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Supreme Court of Texas  
John Christopher Franka, M.D. and Nagakrishna Reddy, M.D., Petitioners,  
v.  
Stacey Velasquez and Saragosa Alaniz, both individually and as next  
friends of  
their minor child, Saragosa Mario Alaniz, Respondents  
No. 07-0131

September 10, 2008

Appearances:

Thomas H. Crofts, Jr., Crofts & Callaway, A Professional Corporation, San Antonio, Texas, for petitioner.

Gene S. Hagood, Hagood & Neumann, L.L.P., Alvin, Texas, for respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: Be seated please. The Court is now ready to hear argument in 07-0131, John Christopher Franka, M.D., et al., v. Stacey Velasquez, et al.

COURT ATTENDANT: May it please the Court. Mr. Crofts, will present argument on behalf of the Petitioners. The Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF THOMAS H. CROFTS, JR. ON BEHALF OF THE PETITIONER

MR. CROFTS: May it please the Court. This case concerns one of six election of remedy provisions that were added to the Texas Tort Claims Act in 2003, they're found in a section 101.106 in the Texas Civil Practice and Remedies Code. Three of these six provisions simply expand on the concept that was already there in the election of remedies provision before 2003 in that they provide that pursuit of the claim against the government is going to foreclose, pursuit of, pursuit of a claim against the employee and involving the same subject matter.

The other three absent the need to the election of remedies concept and that they are triggered by claims against the employee rather than claims against the government. Two of them simply provide

new defenses for the government. For example, one of the provisions is that a judgment against the employee, [inaudible] to sued against the employer for the same subject matter. Another of them even provides that a suit against the employee is it irrevocable election of any-- and forecloses a claim against the employer. Unless the employer consents that's a kicker, on that one which gets into the one that this cases about 101.106(f). Because it does provide that in a suit brought against an employee, that the government does consent under certain circumstances for the employer to be substituted for that employee as the defendant in the case.

JUSTICE O'NEILL: And that's typically when the employee acts in an official capacity and when you've got a doctor practicing medicine, who is accused of, of not using good sound medical judgment. How do you square that with acting in of-- official capacity or performing a governmental function?

MR. CROFTS: Your Honor, I think in, in, in the, in the context of common law official capacity the Court has held in the Cassine case that practicing medicine is not a governmental function, in that unless the doctor is involved then something really governmental. The common law doctrine of official immunity is, is not available in that context, this type ...

JUSTICE HECHT: This is sort of-- this paragraph (f) reverse Cassine?

MR. CROFTS: No, sir. I don't think it does because it's, it is a not necessarily official immunity as contemplated by, as contemplated by-- it's the origin official immunity which is kind of a derivative of sovereign immunity. This ...

JUSTICE HECHT: But (f) seems to say if the doctor's on the job um he's got sovereign immunity.

MR. CROFTS: He's got some kind of immunity, I don't know that it would be call it cat-- properly categorized at sovereign immunity.

JUSTICE HECHT: Why isn't it sovereign because it's in the employee's official capacity on it.

MR. CROFTS: I think because sovereign involves a, a, a jurisdictional concept, I think election of remedies is more of a defense, I think they're very close. I think they very related, I think it's so arguable.

JUSTICE HECHT: If he is only sued in his official capacity doesn't he have governmental-- isn't the suit -- is against the government he has immunity?

MR. CROFTS: Under the statute? If it's, if it's a suit in the course of his employment and it's a suit that could have been brought against the government, then it provides a statutory immunity. I think a problem with saying it's sovereign immunity, Your Honor, is that it, it, it-- a condition to that immunity being there is that, there is an action available against the employer, the state employer. And if there's an action available against the state employer, there wouldn't be sovereign immunity. And this figures into how the element in this statute that requires because for this statute-- the new statutory immunity to be available to the employee according to the statute. It's gotta be-- it's got to be shown by some degree that the suit could have been brought against the government.

Now, all the cases-- court of appeals cases dealing with what the statute means when it says could have been brought against the employer. Basically, uniformly I don't know that there's one says anything other than this. There has to be a showing that the employer government's immunity was waived, in order for this immunity to be

available to the employee. So I think it would be-- it would be a strange thing if this were-- the employee's immunity were equated to sovereign immunity in a situation under the same facts when the government didn't have sovereign immunity.

JUSTICE HECHT: Well, I'm not sure I understood. So your position is that (f) applies this phrase that we're worrying about could have been brought under this chapter means successfully brought under the chapter.

MR. CROFTS: That gets to the heart of our question about "What, what that means? and What is the review process and what is the standard, the standard for deciding." When is it-- what is necessary to show that it could have been brought against, against the government, then keep in mind this is a pre-trial procedure. The cases that hold there needs to be a showing that there was-- there a circumstances under which the employer, government's immunity would be waived in order for this to be available. The statute that says motion to dismiss, doesn't-- so the, so the questions: What, what is this standard? What do you-- what is that moving employee have to show in order to get this immunity in of this pre-trial setting?

Some cases have said, "and now [inaudible] it to other of, of motions to dismissed context like arbitration and like a-- the expert reports said, oh, it's just abuse of discretion." Others say it's so much like a plea to the jurisdiction by the government especially because they, they all latch themselves to the idea of there must be-- in order for it to be something that could have been bought. There's-- if there's got to be a waiver immunity those or-- that's wrapped into the, the statute to-- from appeals decisions.

So our position is that-- and this is supported by the *Phillips v. Dafonte* case that we've cited that borrowing from this context of plea to the jurisdiction that a process similar to the courts analysis of pleas to the jurisdiction when a claimant is suing the government as discussed in the Miranda case and others of this Court if the movant can, have put on evidence that if, if true would defeat a hypothetical plea to the jurisdiction by the government and this wraps this statutory proceeding not really into a jurisdictional thing I don't think it's a jurisdictional thing about the employee I think it's just a statutory defense.

CHIEF JUSTICE JEFFERSON: So the question would be if the plaintiff-- we just imagine a circumstance with the plaintiff sued not the doctors but the hospital. And, and do we if do this mental exercise if the hospital then filed a plea to the jurisdiction, would have be successful based on the pleadings in the evidence of the employees it presented in this case.

MR. CROFTS: That's correct. That's-- that's our, that's our position I think that's supported by the Philips's case and, and our case we ...

CHIEF JUSTICE JEFFERSON: And that doesn't go to whether the plaintiff would win the case but whether a plea to the jurisdiction would survive.

MR. CROFTS: That, that's right.

JUSTICE JOHNSON: So Counsel under your scenario the burden is on the employee of the state show that the state has liability and so the burden's on the plaintiff to show the state doesn't have liability, we just flip all of the burdens here?

MR. CROFTS: Well, it's, that's a funny thing about the statute, Your Honor. And I ...

JUSTICE JOHNSON: I mean that has to be your position about that.

MR. CROFTS: Has to be our position, but I don't know that it's a show of liability. I think following the Miranda sort of analysis of-- is there's something that would defeat the plead of a jurisdiction before trial specially when it, it's a fact that really merges with the merits, if there's something that would in this hypothetical suit against the government preclude a dismissal for want of jurisdiction by the employer then the movant has shown that it could have been brought.

JUSTICE HECHT: So the government employee is going to come in and testify against the government?

MR. CROFTS: Well, the government-- I don't know that the government employee has to do that in every case, in our case the government employee has proceeded in support of motion for summary judgment an expert report of the Plaintiff. And, and, and keep in mind this all goes up to a, this could have been brought in a hypothetical beating of pre-trial plea to the jurisdiction by the government involves the way were the immunity. And in our case injury caused by tangible property and so the-- we as movements for summary judgment under the statute relied on the Plaintiff's expert report which provides-- which, which contains an opinion that the use of a vacuum extractor in the birth of this child and increased the risk of the shoulder [inaudible] which was the injury that the child suffered during birth.

JUSTICE O'NEILL: If there had been no allegation take the vacuum extractor out of a case. Then you agree that the suit could not have been brought against the government?

MR. CROFTS: Well,

JUSTICE O'NEILL: the employer? ...

MR. CROFTS: I, I mean-- I've, I've-- that's the most use of tangible property that we have in the case and so I, I ...

JUSTICE O'NEILL: So you agree?

MR. CROFTS: Yes.

JUSTICE O'NEILL: Okay. So why can't we [inaudible] between those to the extent the claim is based on the vacuum extractor, then the employee-- that, that-- the employer substituted in for the employee on those claims, but as to the medical judgment claims where the doctor's did not act in an official capacity, those can go forward, that's what the Court of Appeals same to differentiate between.

MR. CROFTS: Your Honor, I think there would be problems splitting a cause some of action there. I think this Court should draw ...

JUSTICE O'NEILL: Well, it's not splitting your cause of action it's two separate causes of action, one in official capacity, one not an official capacity.

MR. CROFTS: Well, I think the question is could the suit that's been brought-- have been brought, that's the statutory language. Could the suit that's been brought ...

JUSTICE O'NEILL: But-- that we're going in-- we're going in circles because if you-- if the doctors will not acting in official capacity you agree it could not have been brought against the employer.

MR. CROFTS: Well, but, but a-- here we have evidence that there, that there was use of tangible property that caused the injury.

JUSTICE O'NEILL: So you don't think someone can act partially in an official capacity and partially not in official capacity.

MR. CROFTS: Well, I'm not sure that I would, I would said that, but I would say under this Court's jurisprudence dealing with pleas to the jurisdiction governmental immunity, that parcing is not done. If it's a suit against the governmental entity for which immunity is waived by virtue of tangible property being a cause of the event. That

doesn't mean that the Court only has jurisdiction of that particular thing. I think the Court's decisions are-- that there other alleged events that participate in the, in the cause there also subject to ...

JUSTICE BRISTER: The question is -what if they are not alleged?

MR. CROFTS: If what ...

JUSTICE BRISTER: I mean, are you saying that the government can make up a claim that the Plaintiff has not asserted and this made up claim could had been brought against the government even though the Plaintiff never asserted and therefore the Plaintiff's cases does [inaudible].

MR. CROFTS: No, sir. I think it has to be within the plaintiff's case, I don't think it has to be ...

JUSTICE BRISTER: If not the ir pleadings but their case.

MR. CROFTS: Correct. I don't think it has to be within their pleadings I think-- and I think the Court's said this in Miranda.

JUSTICE BRISTER: But I don't- if they don't have to plead it, who's going to decide-- well, you know, aren't you saying that the government can come in and say, "we think they should have pled a different claim that we would had been immune for and therefore dismissed the one they actually putted."

MR. CROFTS: Well, not the government that the employee who -

JUSTICE BRISTER: Right, they've sued.

MR. CROFTS: Yes, sir. Yes, sir, because I, I think that ...

JUSTICE BRISTER: So if an employee is driving a government vehicle and commits a drive-by shooting, which there is no waiver for that in the statute, the government can says, "Well, they should had said this was used operation of a motor vehicle,". And get the whole thing dismissed even though that's a crazy claim and not one the Plaintiff's made -

MR. CROFTS: Well, it's in fact ...

JUSTICE BRISTER: - it was just a mistakes because we can imagine somebody might have pled something, that might had come under the tort claims act.

MR. CROFTS: I think under this Court's decisions dealing with pleas to the jurisdiction. The Court looks to the substance of the claim and it's not necessarily tied to the language used in a petition. And, and, and, and certainly there are cases in which are so extreme that, that's going to worked. But in cases like this one it does, because the Plaintiff's suit is based on negligence of these two physicians occurring in the birth of their child and if they don't plead the vacuum extractor as a cause, I think it's perfectly legitimate for the moving employee to come in and say, "We're here are the circumstances ..."

JUSTICE BRISTER: But, but, but-- if, if they-- if the Plaintiff's wanna drop they're good claim, if your right that the vacuum extractor and use of tangible properties, they're good claim, if the Plaintiff's want to drop that say, "look we'll just go forward with our weak claims that there we're more likely to lose on." What does the employee's-- why would the employee's object to that? Because they-- under your theory thy can get rid of the whole thing anyway, good and the bad claims.

MR. CROFTS: Well, I, I think in a, in a case like this when the facts are-- what, what they are and especially when they're owb expert states in his report and his disclosure that the use of a vacuum extractor did increase the risk of this injury, and ...

JUSTICE O'NEILL: But it-- apparently the evidence showed that is

caused the injury simply to the head and that what happened after this of vacuum extractor is what caused the damage that's being sued for in the case.

MR. CROFTS: Well, that's, that's one version that in, in-- and it's true that the vacuum extractor contact with the scalp only caused a minor injury but their expert says, "This is his opinion, that the used of the vacuum extractor increased the risk of this kind of injury occurring." And also says that, "that should had been recognized by the doctors and based on that recognition they should never had even undertaken it."

JUSTICE WAINWRIGHT:[inaudible]

MR. CROFTS: Vaginal. Is my time up?

CHIEF JUSTICE JEFFERSON: Yes. So there any further questions? Thank you, counsel. The Court is ready to hear argument now from the Respondent.

COURT ATTENDANT: May it please the Court. Mr. Hagood, will present argument for the Respondent.

ORAL ARGUMENT OF GENE S. HAGOOD ON BEHALF OF THE RESPONDENT

MR. HAGOOD: May it please the Court. There is one thing among many others that are in-- that is indisputable in this case-- pardon me. And that is that the procedural vehicle chosen by the doctors to pursue this immunity issue is a summary judgment proceeding. The briefing confirms that the summary judgment was filed intentionally for some appellate, strategic purpose that quite can delay I'm not very clear. Did as it may in a summary judgment proceeding, the rules are very clear. Texas Rules of Civil Procedure say, "that a summary judgment is to be granted unless there is a genuine issue of material fact." Case law require ...

JUSTICE BRISTER: Statutes just could had been brought, it doesn't say, "could've-- will win," I mean if, if there's was this car wreck. And you bring it against the government agency employee driver and just wearing my re- red match-- red lights swearing match. And so you say, "well, these could had been brought against the employer," which is surely could had been you don't have to prove your going to win, you don't have to prove who actually had a red light.

MR. HAGOOD: There is a continuum uh, Judge that could have been brought has been discussed. Defendant-- or excuse me, of the doctors have even suggested it could have been brought means, could have been initiate. Well, we know that, that cannot be true.

JUSTICE BRISTER: That could be anything.

MR. HAGOOD: That would be so far on the continuum end that it, it's not.

JUSTICE BRISTER: But doesn't it mean could have been brought-- if it all?

MR. HAGOOD: I think what it means is this, when you look at the immunity cases. There are in, in my judgment at least in to the extent that were involved with here. You can have an immunity claim be, be brought by the defendant governmental entity saying that the tort claims act did not waive-- or your-- our right to to immunity in this situation. If that is brought, the case law Miranda and the others are it very clear, that if-- or excuse me-- the, the defendant must proved entitlement to immunity to the extent that there is no fact issue

against it. Said in other way if the plaintiff produces a fact issue immunity cannot be granted and the case cannot be dismissed.

JUSTICE HECHT: Well, if we construed paragraph(e) emission just few months ago, right?

MR. HAGOOD: Emission.

JUSTICE HECHT: And we said question was what those filed under the, under this chapter mean?

MR. HAGOOD: Yes, sir.

JUSTICE HECHT: And we basically said if its a tort claim and file under this chapter?

MR. HAGOOD: Yeah, I think you, broaden it to any tort claim and conceivable.

JUSTICE HECHT: And why wouldn't we read it the same way in (f) the very next paragraph?

MR. HAGOOD: I've, I've-- Judge Hecht, I'm sorry, I don't understand the, the, the ...

JUSTICE HECHT: Well, (e) says, "a suit filed under this chapter" and (f) says, "a suit that could had been brought under this chapter."

MR. HAGOOD: Oh I, I understand uh

JUSTICE HECHT: Why would we read (f) the same way we read (e) just the other day?

MR. HAGOOD: Well, and, and I think you certainly entitled to but, but what-- one of the things you've asked us to ...

JUSTICE HECHT: But-- I don't understand we're entitled to but I, but I mean what -

MR. HAGOOD: Judge, I'm sorry it wasn't intended.

JUSTICE HECHT: - but why would we or wouldn't or shouldn't we-- why should we or shouldn't we?

MR. HAGOOD: Well, what that-- and, and I think we're talking about apples and oranges here. And let me, let me suggest where, where my thought is, and perhaps this will answer your question. If an individual doctor in this case wants to take advantage of subsection (f), all he has to do is claim immunity. Now, in the question comes ...

JUSTICE HECHT: I'm sorry. What kind of immunity does it claim, you mean?

MR. HAGOOD: Well, had-- and, and I heard the discussion here I've-- Judge ho-honestly I don't know if its sovereign immunity or what. I considered to be official immunity because it's an individual and not a sovereign subdivision of the state. That's why I see it, but from the Plaintiff's stand point, I'm sorry, to be, get right down on the mat about it. I don't like immunity under any name. So regardless of what it is it's still kicks my client out of Court.

JUSTICE HECHT: But it seems to me it makes a big difference here, because this seems to-- (f) seems to define when your acting in a non-individual capacity and when your acting in a governmental capacity.

MR. HAGOOD: I think that's absolutely truth.

JUSTICE HECHT: And in Cassine we said, doctors basically don't act in their governmental capacity.

MR. HAGOOD: That is correct.

JUSTICE HECHT: They're setting the budget or if they're doing something for the hospital, maybe so, but when they're working on patients that's in their individual capacity and that -

MR. HAGOOD: That, that is correct.

JUSTICE HECHT: - fair reading of Cassine.

MR. HAGOOD: Yes, Sir.

JUSTICE HECHT: And does the restructure rhen say, "basically you don't have a fit- an individual capacity anymore."

MR. HAGOOD: Judge at, at it, it very well made because what we've done now is give the doctors a statutory immunity if you will, by only claiming that, hey, I'm an employee basically in the course and scope. And this lawsuit could have been brought under the that Tort Claims Act. So that's a statutory immunity that is different than the other immunities that at, at least I, I have read in connect-- in conjunction with this case. But the standard regardless of what you call it, the standard in my mind is the same, if this subsection (f) is constitutional allows a, a new statutory immunity for doctors.

If that is allowed which apparently it is, that the burden that the doctors have should be in my mind exactly the same burden, that the government has when it asserts immunity at the beginning of the lawsuit and their previous example that suggested and that is you got to prove it, can basically as a matter of law. Meaning that if I raise a fact issue or, or the plaintiff raises a fact issue. You cannot then grant dismissal for the doctor.

CHIEF JUSTICE JEFFERSON: And, I understand that but let me ask you, let me ask question this way.

MR. HAGOOD: Yes.

CHIEF JUSTICE JEFFERSON: Could the Plaintiff's in this case have-- without regard to the doctor, could they have sued the hospital directly on this case?

MR. HAGOOD: Judge, could I have sued them? Yes. Would I have sued them? Absolutely, not. There's not ...

CHIEF JUSTICE JEFFERSON: And what is immediate-- is so were trying to-- you know, it's a struggle here but-- so what does, what does it mean to say could had been brought? It, it doesn't, it doesn't say, that you have to conclusively established liability. It's a hypothetical, could they have brought this suit against the hospital and survive a plea to the jurisdiction from the hospital?

MR. HAGOOD: That, that is a exactly right in my mind, what could have, could have been brought means it, it has to be commensurate with the burden of proof in the issue. Does it have to be conclusively 100 percent proven or is it simply just that you can file a lawsuit if you have a \$150 and, and the guts to do it. It's, it's simply means that if the plaintiff can produce a fact issue, then the suit could not had been brought under, under 101.106(f). To me its gotta be that or otherwise you got inconsistent burdens, you got inconsistent definitions, it can't be anything else. If ...

JUSTICE JOHNSON: But then Counsel, you're saying that the Plaintiff produces a fact issue as to whether it could or could not had been brought.

MR. HAGOOD: Absolutely.

JUSTICE JOHNSON: Okay. So the Plaintiff's position we, we couldn't have brought it and get past summary judgment?

MR. HAGOOD: That, that is exactly right, Judge. And, and along those lines there is ...

CHIEF JUSTICE JEFFERSON: There is such a legal question?

MR. HAGOOD: I'm sorry?

CHIEF JUSTICE JEFFERSON: Here that's a legal question, it's not really, it's not really a factual one. It's would the, the use of this tangible piece of property in this case, would it permit a lawsuit against the hospital or would, would it preclude it because it's not the kind of use in there, there's no causation or, or some kind of that.

MR. HAGOOD: Yeah, Judge. I think that's exactly right. I think that in-- get right down to it. I think that this issue is a question



of law. I don't think, and it, it allows appellant court's a de novo review. I know those were a couple of the issues that the Court wanted us to brief. That's the bottom line of those.

JUSTICE GREEN: But how it was used, how this tangible property was used is a fact question, argument among the doctors whether it caused the injury or not.

MR. HAGOOD: Well, if the Court will remember under the risk utility to determine whether there is a duty, there are fact issues that are decided and that are presented to the Court to determine whether as a matter of law based on these facts there is a duty.

JUSTICE GREEN: So ...

MR. HAGOOD: The duty is a question of law to-- so I agree with you there is--there are factual determinations to be made but they're made to, to allow a, a Court whether it's trial court or appellate court to make a decision as a matter of law whether immunity exists or not. Judge ...

JUSTICE GREEN: So you have to have a trial to determine whether that the hospital is immune or not?

MR. HAGOOD: I'm sorry, sir. I'm sorry.

JUSTICE GREEN: Didn't you have to have a trial in that fact question to determine whether the, the hospital's immune or not?

MR. HAGOOD: Well, there in is where you must decide what the procedural vehicle is to present it, the defendants in this case sought it by way of most for summary judgment. In the Tejada case and in the-- I apologize-- the other, the other case said found that, that the a-- defendant said, the sustain their burden. Both those cases apparently were motions to dismiss.

CHIEF JUSTICE JEFFERSON: Well, let me, let me-- maybe I may not understand this exactly but just summarizing the other sides point. You don't lose anything permanently, if he's-- if that they're right, the government-- governmental unit sub's in and as the defendant. And the plaintiff pursues the case there and if-- as that case proceeds its determined that in fact the government is immune then the case continues against the doctors. So that you don't-- I mean-- you, you, you have-- the sort of it, a test trial so that if in fact the government is not immune and the suit could have been brought that's were the lawsuit goes. If factually or legally it's determined it could not have been brought, then it returns to the Plaintiff. What do you-- what your answer to that scenario?

MR. HAGOOD: Yes, sir. I've got some varied significant-- significant-- yeah, I've got some very definite thoughts about that. I've read the, the briefing that's suggest that the Plaintiff, hey you're in great shape because you have all these potential appeals and if things go exactly right. Judge, I wish I could tell you that every time I step into a trial court everything is going to go exactly right. It doesn't to-- for instance, they suggest that a-- because this, this is not a final judgment if the trial court dismisses or, or grants the immunity and then I got to dismiss bring in the hospital. But that's not a final judgment. Well, I, I think Mr. Crofts or one of his trial counsel, convince the trial court to sever that kind of situation to where the decision was final. All of a sudden now, I'm on appeal with a, a record that, I may not, may not be able to prevail. How, how do we know that's not going to happen? If ...

JUSTICE HECHT: In a-- is it, is it your view of how the statute works, that having chosen to file-- to sue the employee now prohibits you from suing in the government, subject to (f).

MR. HAGOOD: Let me bring up the Briggs case, to answer that

question and Justice Hecht with your permission may I had one more comment to this. Judge, we also have to now be aware and it's a very, very scary thing for me of the Briggs decision. And, and the Calderon decision and I, I apologize I'm not sure which one it is, or maybe both. But what those cases-- or at least one of those cases held is this. Says look you're entitled-- Mr. plaintiff, you're entitled to the, the protection of subsection (f) but you have to comply exactly with subsection (f). And if you contest this as we have through today, you have blown that 30-day window for dismissing and re-filing. And although you may think you're right, although you may have a judge and appellate court say you are right if you end up being wrong at the end of the case, you have not complied with (f). Therefore, (b) applies and you're out -

JUSTICE HECHT: With this ...

MR. HAGOOD: - that's the holding of those two a-- at least one of both of those two cases.

JUSTICE HECHT: But apart from that-- part from the 30-day problem?

MR. HAGOOD: Yes, sir.

JUSTICE HECHT: You, you do think that you're out under (b), unless you can invoke it?

MR. HAGOOD: Oh at-- Judge, absolutely. Yes, sir.

JUSTICE HECHT: So (b) take you've already made an election under (b) and now the question is does that save you or apply?

MR. HAGOOD: It, it-- that is exactly right or the, or the other way but it amounts to the same thing. That's exactly right.

JUSTICE HECHT: And you know this was part of a package of legislation?

MR. HAGOOD: Yes, sir it was.

JUSTICE HECHT: What I'm wondering is if you are right, how does this really change anything, because the Plaintiff could always sue the employee in his individual capacity and if the employee was a professional like a physician under Cassine he'd have a pretty good shot at recovery against the individual and then you'd have the chapter 102 and 104 triggering indemnity probably and you'd get to recover the same way.

MR. HAGOOD: Judge, I'm sorry I, I think it changes everything. From me as a lawyer, I mean some-- Judge Brister, I think you talked about you don't know what is like to be a judge. With me as a lawyer sitting at my desk looking at 101 going, "oh my God if I mess up on this I-- you know better contact my malpractice carrier." And, and this Court and others had made it very very clear that, that the burden is on me and others that bring these lawsuits to make sure we know before we step into a statutory claims act case to know. So does it change everything? Oh absolutely of changes everything.

Now, is there a potential under subsection (f) to allow us to bring suit against the employee and, and then, you know, test the waters, yes there is, Judge there is. But it's about that much, in anybody that does at from my stand point is, is, is seriously walking on, walking on the edge if I'm jumping over.

JUSTICE HECHT: Does that mean that the legislative purpose in (f) was to provide a strong incentive to sued the government and not its employees?

MR. HAGOOD: I think the legislative purpose was exactly what the Court's have said, emission and otherwise and that is to reduce the chances or excuse me, reduce the burden of, of lawsuits against improper defendants to kind of figure out who's, who's doing what, where and when. On or that, that would had been on the, the, the a--

the defendants. And put the burden's shift the burden to us to be very very careful.

JUSTICE HECHT: I was trying ...

MR. HAGOOD: We're trying to do and that's what I've done in this case, Judge.

JUSTICE HECHT: I was trying to look at the bottom line because -

MR. HAGOOD: Okay.

JUSTICE HECHT: -if you, if you sued a government employee physician.

MR. HAGOOD: Okay.

JUSTICE HECHT: In his official capacity and his individual capacity.

MR. HAGOOD: Yes, sir.

JUSTICE HECHT: On the first one you're going to be met with sovereign immunity.

MR. HAGOOD: Absolutely.

JUSTICE HECHT: So that gives you a shot at the second one and you can only be met with official immunity and Cassine says, "Well, you don't really have official immunity except in very limited circumstances."

MR. HAGOOD: Correct.

JUSTICE HECHT: So you're basically reduced to just suing an ordinary person. And if you win, you've got the indemnity provisions of the remedies code, that says, it basically the government is going to come in and then indemnify its employees under any way a reasonable circumstances.

MR. HAGOOD: Yes, sir.

JUSTICE HECHT: So I'm wondering if (f) meant to take that official immunity route off the table by sort of redefining official immunity here or individual capacity.

MR. HAGOOD: Judge, I apologize it sounds like that's a similar question that you'd asked me before and I'm not sure that I can give you any better answer and I apologize to you, I'm just -

JUSTICE HECHT: I, I mean, it's just troubling.

MR. HAGOOD: - I guess I'm just not smart enough to AA%

JUSTICE HECHT: - it's troubling and um and if it does it's very radical, it is very radical change.

MR. HAGOOD: Judge, I've seen it as, as you have a very radical change. But I've seen it as now there's another pitfall for Plaintiffs in bringing lawsuits that wasn't otherwise there. And this d purpose maybe very, very correct. And it, and it obviously has, has produced those results, what, what the legislature wanted. But to get into the minutia and I don't-- my comment is doesn't-- isn't meant to be the demeaning of course but to get into the minutia of-- you know, does it change the official immunity issue in that thing. I, I honestly in my, my thought process has not gone there.

JUSTICE HECHT: Is there much legislative history on this? (f) that's -

MR. HAGOOD: Since, -

JUSTICE HECHT: - part of?

MR. HAGOOD: No, I'm sorry, I, I was going somewhere else, no I have not found any legislative history on that. What I thought you were asking is, since the Franco v Velasquez case has been decided what other cases - there are 27 cases, since that time that have discussed in some form or fashion. The a-- there 101.106(f) provision. Judge, in the, in the 15 seconds that I have left may I ask-- may I make one comment. There is-- Be very careful there-- I don't believe in the

judicial environment that exist today, there would be any chance in a world that this case based on-- even if you accept this strength of Doctor Halbridge's report. Would be decided where there would be-- that would be a tangible use of-- or, or use of tangible personal property. And, and here's the reason. If you look at Doctor Halbridge's report not, not the defendant's suggestion of what it says but his report. All he does is identify this as a risk factor among five other risk factors. Period, paragraph that's it.

Justice O' Neill you acknowledge that there is not any evidence uh, that this caused or was an actual cause it per the rule. But one-- per further for the law, but one thing that is important, a risk factor does nothing more then provide or say that there are certain conditions that make an injury possible, risk factors are nothing more than conditions that make an injury possible. And I remember sitting at and I-- believe it or not but it's true. I remember sitting, reading this Court's decision sometime ago where you, you said conditions that make an injury possible do not equate to use. I'm going what the heck does that mean? Well, 15 years later or so now we've got one. Or at least it is very clear to me, I just thank you so much for your time.

CHIEF JUSTICE JEFFERSON: Any further question? Thank you, Counsel.

MR. HAGOOD: Yes, sir.

REBUTTAL ARGUMENT OF THOMAS H. CROFTS, JR. ON BEHALF OF PETITIONER

MR. CROFTS: I think that's a-- that's a, a, a characterization from one side of the evidence in this case, your Honor. I don't know that there's an-- as a matter of law answer to that question. There's more in this report of Doctor Halbridge, then the mere fact that here's a list of ri-risk factors, he specifically said that these risk factors should have been recognized and had they been recognized the whole vaginal process would not have occurred, the use of the vacuum extractor would not have occurred, there would have been a caesarian section. But I think more importantly he explicitly says, "that the use of a vacuum extractor increased the risk of this kind of injury occurring and I think that's some evidence, some evidence that the use of that tangible property was a cause."

JUSTICE JOHNSON: Counsel, seems like a long times in medical malpractice cases if you have an empty chair that becomes a pretty big part of a trial and just following conceptually where you're headed on this. If we-- if the statute pushes the Plaintiff into a questionable or marginal, even if they get passed summary judgment and get the causation there you have a, you have a vacuum extractor that played some part and your suing, you're talking to a jury, but you have this physicians who in there manipulating the child and everything else. Seems like the statute might actually based be affecting the merits of a claim, where there's an injury and there may be several causes but you are going to have push the Plaintiff to try that on a marginal cause when-- in just putting out a, a significant defendant or defendant's of merits. Is that-- somehow is that the, the goal of the statute here or what it-- does it play in party in your analysis.

MR. CROFTS: Well, I think at-- on the subject of the goal of the statute this-- there's a course of lot of legislative history about the 2003 statutes in this have read this much as I can read. And there's more that I can read about-- the testimony and the- and so forth about

the-- these lead to the, the tort reform legislation in 2003. One comment about 101.106(f) that is reported in the legislative history of house bill four is that this statute, the goal of this statute is to eliminate suits against employees in situations where they-- suit could had been brought against the employer. And- in, in the testimony was that, was from a department-- Texas departmental agency saying, "we-- our employees are being subjected to these suits and we don't want that to take place anymore and that figured into the policy that led to this legislation." But, but, but Your Honor, I don't think the statute answers the question that you're really concerned about and I can see it being a concern. Our, our position is just trying to figure how the statute ought to work. And the statute says ...

JUSTICE JOHNSON: Oh we also, the legislature told us they, their statutes are to be construed to reach a reasonable and just result.

MR. CROFTS: Of course, and, and ...

JUSTICE JOHNSON: You have an injury caused-- say 80 percent by manipulation, let's, let's assume, 80 percent by manipulation or 90 percent or 95 percent and a small percentage by this vacuum extractor. when you start trying to get a jury to, to pin it all on the vacuum extractor, sometimes, as a plaintiff, if you have a difficulty although there's no question that-- let's assume again no question there was fault somewhere, so it's, it's somehow hard to see that reaching a reasonable and just result by the statutory language if we interpret it that way.

MR. CROFT: Your, Honor, I think you have the same problem in suits against the government in which there are multiple features in the factual circumstances that contribute to the cause. One or more of them may have to do with motor driven equipment. One or more of them may have to do with tangible property. Others may have to do with a person conduct that doesn't have anything to do. With either of those immunity waiving circumstances but yet I don't think that in that kind of litigation, you divide up.

What could be pursued against the government and what can't, in the context of sovereign immunity and if these events contribute to the same injury, if they're not divisible. I can see a case where they're divisible but these are circumstances that are not divisible, they're different circumstances but they come together to cause an injury and one of those causes is an immunity waiving event and in that situation, the legislature has said, that the employee has the right to seek this substitution.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Counsel. The case is submitted. The Court, we'll take a brief recess.

COURT ATTENDANT: All rise.

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