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Supreme Court of Texas.
The University of Texas Health Science Center at San Antonio,
Petitioner,
v.
Kia Bailey, Individually and Larry Bailey, Individually, Respondents.
No. 08-0419.

October 7, 2009.

Appearances:
Michael P. Murphy, Office of the Attorney General, Austin, TX, for petitioner.
Steven E. Aldous, Braden Varner & Aldous PC, Dallas, TX, for respondents.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0419, University of Texas Health Science Center versus Kia Bailey and Larry Bailey.
MARSHAL: May it please the Court, Mr. Murphy will present argument for the petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MICHAEL P. MURPHY ON BEHALF OF THE PETITIONER

ATTORNEY MICHAEL P. MURPHY: May it please the Court, the Court of Appeals incorrectly held that plaintiff's claim was not time barred due to the relation-back doctrine in Section 101.106(f). This Court should reverse and dismiss plaintiff's claim because it is barred by the Medical Liability Act's strict two-year statute of limitations. Neither the relate-back doctrine nor Section 101.106(f) excuses plaintiff's untimely filing. To begin with, plaintiff's claim is barred because they didn't sue the university until after the limitations period on their claim had expired. Section 74.251 imposes a strict, two-year limitations period to bring medical liability claims. That applies notwithstanding any other law. Because plaintiffs didn't sue UT until after the limitations period expired, their claim is now barred and the university has a vested right to rely on the statute of limitations as

a defense. It is plaintiff's duty, not the university's.

JUSTICE DON R. WILLETT: Mr. Murphy, is it your position that if the relation-back doctrine had been codified if it were part of 101.106(f) or part of 101.106 that 74.251 would still act as a bar to prohibit.

ATTORNEY MICHAEL P. MURPHY: That's right, Justice Willett. 74.251 applies notwithstanding any other law and this Court has held that that phrase means that it applies over any conflicting statute. But the relate-back doctrine only applies to timely filed claims against defendants that were added within the limitations period. This Court has long held that the relate-back doctrine does not apply when new defendants are added after limitations periods expire.

JUSTICE HARRIET O'NEILL: But they're not really a new defendant, are they? I mean the, the theory is respondeat superior. That's the whole basis of the substitution in.

ATTORNEY MICHAEL P. MURPHY: No, they are. The university is a new defendant just because they sued Dr. Sanders personally. Dr. Sanders in official capacity is an entirely different entity as the university because an official capacity suit is a suit to recover from the university not from Dr. Sanders personally.

JUSTICE DAVID M. MEDINA: What is this vested right that you're talking about? You said the university has a vested right.

ATTORNEY MICHAEL P. MURPHY: It has a vested right to rely on statute of limitations as a defense and that advances the society's interest in repose. This 101.106(f) even if it were an exception to the statute of limitations, generally, would not apply here because of the notwithstanding any other law phrase in 74.251 and the Court of Appeals' decision excusing that untimely filing violates the plain language of 74.251 and it also violates the university's vested right. When plaintiff substituted the university, as I mentioned, for Dr. Sanders it add a new defendant and adding a new defendant after limitations does not relate back to the original petition. Section 101.106(f) is simply not an exception to the statute of limitations and it does not convert a personal capacity claim into an official capacity claim. Subsection (f) is a tort restriction, not a claim preserver although the provision is not a model of clarity and it does impose a stiff restriction on plaintiff's claims. The only reasonable interpretation of the provision is that it applies subject to other procedural requirements not as an exception to them.

CHIEF JUSTICE WALLACE B. JEFFERSON: I haven't seen the petition, but I assume when the plaintiff sued the doctor, it said individually.

ATTORNEY MICHAEL P. MURPHY: No capacity was stated, Chief Justice Jefferson, but the clear intent was to sue him personally. There's no dispute about that and, in fact, they fought the 101.106(f) motion of Dr. Sanders because they continued to want to seek recovery from him personally. They eventually lost and the Court of Appeals decided not to file a PFR, but ...

CHIEF JUSTICE WALLACE B. JEFFERSON: Was the UT Health Science Center mentioned at all in the?

ATTORNEY MICHAEL P. MURPHY: They were not mentioned. They were not served. No official capacity was stated. The Tort Claims Act was not mentioned. The university was not served with an expert report. They were not served with notice under the Tort Claims Act as required or under the Medical Liability Act as required.

JUSTICE PHIL JOHNSON: But did they have any actual notice?

ATTORNEY MICHAEL P. MURPHY: There's no actual notice in this case. Notice is irrelevant here.

JUSTICE PHIL JOHNSON: Well it may be irrelevant, may not be irrelevant, but did the university have any report. It seemed like I recall from the briefing that maybe the doctor said this was not a good result and something may have happened.

ATTORNEY MICHAEL P. MURPHY: Justice Johnson, that's correct. Dr. Sanders notified the risk manager merely that the procedure did not go as intended that a claim may be filed against him, but as this Court ...

JUSTICE PHIL JOHNSON: And that was when?

ATTORNEY MICHAEL P. MURPHY: That was soon after within I think oh probably a week or two of the surgery, but as this Court held in Simons, actual notice requires actual subjective knowledge of fault. Dr. Sanders' notice to the risk manager doesn't come anywhere near that level of knowledge.

JUSTICE PHIL JOHNSON: It's not in the briefing. That's not the question presented, I understand, but the fact that the university was aware of an incident may have something to do with whether or not it's unfair to bring them in at this point.

ATTORNEY MICHAEL P. MURPHY: Well it's not unfair because plaintiff exclusively sought recovery from Dr. Sanders personally. They only wanted to recover from him. So the university had no incentive or notice to prepare a defense and that's the point of the statutes of limitations.

JUSTICE PHIL JOHNSON: Of course, he didn't get sued immediately after. It took awhile, but both he and the university apparently knew that things did not go exactly as maybe he had planned in the surgery and knew that immediately.

ATTORNEY MICHAEL P. MURPHY: That's correct, but they didn't sue the university. They sued Dr. Sanders.

CHIEF JUSTICE WALLACE B. JEFFERSON: Does the record show how Dr. Sanders came to have the lawyer or who retained the lawyer for him? Was it, did he hire with personal funds or whatever?

ATTORNEY MICHAEL P. MURPHY: It's my understanding that he did. The record is not entirely clear about where the money came from, but it is clear that he did not serve, he did not seek defense from the Attorney General. He didn't serve or forward the pleadings received by the plaintiff to the Attorney General's office within 10 days and the plaintiffs didn't serve the Attorney General's office either.

JUSTICE HARRIET O'NEILL: Doesn't this create kind of a gotcha? I mean, all the individual has to do and let's presume he was sued individually, all the defendant has to do is just wait until the one year passes and then try to substitute in and that doesn't seem fair.

ATTORNEY MICHAEL P. MURPHY: Well, the purpose of the election of remedies section is to force plaintiffs at the outset to decide.

JUSTICE HARRIET O'NEILL: Well at the outset, but for the defendants too at the outset. If they don't feel like they're properly sued to substitute in the proper party.

ATTORNEY MICHAEL P. MURPHY: Well there is definitely a natural incentive for an employee to want to get out of the suit, but I think this is an anomaly case for sure, but there's no time limit in 101.106(f).

JUSTICE HARRIET O'NEILL: You're saying that it probably won't be an anomaly if we adopt your position. There'd be no reason and the doctor could then get together with the government entity and say wait and file until a year's passed and then nobody's liable.

ATTORNEY MICHAEL P. MURPHY: Well the statute doesn't prohibit that. However, the employee would still have to prove that the claim

could have been brought against the government entity. So if the plaintiff had correctly sued the employee, they'd have nothing to worry about. However, if they could have sued the unit, the governmental unit, then they should have at the outset as 101.106 clearly warns. I mean, 101.106(f) provides a clear warning. It does provide very stiff and irrevocable consequences to plaintiffs, but it does provide warning to them that they have to make a decision right upfront that that's going to stick with them throughout the litigation.

CHIEF JUSTICE WALLACE B. JEFFERSON: The respondent says that the Lovato case supports their position, what's your response?

ATTORNEY MICHAEL P. MURPHY: Austin Nursing v. Lovato does not apply, Chief Justice Jefferson, because it concerned a defect in capacity where the plaintiff, the parties did not change in that case. The plaintiff merely sued in a capacity that she did not yet have and later corrected that. There's a couple of distinctions. First, the defendant never changed and the parties in substance never changed. It's merely her correcting her pleadings to reflect her capacity.

JUSTICE DON R. WILLETT: Does the record show why 13 months went by before Dr. Sanders sought substitution or dismissal?

ATTORNEY MICHAEL P. MURPHY: It doesn't, Justice Willett. It's unclear why that happened. I think this is possibly a case of truth is stranger than fiction because under normal circumstances, employees would naturally have an incentive to get out right away rather than defend the claims themselves.

JUSTICE DALE WAINWRIGHT: Although it wouldn't be unreasonable to expect that a defendant by its strategy would want to wait until after the limitations is passed before moving for dismissal. Nothing in the statute precludes it or requires it.

ATTORNEY MICHAEL P. MURPHY: That's right. Nothing in the statute. Put the time limit on 101.106(f) dismissal motion, but the point there is that it forces the plaintiffs to carefully consider who to sue and it also forces and encourages plaintiffs if they could have sued the governmental unit to actually sue the governmental unit because the reality is plaintiffs or excuse me, employees could wait until after limitations expire, but there are other procedural requirements.

JUSTICE DALE WAINWRIGHT: Counsel, let me jump in here. So would your textural argument be that the legislature wanted plaintiffs to be careful in this area, tread very carefully in light of the statutory mandates, but if there's a mistake made that it's open-ended as to when defendants can raise that mistake. That was the legislative intent or perhaps an oversight.

ATTORNEY MICHAEL P. MURPHY: Well, I think the legislature viewed this as not a mistake, but as trying to curtail creative pleading to avoid [inaudible].

JUSTICE DALE WAINWRIGHT: No the backend not requiring a time limit for raising the motion to dismiss and allowing it to be raised after the limitations perhaps, which is why we're here today.

ATTORNEY MICHAEL P. MURPHY: Well I would ex--I'm sorry.

JUSTICE DALE WAINWRIGHT: That backend issue is either intended or unintended.

ATTORNEY MICHAEL P. MURPHY: I think it was probably unintended because the legislature probably expected employees with a natural incentive to file their claim, file their dismissal motion right away, but I think by not creating a time limit, it also creates a real warning to plaintiffs that this could happen and it is a sobering reminder that they have to carefully consider who to sue and if they can sue the governmental unit, they should. I mean 101.106 (a) and (e)

both impose very strict limitations on.

CHIEF JUSTICE WALLACE B. JEFFERSON: If the defendant had not filed a motion to dismiss in this case and the evidence showed that he was in the course and scope of employment with the UT Health Science Center, then the case will be pure respondeat superior liability case correct?

ATTORNEY MICHAEL P. MURPHY: [inaudible] If the empoyee never filed, if the doctor never filed a 101.106(f) motion, then it would be just a pure negligence case that he could theoretically be subject to liability for.

CHIEF JUSTICE WALLACE B. JEFFERSON: But he could also, who would ultimately have to pay a judgment. I mean, would it be if he were in the course and scope and there's a finding against him having practiced medicine within the course and scope and committing malpractice assume the jury finds those facts, who is liable for that judgment?

ATTORNEY MICHAEL P. MURPHY: Well it would be him because he didn't invoke 104.005, which is the, which permits employees sued personally to be defended by the state and to be indemnified by the state.

CHIEF JUSTICE WALLACE B. JEFFERSON: So he would waive indemnity if he didn't pursue 104?

ATTORNEY MICHAEL P. MURPHY: That's right. He had to file within 10 days or forward within 10 days the pleadings to the Attorney General. But that's not the case here. The case here is that he figured out that he should have filed this 101.106(f) motion and he did and the trial court and the Court of Appeals concluded that the claim could have been brought against the university and that reveals that the plaintiffs should have initially sued the university.

JUSTICE NATHAN L. HECHT: This is not your case either, but what if the judge had not ruled within 30 days. It got pretty close here.

ATTORNEY MICHAEL P. MURPHY: If the judge had not ruled within 30 days then they would be barred by 101.106(f).

JUSTICE NATHAN L. HECHT: So they, you're reading of (f) is that the plaintiff has to make an election within 30 days whether the judge rules or not.

ATTORNEY MICHAEL P. MURPHY: That's right, that's right and there are ways to speed up the hearing and the ruling, but yes, they have to decide right away and they can always appeal the Court of Appeals, the trial court's order as happened in this case.

JUSTICE DALE WAINWRIGHT: What's your make of the trial judge's ruling that the plaintiff sued against defendant Sanders, M.D. as in defendant Sanders official capacity only as employee of UT Health Sciences Center, at the trial court?

ATTORNEY MICHAEL P. MURPHY: I believe that's just, they're, the trial court is just basically copying the language of 101.106(f) which has in its first sentence the phrase considered to be an official capacity claim. It's just a reflection that the plaintiffs could have filed an official capacity claim. Now they must because of the employee, Dr. Sanders' motion, they must seek recovery exclusively from the university.

JUSTICE DALE WAINWRIGHT: Now the ruling according to the briefing is in response to an objection to an exhibit, but it sounds like a factual determination by the other judge.

ATTORNEY MICHAEL P. MURPHY: That could have been brought up. My time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counsel. The Court will now hear from the respondent.

MARSHAL: May it please the Court, Mr. Aldous will present argument for the respondent.

ORAL ARGUMENT OF STEVEN E. ALDOUS ON BEHALF OF THE RESPONDENT

ATTORNEY STEVEN E. ALDOUS: May it please the Court, first of all I want to say that I'm proud to stand up here representing a fine young woman, Kia Bailey, before you. Sometimes I forget why I'm here, but I'm trying to make sure I keep her in mind because every time my 16-year-old son does something that makes me cringe, I just think about the things she's been through and it makes me feel better. The couple of questions that you all have asked and let me just set this out. I think it clearly was a strategy on behalf of the defendants in this case to file the motion, the 101.106(f) after limitations ran. First of all, I can say this because the trial counsel for Dr. Sanders was actually it already had an appeal related to this very issue before the San Antonio Court of Appeals, Franka v. Velasquez 2006 Westlaw 2546535 cited in one of my footnotes. So she was entirely familiar with the issue and brought it up and if you will look, the statute of limitations ran on June 30, 2006, which happens to be the exact day that the administrator for the University of Texas Health Science Center of San Antonio signed his affidavit stating that Dr. Sanders was in the course and scope of his employment at the time of his surgery.

JUSTICE PHIL JOHNSON: I mean, there's no reason they shouldn't do that if that's a trial strategy and they're allowed to do it correct?

ATTORNEY STEVEN E. ALDOUS: Well, I would say typically this Court has not allowed people to use the statute of limitations in such a way that it deprives someone unreasonably of a cause of action. In 19---

JUSTICE PHIL JOHNSON: Let me ask this question. Is there any evidence in the record about insurance coverage in this case?

ATTORNEY STEVEN E. ALDOUS: There is not. Let me just say that in Rooke v. Jenson, which Justice Jefferson cited in the Lovato case, which was a per curiam opinion from this Court, the statute of limitations was not created to provide a log behind which opportunistic defendants could smugly lay for two years and then emerge solemnly proclaiming their statutory rights. That's what I was referring to when I said this Court usually does not look upon these matters in such a way that you can use it in the way that the defendants have used it in this case.

JUSTICE DALE WAINWRIGHT: So if the defendants make a mistake and overlook that their strategy is going to be effective, that's okay, but if they plan it, it's not okay. Is that what you're arguing?

ATTORNEY STEVEN E. ALDOUS: No. What I'm arguing is that in this case I can actually act like I have the high ground when maybe it wouldn't be that way if I didn't.

JUSTICE DON R. WILLETT: Why is June 30 the limitations day? The surgery was April 15.

ATTORNEY STEVEN E. ALDOUS: The 75-day notice period extends limitations until that day.

JUSTICE DON R. WILLETT: Okay, gotcha.

JUSTICE PHIL JOHNSON: Let me ask a question. When you request the records and before you file your lawsuit or you get the records, is there, what level of difficulty is there in determining whether this doctor was in the course of employment or not and I guess your case was filed was plenty, but what if someone files a month before the limitations runs. Can you find out truly and?

ATTORNEY STEVEN E. ALDOUS: It's an interesting proposition in this case as you know or you may know. My law firm was not the law firm that

filed the original petition. However, Dr. Sanders accepted his appointment approximately three weeks prior to the time he performed this surgery. He performed the surgery at Christa Santa Rosa Hospital, which is not the University of Texas Health Science Center of San Antonio. In fact, his records in his file still used his old firm, the Texas Orthopedic whatever, as his letterhead. So there was no outward indication on the records that this surgery was done while he was appointed to the University of Texas. Subsequently in fact the only time there was an amended answer filed in this case that asserted an indemnity provision that is set forth in or requested the that said this case is brought under chapter 74 and also under 101, but it made no real reference to the fact that he was actually working for the University of Texas at the time. It wasn't until August 25th that that allegation actually came out. August 25, 2006.

JUSTICE PHIL JOHNSON: But the ability of the plaintiff's attorney to find out whether the doctor was working for, who the doctor was working for, that was my question.

ATTORNEY STEVEN E. ALDOUS: Typically, it is an easy proposition.

JUSTICE PHIL JOHNSON: It is or is not?

ATTORNEY STEVEN E. ALDOUS: It is. In this case, it was not simply because of the timing of the issues.

JUSTICE NATHAN L. HECHT: Does (f) change the rule in Casson?

ATTORNEY STEVEN E. ALDOUS: Yes. Let me just, I want, let me address this. First of all, I think we can all agree that the relation-back doctrine does not offend the absolute two-year statute of limitations bound in 74.251 and the reason I say that is if you look at 74.251 and actually it says no healthcare liability claim may be commenced unless the action is filed within two years from the occurrence. Now the only case that I could find that was actually directly on point was an appeal from a young trial judge in Dallas named Nathan Hecht of Bradley v. Etessam where summary judgment was granted because they filed an amended petition after the limitations and the judge said you can't do that. The Court of Appeals said no, that's not right. Relation-back does work because an action is a suit and you satisfy the limitations by filing the action within two years. Anything that amends it with regard to causes of action or facts later on is not offensive of it and Justice Green in the In re Jordan case, you went through a lot of trouble to say, to distinguish causes of action versus a suit and you said causes of actions are based on facts.

JUSTICE HARRIET O'NEILL: But we have also said that you can't relate back to pull in a new defendant.

ATTORNEY STEVEN E. ALDOUS: True, but.

JUSTICE HARRIET O'NEILL: And that seems to be the argument.

ATTORNEY STEVEN E. ALDOUS: That's right.

JUSTICE HARRIET O'NEILL: Sued individually and you're bringing in now official capacity.

ATTORNEY STEVEN E. ALDOUS: As I understood their briefing, they disputed even that relation-back was appropriate with regard to 74.251. Once we set the relation-back works, then the question is can this my amended petition which as UT relate back to the one that filed against Dr. Sanders and I say yes because the legislative intent from Section (f) is clear. It says suit [inaudible] filed against an employee of a governmental unit based upon 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 and the employee's official capacity only.

JUSTICE NATHAN L. HECHT: So that changes the rule in Casson do you

think?

ATTORNEY STEVEN E. ALDOUS: What that does is it says that the Court now considers the legislature has said you now consider that that employee is being sued in his official capacity only.

JUSTICE NATHAN L. HECHT: Because Casson would have said the opposite.

ATTORNEY STEVEN E. ALDOUS: I believe so.

JUSTICE NATHAN L. HECHT: So this is a fairly significant change because Casson said well doctors are not like a lot of government employees who are not professional people who go about their jobs and they're generally in the course of employment and that's their official capacity. But a doctor when he's exercising medical discretion as opposed to some sort of administrative governmental discretion is in his individual capacity not in his governmental capacity, therefore he doesn't have official immunity and so I'm wondering if this changes that rule.

ATTORNEY STEVEN E. ALDOUS: Well let me just say this. I believe that the legislature gave us no intent in this statute that it intended to take away a citizens' common law right cause of action against a state employee individual.

JUSTICE DON R. WILLETT: But there was intent that plaintiffs act carefully and choose their defendant carefully and do a careful investigation pre lawsuit.

ATTORNEY STEVEN E. ALDOUS: Well, not necessarily. And let me say it this way. You have two careful decisions to make. One is proceed against the employee alone or proceed against the state entity under the Tort Claims Act. That's the question you asked. So what you have to decide is can I bring this if I'm going to sue the government only. Is it something that I can recover under the Tort Claims Act because actually the liability of an individual is broader. It covers things that are not just from the use of tangible personal property. For instance, if I would have alleged in this case that he gave a bad prescription, then that would not be something that would be under the Tort Claims Act and it would have been a suit that was just individually and I think it was Justice Jefferson who asked earlier what would have happened in this case if the employee had never filed 101.106(f) motion and the answer to that question is a judgment if it would have been rendered would have been rendered against the doctor. However, the Tort Claims Act gives certain protections to an employee. It limits the damages to $100,000 and gives that employee a right of indemnity back against the state institution. For them to argue and to say to you that the hospital had nothing to do with this and the hospital was unfairly left out of the loop just ignores the reality of the situation.

CHIEF JUSTICE WALLACE B. JEFFERSON: Counsel said that right would have been waived because there was no effort to notify the Attorney General within 10 days.

ATTORNEY STEVEN E. ALDOUS: There certainly is no statute that says it would be waived perhaps pursuant to the rules, regulations or of the Office of the Attorney General. They may say it had been waived, but the statute clearly says an employee acting within the course and scope of his employment who's being sued is entitled to indemnity and that's in 104.003 and 108.002. Now in, so I think that the common law right of action still exists, but what this section does.

JUSTICE NATHAN L. HECHT: But I'm not sure I know what that means, that line. It seems to change, it seems to say that when you're saying, in this case a physician although not limited to that, if he's acting

in the general scope of employment, then that's in his official capacity and you have to sue the government.

ATTORNEY STEVEN E. ALDOUS: If he files the motion.

JUSTICE NATHAN L. HECHT: Yes, but curiously, it doesn't require the judge to rule. It seems to put the plaintiff to an election whether the judge rules or not. That's why I asked the petitioner what happens after 30, what if the judge doesn't rule in 30 days. Here he ruled pretty close to the end.

ATTORNEY STEVEN E. ALDOUS: Yeah, I was feeling that pressure because there was a case of, I think, Corpus Christi or Beaumont that said that if you wait 'til after the 30 days, you've waived your right. There is one case that says that.

JUSTICE NATHAN L. HECHT: Well there's another case where the plaintiff went ahead and dropped the physician or the employee and added the government and then decided he wanted to go back the other way and they said well you can't do that.

ATTORNEY STEVEN E. ALDOUS: Yes, that's why in this particular case, once the motion was filed, I asked for it to be set for hearing because I knew about the case so I asked for it to be set for a hearing as soon as I could. It was actually heard and the judge ruled and I filed the amended petition the day of the 30 days passing, although I did it by mail, but it still was accepted.

JUSTICE NATHAN L. HECHT: So it was filed the next day, but it was done by mail so that's why it was [inaudible].

ATTORNEY STEVEN E. ALDOUS: That's correct.

JUSTICE NATHAN L. HECHT: But you do think like the petitioner does that if the trial judge doesn't rule in 30 days, the plaintiff still has to make the election.

ATTORNEY STEVEN E. ALDOUS: I can't imagine that being the rule simply because the judge does have to find that the case could have been brought under the statute, under the Tort Claims Act. So if I had a situation where I sued the doctor for a common law claim and the common law claim was, for instance, he gave me a bad prescription, which is not the tangible or the use of tangible personal property and the employee filed the motion, what this would seem to say is that I have to basically figure out for myself whether or not the judge is going to decide that it could have been brought under the Tort Claims Act or not. Now, truthfully, that's what it says. Does it make sense? Not necessarily. It should say 30 days after the Court rules, but.

JUSTICE NATHAN L. HECHT: But it sure doesn't.

ATTORNEY STEVEN E. ALDOUS: It sure doesn't and I can't really change it despite all my years in the legislature. Let me say once the legislature said the suit is considered to be against the employee in the employee's official capacity only, what that means is it puts it squarely in Lovato, the Austin nursing center case because in that case what you said was curing capacity, fixing capacity, changing capacity, when everybody has [inaudible], that relates back and that was a case, a medical malpractice case and what this ends up saying is the legislature said what we're going to do is we're going to change its capacity. Now we all have to assume the legislature knows the law and as this Court is aware, suit against an official in his official capacity is the same as suit against the state.

CHIEF JUSTICE WALLACE B. JEFFERSON: And it would be a suit in his official capacity no matter what the plaintiff's allegations were correct?

ATTORNEY STEVEN E. ALDOUS: Irrespective of whether or not capacity was alleged in the petition.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well what I'm saying is in this case it was a suit against the doctor in his individual capacity. In 101.106(f) says if it could have been brought against the governmental entity and is within the general scope of employment, then it is deemed to be a suit against the doctor in his official capacity no matter what the petition says.

ATTORNEY STEVEN E. ALDOUS: Exactly and as a result. So this actually makes sense then because what you see is the legislature saying if you could have brought this case under the Tort Claims Act, we're going to give the employee an opportunity to get out. Now the reason that to me why that is what is shown by the intent is because if the legislature intended to take away a cause of action that a plaintiff had, it would have simply said the case is dismissed, not that you substitute in the governmental unit and I assume that as we all have to that the legislature knows the law and they know that a case against an official in his official capacity is, in fact, a suit against the state so that it would relate back to the original petition. As the Court of Appeals said, the facts, the plaintiff and all the claims have never changed. The only that's changed is now UT is standing in the shoes of Dr. Sanders, its employee. Its employee filed the motion. Its employee was fully, the hospital was fully aware of the case, was fully aware of the claims. In fact, the university entered in a rule 11 agreement with me when I filed a motion for summary judgment to get all these issues satisfied, one of my grounds for my motion for summary judgment was that the statute of limitations was it did relate back. The University of Texas Health Science Center entered into a rule 11 agreement with me agreeing that it would not assert a notice of defense in this case and that's at page 544 of the record. I think that if the legislature was going to intend to allow a defendant to take away their right, it would have done so expressly rather than through the 101.106(f) that we have here.

JUSTICE DAVID M. MEDINA: Tell me about this rule 11 agreement again. Can you go back and talk about this rule 11 agreement and what bearing and weight should we give that if any.

ATTORNEY STEVEN E. ALDOUS: One of the grounds for me opposing the motion of the doctor when he wanted to switch in UT is I said well what if UT raises a limitations defense.

JUSTICE DON R. WILLETT: When was this in the chronology of everything?

ATTORNEY STEVEN E. ALDOUS: It was at the hearing on the doctor's motion to substitute so it would have been in September of 2006. I said it says that you have to be able to bring it under the Tort Claims Act and what if the hospital says that or doesn't consent and the judge said well tough luck and so entered the order anyway, but as part of that, I filed a motion for summary judgment saying trying to clear the grounds for all of what the hospital or UT would have known. In other words, I filed a motion for summary judgment that they had notice, actual notice. I filed a motion for summary judgment saying that it was, it did involve the use of tangible personal property and the other grounds that the only thing that I didn't file it on was the actual negligence of the doctor. In response to that, trial counsel for the University of Texas entered into a rule 11 agreement with me agreeing with all of that motion except the limitations defense. So basically.

JUSTICE DON R. WILLETT: This was after the limitations had run anyway correct?

ATTORNEY STEVEN E. ALDOUS: Well that's the allegation, but the timing had clearly run, but this is at page 544 of the record. So

basically by entering the rule 11 agreement, it left the only thing for us to argue on competing motions for summary judgment, the limitations issue. In Texas A&M v. Koseoglu, something -oglu, Justice Green wrote the opinion. It involved whether or not the employee in its official capacity could appeal an interlocutory appeal from a denial of or granting of a plea to the jurisdiction. In that case, you actually said I don't believe the legislature could intend to treat an official in his official capacity different from the government when we know what the law is and I submit to you that it's the same here. It's the same here in that we know that an official in his official capacity is the same thing as the state once the statute says they're the same, then it relates back. In addition, they cannot rely on the fact that they didn't consent because as Justice O'Neill as you said in the Mission ISD v. Garcia case, the legislature is the one who determines when consent is given by the state and 101.106(f) actually gives consent to add the university as the party.

CHIEF JUSTICE WALLACE B. JEFFERSON: Counsel, I see that your time has expired. Are there any further questions? Thank you, Counsel.

ATTORNEY STEVEN E. ALDOUS: Thank you very much.

REBUTTAL ARGUMENT OF MICHAEL P. MURPHY ON BEHALF OF PETITIONER

ATTORNEY MICHAEL P. MURPHY: Just a few points. First, the phrase considered to be in Section 101.106(f) simply means that if the preceding conditions are satisfied, the plaintiff could have filed an official capacity claim. That's all it means and that opens the door to the employee's ability to file a dismissal motion. Second, 101.106(f) does not convert a claim as respondents allege here. If it did, the dismissal and substitution requirements in the second sentence of 101.106(f) would be entirely superfluous because the defendant, the entity would already be the defendant. It would also constitute a massive end run around a number of procedural requirements including a limitations, presuit notice and expert report filing requirements. Additionally, the Austin Nursing v. Lovato case, that respondents rely upon is just a defect in capacity claim. The parties never changed. It was merely a plaintiff correcting a capacity that she did not yet have. In this case, the difference between a personal capacity suit and an official capacity suit is the difference between the governmental unit and an employee personally. Finally, on the notice issue, notice really is irrelevant here. UT did not have notice under Simons, but even if it did, the only notice it had was of a claim against another defendant, Dr. Sanders personally. It was never served with suit. It was never notified that a claim was filed against it until after limitations had run.

JUSTICE PHIL JOHNSON: If the statute simply said it's determined that the employee was acting in the course of employment and was in his official capacity, the suit against the employee must be dismissed. Don't we get the same situation?

ATTORNEY MICHAEL P. MURPHY: That would be very similar to 101.106(a)'s strict requirement of prohibiting suits against employees once the employer or governmental unit was sued. 101.106(f) has a relatively modest 30-day window for plaintiffs to substitute.

JUSTICE PHIL JOHNSON: It's effectively requiring the dismissal of the suit against the employee.

ATTORNEY MICHAEL P. MURPHY: That's right.

JUSTICE PHIL JOHNSON: So what is the meaning of the rest of this.

What's the meaning of the rest of the language in that section where we're first saying you have to dismiss if it's an official capacity suit. It seems like the rest of the language that you're substituting for has to mean something because you could dismiss and then sue the sued. If you dismiss against the employee, you could promptly file suit against the employer, against the state.

ATTORNEY MICHAEL P. MURPHY: No, you couldn't do that because 101.106(b) prohibits exactly that. The point of the substitution is that, as I said, it's a very modest accommodation to plaintiffs. If, for example, the 101.106(f) motion was filed very early on before other procedural requirements had run and before limitations had run, then yeah, they could add the governmental unit.

JUSTICE DON R. WILLETT: What about opposing counsel's focus in 74.251 on the "may be commenced" language?

ATTORNEY MICHAEL P. MURPHY: I think that's just kind of a red herring. I mean, the Court clearly has held that adding a new defendant, which the university clearly was here, does not relate back to plaintiff's original petition. That's the case here. Therefore, the limitations period in 74.251 expired and entirely bars their claim against the university. Although the result in this case may seem harsh, it is no more so than the consequences imposed by 101.106(a) or (e) which forbids any claim against an employee regardless of the merits when a governmental unit is sued. The Court should reverse the Court of Appeals and dismiss this claim, as time barred.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Murphy. The cause is submitted and the Court will now take a brief recess.

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