Reversed and rendered and Memorandum Opinion filed August 22, 2023.

In The

Fourteenth Court of Appeals

NO. 14-22-00368-CV

CITY OF HOUSTON, Appellant

V.

EMMITT WILSON, Appellee

On Appeal from the County Civil Court at Law No. 1
Harris County, Texas
Trial Court Cause No. 1165664

MEMORANDUM OPINION

Appellant City of Houston challenges the trial court's denial of its summary-judgment motion on two grounds, arguing that it conclusively proved the elements of its official immunity defense,[1] and that Wilson failed to establish application of

[1] Tex. Civ. Prac. & Rem. Code § 101.021(1); see also *Hulick v. City of Houston*, No. 14-20-00424-CV, 2022 WL 288096, at *2 (Tex. App.—Houston [14th Dist.] Feb. 1, 2022, pet. denied) (mem. op.).

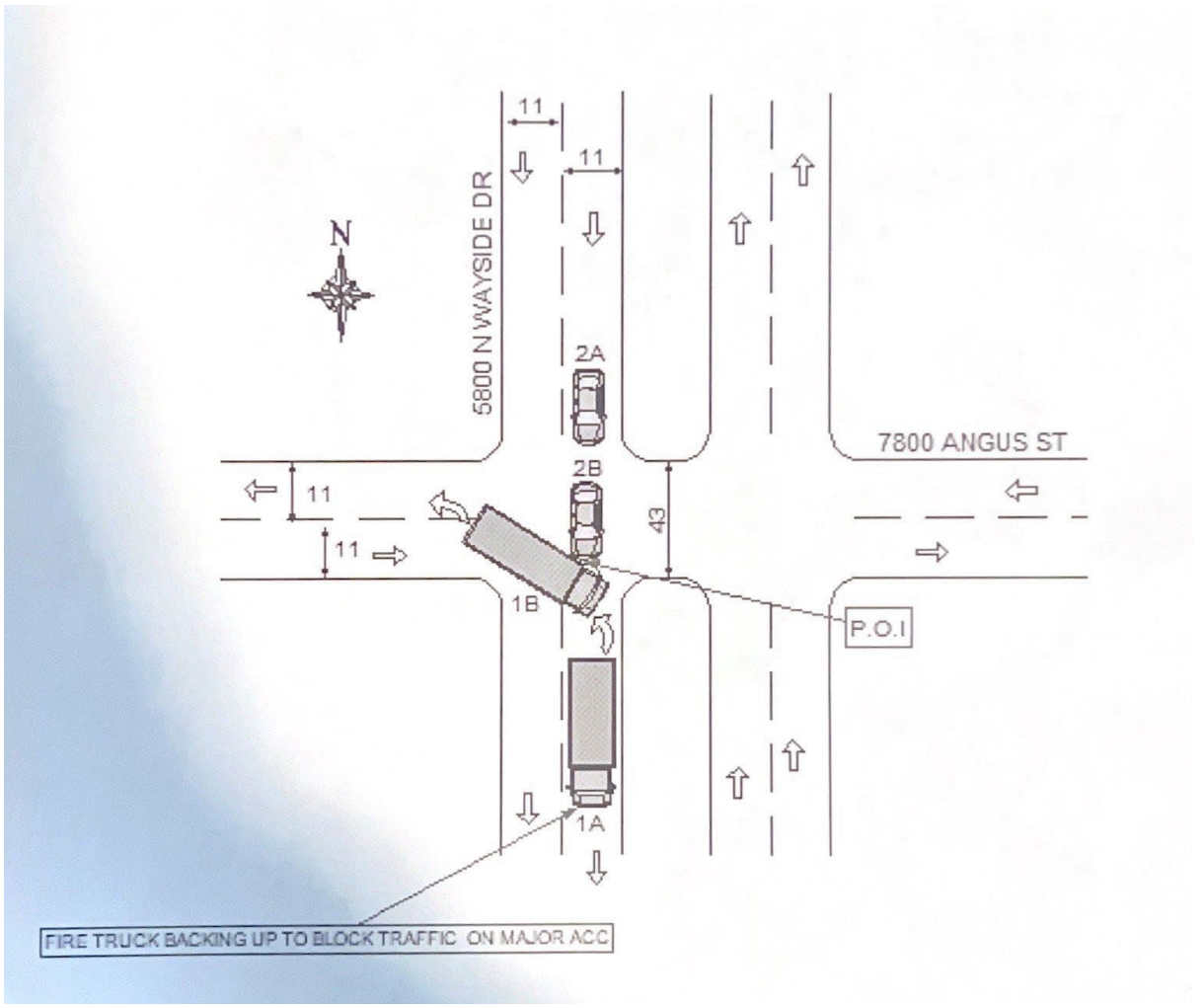
the emergency exception.[2] Because we sustain the City's complaint on the first issue of official immunity, we reverse, without reaching its second issue.

I. FACTUAL AND PROCEDURAL BACKGROUND

On April 26, 2019, Wilson, traveling southbound on Wayside came upon Engine 43 at the intersection of Angus and Wayside. Engine 43 had been dispatched to respond to an 18-wheeler-sedan collision on the northbound side of Wayside, north of Angus. Jason Carroll, the fire engine operator driving Engine 43, concluded he needed to back up the engine to negotiate the heavy traffic conditions in route. When Engine 43 began backing up with his spotter guiding, so did Wilson. But when Wilson ran out of room he had to stop before colliding with a vehicle behind him. Engine 43 continued and collided into Wilson's vehicle.

After the police arrived and investigated Engine 43's collision with Wilson, the investigating officer issued a report depicting the sequence.

[2] Tex. Civ. Prac. & Rem. Code § 101.055(2).



Wilson filed this lawsuit against the fire engine operator driving Engine 43, Jason Carroll, and the City of Houston ("the City" or "Houston") under the Texas Tort Claims Act ("TTCA") on February 26, 2021. After the City and Carroll moved for summary judgment on immunity, Wilson amended his pleadings, removing Carroll from the lawsuit.

In its summary-judgment motion, the City argued that it was immune from suit on account of Carroll's official immunity, alleging that when the accident occurred Carroll was acting within the scope of his authority, performing a discretionary duty, and acting in good faith.[3] To support its motion, the City

[3] In the City's motion, the City also challenged Wilson's negligence claims on the

provided Carroll's affidavit which, in addition to providing expert opinions on the applicable legal standards, provided the only testimony about the events leading to the collision.

Carroll's Affidavit's Description of Events

In his affidavit, Carroll explained that while he and the Houston Fire Department (HFD) normally use two spotters for backing up engines, Carroll exercised his judgment to use one, because "the second spotter would have been completely exposed and vulnerable to being hit by an inattentive motorist." "Stevenson [the spotter] was positioned on the passenger side of Engine 43 for his own safety during this maneuver; if any inattentive motorists had ignored our efforts, Stevenson could dart behind Engine 43 for protection." Carroll also made the judgment call to disengage the siren so that he could hear his spotter's radio transmissions but left his emergency lights engaged. Carroll explained that the engine was also equipped with backup alarms. It was undisputed that these alarms were operating at the time of the accident here. As soon as Carroll put Engine 43 in reverse, the backup alarm also sounded.

Carroll's affidavit shows that he checked his mirrors and then used the passenger side mirror to back up so he could also observe the physical commands of his spotter, and that he then backed up "as slowly and as carefully as possible—at no more than 2 mph." Carroll testified that Engine 43 was moving "at a speed that I did not believe presented an extreme risk beyond that which is part and parcel of backing up a pumper truck."

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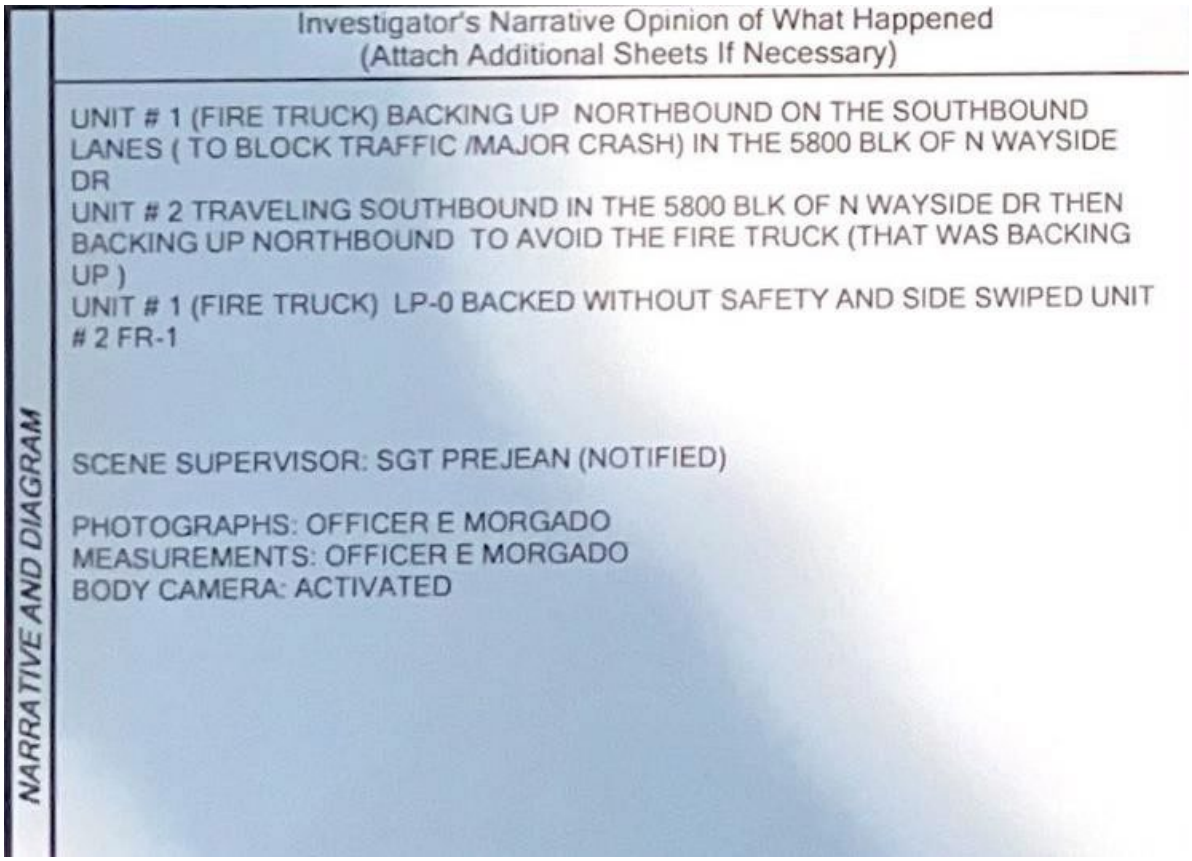
grounds that Wilson "could not meet his burden to negate the applicability of the TTCA's Emergency Exception," and argued that Plaintiff's negligent entrustment claim falls outside the TTCA's immunity waiver. The negligent entrustment claim is not at issue in this appeal, and although the parties' significantly briefed the issue of Emergency Exception, our holding requires that we only address the official immunity issue.

Carroll testified that he then heard a horn sound and his spotter Stevenson radioed for Carroll to stop Engine 43 from backing up and that he immediately stopped. When he looked out the driver's side window, he saw Wilson's SUV "within 500 feet of the rear of Engine 43".[4] Carroll's affidavit shows that when he noticed the SUV backing up, he reasoned that he had sufficient room to back Engine 43 into position. Carroll then resumed backing up and looked to his passenger side mirror "so I could observe Stevenson's instructions." Without sounding his horn or otherwise warning Carroll or the spotter, Wilson suddenly stopped backing up. According to Carroll's affidavit that is when Engine 43 and Wilson's SUV made contact.

Wilson filed a response to the City's motion, arguing that fact issues on the latter two elements of the immunity argument—that Carroll was performing a discretionary duty, and acting in good faith at the time of the occurrence—prevented summary judgment. To support his response, Wilson filed the police report for the incident, and otherwise refers to Carroll's affidavit. The officer's entries in the report indicate that Carroll "backed without safety and side swiped" Wilson's vehicle.

[4] See Tex. Trans. Code 545.407(a) (prohibiting drivers from following within 500 feet of a fire apparatus responding to a fire alarm or drive into or park the vehicle in the block where the fire apparatus has stopped to answer a fire alarm).



NARRATIVE AND DIAGRAM

Investigator's Narrative Opinion of What Happened
(Attach Additional Sheets If Necessary)

UNIT # 1 (FIRE TRUCK) BACKING UP NORTHBOUND ON THE SOUTHBOUND LANES (TO BLOCK TRAFFIC /MAJOR CRASH) IN THE 5800 BLK OF N WAYSIDE DR
UNIT # 2 TRAVELING SOUTHBOUND IN THE 5800 BLK OF N WAYSIDE DR THEN BACKING UP NORTHBOUND TO AVOID THE FIRE TRUCK (THAT WAS BACKING UP)
UNIT # 1 (FIRE TRUCK) LP-0 BACKED WITHOUT SAFETY AND SIDE SWIPED UNIT # 2 FR-1

SCENE SUPERVISOR: SGT PREJEAN (NOTIFIED)

PHOTOGRAPHS: OFFICER E MORGADO
MEASUREMENTS: OFFICER E MORGADO
BODY CAMERA: ACTIVATED

Based on this record, the trial court denied the City's summary-judgment motion, and this appeal followed.

II. Official Immunity

Subject-matter jurisdiction is necessary to a court's authority to decide a case. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). A plaintiff must allege facts affirmatively showing the trial court has subject-matter jurisdiction, *id.* at 446, and a party may challenge the lack of subject-matter jurisdiction by filing a plea to the jurisdiction or by other means, including, as here, by motion for summary judgment. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000); *see also Buzbee v. Clear Channel Outdoor, LLC*, 616 S.W.3d 14, 21 (Tex. App.—Houston [14th Dist.] 2020, no pet.). Because subject-matter jurisdiction is a question of law, we review the court's ruling de novo. *Tex. Dep't*

of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004); *City of Brazoria v. Ellis*, No. 14-14-00322-CV, 2015 WL 3424732, at *3 (Tex. App.—Houston [14th Dist.] May 28, 2015, no pet.) (mem. op.).

To obtain a traditional summary judgment based on lack of jurisdiction, a movant must produce evidence showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 551 (Tex. 2019) (citing Tex. R. Civ. P. 166a(c)). The nonmovant may raise a genuine issue of material fact by producing "more than a scintilla of evidence establishing the existence of the challenged element." *Id.* (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004)). Though the City asserted immunity with a traditional summary judgment motion, the applicable standards generally mirror those governing review of an order denying a plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 228; *Ellis*, 2015 WL 3424732, at *3. A defendant's jurisdictional plea may challenge either the plaintiff's pleadings or the existence of jurisdictional facts. *Miranda*, 133 S.W.3d at 228. The City challenged the existence of jurisdictional facts, so we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. *See id.* at 227. In both traditional summary judgment and plea to the jurisdiction contexts, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts arising from such evidence in the nonmovant's favor. *See id.* at 228. If the relevant evidence is undisputed or a fact question is not raised relative to the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id.* If the evidence creates a fact question regarding the jurisdictional issue, the trial court cannot grant the plea, and the fact issue will be resolved by the fact finder. *Id.* at 227-28.

The City, as a municipality and political subdivision of the State, cannot be vicariously liable for an employee's acts unless its governmental immunity has been waived. *Gomez v. City of Houston*, 587 S.W.3d 891, 896 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (en banc); *City of Pasadena v. Belle*, 297 S.W.3d 525, 529 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Under the facts of this case, potential waiver of the City's immunity from suit and liability is found in TTCA section 101.021, which provides in relevant part:

> A governmental unit in the state is liable for ... property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law ....

Tex. Civ. Prac. & Rem. Code § 101.021(1).

Because official immunity is an affirmative defense, the burden rests on the City to establish all elements of the defense. *Gomez v. City of Houston*, 587 S.W.3d 891, 897 (Tex. App.—Houston [14th Dist.] 2019, pet. denied). The parties do not dispute whether Wilson's injuries arose from the operation or use of a motor-driven vehicle. The dispute was and remains whether Carroll "would be personally liable to the claimant under Texas law." The City contends that Carroll would not be liable because he is protected by official immunity.

A. Did the city establish each element of its official immunity defense as a matter of law?

"A governmental employee is entitled to official immunity: (1) for the performance of discretionary duties; (2) within the scope of the employee's

authority; (3) provided the employee acts in good faith." *Hulick v. City of Houston*, No. 14-20-00424-CV, 2022 WL 288096, at *2 (Tex. App.—Houston [14th Dist.] Feb. 1, 2022, pet. denied) *citing Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000); *see also Belle*, 297 S.W.3d at 530; *Harris County v. Gibbons*, 150 S.W.3d 877, 886 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Woods v. Moody*, 933 S.W.2d 306, 307 (Tex. App.—Houston [14th Dist.] 1996, no writ). As he did in the trial court, Wilson concedes the first element; the record provides conclusive, uncontradicted, proof that Carroll was acting within the scope of his authority as an employee for the City. Thus, the elements in question are whether the City conclusively proved that Carroll was performing discretionary duties at the time of the accident and whether he was acting in good faith.

1. Did the City conclusively establish that Carrol was performing *discretionary duties* at the time of the incident?

An action is discretionary if it involves personal deliberation, decision, and judgment; on the other hand, an action that requires obedience to orders or the performance of a duty as to which the employee has no choice is ministerial. *Ramos v. Tex. Dep.'t of Pub. Safety*, 35 S.W.3d 723, 727 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (citing *Chambers*, 883 S.W.2d at 654). The distinction between ministerial and discretionary acts is often one of degree because any official act that is ministerial still requires the employee to use some discretion in its performance. *Id.* In determining whether an act is discretionary, the inquiry focuses on whether an employee was performing a discretionary function—not on whether the employee had the discretion to do an allegedly wrongful act while discharging that function, or whether the job description at issue includes discretionary duties. *Id.* We determine whether the employee's actions involved personal deliberation, decision, and judgment. *Chambers,* 883 S.W.2d at 654; *City of San Angelo Fire Dep't v. Hudson*, 179 S.W.3d 695, 704

(Tex. App.—Austin 2005, no pet.).

Carroll testified in his affidavit that, on April 26, 2019, the call to which he was responding at the time of the accident "was dispatched as an emergency call." Carroll explained he knew based on the proximity of the station to the accident that his crew—composed of "three [EMTs] and one paramedic who could provide emergency medical care if necessary"— "would be the first arriving medical personnel to this scene." In addition to its dispatch, Carroll explained he considered this to be an emergency. He stated, "I believed this emergency call to be *particularly urgent* because of the context of the crash being between an 18-wheeler and sedan, that might have a family in it."

Carroll testified that when he determined he would need to back up on Wayside, he used his individual judgment to leave his emergency lights engaged but disengaged the siren so that he could hear his spotter's radio transmissions. Carroll also explained that his back up signals would sound. Wilson did not dispute that these alarms were operating at the time of the accident and admits that "Mr. Carroll and all the [City's] agents were responding to an emergency" at the time of the accident.

The record establishes as a matter of law that Carroll was conducting a discretionary duty at the time of the collision, as operation of an emergency vehicle in an emergency situation is a discretionary duty. *See City of Houston v. Flaniken*, 108 S.W.3d 555, 557 (Tex. App.—Houston [14th Dist.] 2003, no pet.)(finding a discretionary duty as a matter of law where the plaintiff conceded that the truck "was on an emergency run" and where plaintiff nevertheless challenged the discretionary duty element, by testifying that emergency lights had been deactivated). Carroll and his crew had not yet arrived at the accident scene; there is no evidence the emergency ceased to exist when Carroll was backing up. *See id.*

fn. 1. The fact that Carrol had slowed, put the engine in reverse, and turned off the siren to hear his spotter on the radio did not remove the fact that he was still trying to get to the accident site—the emergency or the discretionary nature of Carroll's activities at the time remained.

Because the evidence was uncontroverted that Carrol was operating Engine 43 in the course of an emergency response to a vehicle accident, and Carroll's affidavit illustrates the various decisions he made in the course of driving Engine 43 leading up to the collision—including determining the proper route to the accident, whether to keep the emergency siren and lights engaged while backing up, whether and how many spotters he should have while performing the reverse maneuver—we conclude that the Carrol was performing *discretionary duties* at the time of the incident. *See id*. Thus, to the extent the trial court's denial of summary judgment was based on a finding that the City failed to conclusively establish that Carrol's acts were discretionary duties at the time of the collision, such finding was erroneous. We next consider the trial court's implicit finding that the City failed to conclusively establish that Carrol was acting in good faith at the time of the incident.

2. Did the City conclusively establish that Carrol was acting in good faith at the time of the incident?

A court must measure good faith against a standard of objective legal reasonableness, without regard to the fire engine operator's subjective state of mind. *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). To be entitled to summary judgment, the City must carry the burden to prove conclusively that a reasonably prudent police officer, under the same or similar circumstances, could have believed his actions were justified based on the information he possessed at the time. *Telthorster v. Tennell*, 92 S.W.3d 457, 465 (Tex. 2002). The City need

not prove that it would have been unreasonable not to take these actions, or that all reasonably prudent fire engine operators would have taken the same actions. *See id.* Rather, the City must prove conclusively that a reasonably prudent fire engine operator, under the same or similar circumstances, *might* have reached the same decision. *See id.* That Carroll may have been negligent will not defeat good faith; this test of good faith does not inquire into "what a reasonable person *would have done*," but into "what a reasonable [fire engine operator] *could have believed.*" *Id.* (internal quotations and citations omitted). The good-faith standard is analogous to an abuse-of-discretion standard that protects " 'all but the plainly incompetent or those who knowingly violate the law.' " *Texas Dept. of Public Safety v. Bonilla*, 481 S.W.3d 640, 643 (Tex. 2015) (per curiam) (quoting *City of San Antonio v. Ytuarte*, 229 S.W.3d 318, 321 (Tex. 2007) (per curiam)).

In this context, good faith depends on how a reasonably prudent fire engine operator could have assessed both the *need* to which the fire engine operator was responding and the *risks* of the fire engine operator's course of action, based on the fire engine operator's perception of the facts at the time of the event. *Wadewitz*, 951 S.W.2d at 467. The "need" aspect of the balancing test refers to the urgency of the circumstances requiring intervention. *Id.* In the context of an emergency response to an accident, need is determined by factors such as: (1) the seriousness accident to which the officer is responding; (2) whether the fire engine operator's immediate presence is necessary to prevent injury or loss of life; and (3) what alternative courses of action, if any, are available to achieve a comparable result. *See id.*

The "risk" aspect refers to the countervailing public-safety concerns: (1) the nature and severity of the harm the fire engine operator's actions could cause (including injuries to bystanders as well as the possibility that an accident would

prevent the officer from reaching the scene of the original emergency); (2) the likelihood that any harm would occur; and (3) whether any risk of harm would be clear to a reasonably prudent fire engine operator. *Id.*

To prevail, a governmental defendant's proof must sufficiently address these need/risk factors. *Telthorster*, 92 S.W.3d at 462. An expert giving testimony regarding good faith must discuss what a reasonable officer could have believed based on the officer's perception of the facts at the time of the event, and this discussion must be substantiated with reference to both the need and risk aspects of the balancing test. *See Wadewitz*, 951 S.W.2d at 466–67; *Belle*, 297 S.W.3d at 531. In addition, the facts of the case may require the expert to provide a continuing assessment of the need and risk factors because emergency responses and police pursuits may involve rapidly changing circumstances. *Belle*, 297 S.W.3d at 531.

A reviewing court analyzing these factors first determines whether the governmental unit met its initial burden to prove conclusively the fire engine operator's good faith. *Gomez*, 587 S.W.3d 898. Only when it has been determined that the governmental unit met this burden does the court address whether the nonmovant's evidence raises a genuine issue of material fact on the issue of good faith. *Id.*

Carroll's affidavit describes the circumstances, follows his decision-making, and provides his expert opinions with reference to the needs and risks associated with the emergency and his judgement—what "a reasonable [fire engine operator] could have believed based the same or similar circumstances". Carroll concludes that a reasonable fire engine operator could have believed that his actions were justified based on his perception of facts at the time. Carroll's affidavit clearly addresses both need and risks sides of the balancing test.

With respect to the *needs*, Carroll's affidavit provides numerous details:

Carroll testified that, because the incident involved an 18-wheeler, "I knew the collision was likely to be serious and that we need to get there quickly." "Eighteen wheelers typically have fuel containers on the side of the cab that is about the same height as a sedan." He continued: "if the sedan punctured one of those containers, fuel could leak on the roadway presenting a fire hazard." Carroll testified that, in addition, "there is a potential in an accident between and 18-wheeler and a sedan that the sedan drove under or got pinned under, which would present an extrication alarm." "An extrication alarm calls for additional personnel, including a District Chief, ladder company, and heavy rescue." He observed that, "to determine whether this additional personnel was required, Engine 43's team needed to get to the scene as soon as possible." He testified that it was also "[i]mportant for Engine 43's team to get to the scene to prevent other motorists from driving through the crash scene, possibly through a fuel spill and into the victims and other first responders." Consequently, Carroll exercised his discretion, based on his experience and training, to get to the scene of the 18-wheeler accident as quickly as possible.

Carroll testified that, at the time of the accident, the weather was clear and the roads were dry; however, traffic was very heavy due to the 18-wheeler collision. Carroll also testified that, because of heavy traffic conditions, he exercised his individual judgment to determine the best way to reach the scene of the 18-wheeler collision. Carroll determined that he could not, for example, take the "pass-through on Wayside" because "there were too many cars blocking our path to the scene. Carroll, therefore, "exercised his individual judgment to stop on Wayside back up on Angus Street and divert northbound traffic onto Angus." "I exercised my individual judgment to stop on Wayside, use a spotter to back into Angus Street and divert Northbound traffic onto Angus, so that I could eventually

get Engine 43 closer to the scene of the incident in case water was needed." He testified that "there is always some risk in backing up a pumper truck, so I wanted the assistance of a spotter to minimize that risk."

With respect to the *risks*, or countervailing public-safety concerns, Carroll's affidavit identifies the nature of the harm as "harm to other motorists," notes that there is "*always some risk* in backing up a pumper truck," and addresses his means of countenancing that risk by using a spotter and backing up "as slowly and as carefully as possible—at no more than 2 mph." The affidavit's universal language—"*always* some risk"—indicates that the risk of backing up an Engine is clear among reasonably prudent fire engine operators. In connection with this risk, to Carroll's statement that that a reasonable engineer/operator could conclude his actions were justified, Carroll references "*the minimal risk* of harm to others from [his] own driving." *See Flaniken*, 108 S.W.3d at 557 ("and although there is always risk in backing up a vehicle, there was no evidence that this was done at an unsafe speed; the risk in this case was much less than that involved in a high speed chase or running traffic signals").

On this record, the City satisfied its burden to prove conclusively that Carroll was acting in good faith at the time in question.

The fact that Carroll had turned off his siren or that he had chosen only one spotter is unconvincing in light of the circumstances described in Carroll's affidavit, and thus the cases Wilson has cited are not germane to this case. *See Junemann v. Harris County*, 84 S.W.3d 689, 694 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (Unlike the officers in *Junemann,* Carroll *did* explain why he did not also use his siren when backing up and how that factored into his risk analysis); *Harris County v. Smyly*, 130 S.W.3d 330, 335 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (Material facts regarding good faith were contradicted in

Smyly, while no facts are contested on our record); *City of Brazoria, Tex. v. Ellis*, No. 14-14-00322-CV, 2015 WL 3424732, at *6 (Tex. App.—Houston [14th Dist.] May 28, 2015, no pet.) (mem. op.) (not designated for publication) (*Ellis* involved a fact dispute over whether a siren had been used at all in a case in which the plaintiff claimed not to have had adequate warning of a speeding police car; in this case, Carroll had the sirens and turned them off momentarily, and moreover, there was no dispute Wilson was aware of the presence and movements of Engine 43).

Thus, to the extent the trial court's denial of summary judgment was based on a finding that the City failed to conclusively establish that Carrol was acting in good faith at the time in question, such finding was erroneous. We next consider the trial court's implicit finding that the that Wilson offered evidence that no reasonable officer in Carroll's position could have believed that the facts were such that they justified Carroll's conduct.

3. Did Wilson present evidence that no reasonable officer in Carroll's position could have believed that the facts were such that they justified Carroll's conduct?

If the trial court concluded, as we have, that the City met its summary-judgment burden, then to have raised a fact issue, Wilson must have done more than show that a reasonably prudent fire engine operator could have reached a different decision. *Gomez v. City of Houston*, 587 S.W.3d 891, 897 (Tex. App.—Houston [14th Dist.] 2019, pet. denied). Wilson must have offered evidence that no reasonable officer in Carroll's position could have believed that the facts were such that they justified Carroll's conduct. *See id.*

The only evidence Wilson presented was the police report wherein the police officer responding to the Carroll-Wilson incident found Carroll at fault. The statements in the police report that Carroll's actions were "unsafe" or negligent

does not defeat good faith. *Telthorster v. Tennell*, 92 S.W.3d 457, 465 (Tex. 2002) (Wilson did not offer any evidence on good faith, to inquire into 'what a reasonable officer *could have believed.*'"). Wilson's evidence fails to adequately rebut either of the contested elements of governmental immunity. On this record, to the extent the trial court's denial of summary judgment was based on a finding that Wilson had adequately rebutted the City's proof, we conclude such holding erroneous.

Accordingly, with sufficient proof showing that Carroll would not be liable because he is protected by official immunity, the trial court erred in denying the City's summary-judgment based on official immunity.

III. CONCLUSION

Having sustained the City's complaint that the trial court erred in denying its summary judgment on its official immunity grounds. We reverse and render a judgment dismissing Wilson's action.

/s/ Randy Wilson
Justice

Panel consists of Chief Justice Christopher, Justice Bourliot and Justice Wilson.