NO. 10-18-00168-CV

IN THE COURT OF APPEALS
FOR THE TENTH JUDICIAL DISTRICT
WACO, TEXAS

Heather Kutyba,
Appellant,

v.

Ashlee E. Watts, D.V.M. and Texas A&M University,
Appellees.

On Appeal from the 361st Judicial District Court
Brazos County, Texas
Trial Court Cause No. 17-2110-cv-361
The Honorable Steve Smith Presiding

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ORAL ARGUMENT REQUESTED

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STATUTES

STATEMENT OF THE CASE:

Nature of the Case:	Heather Kutyba ("Kutyba") asserted tort claims against Ashlee E. Watts, D.V.M. ("Dr. Watts") and Texas A&M University ("the University") for alleged veterinary malpractice. C.R. at 29-54.
Course of Proceedings	The University filed a motion to dismiss Dr. Watts pursuant to 101.106(e) of the Texas Tort Claims Act ("TTCA") and a plea to the jurisdiction, alleging immunity from suit. C.R. at 65-98, 174-182.
Trial Court Disposition:	This appeal arises from the granting of the University's motion to dismiss Dr. Watts pursuant to section 101.106(e) of the Texas Tort Claims Act and its plea to the jurisdiction. 1st Supp. C.R. at 11-12.

STATEMENT REGARDING ORAL ARGUMENT

The University believes that oral argument would assist appellate review. A central premise of Kutyba's argument is that the TTCA waives sovereign immunity for the death of animals if said death is caused by the negligent operation or use of tangible personal property. If accepted, that notion could adversely impact governmental units throughout the State. Oral argument would provide the opportunity for the parties to fully discuss before the Court the implications of Kutyba's novel and erroneous legal theory.

ISSUES PRESENTED

The issues identified by Kutyba do not accurately frame the questions to be addressed on appeal arising from the granting of the University's plea to the jurisdiction and motion to dismiss Dr. Watts pursuant to section 101.106(e) of the Texas Tort Claims Act. Thus, the University restates the issues as follows:

1. Under the Texas Tort Claims Act, recovery for property damage is available only when the property damage is caused by the negligence of a governmental employee operating motor-driven equipment or a motor vehicle. Plaintiff's property, a horse, was allegedly damaged because of veterinary malpractice. Is this alleged veterinary malpractice sufficient to waive the University's sovereign immunity for property damage?

2. The TTCA provides that when a plaintiff sues both employer and employee, section 101.106(e) requires that the employee "immediately be dismissed" on the employer's motion. Kutyba sued both the University and its employee, Dr. Watts. Did the trial court err in granting the University's motion to dismiss Dr. Watts pursuant to 101.106(e)?

3. The trial court considered Kutyba's objections to the University's evidence in support of its motion to dismiss Dr. Watts pursuant to 101.106(e). Did the trial court abuse its discretion by overruling Kutyba's objections?

INTRODUCTION

This case involves the trial court's grant of the University's plea to the jurisdiction and motion to dismiss Dr. Watts pursuant to section 101.106(e) of the Texas Tort Claims Act.[1] It is undisputed that the alleged damage to Kutyba's property was *not* caused by Dr. Watt's negligent operation or use of a motor-driven vehicle or motor-driven equipment. Nor is it disputed that when the University filed a motion to dismiss Dr. Watts, the University confirmed that Dr. Watts was acting within the course and scope of her employment and that the University, not Dr. Watts, was the proper party. This case does not raise many of the recurring themes underpinning Kutyba's arguments, which have nothing to do with the trial court's jurisdiction or the issues raised on appeal.

First, immunity from suit bars suits against a governmental entity. *Gen. Serv. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). As a result, a waiver of immunity from suit is a necessary element of subject-matter jurisdiction. *Texas Natural Res. Conservation Comm'n, v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002). A waiver of immunity must be "clear and unambiguous." *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 58 (Tex. 2011). Absent waiver, a governmental entity has immunity from suit. *IT-Davy*, 74 S.W.3d at 853. If there is no waiver of immunity from suit r legislative consent to sue, the court does not have jurisdiction over the merits of a case.

[1] Tex. Civ. Prac. & Rem. Code § 101.001 *et seq.* All statutory references are to the Civil Practice and Remedies Code unless otherwise noted.

In this case, Kutyba has not and cannot meet her burden to establish the Court's jurisdiction because she cannot show that the University's governmental immunity has been waived.

Second, Section 101.106 of the Tort Claims Act imposes "irrevocable consequences" on a plaintiff's decision to sue a governmental unit, its employee, or both. *Univ. of Tex. Health Sci. Ctr. v. Rios*, 542 S.W.3d 530, 537 (Tex. 2017). If a plaintiff chooses to file suit "under this chapter [the Tort Claims Act] against both a governmental unit and any of its employees," the consequence is that "the employees shall immediately be dismissed on the filing of a motion by the governmental unit." Section 101.106(e). By asserting tort claims against both the University and its employee, Kutyba thus "made an irrevocable election under subsection (e) to pursue those claims against the government only." *Id.* at 538; *Tex. Dep't of Aging & Disability Servs. v. Cannon*, 453 S.W.3d 411, 417 (Tex. 2015). Her attempt to revoke that election by amending her petition cannot defeat the employee's right to dismissal under section 101.106(e).

STATEMENT OF FACTS

The statement of facts offered by Kutyba is incomplete, and is supplemented as follows:

A. Kutyba judicially admitted Dr. Watts was an employee of the University at the time of the alleged negligence.

Kutyba's [First] Amended Petition was filed on September 13, 2017, wherein she

sued Dr. Watts, Texas A&M Veterinary Medical Teaching Hospital[2], and the University for damages arising out of alleged veterinary malpractice. C.R. at 29. Kutyba judicially admitted that Dr. Watts, the treating veterinarian, "was employed by [the University], the details of their work were controlled by [the University], and these agents, servants, employees, and/or vice principals were acting in the course and scope of their employment with [the University]." C.R. at 46-47.

The University filed its Motion to dismiss Dr. Watts pursuant to section 101.106(e) on November 1, 2017. C.R. at 65. The University stated that Dr. Watts was a full-time employee and was acting in the course and scope of her employment with the University at the time of the alleged negligence. C.R. at 67. Kutyba subsequently amended her petition on January 23, 2018, to remove her judicial admission that Dr. Watts was an employee of the University. C.R. at 117-125.

[2] Texas A&M Veterinary Medical Teaching Hospital was later dropped by Kutyba. C.R. at 102.

SUMMARY OF THE ARGUMENT

Kutyba failed to establish a claim under the TTCA and thus failed to invoke that statute's limited waiver of sovereign immunity. Accordingly, the trial court properly granted the University's plea to the jurisdiction on subject-matter grounds. Kutyba cannot bring suit as a matter of law, regardless of her assertion that the TTCA waives sovereign immunity for "death" of property. The plain language of the statute provides a limited waiver for property damage in *only one* narrow set of circumstances, *i.e.*—only when the property damage is caused by the governmental employee's negligent operation or use of a motor vehicle or motor-driven equipment. Section 101.021(1)(A). That is the only exception. Because Kutyba did not and could not allege that the damage to her property was caused by Dr. Watts' negligent use of a motor vehicle or motor-driven equipment, the trial court properly dismissed her claim for lack of subject-matter jurisdiction.

Further, Kutyba's argument that Dr. Watts should not have been dismissed from this lawsuit also fails as a matter of law. Section 101.106 "forc[es] plaintiffs to make an irrevocable election *at the time suit is filed*," and this "decision regarding whom to sue has irrevocable consequences." *Rios,* 542 S.W.3d at 536-537. When the plaintiff sues both the governmental unit and any of its employees under the Tort Claims Act, the "irrevocable consequence" is that the employees must "immediately be dismissed on the filing of a motion by the governmental unit." Section 101.106(e). The trial court here, correctly granted the University's motion to dismiss Dr. Watts pursuant to section

101.106(e) and that judgment should be affirmed.

In short, the trial court correctly granted the University's plea to the jurisdiction and motion to dismiss.

ARGUMENT

1. The trial court correctly granted the University's plea to the jurisdiction because Kutyba brought suit on the basis of damage to property and did not allege the damage was caused by the negligent operation or use of a motor-driven vehicle or motor-driven equipment.

Tort claims against governmental entities may only be brought under the Texas Tort Claims Act which, in general, provides a limited waiver of immunity for (1) property damage, personal injury or death caused by an employee's negligent operation or use of a motor-driven vehicle or motor-driven equipment; (2) personal injury and death caused by a condition or negligent use of tangible personal property; and (3) personal injury and caused by a defective condition of real property. Section 101.021. Kutyba does not allege she suffered personal injury or death; rather, she claims that her property was destroyed. C.R. at 102.

"The Texas Tort Claims Act distinctly reflects that recovery for property damage may arise in *only one instance*—when damages are proximately caused by the operation or use of motor-driven vehicles or motor-driven equipment." *City of San Antonio v. Winkenhower*, 875 S.W.2d 388, 390 (Tex. App.—San Antonio 1994, writ denied (emphasis added)). Consequently, the University is immune from property damage claims not caused by a motor-driven vehicle or equipment. *Id.*; *see also Dept. of Hwys. & Public Transp. v. Pruitt*, 770 S.W.2d 638, 639 (Tex. App.—Houston [14th Dist.] 1989, no writ)("[T]he state does not waive sovereign immunity as to *property damage* unless the damage is caused by the negligent act or omission of a state employee *and arises* from

the operation of motor driven equipment."); *City of Hearne v. Williams*, 715 S.W.2d 375, 377 (Tex. App.—Waco 1986, writ ref'd n.r.e.) ("[L]iability of a unit of government is limited to personal injuries or death of a person; and to property only when caused by the negligent acts of a governmental unit's employees in the operation of a motor vehicle.").

Earlier this year, the Amarillo Court of Appeals considered a similar case involving the City of Lubbock that also dealt with the death of horses. The Court of Appeals ultimately concluded that the City's immunity was not waived for the death of horses because the damage to the horses, *i.e.*, property, had not been "proximately caused by the City's operation or use of a motor-driven vehicle or motor-driven equipment." *Davis v. City of Lubbock*, No. 07-16-00080-CV, 2018 WL 736344, at 5-6 (Tex. App.—Amarillo Feb. 6, 2018, no pet. h.) (mem. op.). In *Davis*, the plaintiff, a horse owner, filed suit against the City of Lubbock for selling bacteria-laden hay that killed two horses and injured a third. *Id.* at *1. In her pleadings, Davis alleged that because a tractor baled the hay there was a waiver of sovereign immunity. *Id.* at *5. The Court found that sovereign immunity was not waived because the death of Plaintiff's horses was not caused by the operation or use a motor-driven vehicle or motor-driven equipment. *Id.* at *6. *Davis* is analogous to the instant case as sovereign immunity is not waived for Kutyba's alleged "death" of property because Kutyba does not, and cannot, assert that the damage to her property was caused by the use or operation of a motor-driven vehicle or equipment.

A. The plain text of section 101.021 waives immunity for death arising out of the condition or use of tangible personal property only when that death is of a person—not an animal.

By the plain text of section 101.021, the University is only liable for death caused by the condition or use of tangible personal property when that death is of a person; the University is immune from suit when the death caused by the condition or use of tangible personal property is of an animal. Here, Kutyba argues that because her horse died, the TTCA's provision that waives sovereign immunity for "death so caused by… use of tangible personal property" is applicable. However, because that provision applies only to death of people, not animals, it is inapplicable in this case. Therefore, because Kutyba brought suit for damage to her horse—*i.e.*, her property—the University's sovereign immunity is only waived if that damage arose from the operation or use of a motor-driven vehicle or motor-driven equipment.

When construing a statute, courts look to the plain meaning of the statute's language. If a statute is unambiguous, courts "read unambiguous statutes as they are written, not as they make the most policy sense." *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 629 (Tex. 2013). As the Texas Supreme Court has stated: "Even if the result seems to us to be unreasonable, 'reasonableness is not the standard for eschewing plain statutory language.'" *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 570 (Tex. 2014) (quoting *In re Blair*, 408 S.W.3d 843, 859 (Tex. 2013) (Boyd, J. concurring)). Instead, the "high standard" for when the plain language of a statute must be eschewed is "absurdity." *Id.* When words do not have a specific legal meaning or statutory

definition, they are construed according to their ordinary usage unless a contrary intention is apparent from the context. *E.g.*, *In re Ford Motor Co.*, 442 S.W.3d 265, 271 (Tex. 2014) (orig. proceeding).

Legislative consent to sue the State must be expressed in "clear and unambiguous language" and any ambiguity must be resolved in favor of retaining immunity. *Tooke v. City of Mexia*, 197 S.W.3d 325, 333 (Tex. 2006) and Tex. Gov't Code § 311.034 (West 2006) (immunity waivers must be "effected by clear and unambiguous language"); *see also Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003). The Legislature has clearly and unambiguously waived sovereign immunity for property damage *only* when that damage arises from the operation or use of a motor-driven vehicle or equipment. Section 101.021(1)(A). To conclude otherwise would undermine the plain meaning of the statute and existing law.

The maxim *expressio unius est exclusio alterius* is often employed in the construction of statutes. *Guinn v. State*, 696 S.W.2d 436, 438 (Tex. App.—Houston [14th Dist.] 1985). In general, a statute's inclusion of a specific limitation excludes all other limitations of that type. *Harris Cty. v. Crooker*, 112 Tex. 450, 458, 248 S.W. 652, 655 (1923).

The usual application of the maxim has been taken one step further in the TTCA: the section cited by Kutyba created a specific waiver of sovereign immunity for "personal injury and death so caused by the condition or use of tangible personal property…." Section 101.021(2). In the previous sub-section of the same *numbered section of the statute*, the Legislature created a waiver of liability for that same class *and also*

property damage. Section 101.021(1) (emphasis added). In applying the principal to Section 101.021 as a whole, the Legislature intended to retain sovereign immunity for property damage claims stemming from the use of tangible personal property, because it only waived immunity for "personal injury and death." § 101.021(2).

Notably, the majority of Kutyba's brief ignores the first three words of the subsection she relies upon, in favor of expounding upon the term "death" in isolation. Appellant's Br. 6-7. However, the Legislature did not place a comma anywhere in the phrase "personal injury and death". Therefore, the term "personal" modifies both "injury and death," and the plain meaning of "person" applies to a human, not chattel. *Person*, Black's Law Dictionary 1028 (5th ed. 1979) (defined as "a human being").

B. Animals are considered property under Texas Law.

Kutyba ignores the fact that under Texas law her horse is considered property. *See* Tex. Prop. Code § 42.002(a)(10)(A); *Archibald v. Act III Arabians*, 755 S.W.2d 84, 86 (Tex. 1988) ("A horse is an existing tangible good."); *City of Houston v. Jenkins*, 363 S.W.3d 808, 813 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) ("It is undisputed that a dog is tangible personal property."); *City of Houston v. Davis*, 294 S.W.3d 609, 612–613 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (dog considered property for the purposes of the TTCA). In *Strickland v. Medlen*, the Supreme Court determined that "[p]ets are property in the eyes of the law" and "the term 'property' is not a pejorative but a legal descriptor." *Strickland v. Medlen,* 397 S.W.3d 184, 185-86 (Tex. 2013).

Decades of Texas case law clearly establish that horses are considered "property". Therefore, the only waiver of the University's sovereign immunity arises from section 101.021(1) of the TTCA.

C. Kutyba concedes that the damage to her property—the horse—did not involve the operation or use of a motor-driven vehicle or motor-driven equipment.

Kutyba fails to address the University's central argument: there is no waiver of sovereign immunity because Kutyba's property was not damaged by a motor-driven vehicle or motor-driven equipment. When faced with a plea to the jurisdiction that challenges the pleadings, a plaintiff is required to show that her pleading states a valid waiver of sovereign immunity or that immunity is inapplicable. *Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-227 (Tex. 2004). When a plaintiff's pleadings affirmatively negate the court's jurisdiction, as Kutyba's pleadings did here, the case should be dismissed with prejudice. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 726-727 (Tex. 2016) (dismissing case where pleadings affirmatively negate proximate cause). Neither the petition nor Kutyba's brief has alleged that the damage to her property stemmed from negligent operation or use of a motor-driven vehicle. In fact, Kutyba admitted that there was "no motor-driven equipment involved" in causing the alleged damage to her property. R.R. at 4.

Notably, Kutyba's petition fails to even allege a waiver for the "death" of her property as she alleges in her brief. Rather, Kutyba claims that the "injuries to *Ms. Kutyba* were caused, at least in part, by a condition or use of tangible personal or real

property…" C.R. at 119 (emphasis added). Kutyba had approximately six weeks after the State filed its Plea to the Jurisdiction to amend her pleadings and assert jurisdictional facts to support a waiver of sovereign immunity, but did not do so.

Kutyba has affirmatively negated the existence of jurisdiction by admitting and alleging facts that definitively show there is no waiver of the University's sovereign immunity. The Court properly dismissed her case.

D. Kutyba asks the Court to create a new waiver of sovereign immunity not present in the TTCA, which would lead to absurd results.

To circumvent established Texas case law, Plaintiff attempts to recast her claim as one involving the "death" of property. The plain terms of the TTCA's waiver of sovereign immunity are clear: immunity is only waived for claims of property damage when proximately caused by the negligent use of a motor-driven vehicle or motor-driven equipment. *Menefee v. Medlen*, 319 S.W.3d 868, 877 (Tex. App.—Fort Worth 2010, no pet.), overruled on other grounds by *Franka v. Velasquez*, 332 S.W.3d 367, 382 n. 67 (Tex. 2011) (plaintiff's claims for euthanasia of family pet were for property damage, and therefore had to arise from operation or use of a motor-driven vehicle or motor-driven equipment for waiver of sovereign immunity under the TTCA); *Tex. Parks & Wildlife Dep't v. E. E. Lowery Realty, Ltd.*, 235 S.W.3d 692, 694 (Tex. 2007) ("The Texas Tort Claims Act provides a limited waiver of sovereign immunity when property damage arose 'from the operation or use of a motor-driven vehicle or motor-driven equipment.'"); *Winkenhower*, 875 S.W.2d at 390 ("The Texas Tort Claims Act distinctly

reflects that recovery for property damage alone may arise in only one instance--when damages are proximately caused by the operation or use of motor-driven vehicles or motor-driven equipment."); *Pruitt*, 770 S.W.2d at 639; *see De Anda v. County of El Paso*, 581 S.W.2d 795, 796-97 (Tex. App.—El Paso 1979, no writ) (government units liable for property damage under the TTCA only when caused by the negligent acts of State employees in their operation of motor-driven vehicles); *Williams*, 715 S.W.2d at 377. The TTCA contains no other waiver of sovereign immunity for property damage, including even "death" of property.

Expanding the TTCA's sovereign immunity waiver to waive immunity damages stemming from the "death" of property caused by the condition or use of tangible personal property would lead to absurd results. First, "death" would have to apply to all things in the living kingdom: monera, protists, fungi, plants, and animals. Second, the living organism would have to, at some point, die. Causing severe injuries to an organism, but not actually killing it, would not waive sovereign immunity. Under this reading, veterinarians would be incentivized to keep severely injured animals on life support rather than euthanizing the animal for fear of incurring liability. Finally, the "death" would have to be caused by the condition or use of tangible personal or real property. One possible outcome of many from an expansive waiver for "death", such as Kutyba requests, would be a situation where sovereign immunity would be waived if a state employee, in the course and scope of his employment, negligently killed grass with his shoe.

There is no indication that the Legislature intended for the waiver of immunity for "death" to be as expansive as Kutyba argues. Instead, these absurd results would be in direct contravention of the purpose of the sovereign immunity, that is, "to shield the public from the cost and consequences of improvident actions of their governments." *City of Houston v. Williams*, 353 S.W.3d 128, 131 (Tex. 2011).

E. The Texas Education Code does not include a waiver of sovereign immunity for the "death" of property.

As previously addressed, any waiver of sovereign immunity must be clear and unambiguous. Nowhere else in Kutyba's brief does she even suggest a waiver of sovereign immunity, let alone a clear and unambiguous waiver. Instead, Kutyba cites a series of statutes that she contends "contemplate" potential lawsuits against the University's veterinarians.

Chapter 59 of the Texas Education Code, *Medical Malpractice Coverage for Certain Institutions*, pertains to state indemnification of government employee for suits concerning wrongful death. Tex. Educ. Code § 59.001 *et seq.* As stated in Kutyba's brief, "[t]he Texas Education Code expressly requires the University to indemnify 'a member of the medical staff or a student' for certain 'medical malpractice claims[.]'" Appellant's Br. 9 (*citing* Tex. Educ. Code § 59.08(a), (e)). Kutyba then notes that the Education Code defines "medical staff or students" to include, among other things, veterinarians. Appellant's Br. 9. Kutyba cites this provision for the proposition that:

> [B]ecause the Texas Education Code expressly recognizes that [the University's] veterinarians might be held

> liable for causes of action arising out of the death of their patients, it follows the legislature expected that both [the University's]and [the University's] veterinarians might be sued. But the only way for a veterinarian employed by [the University]to be sued would be if the TTCA's waiver applies.

Appellant's Br. 10. However, Kutyba ignores an alternate explanation for that provision, namely, that veterinarians may render medical treatment to humans in some circumstances. Although veterinarians are generally prohibited from practicing medicine on humans, "[a] veterinarian may render first aid or emergency care to a human if such action is without expectation of compensation in response to an emergency or disaster situation." 22 TAC § 573.60. The Legislature may have included the provision of the Education Code that requires the University to indemnify its veterinarians in case they are sued for medical malpractice for medical treatment provided to humans in an emergency or disaster situation.

Regardless, for sovereign immunity to be waived by statute, the statute must clearly and unambiguously waive immunity. *Travis Cent. Appraisal Dist. v. Norman*, 342 S.W.3d 54, 58 (Tex. 2011). Here, Kutyba does not cite any provision, including that in the Education Code, that explicitly waives immunity in this case. Mere recognition that a veterinarian may be sued and incur defense costs is not a clear and unambiguous waiver of sovereign immunity.

F. This Court should not rewrite statutes based upon policy concerns.

Kutyba's public policy justifications for expanding the TTCA's waiver of sovereign immunity are misplaced. The Texas Supreme Court has consistently held that the Legislature, not the Judiciary, is the appropriate entity to enact a waiver of sovereign immunity and decide on public policy issues. *Sw. Bell Tel., L. P. v. Harris County Toll Road Auth.*, 282 S.W.3d 59, 68 (Tex. 2009); *Strickland v. Medlen*, 397 S.W.3d 184, 196-197 (Tex. 2013). For the above reasons, this Court should decline Kutyba's invitation to expand the TTCA's limited waiver of sovereign immunity.

2. The trial court properly dismissed the individual employee upon the University's motion to dismiss because the trial court was required to do so once the University filed its motion.

A. Kutyba brought suit under the Texas Tort Claims Act.

Kutyba's tort claims were brought under the TTCA, and Kutyba has not argued otherwise. Any tort claim brought against a governmental unit is considered to be brought "under" the TTCA for the purposes of § 101.106. *Franka v. Velasquez*, 332 S.W.3d 367, 375–380 (Tex. 2011). The University is a governmental unit as per Tex. Educ. Code § 86.02 and Tex. Civ. Prac. & Rem. Code § 101.001(3). Finally, Kutyba filed suit against the University for negligence under a *respondeat superior* theory, gross negligence, and negligent hiring, training, and/or supervision, all of which are sound in tort. C.R. at 46-53. Therefore, Kutyba filed suit under the TTCA.

If a plaintiff sues both an employer and one of its employees under the TTCA, section 101.106(e) requires that the employee "immediately be dismissed" on the employer's motion. It is undisputed that Kutyba filed suit against both the University and one of its employees, Dr. Watts. C.R. at 30. It is also undisputed that in her [First] Amended Petition, filed on September 13, 2017, Kutyba made a judicial admission that Dr. Watts was an employee of the University, stating that she "was employed by [the University], the details of their work were controlled by [the University], and these agents, servants, employees, and/or vice principals were acting in the course and scope of their employment with [the University]." C.R. at 46.

B. The University confirmed Dr. Watt's employment upon filing the 101.106(e) motion to dismiss.

On November 1, 2017, Defendant timely filed its 101.106(e) motion to dismiss. C.R. at 65. It was only after the University confirmed Dr. Watt's status as an employee of the University by filing the 101.106(e) motion to dismiss, that Kutyba attempted to change her judicial admission by filing a Second Amended Petition on January 2, 2018. C.R. at 102. However, in *UTHSC v. Rios,* the Supreme Court has recently held that:

> If the plaintiff…sues both employer and employee, section 101.106(e) requires that the employee 'immediately be dismissed' on the employer's motion. We hold that this statutory right to dismissal accrues when the motion is filed and *is not impaired by later amendments* to the pleadings or motion.

Rios at 532 (Tex. 2017) (emphasis added). The Court also held that in the scope of employment analysis, the only objective is to determine if "there is a connection between the employee's job duties and the alleged tortious conduct." *Id.* at 535.

Plaintiffs who sue governmental units and their employees under the TTCA have been warned by the Supreme Court that the decision regarding whom to sue has "irrevocable consequences" and "must proceed cautiously before filing suit and carefully consider whether to seek relief from the governmental unit or from the employee individually." *Rios,* 542 S.W.3d at 537 (*citing Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008). In this case, Kutyba did not make a choice, but rather sued the University and Dr. Watts, the University's employee. Kutyba's decision to sue both the University and its employee is, in fact, an irrevocable election

to pursue her alleged claims against only the University. *Id.*; *Tex. Dep't of Aging & Disability Servs. v. Cannon*, 453 S.W.3d 411, 417 (Tex. 2015).

By choosing to sue the University and its employee under the TTCA, Kutyba triggered the University's procedural remedy under section 101.106(e), which required the trial court to immediately dismiss the employee once the University filed its motion.[3] The plain language of section 101.106(e) controls in this case:

> If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

Section 101.106(e).

Kutyba attempted to avoid those consequences in this case by amending her petition for a second time to undo her irrevocable election, by asserting that "[o]n information and belief, Dr. Watts is not an 'employee' of the University under Tex. Civ. Prac. & Rem. Code § 101.106(e). C.R. at 117. However, the plain language of section 101.106(e) and the recent Supreme Court holding in *Rios* do not allow her to do so. Thus, at the time the University filed its section 101.106(e) motion, Dr. Watts was entitled to immediate dismissal of the tort claims against her when the University filed the motion and Kutyba's subsequent amendment does not avoid the consequences of

[3] Kutyba further argues that the University has the burden to show dismissal of Dr. Watts is proper, and that this burden mirrors the standard of summary judgment. Appellants' Br. 17-18. In support of this proposition, Kutyba cites the *Lenoir v. Marino*, 469 S.W.3d 669, 675 (Tex. App.—Houston [1st Dist.] 2015), *aff'd*, 526 S.W.3d 403 (Tex. 2017), *reh'g denied* (Sept. 22, 2017). However, *Lenoir* addresses the standard of dismissal under 101.106(f), when only the employee has been sued and not the employer. The University's Motion to Dismiss Dr. Watts was pursuant to 101.106(e).

her judicial admission. *Rios,* 542 S.W.3d at 538.

C. The Trial Court Did Not Abuse its Discretion in Overruling Kutyba's Objections to The University's Evidence

The admission and exclusion of evidence is committed to the trial court's sound discretion. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). "A trial court exceeds its discretion if it acts in an arbitrary or unreasonable manner or without reference to guiding rules or principles." *Pike v. Tex. EMC Mgmt., LLC*, No. 10-14-00274-CV, 2017 WL2507783, at 19 (Tex. App.—Waco June 7, 2017)(pet. denied) (mem. op.). When reviewing matters committed to the trial court's discretion, the Court may not substitute its own judgment for the trial court's judgment. *Id.* And the Court must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

Kutyba objected to Dr. Watts's affidavit and Dana McMahon's affidavit—attached to the University's motion as Exhibits B and C, respectively—as conclusory on the basis that a 101.106(e) motion requires summary judgment evidence. As discussed throughout this brief, the Texas Supreme Court has consistently held that the mere filing of a 101.106(e) motion confirms that the employee was acting within the scope of employment, which disposes with the need for affidavits. *Rios*, 542 S.W.3d at 538. In this case, the affidavits merely provided further support. Additionally, neither affidavit is conclusory as they are both clear, positive and direct, credible, and free from contradictions and inconsistencies. *See* Tex. R. Civ. P. § 166(a)(c). Neither affidavit

merely parrots section § 101.101(2)[4] statutory language as they both contain specific factual bases for the statements made therein. *Nichols v. Lightle*, 153 S.W.3d 563, 570 (Tex. App.—Amarillo 2004, pet. denied). Furthermore, these statements do not relieve any named party of liability, but merely serve to correctly align the proper parties to the suit.

Interested witness testimony is sufficient to prove or negate facts as matter of law if the testimony is clear, positive, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. *Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989). Exhibit B to the University's motion to dismiss, Dr. Watts's affidavit, is based on her personal knowledge that "[a]t all time material to Plaintiff's lawsuit, [she] was in the paid service of Texas A&M University as an Assistant Professor of Large Animal Surgery" and that she "was in the course and scope of [her] employment with Texas A&M University when [she] treated Dazzle at Texas A&M Veterinary Medical Teaching Hospital." C.R. at 97. These statements of fact are based on personal knowledge, clear, positive, direct, credible, and free from contradictions and inconsistencies. As such, the trial court did not err in overruling Kutyba's objection.

[4] "Employee" means a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control." Tex. Civ. Prac. & Rem. Code § 101.101(2).

Exhibit C to the University's motion to dismiss, Dana McMahon's Affidavit, is based on her employment as the business administrator in Large and Small Animal Clinical Sciences. C.R. at 98. Ms. McMahon attests that she "examined the Texas A&M University employment records and can confirm that Ashlee E. Watts is currently employed in the Large Animal Clinical Science Department at Texas A&M University's College of Veterinary Medical & Biomedical Sciences." *Id.* Ms. McMahon further attests that Dr. Watts "was and currently is in paid employment status with Large Animal Clinical Science Department at Texas A&M University's College of Veterinary Medical & Biomedical Sciences from March 19, 2012, to present, October 31, 2017." *Id.* These statements of fact are based on personal knowledge, clear, positive, direct, credible, and free from contradictions and inconsistencies. As such, the trial court did not err in overruling Kutyba's objection.

Both exhibits to the University's motion to dismiss further support that Dr. Watts was in the course and scope of her employment with the University when she treated Kutyba's horse at the Texas A&M Veterinary Medical Teaching Hospital. They do not parrot Tex. Civ. Prac. & Rem. Code § 101.101(2) and these assertions are grounded in relevant facts. Therefore, the trial court did not abuse its discretion when it overruled Kutyba's objections.

PRAYER FOR RELIEF

For these reasons, Dr. Watts and the University pray that this Court affirm the trial court order granting the University's plea to the jurisdiction, affirm the trial court

order granting its motion to dismiss the University employee pursuant to Section 101.106(e) of the Texas Civil Practice Remedies Code and overruling Kutyba's objections to evidence, and any relief for which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this **Appellees' Brief** contains 5,749 computer generated words, as calculated by Microsoft Word 2018, in accordance with Rule 9.4 of the Tex. R. App. P.

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CERTIFICATE OF SERVICE

I certify that on October 15, 2018, and in compliance with Rule 9.5 of the Texas Rules of Appellate Procedure, I served a copy of this Appellees' Brief on counsel for the Appellant, Ms. Mary Conner, by electronic service. Service was made concurrently with the electronic filing of this document.

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