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Supreme Court of Texas.
University of Texas Southwestern Medical Center at Dallas, Petitioner,
v.
The Estate of Irene Esther Arancibia by its Beneficiary Victor Hugo Vasquez-
Arancibia; Victor Hugo Vasquez-Arancibia, Individually; and Cecilia Vasquez-
Arancibia, Individually, Respondents.
No. 08-0215.

September 10, 2009.

Appearances:
Daniel L. Geyser, Office of the Attorney General, Austin, TX, for petitioner.
Lance E. Caughfield, Kelsoe Anderson Khoury & Clark, PC, Dallas, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson and Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated please. The Court is ready to hear argument in 08-0215, UT Southwestern Medical Center v. The Estate of Irene Esther Arancibia.
JUSTICE MEDINA:Are you always so happy?
ATTORNEY DANIEL GEYSER:I normally am. Especially today. I hope not.
MARSHALL: May it please the Court, Mr. Geyser will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

## ORAL ARGUMENT OF DANIEL L. GEYSER ON BEHALF OF THE PETITIONER

ATTORNEY DANIEL GEYSER: May it please the Court, for two, independent reasons, the plaintiff's suit is barred under the controlling terms of the Tort Claims Act. First, the plaintiff's failed to provide notice which is a jurisdictional error under the 2005 Amendment to the government code section 311.034. Contrary to the holding below, that amendment does control impending cases. The rule against retroactivity does not apply outside the limited context of substantive rules and vested rights and because no one has the right to file a statutory action while at the same time ignoring the statute's very terms, retroactivity is simply not an issue in this case. Second, the Tort Claims Act Election of Remedies Provision Section 101.106

independently precludes this action. The defendant employee invoked his absolute right under subsection (f) to be dropped from the suit and plaintiffs failed to respond by dismissing the employee and adding the employer within the mandatory 30-day window.

JUSTICE HARRIET O'NEILL: Let's to back to the actual, to the notice. The argument's been made that they had actual notice here. You've got the death of the patient and immediate phone calls saying something terrible has happened and immediate requests for risk management review. The purpose of risk management is to determine your culpability. Why would there not be actual notice in this situation? It seems like your brief contemplates that you have to admit fault for there to be actual notice.

ATTORNEY DANIEL GEYSER: I believe that this Court's standard in Simons actually imposes that as the burden and Simons specifically rejected the notion that the death alone is sufficient to establish notice of fault.

JUSTICE HARRIET O'NEILL: A subjective awareness that its fault contributed to the claimed injury. So all the governmental entity has to do is say we weren't at fault.

ATTORNEY DANIEL GEYSER: But, Justice O'Neill, I think there are two important points. One, the facts in this case and, two, the reason why the standard is as high as it is. The facts on this case actually disprove any subjective awareness of fault or even contributing fault. The very email that noted the death and the called it a terrible outcome in death whether it's expected or a result of negligence is a terrible outcome, said that they went through the procedure and thought it went well and "it went perfectly." That shows that the doctor in this case not only didn't think that they were at fault, but thought that the procedure as they performed it had been performed correctly.

JUSTICE HARRIET O'NEILL: So they'd have to say boy did I mess up?

ATTORNEY DANIEL GEYSER: They do and the reason for that is that degree of subjective intent is what puts the defendant in the same position they would have been had the plaintiff provided the mandatory written notice under the Act.

JUSTICE PHIL JOHNSON: I thought there was a discussion about this having been reviewed by a committee that, in fact, found that there was a violation of standards, but it was accepted. Am I misreading the briefs somehow?

ATTORNEY DANIEL GEYSER: No, Your Honor, that's exactly right.

JUSTICE PHIL JOHNSON: Does a peer review committee or a quality control committee or what committee was that?

ATTORNEY DANIEL GEYSER: It was a doctor who, I believe, is a member of the peer review committee. It's the first step of reviewing what happened and he did conclude that there was a deviation, but found that their actions were acceptable, which is the opposite of negligence.

JUSTICE PHIL JOHNSON: There's a deviation from the standard of care, but it was an acceptable deviation?

ATTORNEY DANIEL GEYSER: That's correct. It was not.

JUSTICE PHIL JOHNSON: Well doesn't that give subjective notice that there was a deviation from the standard of care and that seems like that's what Justice O'Neill just talked about. We have subjective knowledge that there was a deviation from the standard, but we think it's all right so, therefore, we don't have notice. Is that, that has to be, that's the position you're taking it seems like.

ATTORNEY DANIEL GEYSER: It's a deviation from perhaps the exact way the procedure should have run, but that does not mean that the

deviation showed negligence. In fact, they found that their conduct was acceptable, which again is the opposite of negligence and the reason.

JUSTICE HARRIET O'NEILL: What legal principle does that correlate to, an acceptable deviation?

ATTORNEY DANIEL GEYSER: There could be a set way that the procedure typically runs and if it deviates a little, but not to the degree that would rise to medical negligence, that could be still an acceptable procedure and in this case, it is the plaintiff's burden to show that they actually thought they were at fault. Now maybe the Court disagrees with the conclusion of the doctor who reviewed the file and not only did he find it acceptable, but he elected not to elevate the case to the next standard or to the next step of administrative view precisely because it was acceptable conduct. So, in this case, they need to show that the defendant was in the same position they would have been and had they received written notice, the written notice is what gives the defendant the full incentive as this Court explained in Simons, to investigate the accident.

CHIEF JUSTICE WALLACE B. JEFFERSON: I may not have understood when you first began your remarks, but are you saying that 311.034 applies or does not apply?

ATTORNEY DANIEL GEYSER: It does apply to this case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Oka. Retroactively? Or that's not the issue.

ATTORNEY DANIEL GEYSER: The issue is whether the application of that statute to this case would be retroactive under Texas law and retroactivity is a term of art and it means a change in the law that affects a substantive rule or a vested right and, in this case, it doesn't affect either substantive rules or vested rights. So the change in the law does apply to this pending case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay now my question is and we will get more into retroactivity in a moment, but there presumably are many pre-2005 cases before this statute was in effect that proceeded to judgments. If your argument is correct that there's no jurisdiction here then in those cases that went to judgment and money changed hands are void. They should go away and the government gets its money back, is that right or not?

ATTORNEY DANIEL GEYSER: No, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why not?

ATTORNEY DANIEL GEYSER: Any case that has reached a final, nonappealable judgment, it becomes vested that then the plaintiff in those cases does have a substantive.

CHIEF JUSTICE WALLACE B. JEFFERSON: But the trial court never had jurisdiction over those cases. How would it ever become vested?

ATTORNEY DANIEL GEYSER: It would become vested so long as it became final before the act's effective date. The act's effective date is what kicks in the new jurisdictional stripping provision. Before that, any action that vests becomes a final judgment. The Court, at that time, did have jurisdiction. It's only once the act becomes effective that a failure to provide notice does become a jurisdictional impediment instead of just a mandatory merits-based impediment to the plaintiff prevailing.

CHIEF JUSTICE WALLACE B. JEFFERSON: So vested right requires a judgment?

ATTORNEY DANIEL GEYSER: It requires a final, nonappealable judgment, that's right, and I believe that in this case, it's clear that this statute doesn't affect substantive rights for at least four different reasons.

JUSTICE PHIL JOHNSON: Counsel, let me stop just a moment. The Court of Appeals referenced a different statute that said that unless we, the legislature specifically says it's retrospective or retroactive, it's presumed not to be. Neither one of you seem to discuss that, but that's what the Court of Appeals kind of hung its hat on.

ATTORNEY DANIEL GEYSER: The Court of Appeals was wrong and this is why. That statute assumes that the nature of the change would implicate a substantive rule or a vested right.

JUSTICE PHIL JOHNSON: But it doesn't say that though. It just says any statute. How do we get to the extra words you're adding to it?

ATTORNEY DANIEL GEYSER: They're not extra words, Your Honor. Retroactive, again, is a term of art. When the legislature uses words like that in the Cook Construction Act, they're legislating against the backdrop of precedent in both state courts and federal courts that have long established that a rule is not retroactive or retrospective if it's just a change in procedure or change in jurisdiction and, in this case, there is no change to any of the substantive rights at issue. The plaintiff, in fact, had no claim under pre-existing law because they failed to provide notice.

JUSTICE DON R. WILLETT: Are these your four reasons you were going to get into?

ATTORNEY DANIEL GEYSER: These are. The first is that there is no substantive right to file a procedurally defective claim. Once the plaintiff failed to provide notice and the defendant interposed a timely objection, that was sufficient under both Simons and Loutzenhiser for the case to be dismissed. So this isn't depriving the plaintiff of any right they had. No one ever has a right to invoke the statute and yet ignore what the statute says the plaintiff has to do to prevail at trial. The second reason is looking to the traditional load stars of the retroactivity analysis and this is reasonable lot reliance and settled expectations. No one ever has a reasonable expectation that anything will happen other than the case will be dismissed if they fail to file the mandatory prerequisites to suit. The third reason is that this is a statutory action and another longstanding background principle of Texas law is that statutory actions because they're provided at the discretion of the legislature can also be repealed at the discretion of the legislature. Until the action has reached a final, nonappealable judgment, which is what distinguishes this case from the cases that became final before the act's effective date, the action can actually be removed entirely. In this case, there's no change to the underlying substantive conduct or the substantive standards. There's no change to the procedure to enforce it. The only change is what happens when you fail to follow a mandatory procedure and the fourth reason is that this.

JUSTICE NATHAN L. HECHT: Then the change is the difference between no jurisdiction and dismissal, which is very small.

ATTORNEY DANIEL GEYSER: That's exactly right. It's extremely small and in this case, the only practical effect is the timing of when the case will be dismissed. Under a rule where this is nonjurisdictional, the same result will happen. It will just happen after the taxpayers and the plaintiffs have absorbed even more litigation expense and the proper notice rules finally applied on direct appeal after a needless trial.

CHIEF JUSTICE WALLACE B. JEFFERSON: It may be a small change between dismissal and no jurisdiction, but before the act, there was no consequence to failing to give notice especially when the trial

proceeds and discovery I mean there is litigation going on here for a year or so and under prior law, that would litigation could continue and the question of notice goes away, isn't that right?

ATTORNEY DANIEL GEYSER: That's wrong, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: What's wrong?

ATTORNEY DANIEL GEYSER: Once the defendant's amended their answer, under Texas law defendants have the right to amend their answer even after trial, the trial has gone on for awhile. This hadn't reached a trial. There was still in the discovery change and the motion stage. They amended their answer. The plaintiffs didn't object to the amended answer and the amended answer raised the notice defense. So at that point, there was a hearing on the notice defense and if the lower court had found that, in fact, notice wasn't provided and that actual notice was inadequate in this case, the case would be dismissed. So the only effect in this case is whether the actual notice inquiry will be determined immediately on interlocutory appeal and potentially and we submit it should be dismissed on those grounds and save jurors' time from coming to a for a needless trial and the taxpayers' time in defending these suits and the plaintiffs and the time in trying to litigate this action. It just gives an immediate resolution as the legislature intended through the interlocutory Pelletier restriction statute and we do think it's very important to realize that there is a reason that the Simons standard is so high for actual notice and that's providing written notice is the ordinary way that the legislature intended in the vast majority of claims and, in fact, in every claim where plaintiffs actually should do it to provide notice to the defendant entity, the actual notice is a fast stop.

JUSTICE NATHAN L. HECHT: In Simons though, there was an auger attached to the tractor's power take-off and I believe the plaintiff had a wrench attached to it or something and it was engaged and the wrench came around and hit him so maybe he shouldn't have had the wrench on the auger, maybe the auger shouldn't have been, maybe the tractor shouldn't have been running, but anyway there are lots of scenarios where different people could have been at fault or maybe nobody was really at fault, but is a perforated bowel different? I mean, here is there anything in the record that we have that would indicate that perforated bowels just happen like wrenches on power take-offs and that it's not, it can happen outside someone's negligence?

ATTORNEY DANIEL GEYSER: Yes, Your Honor, and, in fact, we have the best evidence of that in the record is the review of the doctor who looked at the procedure and found that the conduct was adequate and acceptable.

JUSTICE NATHAN L. HECHT: Well acceptable, you know, I don't know if that means that bad things sometimes happen, but it's still the doctor's fault. The bowel shouldn't be perforated.

ATTORNEY DANIEL GEYSER: That's certainly true, but sometimes any invasive surgery and this is an invasive surgery comes with the risk that sometimes accidents do happen. Accidents don't always rise to the level of medical negligence. There could be a deviation from procedure that is still acceptable where the conduct was still within professional standards in the same way that a trial lawyer might miss some objections at trial, but still not commit malpractice in the legal sense. It's not true that just because something bad happened that shows that they understood they were at fault and that is the standard that Simons says because that is the level of knowledge that puts the defendant on notice that they need to investigate and prepare a defense

in the same way that they would have had they received written notice and written notice is so easy to provide.

JUSTICE HARRIET O'NEILL:But you'd admit that there's a weird sort of procedural conundrum under 101.106 (b) because you don't have to give notice to the individual doctors, but then if the individual doctors move to substitute the governmental entity, what happens to notice and there's just sort of a gap there in the statutory scheme.

ATTORNEY DANIEL GEYSER: We submit that there is no gap.

JUSTICE HARRIET O'NEILL: Well, of course, you do, but.

ATTORNEY DANIEL GEYSER: The notice requirement is categorical. It doesn't draw any exceptions and the legislature could have drawn an exception if it chose to do that and the purpose of the notice requirement applies whether the defendant is the initial defendant in the case or substituted defendant. They still have the same need to start collecting evidence and prepare a defense within six months of the accident. It shouldn't be up to the plaintiffs to essentially create what will be a broad sweeping end-run around the notice requirement by simply suing the employee, watching as the employee predictably drops out of the case because they have the absolute right to do that and it's the rare employee who chooses that they would rather face the lawsuit or they could substitute in the employer on their behalf. I see my time has expired.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any questions? Thank you, counselor. The Court is ready to hear argument from the respondents.

MARSHALL: May it please the Court, Mr. Caughfield will present argument for the respondents.

ORAL ARGUMENT OF LANCE E. CAUGHFIELD ON BEHALF OF THE RESPONDENT

ATTORNEY LANCE CAUGHFIELD: Good morning and may it please the Court. Your Honor, we are confronted with something of a circular argument this morning because, in essence, the government is asking us to determine the notice issue before we determine whether or not the Court has jurisdiction to determine the notice issue and that is because the government is arguing that noncompliance with the notice issue means that there was no vested right. Therefore, the notice statute does not have retroactive application and so with Court's permission, I will begin with the notice issue itself, which was Justice O'Neill's opening question regarding actual notice. There are actually three reasons why written notice was not required. First is because written notice is never required for individual employees. They are sued in their individual capacity. Section 101.101(a) provides that a governmental unit is entitled to receive notice of a claim against it.

JUSTICE NATHAN L. HECHT: But now you're suing the government.

ATTORNEY LANCE CAUGHFIELD: We are now, Your Honor, but only because of the operation of 1006(f).

JUSTICE NATHAN L. HECHT: So you think (f) excuses 101(a).

ATTORNEY LANCE CAUGHFIELD: At the time suit was initiated, pre-suit notice was only required for governmental units who weren't sued. Suit was initiated and then there was no pre-suit requirement engrafted into the act in any of the other sections. 106(f) requires that upon the motion of an individual employee, who was working within the scope of his employment with a governmental unit, and when the governmental unit can be sued under the Tort Claims Act, the individual may move for

dismissal and the governmental unit may be substituted in his or her place.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thirty days, but it doesn't say and the notice in provision in 101.101 is excused in that circumstance.

ATTORNEY LANCE CAUGHFIELD: It doesn't say that, Your Honor, but there never is a notice requirement. There never is a pre-suit notice requirement that arises.

CHIEF JUSTICE WALLACE B. JEFFERSON: There is for the government, for governmental entity.

ATTORNEY LANCE CAUGHFIELD: There is for the government.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right.

ATTORNEY LANCE CAUGHFIELD: But, Your Honor, there is no requirement to give that pre-suit notice to the government when only an employee is being sued in his individual capacity.

JUSTICE HARRIET O'NEILL: Well, but subsection (f) says if the suit against the employee is based on conduct within the scope of the employee's employment and if it could have been brought under this chapter against the governmental unit.

ATTORNEY LANCE CAUGHFIELD: Correct, Your Honor.

JUSTICE HARRIET O'NEILL: And it could not have been brought against the governmental unit without the notice.

ATTORNEY LANCE CAUGHFIELD: Interestingly enough, that argument has actually been raised by the plaintiff's bar in an effort to eradicate individual immunity under 106(f) and has been rejected. The Court of Appeals in Bailey v. Sanders, San Antonio Court of Appeals in 2008, was confronted with this same argument. The plaintiff's bar raised the argument that whenever no notice is provided to the governmental entity 106(f) can never come into play because the governmental entity could not have been sued under the Tort Claims Act. Therefore, according to the argument that was raised in Bailey by the plaintiffs, there can be no immunity for the individual employees. Now the Court rejected that because, as we state in our brief, it simply makes no sense to apply it in this manner. If so, then the very purpose of 106(f), which is to afford immunity to governmental employees is negated. Instead, the act should be read as the act is written that there is only a pre-suit notice requirement whenever the governmental unit is sued.

JUSTICE PAUL W. GREEN: So let me make sure I understand you. So you're the plaintiff and you realize that your notice time has passed so you choose then to sue the individuals knowing that the individuals will switch out to the governmental entity and then you don't have to worry about the notice.

ATTORNEY LANCE CAUGHFIELD: Your Honor is presenting the problem with the way the statute is written, which is it's subject to gamesmanship on both sides and that is a problem with the way this statute is drafted. However, that problem wasn't presented in this case. In this case...

JUSTICE HARRIET O'NEILL: Do you have the cite for that?

ATTORNEY LANCE CAUGHFIELD: Yes, Your Honor, I do. That is 261 SW 3rd 154.

JUSTICE DALE WAINWRIGHT: But can the statute be read to avoid that gamesmanship?

ATTORNEY LANCE CAUGHFIELD: Your Honor, the statute can be read to avoid the gamesmanship in this case by providing that no actual notice, that no written notice needs to be provided [inaudible] .

JUSTICE DALE WAINWRIGHT: Addressing Justice Green's problem, of course, we've got your particular facts in your case before us, but

interpreting the statute, we've got to make sure it's consistent with no gamesmanship if the statute can be read that way reasonably.

ATTORNEY LANCE CAUGHFIELD: Your Honor, the statute can be read in such a way as to fit within the example that was given that if the notice period, the six-month notice period has expired, then there is no notice required if the individuals are brought into the lawsuit, that's correct. Then the only restraint is going to be the statute of limitations.

JUSTICE DON R. WILLETT: You said there were three reasons why written notice is not required. You got through one right?

ATTORNEY LANCE CAUGHFIELD: Yes, Your Honor.

JUSTICE DON R. WILLETT: What are the others?

ATTORNEY LANCE CAUGHFIELD: The other two, first, Your Honor, the actual notice has been provided and the Court has already addressed this briefly. There is not only an email chain that describes "the terrible outcome of the surgery" including identity of the parties, the doctors and Ms. Arancibia, the decedent, the actual injury was the piercing of the bowel and the resulting death, including times, which is all that's required for notice underneath Simons. There was further the report that was referenced and that report at page 298 and 299 of Clerk's record, states on the bottom this form is for risk management quality management use only. The form goes on to state in handwritten notes, a technical error occurred during the original hernia operation, resulting in a through-and-through small bowel injury. The patient died of sepsis. And as noted by the Court, there was a deviation noted from established standards that was deemed to be acceptable. Now one of the questions that was raised by the Court was whether or not the fact that the hospital itself said well, it's acceptable means that Simons hasn't been fulfilled. The holding of Simons was to clarify the second of the Kathy factors, that the governmental units alleged fault to be provided in the notice. The actual holding is that there must be subjective awareness of its fault as ultimately alleged by the claimant in producing the claimed injury. I think that language is important because it focuses on as ultimately alleged by the claimant. There doesn't need to be an admission of fault. There has to be knowledge of fault as ultimately alleged by the claimant and that was certainly present in this case. In this case, the through-and-through bowel perforation that caused the sepsis, the septicemia and the death was acknowledged just days after this incident and was reported to risk management. So there was actual notice in this case.

JUSTICE PHIL JOHNSON: And it did not go any further beyond the one physician?

ATTORNEY LANCE CAUGHFIELD: Your Honor, that physician chose to not send this further in the review process. They checked off a box that said yes, there are deviations, but I find them acceptable. Do not forward this to the committee.

JUSTICE PHIL JOHNSON: And there was no peer review of any nature other than that and so far as.

ATTORNEY LANCE CAUGHFIELD: In the records that were produced to us, there was no further peer review.

JUSTICE HARRIET O'NEILL: Let me ask you separate and apart from the actual notice issue, the substitution in of the governmental unit, the plaintiff has 30 days to file amended pleadings. How can the individual doctors agree to extend deadline on behalf of the governmental unit by rule 11 agreement.

ATTORNEY LANCE CAUGHFIELD: 106(f) has been analyzed by several different Court of Appeals on that particular issue. Is it an automatic

dismissal after 30 days or does there have to be some proof given? In fact, most of the Courts of Appeals have decided that there has to actually be proof, that since it is the motion, the movement, there is the burden of proof and they must establish the three factors, which are required which is that the employee is a governmental entity, that the suit is based on conduct within the scope of their employment and that suit could have been brought against the governmental entity underneath the Tort Claims Act. We cite one case in our brief, also Hall v. Prodoss, Philips v. Defante and a case that's currently pending before this Court, Franca v. Velasquez, have ruled that there's more than just filing the motion, that the motion actually has to have proof. Franca v. Velasquez is particularly interesting because in that case there was a fact issue that was raised, the movement said well, I've raised the fact issue. The statute says in 30 days you have to dismiss the case. The Court said that's inherently unfair because if only a fact issue is sufficient or indeed if filing a motion is sufficient or in this case as alleged, filing an answer that references the statute is sufficient, then this automatic dismissal can result and dismissal of individual employees when, in fact, the other requirements are not met. They were in the scope of their employment. In fact, it will be proved later in the case. Or they worked, or the governmental entity could not have been sued and it may be proven later in the case, in which case there is no remedy left to the plaintiff. They have been automatically dismissed from the suit under 106(f) and they have no recourse against the governmental unit. We would urge the Court to follow this same sort of reasoning, but you don't need to go as far as the Court in Franco v. Velasquez in this case because there was only an answer that was filed. The answer referenced the statute including its prayer for relief that it be given the statutory relief, but it didn't attach any evidence. It didn't seek to prove the elements. In fact, it didn't list the elements.

JUSTICE NATHAN L. HECHT: If there were evidence, could the parties extend the deadline by rule 11 agreement?

ATTORNEY LANCE CAUGHFIELD: Your Honor, I think the reasoning of these statutes would allow Rule 11 Agreement to be put into place.

JUSTICE NATHAN L. HECHT: How's that?

ATTORNEY LANCE CAUGHFIELD: Because, Your Honor, this is a motion again that must be proven. It falls within the rules of civil.

JUSTICE NATHAN L. HECHT: How is it proven?

ATTORNEY LANCE CAUGHFIELD: It falls within the rules of civil procedure to that extent and so before the hearing is held, if the parties enter into a Rule 11 Agreement that they will not file a motion, certainly that would be appropriate. No motion is filed, this is never triggered. If a motion is filed, and the motion has not yet been heard and the proof hasn't yet been provided to the Court, then, I believe a Rule 11 Agreement and I think the authorities support this, would be appropriate in extending time to have that motion heard. The problem in this case is that the motions have not been heard.

JUSTICE NATHAN L. HECHT: Suppose the hardest case, there is evidence, it is heard, can the parties still extend the deadline?

ATTORNEY LANCE CAUGHFIELD: That is the hardest case, Your Honor.

JUSTICE NATHAN L. HECHT: Yeah.

ATTORNEY LANCE CAUGHFIELD: Unfortunately, I don't have a very clean answer for you, but.

JUSTICE NATHAN L. HECHT: If the answer is no, then why should they be able to do it any other way, that's the next question.

ATTORNEY LANCE CAUGHFIELD: If the answer is no.

JUSTICE NATHAN L. HECHT: If the answer is no, which it would seem to be, they can't extend it, then why should they be able to extend it because there was a delay in the hearing or [inaudible] approve or some other reason.

ATTORNEY LANCE CAUGHFIELD: Well I think the answer can be no on that situation and yes on the others based upon the language of section 106(f). Section 106(f) is conditional. It says if this factor is met and if the other factor is met and those comprise the three factors that I read to the Court earlier, then a plaintiff may move and upon such motion 30 days after the case shall be dismissed. The section itself seems to be contingent upon establishing those factors. Therefore, in Your Honor's situation, the answer could still be no, that those factors have been established and so after that point, there could not be an extension.

JUSTICE HARRIET O'NEILL: So under your argument, the Rule 11 Agreement really is a red herring. You wouldn't need the rule 11 agreement.

ATTORNEY LANCE CAUGHFIELD: Well you wouldn't need to have the Rule 11 Agreement in that particular scenario. Now again in our case, the Rule 11 Agreement was entered before Dr. Watson ever filed his motion and, in fact, he didn't file the motion until January 20 and the case was dismissed against him and the governmental entity was brought in on January 28 and so we don't really have the problems that were focused in on here.

JUSTICE HARRIET O'NEILL: But there is a problem as to two of the doctors, isn't there?

ATTORNEY LANCE CAUGHFIELD: Dr. Yow and Dr., yes, Your Honor, there is a problem as to them and they fit within that second scenario, which is where there has been a motion filed, but there has not been a motion heard yet by the Court.

JUSTICE HARRIET O'NEILL: And under both of those scenarios, the rule 11 is irrelevant.

ATTORNEY LANCE CAUGHFIELD: I believe the rule 11 could be used to extend the period of time for the proof underneath the reading of 106(f). If those issues have not yet been established, since 106(f) is contingent upon those issues being established, then a Rule 11 Agreement could be effective to extend the date of the hearing. Now, Your Honor, briefly in the time that's remaining to me, unless there's any further questions of the notice issues and the third issue, since Your Honor is keep track, the third issue was going to be the argument under 106(f) that requiring notice can lead to gamesmanship, which has already been addressed in an earlier discussion. Now turning to the retroactivity question. In Loutzenhiser, this Court said that the notice provisions of the Tort Claims Act were not jurisdictional. Now the issue in Loutzenhiser was not whether those issues could be raised at any point in litigation, but whether they could be raised in a plea to the jurisdiction. This Court determined that they could not because they were not jurisdictional. The response of the legislature was section 311.034. The legislature in an obvious attempt to judically, to legislatively overturn the judicial decision on Loutzenhiser simply stated that these determinations of notice and the other conditions precedent were jurisdictional. Of course, we don't have a definition of what jurisdictional means and jurisdictional as noted in the brief can mean a variety of different things, but we do know what they were trying to address and they were trying to address the fact that these notice issues could not be raised in a pleaded jurisdiction under Loutzenhiser. The intent seems to be that they could be raised under

the plead to jurisdiction after the statute was brought into effect. Now there is a prohibition against retroactivity, of course, in the Texas Constitution it is much more clear than in the Federal Constitution found in Article 1, Section 16 and enforced under Article 1, Section 29. Statutes as a result are deemed to be perspective only or presumed to be perspective only.

JUSTICE PHIL JOHNSON: Before you go into the constitutional argument, do you agree with opposing counsel on the statutory argument that the Court of Appeals used? It just said that the statute was not distinguished between procedural or substantive or vested rights. It just says any statute and he takes the position that doesn't apply when it's only procedural or remedial. Are you in agreement with that or do you [inaudible] with your opponent's position or do you disagree with that?

ATTORNEY LANCE CAUGHFIELD: I agree with both the lower court and its interpretation of 311022 and with this Court in the Subaru case and its analysis of the prospective presumption, which [inaudible] applied.

JUSTICE PHIL JOHNSON: Well, if we go with that position, you don't even need to talk about the constitutions, is that correct? Because it's not retroactive. It doesn't specifically say so.

ATTORNEY LANCE CAUGHFIELD: And, Your Honor, I would say this is actually a codification of constitutional law. Landgraf recognized this has been a long-held presumption that the statute is going to be prospective as opposed to retroactive.

JUSTICE PHIL JOHNSON: But if you violate the constitution, then it's void. The statute just tells us how to interpret the laws.

ATTORNEY LANCE CAUGHFIELD: Well that's actually an interesting question, Your Honor, because under Article 1, Section 29, if a statute is deemed to be retroactive, it's also void.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY LANCE CAUGHFIELD: So.

JUSTICE PHIL JOHNSON: But the statute does, one statute's not going to void another one. It just tells us how to interpret it.

ATTORNEY LANCE CAUGHFIELD: That's correct, Your Honor, and it's a codification, like I said, of the general presumption of prospective application. The Landgraf Court explained why that presumption should be applied and, again, Landgraf was a remedies case, essentially. It's similar to this because it was the addition of a new remedy underneath federal law for a cause of action. Landgraf said that requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it's an acceptable price to pay for the [inaudible] benefits. We don't have that sort of consideration by Congress here. In fact, the statute doesn't say it should be applied retroactively at all and so the presumption should remain in place of prospective application. Now the argument has been raised that this is merely a procedural rule, but as Justice Bradley back in 1885 mentioned in a dissenting opinion, remedies are the life of rights and that was essentially what this Court recognized in the Lykes case. In the Lykes case, this Court looked to the change of the Tort Claims Act and it recognized that where there has been a change in the remedy, there can be a disruption of the right and where that right is abolished, where the remedy is completely abolished, then there can be an improper retroactive application of the statute. That's what's happened in this case. In Lykes, the change allowed the plaintiff time to amend their pleadings. The plaintiff's cause of action accrued several months before the change in law was to go into effect. In this case, there was no

opportunity to amend any potential defect. Assuming that written notice was ever required, pre-suit written notice could not be provided in this case, a year after the litigation was commenced, which was in the plea the jurisdiction was filed. And so contrary to Likes, the remedy when it was eradicated took away the life of the right and so a vested right was effected.

JUSTICE HARRIET O'NEILL: Okay, let me follow up real quickly on the 30- day extension of the 30-day requirement. I was a little bit confused by your argument there. Statute says the employee can move for dismissal of the suit unless the plaintiff files amended pleadings dismissing the employee and names the governmental unit as defendant on or before the 30th day after the date the motion is filed. I took it from your answer that it had to have been granted and the 30 days extended the discovering period to prove the elements that's necessary for the grant, but this just says after the date the motion is filed.

ATTORNEY LANCE CAUGHFIELD: And this is the problem the Courts of Appeals are struggling with in trying to interpret this provision. Of course, if there is a proof element required, then simply 30 days after filing doesn't work.

JUSTICE HARRIET O'NEILL: But that's what the statute says.

ATTORNEY LANCE CAUGHFIELD: And the statute in section 106(f) begins if a suit is filed against an employee based on conduct from the general scope of the employee's employment and if it could have been brought under this chapter, the suit is considered to be against the employee and the employee's official capacity only on the employee's motion and then it continues on to the section that was read by Your Honor. The statute is written to be conditional in this manner.

JUSTICE HARRIET O'NEILL: But it seems to put the plaintiff to a choice in that instance. The plaintiff's got to decide whether to ride within the course and scope course or outside the course and scope course and replete through this act is the forcing of that choice early on right or wrong. It seems to be the plain language.

ATTORNEY LANCE CAUGHFIELD: And that's, Your Honor, one of the reasons that I'm glad not to be the counsel of Franco v. Velasquez, which is the case that does squarely present these issues. As we noted in our motions and our responses to the petition, this case doesn't squarely present that issue, but I can certainly address your question and that is a concern that the plain language of the act does require dismissal after 30 days of the filing of the motion. What I believe the Franca Court is getting at is what this Court noted in the Reata Construction Corporation v. City of Dallas case, which is that sovereign immunity is essentially a common-law concept and that this Court may modify sovereign immunity when it's application would be unfair. I see that my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Finish your thought.

ATTORNEY LANCE CAUGHFIELD: When it sees that the application would be unfair. In that case it would, in the Reata case, it would be unfair for a governmental entity to sue and bring affirmative claims against an entity, but not be allowed to be sued in return. It may very well be that under the construction of this section 106(f) that it would be inherently unfair to have a mechanism whereby half of the potential right, which is against either the individual in their individual capacity or the government is taken away within 30 days without any real notice, opportunity, due process to have that determination made and that this Court may very well decide under its Reata holding and its right to govern the common law that that would be improper.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank

you, counselor.

REBUTTAL ARGUMENT OF DANIEL L. GEYSER ON BEHALF OF PETITIONER

ATTORNEY DANIEL GEYSER: May it please the Court, a few quick points. The first is that this Court does need to determine the jurisdictional question in order to determine its own jurisdiction just as the Court recognized in both Simons and Loutzenhiser. So the predicate issue. So the predicate issue before we get to whether actual notice was met is whether this is a jurisdictional question in the first place.

JUSTICE HARRIET O'NEILL: Well, but if there's actual notice, then the jurisdictional question doesn't arise.

ATTORNEY DANIEL GEYSER: It does, Your Honor, because this comes up under interlocutory appeal. This Court only has jurisdiction to address jurisdictional issues. So before the Court can determine whether notices are either met or not, whether we prevail on the merits or not of that issue, it first has to determine whether it's jurisdictional in the first place and we submit that this is clearly a law that does not implicate the retroactivity concerns. My opposing counsel referenced the Landgraf decision. Landgraf pointed out that there are two competing strands of case law. These are the same competing strands that this Court has recognized time and again in its decisions extending back over a century, which is laws that change and affect substantive rules and vested rights are presumed not to apply retroactively under federal law and are banned from applying retroactively under state law, but laws that do not implicate those substantive rules and vested rights are presumed to apply immediately to all pending cases.

JUSTICE PHIL JOHNSON: Any of those cases interpret this statute?

ATTORNEY DANIEL GEYSER: I believe in Subaru to the extent it mentioned it, it acknowledged that retroactivity concerns precisely because retroactivity is a term of art, are implicated only if the change in the law implicates substantive rights.

CHIEF JUSTICE WALLACE B. JEFFERSON: But Subaru, we said, really what we're talking about is a different forum. We're not going to extinguish a right. You can do it, you just have to exhaust administrative remedies at the agency before you come up. So it didn't ultimately get rid of the case.

ATTORNEY DANIEL GEYSER: It may not have, Your Honor, but I think here too if someone did have a valid claim, notwithstanding their failure to provide notice, they could take that to the legislative form and the law does not guarantee any particular tribunal, even a judicial tribunal, especially to trial statutory action and most definitely to try an action that the plaintiff has failed to meet the controlling prerequisites to maintaining that cause of action in the first place. This simply does not implicate any substantive or vested right. The Lykes case is not to the contrary. In that case, the Court was looking at a common law, a vested common law action, not a statutory action. And in any event, I believe Lykes actually rejected the claim precisely because there was a period where the right could have vested.

JUSTICE PHIL JOHNSON: Justice Hecht asked the question about the perforated bowel and if this is a little different maybe than a power takeoff on the tractor. What more would the hospital have done if they had been given notice of claim other than what they did? They had the doctor that scrubbed looked at it. The doctor that supervised looked at

it, had another physician look at it. They knew exactly what was involved. What more would they have done had they received notice that someone was making a claim that they violated the standard of care by perforating the bowel.

ATTORNEY DANIEL GEYSER: Well hypothetically and it is a hypothetical because they weren't provided the written notice so we could see what they really would have done. Presumably they would have gone to the second step of administrative review. That was cut off.

JUSTICE PHIL JOHNSON: [inaudible] the same, they'd looked at the same facts with an expert, with experts looking at it. You've already had two experts, one the supervising physician, one the reviewing physician, both of them presumably were experts in this particular area. So all you would have done is have another set of experts look at it.

ATTORNEY DANIEL GEYSER: And presumably if they reached the same conclusions as these two experts, they would have concluded that the hospital was not at fault and the Simons standard looks to actual subjective awareness. So it doesn't matter what we might think looking at this and saying there's a deviation from the standard of care. That sounds like negligence to us. They thought it was acceptable.

JUSTICE PAUL W. GREEN: Isn't the answer, isn't the answer though that if they got the notice, they would have sent it over to risk management, which is what they did.

ATTORNEY DANIEL GEYSER: They, it's unclear what else they would have done, but the same standard has to apply to an entity that doesn't receive a notice and that doesn't take the same care in investigating matters just to see what possibly happened. The inquiry notice is not enough. It has to be actual subjective awareness. It doesn't matter what we think. It matters what the hospital thought and they thought the procedure was acceptable. The doctor who attended the procedure thought it went perfectly. That is the opposite of believing you are actually at fault for the injury. And there is also an easy way for the 101 and 106 interaction with this and the Tort Claims Act notice provision to avoid gamesmanship and that's plaintiffs are on notice that almost every employee will substitute out of the employer whenever they're sued. So the answer is provide written notice to both the employer and the employee even if you intend to sue only the employee at first.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, counsel. The cause is submitted and the Court will take a brief recess.

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