzalez's dissenting opinion in *Lucas* may provide the answer. He points out that "[t]he open courts provision was never intended to create any new rights, nor was it intended to elevate the common law to constitutional stature."[167] The legislature is free to abolish common law rules *entirely*, and therefore, so long as the legislature has a reasonable basis for abolishing the common law, the statute will not violate the Open Courts

[162] *See id.*

[163] *Id.*

[164] Thomas v. Oldham, 895 S.W.2d 352, 354–55 (Tex. 1995).

[165] *See supra* Part II.C.

[166] *See supra* Part II.C.

[167] Lucas v. United States, 757 S.W.2d 687, 698 (Tex. 1988) (Gonzalez, J., dissenting).

provision.[168] The legislature has never been required to provide *any* substitutions for modification of common law causes of action.[169] Justice Gonzalez argues that the court has never interpreted that a substitution of an individual remedy is necessary, and the court in *Lebohm v. City of Galveston* explicitly states, "[I]t may be seen that legislative action withdrawing common-law remedies for well established common-law causes of action for injuries . . . is sustained only when it is reasonable in substituting other remedies, *or* when it is a reasonable exercise of police power in the interest of the general welfare."[170] Thus, abrogation of a common law cause of action without providing any substitution of remedies does not violate the Open Courts provision so long as there is a reasonable exercise of police powers.[171]

In *Franka*, the court hints that a tradeoff of expanding government liability in certain situations while abrogating claims against government employees is a reasonable exercise of police powers even though the individual litigant may not always benefit from this tradeoff.[172] However, it may be difficult to reconcile a decision, holding that § 101.106(f) is a reasonable means of protecting government employees from frivolous litigation, with *Sax* and *Lucas*, where the court held that abrogation of legitimate claims was an unreasonable means of protecting medical providers from frivolous litigation.[173]

2. Section 101.106(f) May Be an Unreasonable Abrogation of a Common Law Remedy.

In *Texas Association of Business*, *Lucas*, and *Sax*, the Texas Supreme Court said that for the abrogation to be a reasonable exercise of police power the reason for the restriction must *outweigh* a victim's right to redress.[174] In determining whether an abrogation is reasonable, the court

[168] *See id.* at 697.

[169] *See id.*

[170] *See id.* (quoting Lebohm v. City of Galveston, 275 S.W.2d 951, 955 (Tex. 1955)) (emphasis added).

[171] *See id.* The majority in *Lucas*, however, declined to adopt this reasoning. *See id.* at 690.

[172] *See* Franka v. Velasquez, 332 S.W.3d 367, 385 (Tex. 2011).

[173] *Lucas*, 757 S.W.2d at 691–92; Sax v. Votteler, 648 S.W.2d 661, 665–66 (Tex.1983).

[174] *See Tex. Ass'n of Bus.*, 852 S.W.2d at 450; *Lucas*, 757 S.W.2d at 691–92; *Sax*, 648 S.W.2d at 665–66; *see also* LeCroy v. Hanlon, 713 S.W.2d 335, 341 (Tex. 1986); Lebohm v. City of Galveston, 275 S.W.2d 951, 955 (Tex. 1955).

has considered whether there is an alternative remedy, although this is not required under the Open Courts provision. For example, in *Thomas* the plaintiff had the option to sue and collect from either the government employee or the governmental unit, just not both.[175] However, under Section 101.106(f), victims of government employees have no remedy when the governmental unit retains sovereign immunity.[176] Since there is no alternative remedy available under § 101.106(f), the next question is whether or not complete abrogation is reasonable.

The Texas Supreme Court's holding in *Lucas* may also be informative on whether Section 101.106(f) is a reasonable abrogation of litigant's constitutional right to redress. In *Lucas*, the Legislature imposed a $500,000 cap on economic damages and a $150,000 cap on non-economic damages rendered against a physician or health care provider.[177] The Court of Appeals for the Fifth Circuit certified a question to the Texas Supreme Court asking if this cap violated the Open Courts provision of the Texas Constitution when the caps apply to an individual whose damages exceeded the $500,000 cap on economic damages and $150,000 cap on non-economic damages.[178] The Texas Supreme Court stated the medical malpractice caps were unconstitutional as applied to catastrophic patients because it unreasonably abrogated their common law claim.[179]

In determining whether the statutory scheme passed the second prong of the Open Courts test, the Texas Supreme Court held the medical damages cap was not a "reasonable exercise of police powers."[180] The court weighed the restriction against the statute's purpose.[181] The court said the legislature intended to limit not just frivolous but also legitimate health care liability claims to help ameliorate the effects of the "medical malpractice insurance crisis."[182] In balancing the competing interests the court said:

[175] Thomas v. Oldham, 895 S.W.3d 352, 357–58 (Tex. 1995).

[176] *See supra* Part II.D.

[177] *See Lucas*, 757 S.W.2d at 689.

[178] *Id.* at 687.

[179] *See id.* at 690.

[180] *See id.; see also id.* at 697 (Gonzalez, J., dissenting).

[181] *See id.* at 690–91.

[182] *See id.* at 691 (quoting Medical Liability and Insurance Improvement Act, 65th Leg., R.S. ch. 817 § 1.02(a)(5), 1977 Tex. Gen. Laws 2039, 2040, *repealed by* Act of June 2, 2003, 78th Leg., R.S. ch. 204 § 10.09, 2003 Tex. Gen. Laws 884, 884).

> In the context of persons catastrophically injured by medical negligence, we believe it is unreasonable *and* arbitrary to limit their recovery in a speculative experiment to determine whether liability insurance rates will decrease. Texas Constitution article I, section 13, guarantees meaningful access to the courts whether or not liability rates are high.[183]

Ultimately, Texans could avoid the Open Courts dilemma by amending the Texas Constitution to permit caps on non-economic damages.[184] Given the Texas Supreme Court's holding in *Lucas*, it is likely that entirely prohibiting recovery of economic and non-economic damages from negligent government employees' to limit harassing and frivolous litigation is also a violation of the Open Courts provision when there is no alternative remedy available, such as waiver of sovereign immunity.[185]

If a court takes up this issue and uses the reasonableness test as articulated in *Texas Business Association*, *Lucas*, and *Sax*, it will have to decide whether it is reasonable to cut off the tort victim's remedy to shield government employees from liability while the state shields itself with sovereign immunity.[186] Abrogation in this context would seem harsh, arbitrary, and perhaps even unreasonable. In analyzing the Open Courts provision, the Texas Supreme Court has never ruled on whether complete abrogation of a tort victim's remedy without providing any substitute or alternative remedy or window of time to sue is a reasonable exercise of police powers when weighed against the litigant's right to redress.[187] If the

[183] *Id.* (emphasis in original).

[184] Joseph M. Nixon, *The Purpose, History and Five Year Effect of Recent Lawsuit Reform in Texas*, THE ADVOC. (TEXAS), Fall 2008, at 18.

[185] *See Lucas*, 757 S.W.2d at 692.

[186] *See* Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 450 (Tex. 1993); *Lucas*, 757 S.W.2d at 691–92; Sax v. Votteler, 648 S.W.2d 661, 665–66 (Tex.1983).

[187] *See, e.g.*, Shah v. Moss, 67 S.W.3d 836, 842 (Tex. 2002) (holding that a statute of limitations on medical injuries did not violate the Open Courts provision when the plaintiff had a reasonable opportunity to discover the legal injury); Cash Am. Int'l Inc. v. Bennett, 35 S.W.3d 12, 21–22 (Tex. 2000) (holding that the statutory benefit provided was adequate to avoid a violation of the open courts doctrine); Jennings v. Burgess, 917 S.W.2d 790, 793–94 (Tex. 1996) (refusing to address a constitutional challenge when the plaintiff had a reasonable opportunity to discover the alleged wrong within the limitations period); Weiner v. Wasson, 900 S.W.2d 316, 321 (Tex. 1995) (applying tolling to the limitations period of a minor's claim to avoid an unconstitutional application of the Medical Liability Act); Tex. Workers' Comp. Comm'n v.

court weighs the need to protect government employees from unwarranted and frivolous suits against denying a legitimate litigant any right to redress, it is likely a court may hold that Section 101.106(f) violates the Open Courts provision.

IV. CONCLUSION

The Texas Supreme Court in *Franka* greatly extended the scope of immunity for government employees under Section 101.106(f). After *Franka*, government employees are immune from liability so long as their conduct is within the scope of their duties. If the governmental unit retains sovereign immunity, victims of government employee negligence may now be left without any remedy. This may be harsh for medical malpractice victims because sovereign immunity will almost never be waived under the TTCA. Furthermore, it is questionable what remains of the statutory election scheme under Section 101.106(a)–(e) or official immunity.

The Texas Supreme Court's interpretation of Section 101.106(f) raises a constitutional question, and it is unclear whether Section 101.106(f) violates the Texas' Open Courts provision. If the court uses the standard for reasonableness as laid out in *Texas Association of Business, Lucas,* and *Sax*, it may be difficult to find that the need to protect government employees from frivolous or unwarranted lawsuits outweighs a legitimate litigants' right to any redress for his injury. Therefore, a court may find that Section 101.106(f) is unconstitutional as it applies to suits when sovereign immunity is not waived.

Garcia, 893 S.W.2d 504, 522–23 (Tex. 1995) (holding the statutory benefits provided were sufficient to avoid a finding that the statute in question was unconstitutional).