AFFIRMED IN PART, REVERSED IN PART, AND REMANDED and Opinion Filed July 18, 2023

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00911-CV

ROGELIO SANTANDER SR. AND JULIA GARCIA, INDIVIDUALLY AND AS CO-ADMINISTRATORS OF THE ESTATE OF ROGELIO SANTANDER JR., AND CRYSTAL ALMEIDA, Appellants
V.
CHAD SEWARD, HOME DEPOT U.S.A., INC., AND POINT 2 POINT GLOBAL SECURITY, INC., Appellees

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-07132

MEMORANDUM OPINION

Before Justices Carlyle, Garcia, and Rosenberg[1]
Opinion by Justice Garcia

Dallas police officers Rogelio Santander Jr. and Crystal Almeida were dispatched to a Home Depot store where Armando Luis Juarez was being detained. After the officers arrived, Juarez pulled out a gun and shot them both, fatally injuring Santander. Santander's survivors and Almeida sued several defendants, including

[1] The Hon. Barbara Rosenberg, Justice, Assigned

appellees Home Depot U.S.A., Inc., Point 2 Point Global Security, Inc., and Chad Seward, a Dallas police officer who was working a second job as a security guard at the Home Depot store at the time. Appellants' liability theories hinged in part on whether appellees acted reasonably in dealing with Juarez before Santander and Almeida arrived.

Appellees obtained take-nothing judgments from the trial court on dispositive motions, and, after a severance, appellants timely appealed. We affirm in part, reverse in part, and remand.

I. Background and Appellate Issues

A. Factual Allegations

Appellants alleged the following facts in their fourth amended petition, which was their live pleading for purposes of this appeal.

In 2017, appellee Home Depot changed its "asset protection policies." Previously, its policies called for suspected shoplifters to be confronted after passing a point of sale, and they allowed Home Depot employees and security vendors to handcuff and search suspects. In 2017, Home Depot changed its policies and no longer allowed its personnel to physically search or restrain suspected shoplifters.

In and before April 2018, the Home Depot store at 11682 Forest Central Drive in Dallas was known to be the site of frequent criminal activity. To address the problem, Home Depot middle managers designed a strategy that included removing

undesirable people from the premises by giving them criminal-trespass warnings.[2] Another part of this strategy included staffing the location with off-duty police officers supplied by appellee Point 2 Point. One of those officers was appellee Chad Seward, a police officer for the Dallas Police Department (DPD).

On April 24, 2018, Seward was working at the Forest Central Home Depot store when a man named Armando Luis Juarez came in. Home Depot employee Scott Painter called Seward on his cell phone, told him that Juarez was acting suspiciously, and directed Seward to help Painter issue a criminal-trespass warning to Juarez. The events that followed, which we will discuss in detail later in this opinion, led to Juarez's being taken to the store's asset-protection office. Seward "called in a cover element of on-duty [police] officers to the store." Officers Rogelio Santander Jr. and Crystal Almeida responded to the call and went to the store's office where Juarez was being detained. Seward went to the officers' squad car, confirmed that Juarez had an outstanding arrest warrant, and relayed this information to Painter by cell phone. When Almeida approached Juarez to take him into custody, Juarez pulled a firearm from his pocket and shot Santander, Almeida, and Painter. Santander died from his injuries; Almeida and Painter survived.

[2] A person commits criminal trespass by entering another's property after receiving notice that entry is forbidden or by remaining on another's property after receiving notice to depart. *See* TEX. PENAL CODE ANN. § 30.05(a).

B. Procedural History

Appellants (Santander's parents and Almeida) filed this wrongful-death, survival, and personal-injury lawsuit against Juarez, Seward, Home Depot, and others not relevant to this appeal. Appellants later added Point 2 Point as a defendant.

Seward filed a motion to dismiss appellants' claims based on § 101.106(f) of the Texas Civil Practice and Remedies Code. He later filed a supplemental motion to dismiss.

Appellants then filed their fourth amended petition, which remained their live pleading at the time of the orders now on appeal. They asserted claims against Seward, Point 2 Point, and Home Depot as follows:

Seward	Point 2 Point and Home Depot
Negligence	Negligence
Negligent undertaking	Negligent undertaking
	Negligent training and supervision
	Vicarious liability for the conduct of Seward, Painter, and Elijah Lateef

The vicarious-liability claims rested on theories of respondeat superior, joint venture, and agency.

Appellants filed a response to Seward's motion to dismiss and separate objections to Seward's evidence.

After a nonevidentiary hearing, the trial judge signed an order granting Seward's motion to dismiss and a separate order generally overruling appellants' evidentiary objections.

Point 2 Point and Home Depot filed separate motions for summary judgment. Appellants filed responses to those motions. After a hearing, the trial judge signed orders granting the summary-judgment motions. Appellants' claims against other defendants not relevant to this appeal remained pending.

Appellants then filed a motion for reconsideration of the order dismissing their claims against Seward. Seward filed a response to that motion, and Home Depot filed a response and an amended response to that motion. After a nonevidentiary hearing, the trial judge signed an order denying the motion for reconsideration.

Based on a motion for severance, the trial judge severed appellants' claims against appellees into a separate case, thereby creating a final judgment in appellees' favor. Appellants timely appealed.

C. Issues on Appeal

Appellants assert seven issues on appeal. Their first issue challenges the dismissal of their claims against Seward. Their remaining issues challenge the summary-judgment orders in favor of Point 2 Point and Home Depot.

II. Issue One: Whether Seward Was Entitled to Dismissal

We begin with appellants' first issue on appeal: did the trial judge err by dismissing appellants' claims against Seward under Civil Practice and Remedies

Code § 101.106(f)? Because the evidence raises a genuine fact issue as to whether Seward was acting within the scope of government employment as to some of his conduct, we conclude that the trial judge erred and sustain appellants' first issue in part.

A. Standard of Review

Section 101.106(f) extends governmental immunity to government employees under certain circumstances. *See Franka v. Velasquez*, 332 S.W.3d 367, 371 n.9 (Tex. 2011) ("By moving for summary judgment on section 101.106(f), defendants were asserting claims of governmental immunity."). The supreme court has indicated that when a defendant presents a motion to dismiss based on § 101.106(f), the rules governing immunity-based pleas to the jurisdiction apply. *See Marino v. Lenoir*, 526 S.W.3d 403, 405 (Tex. 2017) (in appeal from § 101.106(f) ruling, "we may consider whether there are issues of material fact that should have precluded the trial court from granting the motion to dismiss"); *id*. at 405 n.5 (citing *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–28 (Tex. 2004), for premise that in an appeal from an evidence-based plea to the jurisdiction, the appellate court reviews de novo whether the evidence raised a material issue of fact).

Accordingly, we review de novo the trial judge's order granting Seward's motion to dismiss, and we must reverse if the evidence raises a genuine fact issue as to any element of Seward's § 101.106(f) defense. *See id*. at 405 & n.5; *see also Garza v. Harrison*, 574 S.W.3d 389, 406 (Tex. 2019) (defendant was entitled to

dismissal under § 101.106(f) because evidence "conclusively establishe[d]" the contested element of his § 101.106(f) defense); *Fink v. Anderson*, 477 S.W.3d 460, 465–66 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (defendant seeking dismissal under § 101.106(f) must conclusively prove elements of that defense).

The rules governing immunity-based pleas to the jurisdiction support this allocation of the burdens. *See Marino*, 526 S.W.3d at 405 n.5. The plaintiff has the burden to plead facts affirmatively showing the trial court has jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In determining whether the plaintiff has met this burden, we construe the pleadings liberally in favor of the plaintiff and look to the plaintiff's intent. *Id*. If the plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court considers relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised. *Id*. at 227. If the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Id*. at 228. When reviewing a plea to the jurisdiction in which the pleading requirement has been met and evidence implicating the case's merits has been submitted to support the plea, we take as true all evidence favorable to the nonmovant. *Id*. We indulge every reasonable inference and resolve doubts in the nonmovant's favor. *Id*.

B. Applicable Law

1. Overview of § 101.106(f)

After the Texas Tort Claims Act was enacted, plaintiffs often sought to avoid its limitations by suing governmental employees rather than the governmental unit itself. *See Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 656 (Tex. 2008). Governmental employees could assert the defense of official immunity, but determining whether that defense applied in particular cases was sometimes problematic. *See Franka*, 332 S.W.3d at 383.

To protect governmental employees, the legislature then added an election-of-remedies provision to the TTCA. *Garcia*, 253 S.W.3d at 656. Part of that provision, § 101.106(f), gives governmental employees a form of governmental immunity. *See Franka*, 332 S.W.3d at 371 n.9. Section 101.106(f) reads as follows:

> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(f). Additionally, the TTCA defines "scope of employment":

> "Scope of employment" means the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.

Id. § 101.001(5).

Thus, under § 101.106(f), a defendant is entitled to dismissal of a claim upon proof that (1) he was an employee of a governmental unit, (2) his allegedly tortious acts fell within the general scope of his government employment, and (3) the claim could have been brought against the governmental unit under the TTCA. *See id*. § 101.106(f); *Cathcart v. Jones*, No. 05-18-01175-CV, 2020 WL 2214105, at *6 (Tex. App.—Dallas May 7, 2020, pet. denied) (mem. op.); *see also Garza*, 574 S.W.3d at 396.

2. Caselaw Addressing "Scope of Employment" Under the TTCA

This appeal focuses on the "scope of employment" element of § 101.106(f) immunity. The Texas Supreme Court has recently decided two cases that address the proper interpretation of that element.

a. *Laverie v. Wetherbe*

First is the case of *Laverie v. Wetherbe*, 517 S.W.3d 748 (Tex. 2017). Laverie was a dean at Texas Tech University, and Wetherbe sued her for defamation after Wetherbe was passed over for both a dean position and a mark of distinction called a "Horn professorship." *Id*. at 750–51. The trial court denied Laverie's § 101.106(f)-based summary-judgment motion, the court of appeals affirmed, and the supreme court reversed. *Id*. at 750. Construing the scope-of-employment element, the supreme court held that the element is fundamentally objective: "Is there a connection between the employee's job duties and the alleged tortious conduct?" *Id*.

at 753. The answer to that question may be yes "even if the employee performs negligently or is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to her job responsibilities." *Id*. Rejecting the lower courts' contrary view that the defendant employee's subjective intent is relevant, the supreme court held that Laverie successfully established that objectively she was acting in the scope of her employment when she made statements about Wetherbe in her roles as dean and as a member of the dean search committee. *Id*. at 756.

b. *Garza v. Harrison*

In *Garza v. Harrison*, the supreme court considered the scope-of-employment element of § 101.106(f) specifically in the context of an off-duty police officer. *See* 574 S.W.3d at 393–94. Garza was a police officer for the city of Navasota, and he also worked part-time as a "Courtesy Patrol Officer" for the apartment complex where he lived. *Id*. at 394. While off-duty from his police-department job, Garza arrived at the apartment complex and encountered Jonathen Santellana. *Id*. at 395. Suspecting that Santellana was engaged in illegal-drug-related activity, Garza retrieved his firearm from his apartment and then returned to the parking lot, where he saw Santellana sitting in a car and putting marijuana into a pill bottle. *Id*. Garza then displayed his badge and asked Santellana to get out of the car. *Id*. Although the precise sequence of events thereafter was disputed, it was undisputed that Garza fatally shot Santellana during the encounter. *Id*. at 395–96. Santellana's parents sued

Garza for wrongful death, the trial court denied Garza's § 101.106(f) motion to dismiss, and the court of appeals affirmed. *Id*. at 396–97.

The supreme court reversed and rendered judgment in favor of Garza. It framed the question as whether Garza was acting within the scope of his employment as a police officer when, while off-duty and outside of Navasota's territorial jurisdiction, Garza confronted and attempted to arrest Santellana. *Id*. at 400. The court repeated the *Laverie* test that "the critical inquiry is whether, when viewed objectively, 'a connection [exists] between the employee's job duties and the alleged tortious conduct.'" *Id*. at 401 (quoting *Laverie*, 517 S.W.3d at 753). But it also said that "[c]onduct falls outside the scope of employment when it occurs 'within an independent course of conduct not intended by the employee to serve *any* purposes of the employer.'" *Id*. at 400 (quoting *Alexander v. Walker*, 435 S.W.3d 789, 792 (Tex. 2014) (per curiam), and adding emphasis).

The supreme court then held that city police officers, regardless of whether they are on-duty or within their primary jurisdiction, are acting within the general duties of their governmental employment whenever they attempt to arrest someone for a crime committed in plain view. *Id*. at 401. Relying on case law, the court reasoned that police officers are "relatively unique among governmental employees" because they are expected to stop crime whenever it occurs, and thus an off-duty officer immediately becomes an on-duty officer if he or she observes a crime. *Id*. at 403. The court also stated that a police officer's scope of employment is not limited

to activities mandated by his or her employer or strictly directed by the Texas Code of Criminal Procedure; rather, that scope encompasses acts that, objectively, "are 'of the same general nature as the conduct authorized or incidental to the conduct authorized to be within the scope of employment.'" *Id*. at 404–05 (quoting *Laverie*, 517 S.W.3d at 753).

Importantly for this case, the *Garza* court recognized that cases involving off-duty police officers who are working a second job can present difficult scope-of-employment questions:

> [B]ecause a police officer is always a police officer, even during off-duty hours, the capacity in which an officer is acting may be amenable to uncertainty. The confusion is compounded when, as in this case and many others, an officer has undertaken private employment during off-duty hours. To determine what capacity a peace officer was acting in when conduct providing the basis for a claim has occurred, *Blackwell v. Harris County*[, 909 S.W.2d 135 (Tex. App.—Houston [14th Dist.] 1995, writ denied),] suggests some helpful guidelines. An officer enforcing general laws in accordance with a statutory grant of authority is acting in the course and scope of employment as a peace officer. ***But if an officer is protecting a private employer's property, ejecting trespassers, or enforcing rules and regulations promulgated by the private employer, a fact question may arise as to whether the officer's conduct is in a private or official capacity***.

Id. at 403 (emphasis added) (footnotes omitted).

C. The Evidence

Next we summarize the relevant evidence the parties submitted in connection with Seward's motion to dismiss.

1. Scope of the Evidentiary Record

No evidence was admitted at the motion-to-dismiss hearing, so the relevant evidence consists of the evidence previously filed with Seward's motion to dismiss, his first supplemental motion to dismiss, and appellants' response.

However, in arguing appellants' first issue, both sides refer to evidence outside the motion-to-dismiss record. For example, the parties cite evidence attached to summary-judgment papers filed after the trial court had already granted Seward's motion to dismiss. We do not consider that evidence because we must review the ruling based on the record that was before the trial court at the time it ruled. *See Spiritas v. Davidoff*, 459 S.W.3d 224, 231 (Tex. App.—Dallas 2015, no pet.).

Appellants also filed a motion for reconsideration of the order dismissing their claims against Seward, and they attached additional evidence to that motion. On appeal they rely heavily on one exhibit to that motion, an affidavit by Dallas Police Detective Angela Arredondo. But the trial court denied appellants' motion for reconsideration, and its order does not affirmatively indicate that the court accepted or considered appellants' new evidence in deciding the motion for reconsideration. Because the trial court did not affirmatively indicate that it was accepting or considering appellants' new evidence, we conclude that the Arredondo affidavit and other evidence attached to appellants' motion for reconsideration are not before us in our review of the order dismissing appellants' claims against Seward. *See Chang v. Liu*, No. 05-20-00977-CV, 2022 WL 17175006, at *6 (Tex. App.—Dallas Nov.

23, 2022, no pet.) (mem. op.) (applying this rule in summary-judgment context); *Hagan v. Pennington*, No. 05-18-00010-CV, 2019 WL 2521719, at *4 (Tex. App.—Dallas June 19, 2019, no pet.) (mem. op.) (same).

2. Review of the Evidence

Next we review the evidence to determine whether it conclusively establishes that Seward was enforcing general laws in accordance with a statutory grant of authority, which would place him within the scope of his government employment, or whether there is a genuine fact issue on this point. *See Garza*, 574 S.W.3d at 403. The evidence consisted mainly of Seward's affidavit and excerpts from the depositions of Seward, Painter, and another person named Elijah Lateef. As will be seen, their testimony about the incident was not entirely consistent. Painter and Seward's testimony differed in two critical areas: (1) whether Seward conducted a search of Juarez; and (2) the time and location of Seward's call to dispatch to determine whether there was a warrant for Juarez.

a. Background Facts

Seward testified by affidavit that from May 2012 to the date of the incident, April 24, 2018, he was employed as a patrol officer by the DPD. On the day of the incident, Seward was off-duty and working a second job at the Home Depot store in question. Scott Painter testified by deposition that in April 2018 he was an asset protection specialist at a Home Depot store in Dallas.

Seward testified in his deposition that before the incident in question, Painter said that Home Depot wanted Seward "mostly just to be there to, you know, assist with either trespassing, or just stay in front, be visible, and help deter theft." Somebody mentioned to Seward that Home Depot was having "a lot of shoplifting issues. So they were just trying to trespass people to keep them from coming in the store." Seward described the criminal-trespass-warning process as follows: "They have—we have a yellow warning card that stays with the property that shows that I gave an actual warning, and that the property can use as proof that a warning was given. It helps us locate the report where the warning was given." Seward claimed that only he "had the authority to issue the criminal trespass by statute." Painter also testified that he had to have the police involved to be able to issue a criminal-trespass warning.

b. Juarez was noticed and watched.

Painter testified that he observed Juarez engage in "a very unnormal behavior" in the Home Depot store. First, Painter saw him grab a bucket with the lid and proceed to the paint aisle. Then he saw Juarez quickly grab three painter's shirts and one other small item, put them inside the bucket, and put the lid on top. He thought Juarez's behavior indicated an intent to shoplift. Later, in a different area of the store, he saw Juarez pick up a knife, put it into the bucket, and put the lid back on top.

Seward testified in deposition that he first became aware of Juarez's presence in the store when Painter called him on his cell phone and said "something to the

effect of, he sees somebody that is acting suspicious, and he believes they're shoplifting." Painter said something to the effect that Juarez was putting items into a bucket and putting the lid on it, and that Painter thought Juarez "was stealing merchandise, getting ready to take it somewhere to steal it." Painter described Juarez to Seward, and Seward was able to identify him walking around near the front of the store. Seward testified that he considered Painter to be a reliable person to relay such information to him, but, "[a]t this point, I don't have enough to where I would stop him in the store for just walking around with a bucket." Seward watched Juarez walk across the front of the store from the "shopping area" to "I guess that's like the seasonal area, over on the opposite end of the area." Seward testified that, aside from what Painter had said, "[w]hat I saw—I didn't see [Juarez] do anything that would tell me he committed a crime. I was only acting on what I was being told to [sic] by Painter."

Painter testified that Juarez went into a bay that "wasn't completely stocked, and everything was pulled to the front." There was a "big gap of empty space behind the insulation," and Painter saw Juarez go "behind that product with the bucket." Painter could see Juarez "open the bucket and start to take the product out." But because Juarez "conceal[ed] himself behind that product," he "lost visual" and could not see if Juarez was concealing items on his person.

Painter further testified that immediately after Juarez went "behind the insulation," Painter called Seward and let him know what had happened. Painter

quoted himself as saying, "I've got this guy. He's in the process right now of stealing. It's $30 worth of stuff." Painter further told Seward that he just wanted Juarez to be given a criminal-trespass warning and then let go, and "the products will be recovered."

Seward testified similarly that Painter told him over the phone that Juarez went into "the back aisles, up against the riser where the insulation is kept. And then he went behind there, and Painter said something to the effect of, it's not worth the stop. I just want him trespassed." Based on what Painter had told him, Seward thought Juarez had taken merchandise into an area where no reasonable person would take merchandise. Seward went to the location where Painter was and described what happened next as follows:

> Best of my memory, it was basically just Painter telling me he just wants him trespassed. He saw him go behind the insulation, and what he's doing is—you know, it just looked too suspicious, and it could—he could have mentioned something about it's a violation of company policy for customers to do things like that. He just wants him trespassed. It was very short and to the point, what he wanted. The timing there was very short from when I talked with Painter to when Juarez came out.

c. Seward and others confronted Juarez.

Painter testified that Seward was accompanied by another person, Elijah Lateef, as Seward arrived at the location where Painter was. Painter pointed to the place where Juarez was, and his intention was for Seward to issue a criminal-trespass warning and get Juarez out of the store. He told Seward to get Juarez out from behind the insulation and give him a criminal-trespass warning. Seward approached and

said something to effect of, "Hey, sir, we need you to come out here and talk with us for a minute." Juarez came out from the insulation without the bucket, and Painter said something like, "Hey, man. We need you to go—come to the office with us. We're going to issue you a criminal trespass, and you'll be on your way."

Seward testified that when Juarez came out of the insulation and they began to walk to the back office, Seward did not consider himself to be assisting in an investigation by Painter. He testified, "At this point, I'm investigating a criminal trespass to give a warning. [Painter's] investigation of him shoplifting had been completed by him." He also testified that he considered himself to be acting in his capacity as a licensed police officer for the City of Dallas.

Painter testified that the group started to walk towards the office, which was at the back of the store. Painter was in front, but in his peripheral vision he saw "Seward grab Juarez's left arm and—and Juarez immediately just kind of buckled and went to the ground." Juarez "went from standing to immediately into a fetal position." Painter "went to grab [Juarez's] arm," and he heard Seward say, "He's got the Mace on his belt loop." Lateef grabbed the mace from Juarez's belt loop, and he also took a "long, skinny bifold wallet from Juarez's back pocket." (Seward, however, testified that he was the one who removed "the pepper spray" from Juarez's person.) Painter testified that Juarez was very tense, but then Painter said, "Hey, man, all we're doing is giving you a criminal trespass. You're going to be on your way. Like, let's take this calm. We're going to get you—take you to the office.

You'll be on your way. You'll be free to walk out within probably 30 minutes." That calmed Juarez down.

d. Differing Accounts Regarding Whether Juarez Was Frisked

Seward's and Painter's accounts differed as to whether Seward ever searched or frisked Juarez.

Seward claimed that he performed a protective frisk, meaning a cursory search of the outside of Juarez's clothing, while Juarez was on the floor. He stated that he frisked Juarez with his right hand while he held Juarez's arm with his left hand. He intended to pat down all the pockets of Juarez's pants that he could identify as pockets. He asserted that he detected unidentifiable objects in Juarez's pockets, but he did not feel anything that felt like a firearm or another weapon; he therefore did not believe that he had the right to search Juarez's pockets. Seward further testified that he never asked Juarez what was in his pockets or if he could remove the unidentified objects from his pockets. He thought his frisk was adequate.

Painter recalled the events to this point differently. Painter testified that he never saw Seward search Juarez.

e. Differing Timelines and Location for Seward's Call to Dispatch

Seward's and Painter's accounts also differed on the timeline and location of Seward's call to dispatch. While Seward claimed that he called dispatch as Juarez was on his knees in the store, Painter testified that Seward did not make the call until

the group had made their way to a back office used for Painter's asset protection function.

Seward testified to the following events:

> It happened right after I took the pepper spray. I do a—I get his name, and—he gives his name, date of birth. I try to do a subject check over the radio of what it is. And dispatch comes back with a soundalike warrant. So it's very—very close to what he gave me, but it's not exactly what he gave me for a name. And I have no ID on him, and I have no way to prove or disprove who he is. So at this point, I now have an actual detention of the person. He's not under arrest, but he's not free to go while I investigate further. So I asked dispatch to not confirm on the warrant and to send me cover so I can identify who he is.

According to Seward, he made the call while Juarez was on his knees and Seward was holding him with his left hand. He also testified that Juarez heard Seward's radio conversation with dispatch, and when the dispatch person gave Seward a name that included a middle name, Juarez "heard the transmission" and said that he had no middle name and that the name given by dispatch was not him. Because Seward could neither confirm nor refute what Juarez told him, he told dispatch to "hold off on confirmation" and to "start [Seward's] cover element" so Seward could identify him. According to Seward, that is standard DPD procedure.

There was evidence that a second weapon was found on Juarez at some point during the incident. In his deposition, Lateef testified that he looked into Juarez's wallet and found some sort of knife that was thin enough to fit inside the wallet. Seward testified that he learned from Lateef that there was a credit-card-shaped knife "buried in [Juarez's] wallet." Seward claimed that although this discovery did not

make him raise or lower his guard, it did contribute to his feeling the need to frisk Juarez. According to Seward, Juarez then stood up with assistance. In contrast, Painter testified that after Juarez's fall, the group went to the back office that was used for Painter's asset-protection function. Painter told Juarez to sit in a chair, and he complied. Lateef put Juarez's wallet on the desk and left. According to Painter, Seward asked Juarez for his name and date of birth so he (Seward) could document the criminal trespass. Painter claimed that Seward then called dispatch and "dispatch either said that it was the wrong name or—something didn't add up where they couldn't find the information." While using his radio, Seward had an earpiece in, so Painter could hear what Seward said but not what dispatch was saying to him.

Painter also testified that Seward opened Juarez's wallet and saw an ID or driver's license with Juarez's picture and date of birth. This is inconsistent with Seward's and Lateef's testimony; Seward testified that he remembered that Juarez's wallet contained nothing with any kind of name on it. Lateef also testified that "Juarez's wallet did not have any ID on it." In any event, Painter testified that Seward called that name and date in to dispatch, and then Seward said that there was a possible warrant for Juarez's arrest. Seward said, "I need to check that warrant. Please send an on-duty unit." After that, "there was a lot of silence" in the office while they waited. Juarez appeared to be calm and relaxed.

Seward testified that he stayed in the office until officers Santander and Almeida arrived. Seward said that he just needed to confirm who Juarez was, and

Santander handed Seward some keys. Seward asked Santander where he was parked, and then he went out to the car. The car had a standard laptop in it, and when Seward got there Juarez's county profile with his name and a current picture was already pulled up. Seward "clicked on the other screen which also had the warrant that popped up, and all the information matched." It was a county arrest warrant containing very basic information, so Seward did not know specifically what it was for. But according to DPD policy, he did not have discretion not to arrest Juarez at that point.

Seward's next testimony is not entirely clear, but he indicated that Santander and Almeida should have heard him confirm the warrant over the radio. But because Seward was having issues with his radio in the store, there was a chance that Santander and Almeida did not hear him, so within a minute or two he called Painter to make sure the message got through. Regarding his call to Painter, Seward testified:

> I said something along the lines of, let the officers know he's got a good warrant. Go ahead and hook him up, arrest him, it was something along those lines. I didn't tell him specifics or details. It was just enough to convey the message to them that he—this is why he's going to jail.

Perhaps twenty or thirty seconds later, Seward heard the radio call for help. At first he did not realize the call was coming from inside the store, because it was Painter calling for help on the radio.

Painter testified that he received the call from Seward, hung up, and told Santander and Almeida, "Seward said, 'Hook him up.'" Juarez said, "So I'm going

to jail?" Painter replied, "Yes." As soon as Painter said that, he saw the gun in his peripheral vision, and he heard the shots go off.

According to appellants' third amended petition, which Seward attached to his motion to dismiss as evidence, Almeida approached Juarez to arrest him after Seward called in. Juarez pulled a firearm from his right front pocket and shot Almeida, then Santander, and then Painter. Santander's wounds were fatal, while Almeida and Painter survived.

f. Evidence Regarding Relevant DPD Policies and Procedures

The evidence includes excerpts from a document called "Dallas Police Department General Order." Seward testified that he was always working under the general orders.

General Order 315.02 is entitled "Arrests Made on NCIC, TCIC, and NCTCIC Checks." It provides, in part, as follows:

> C. An NCIC or TCIC hit alone is not probable cause to arrest. A hit indicates a warrant has been issued and the date of the warrant. A hit is only one fact that an officer must add to other facts in arriving at sufficient legal grounds for probable cause to arrest. It is imperative that officers compare sufficient identifiers to verify that the person in custody is the same person named in the warrant.
>
> 1. To verify a person's identity, consider the following possible identifiers: [followed by a list of characteristics including name, race, sex, date of birth, and complete physical description].

Seward testified that he obtained a "hit" within the meaning of 315.02 when he initially called in with the name and birthdate that Juarez gave him and was told that

a hit with a similar name came back. Juarez said that he was not the person named in the warrant, but Seward had no way to confirm that, "so he was detained for that." Seward called for a squad car to come out so he could try to verify whether there was a warrant for Juarez.

Seward also testified that his frisk of Juarez was undertaken pursuant to General Order 330.01, subsection F. He testified that his status as a licensed peace officer gave him the power to conduct that search. However, that general order is not part of the evidence that was filed before Seward's motion to dismiss was heard.

General Order 421.03 is entitled "Off-Duty Police Service." It provides, in part, as follows:

> A. Off-Duty Response Procedures
>
> 1. As in all on-duty situations, officers will be required to take immediate action to protect life and property. Officers must therefore respond to crimes in progress or to prevent breaches of the peace. If time and opportunity permit, this should be done after ensuring on-duty officers are called for assistance.
>
> . . . .
>
> J. Other Provisions
>
> 1. An officer providing off-duty service shall not:
>
> . . . .
>
> d. Assist in an investigation by a private security and/or investigative agency or private individual.

Seward testified that when he responded to Painter's call and went to the aisle where Juarez was behind some insulation, he did not consider himself to be assisting in an

investigation by Painter at that point. Rather, he was "investigating a criminal trespass to give a warning. [Painter's] investigation of him shoplifting had been completed by him." And he considered himself to be investigating the criminal trespass in his capacity as a licensed Dallas police officer, based strictly on the authority he derived from holding that position.

Seward also testified that he asked for an on-duty cover unit during his initial radio call both (1) to verify who Juarez was and whether he had any outstanding warrants and (2) to use a police computer to type a report regarding the criminal-trespass warning:

> I would need a cover unit anyways to write the trespass warrant. So it's—I didn't ask for them [the cover unit] solely because of that, but to type the report anyways, I would have needed to use their computer.

He further explained:

> If [Juarez is] not the person [with the warrant identified by dispatch], at this point, I'm just going to continue to issue the criminal trespass warning that entails writing a report. So I still need to do all of that on their computer.
>
> Q. This is all per Dallas Police Department procedure, correct?
>
> A. That's correct.

D. Application of the Law to the Facts

1. Factual Bases for the Claims Against Seward

Because the question under § 101.106(f) is whether appellants' claims are "based on conduct within the general scope of" Seward's police employment, we must ascertain what conduct appellants' claims are based on. Appellants argue that

their claims are based on Seward's conduct from the time he participated in the initial contact with Juarez (after Juarez had gone behind the insulation with the bucket of merchandise) until the time Seward confirmed, using Santander and Almeida's police car, that Juarez had an active warrant. Appellants do not dispute that Seward went on-duty once he confirmed the warrant using the equipment in Santander and Almeida's police car.

Appellants' live pleading bears their position out. They asserted a negligence claim against Seward that listed thirteen allegedly negligent acts and omissions, beginning with "[f]ail[ing] to exercise reasonable discretion in detaining Juarez in order to issue a criminal trespass warning given the facts and circumstances known and existing at the time." The other alleged acts and omissions include failing to adequately search and disarm Juarez when he was detained, failing to adequately restrain Juarez after he was detained, seizing Juarez's property, "searching Juarez for outstanding warrants," and failing to warn Santander and Almeida that Juarez had not been adequately searched and disarmed before he was detained. Thus, appellants alleged that Seward acted negligently in several respects, beginning with Juarez's detention.

Appellants also pleaded a separate negligent-undertaking claim against Seward, but it was premised on the same allegedly negligent acts as their general negligence claim.

2. Scope-of-Employment Analysis

Given the allegations in appellants' live pleading, the trial court must have concluded that the evidence conclusively established that Seward entered the scope of his governmental employment at or before the time he personally encountered Juarez. If the evidence raises a genuine issue of material fact on that point, the trial court erred by dismissing the claims against Seward under § 101.106(f). *See Marino v. Lenoir*, 526 S.W.3d 403, 405 & n.5 (Tex. 2017).

a. The Parties' Arguments

We turn to the parties' arguments.

Appellants posit several factual reasons Seward did not enter the scope of his governmental employment when he participated in the initial contact with Juarez:

- At that time, Juarez had committed no crime, much less a crime in Seward's presence.
- Seward participated in the encounter at the direction of Painter, a Home Depot employee, and he did so only to enforce Home Depot policy and assist in issuing a criminal-trespass warning.
- The DPD did not instruct Seward to assist in issuing the criminal-trespass warning, and he was being paid for his work by Point 2 Point rather than by the City of Dallas.

Appellants further urge that neither the DPD nor any statute authorized Seward to act as a peace officer in issuing a criminal-trespass warning or to detain Juarez, use force on him, or seize property from him. They distinguish the *Garza* case on the ground that, unlike the off-duty officer in *Garza*, Seward did not personally witness any crime. And, again, appellants concede that Seward entered the scope of his

government employment when he used Santander and Almeida's squad car and computer to confirm Juarez's outstanding warrant.

Seward, on the other hand, argues that he went on duty and therefore entered the scope of his governmental employment as soon as Painter called him and said that he suspected Juarez of shoplifting—which happened before Seward made contact with Juarez when Juarez emerged from behind the insulation.

b. The evidence raises a genuine fact issue as to whether Seward was acting within the scope of his governmental employment as to some of the conduct in question.

We conclude that the evidence before the trial court when it granted Seward's motion to dismiss raises a genuine fact issue as to whether Seward was acting within the scope of his governmental employment when he committed some of the acts and omissions appellants rely on for their claims. Specifically, we conclude that the evidence raises a genuine fact issue about Seward's status during the incident up to the point he contacted dispatch to determine whether Juarez had any outstanding warrants. A reasonable factfinder could conclude that, before that moment, Seward was merely assisting a private employer in enforcing the employer's policies and in ejecting a potential trespasser. *See Garza*, 574 S.W.3d at 403.

Participation in the Initial Encounter and Detention. There is evidence that Painter called Seward and told him that he suspected Juarez of intending to shoplift. Seward saw Juarez, but, in Seward's own words, "I didn't see him do anything that

would tell me he committed a crime. I was only acting on what I was being told to [sic] by Painter."

Soon thereafter, Painter called Seward to come back to the part of the store where Juarez was concealed behind some insulation. When Seward arrived, Painter told him to get Juarez out from behind the insulation and give him a criminal-trespass warning. Seward told Juarez to come out, and Juarez complied. Painter told Juarez to go to the back office, and everyone started to walk that way. This evidence supports a reasonable inference that at that point Seward was participating in detaining Juarez, which is one of the acts that appellants alleged to constitute Seward's negligence.

When Seward participated in detaining Juarez, was he (1) enforcing general laws in accordance with a statutory grant of authority, which would be conduct within the scope of his governmental employment, or (2) merely protecting a private employer's property, ejecting a trespasser, or enforcing a private employer's rules? *See Garza*, 574 S.W.3d at 403. We conclude that a reasonable factfinder could decide he was doing the latter. Seward himself testified that at that point in time, (1) Painter had concluded his shoplifting investigation, (2) Seward did not consider himself to be assisting in that investigation, and (3) Seward was "investigating a criminal trespass to give a warning." Moreover, Painter told Juarez that he would be on his way once he had been given a criminal-trespass warning. Thus, the evidence supports the premise that Seward was not even ejecting a trespasser at this point,

because (i) Painter did not tell Juarez to leave the premises and (ii) there is no evidence that Home Depot had previously forbidden Juarez to enter the premises. Rather, Seward was following a private employer's instructions to lay the groundwork to potentially make Juarez a trespasser in the future. Under *Garza*, we conclude that there is a genuine fact issue whether Seward was acting in the scope of his governmental employment when he first encountered Juarez and participated in detaining him.

Our conclusion is not changed by Seward's testimony that when he first encountered Juarez he considered himself to be acting in his capacity as a licensed police officer for the City of Dallas. As previously noted, § 101.106(f)'s scope-of-employment element is objective rather than subjective. *See Garza*, 574 S.W.3d at 401; *Laverie*, 517 S.W.3d at 753. Accordingly, Seward's testimony about his subjective belief is irrelevant.

Seward, however, argues that, under the Texas Code of Criminal Procedure, he entered the scope of government employment as soon as Painter told him he suspected Juarez of shoplifting. Specifically, Seward relies on article 2.13, which provides that every peace officer (1) has the duty "to preserve the peace within the officer's jurisdiction" and (2) shall "in every case authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime." TEX. CODE CRIM. PROC. ANN. art. 2.13(a), (b). We reject Seward's argument, however, because a reasonable factfinder could conclude that, at this point in the incident, Seward was

neither preserving the peace nor preventing or suppressing crime. As Seward testified, Painter had concluded his shoplifting investigation, and Seward did not consider himself to be assisting in that investigation. Although he described himself as "investigating a criminal trespass to give a warning," we agree with appellants that with respect to giving a criminal-trespass warning, there was nothing to investigate—Home Depot, acting through Painter, wanted Juarez to be given a criminal-trespass warning, and Seward was assisting in the warning process. Moreover, even if Seward considered himself to be acting to prevent shoplifting, the *Garza* opinion specifically mentions protecting the property of a private employer as conduct that is not necessarily within an off-duty officer's scope of governmental employment. *See* 574 S.W.3d at 403.

Seward also cites article 14.03, which authorizes a peace officer to arrest without a warrant "persons found in suspicious places and under circumstances which reasonably show that such persons . . . are about to commit some offense against the laws." CODE CRIM. PROC. art. 14.03(a)(1). But that statute is not applicable to the initial detention of Juarez because Seward did not arrest Juarez at that time. Rather, the evidence indicates that Seward did not decide that Juarez should be arrested until he confirmed the existence of a warrant, which happened only after Santander and Almeida arrived. Thus, article 14.03 is not relevant to Seward's participation in the initial detention of Juarez.

Seward also cites our opinion in *CKJ Trucking, L.P. v. City of Honey Grove*, 581 S.W.3d 870 (Tex. App.—Dallas 2019, pet. denied), for the premise that his public duty was triggered when he had reasonable suspicion that a crime was occurring, even if he could not pinpoint a particular infraction. *See id*. at 877. But *CKJ Trucking* is distinguishable. In that case, an off-duty police officer was driving on a highway when he saw a suspicious circumstance—a police car with its lights activated was parked at a closed liquor store, an SUV was positioned to block the police car in, and no occupants from either vehicle were visible being detained or interviewed. *Id*. at 873. Concerned that a crime was in progress, the officer attempted a U-turn and caused an accident. *Id*. at 874. We concluded that the U-turn was within the scope of the off-duty officer's governmental employment because he was acting on reasonable suspicion that something of an apparently criminal nature was brewing. *Id*. at 877–78. *CKJ Trucking* is distinguishable because at the time of the conduct in question, the off-duty officer involved in that case was not engaged in private employment like Seward was; accordingly, *Garza*'s instructions concerning officers engaged in off-duty employment did not apply in *CKJ Trucking*. In this case, the evidence does not conclusively establish that Seward's initial conduct was within the scope of his governmental employment rather than enforcing a rule promulgated by his private employer. *See Garza*, 574 S.W.3d at 403. Rather, the evidence raises a genuine fact issue as to whether Seward was merely supporting Painter in the issuance of a criminal-trespass warning to Juarez.

Seward suggests that if Juarez had been given a criminal-trespass warning and then refused to leave, that refusal would have been a crime committed in Seward's presence, thereby triggering his governmental employment. But because that did not happen in this case, Seward's suggestion is irrelevant to our analysis.

Protective Frisk? Seward argues that he entered the scope of his governmental employment when he performed a protective frisk of Juarez. The evidence shows that soon after Seward encountered Juarez, Juarez's knees buckled and he went to the floor, someone saw that Juarez had mace or pepper spray on his belt, and either Seward or Lateef took that item away. Seward also testified that he performed a protective frisk of Juarez while Juarez was still on the floor. But other evidence raises a genuine fact question about whether Seward performed a protective frisk at all. Specifically, Painter testified that he did not see Seward perform a search on Juarez, and there was evidence that only a short while later Juarez pulled a gun from his pocket and used it to shoot his victims. These two pieces of evidence support a reasonable inference that Seward did not search Juarez as he claimed.

Seward argues that appellants judicially admitted that he performed a protective frisk of Juarez. However, the alleged admission Seward relies on appears in appellants' original petition. By the time Seward's motion to dismiss was heard, appellants had amended their pleadings, and their live pleading alleged that Seward either failed to search Juarez or conducted an improper search. Thus, appellants did

not judicially admit that Seward searched Juarez. *See Sosa v. Cent. Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam) (statements in superseded pleadings "are not conclusive and indisputable judicial admissions").

In sum, there is a genuine fact issue as to whether Seward performed a protective frisk of Juarez during the events in question. Because the evidence did not conclusively prove that Seward performed such a frisk, we need not decide whether that act would have brought him within the general scope of his governmental employment.

The Warrant Check. Seward also argues that he entered the scope of his governmental employment when he made a radio call to see if Juarez had any outstanding warrants and got an inconclusive answer. There is conflicting evidence about when and where Seward made that call. Seward testified that he made the call right after he took Juarez's pepper spray, when Juarez was on his knees and Seward was still holding him with one hand. Painter, however, testified that Seward made the call after they had taken Juarez to the back office. However, there is no conflict in the evidence regarding whether Seward made the call, and both Seward and Painter testified that during the call Seward asked for assistance, which led to Santander and Almeida's going to the Home Depot.

Seward argues that his call to check for warrants and the continued detention of Juarez while awaiting assistance all fell within the scope of his governmental employment because the Code of Criminal Procedure requires officers to "execute

all lawful process issued to the officer by any magistrate or court." CODE CRIM. PROC. art. 2.13(b)(2). He also points to his own testimony that his request for assistance was "[s]tandard Dallas Police Department procedure" because he needed to confirm whether Juarez had an outstanding warrant and, even if there were no warrants, Seward needed a police computer to write a report in connection with the criminal-trespass warning. The evidence also contains this testimony from Seward:

> Q. Likewise, if you are—if you are requested to give a criminal trespass warning, do you still radio in that name?
>
> A. Yes. We're required to check everybody we encounter.

Appellants emphasize that Seward did not witness a crime and was not investigating a crime during Juarez's detention. But even if the evidence shows that Seward was not investigating a crime, the conclusion is inescapable that he was performing a kind of investigation when he made the call to check for outstanding warrants after Juarez was detained. This kind of call is a common police activity. *See Kothe v. State*, 152 S.W.3d 54, 63–64 (Tex. Crim. App. 2004) (noting that a routine traffic stop is not complete until the officer runs a license and warrants check); *Welcome v. State*, 865 S.W.2d 129, 132 (Tex. App.—Dallas 1993, pet. ref'd) ("[I]t is reasonable for police officers to check for outstanding warrants while confirming a suspect's identification."). We conclude that Seward's checking for outstanding warrants does not fit the *Garza* categories of activities that may fall outside of police employment; that is, the call did not

- protect a private employer's property,

- eject a trespasser from the premises, or
- enforce a private employer's rules or regulations.

See 574 S.W.3d at 403. Instead, as the *Kothe* and *Welcome* cases indicate, there is a clear nexus between Seward's performing a warrants check on Juarez and his job responsibilities as a police officer. Under *Garza*, that nexus satisfies the § 101.106(f) scope-of-employment element. *See id*. at 405 (for § 101.106(f) dismissal purposes, "a nexus must exist between the conduct giving rise to the alleged tort and the officer's job responsibilities.").

Moreover, we note that the Austin Court of Appeals recently held that a sheriff's deputy was acting within the scope of his governmental employment for § 101.106(f) purposes when he entered a house and conducted a warrant check on its occupant. *Lankford v. Abreo*, No. 03-22-00303-CV, 2023 WL 4473391, at *5 (Tex. App.—Austin July 12, 2023, no pet. h.) (mem. op.). Thus, the deputy was entitled to immunity from the occupant's false-imprisonment claim. *Id*. at *5–6. The same logic applies to Seward's conduct in checking Juarez's warrant status.

Finally, we note that appellants concede that Seward went "on-duty" when he confirmed Juarez's warrant using Santander and Almeida's police car and computer. We see no distinction between this conduct and Seward's earlier attempt to confirm Juarez's warrant status via a radio call. Seward's acts were essentially the same, even though the results were different.

We conclude that Seward established that he entered the scope of his governmental employment when he used his radio in an attempt to verify Juarez's identity and warrant status—although the evidence conflicts about when Seward actually made the call—and called for assistance from on-duty police officers. Thus he was entitled to dismissal of appellants' claims against him to the extent they were based on his call to determine Juarez's warrant status and his conduct during and after the call.

Confirmation of the Warrant. Finally, Seward argues that he was entitled to dismissal of the entire case against him because (1) appellants now concede that Seward went on-duty when he used Santander and Almeida's car and computer to confirm Juarez's warrant and (2) Juarez did not cause any harm until after Seward went on-duty and made the call directing that Juarez be arrested. We reject this argument because it is contrary to the language of § 101.106(f).

Under § 101.106(f), a governmental employee is entitled to dismissal of a suit against him or her if the suit is "based on conduct within the general scope of that employee's [governmental] employment." CIV. PRAC. § 101.106(f). Thus, the applicability of the defense turns on the employee's status when he committed the allegedly actionable conduct, not his status when the allegedly resulting harm was suffered. Here, appellants' suit against Seward is based in part on his conduct that was within the general scope of his governmental employment—namely, his conduct beginning at the point he used his radio to check whether Juarez had any

outstanding warrants—and in part on his earlier conduct, as to which there is a genuine fact issue whether he was acting within the general scope of his governmental employment. Under the plain language of § 101.106(f), the fact that Seward's earlier, allegedly negligent conduct did not cause harm until after he concededly entered the scope of his governmental employment is not germane to the analysis. To the extent Seward may argue that appellants cannot prove a sufficient causal nexus between their damages and Seward's pre-warrant-check conduct to support imposing tort liability for that conduct, that question is not before us in this appeal.

E. Conclusion

We sustain appellants' first issue in part. We hold that the trial court erred by dismissing appellants' claims against Seward to the extent that those claims are based on Seward's acts and omissions that occurred before Seward attempted to confirm via radio whether Juarez had any outstanding warrants. The trial court did not err by dismissing appellant's claims against Seward to the extent that those claims are based on Seward's radio attempt to confirm whether Juarez had any outstanding warrants or on Seward's subsequent acts and omissions.

III. Issue Two: Whether Point 2 Point and Home Depot Were Entitled to Summary Judgment Based on Seward's Status as a Police Officer

Next, appellants argue that the trial court erred by granting summary judgment in favor of Point 2 Point and Home Depot to the extent it did so on the ground that

Seward was acting in the course and scope of his employment as a Dallas police officer at all relevant times. We sustain this issue in part.

A. Standard of Review

We review a summary judgment de novo. *See Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

When we review a traditional summary judgment in favor of a defendant, we determine whether the defendant conclusively disproved an element of the plaintiff's claim or conclusively proved every element of an affirmative defense. *Alexander v. Wilmington Sav. Fund Soc'y, FSB*, 555 S.W.3d 297, 299 (Tex. App.—Dallas 2018, no pet.). We take evidence favorable to the nonmovant as true, and we indulge every reasonable inference and resolve every doubt in the nonmovant's favor. *Id.* A matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *Id*.

We review a no-evidence summary judgment under the same legal-sufficiency standard as a directed verdict. *Merriman*, 407 S.W.3d at 248. We consider the evidence in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not. *Id*. The nonmovant bears the burden of producing summary-judgment evidence sufficient to raise a genuine issue of material fact as to each challenged element. *Id*.

B. Claims and Summary-Judgment Grounds

Appellants sued both Point 2 Point and Home Depot on theories of negligence, negligent undertaking, negligent training and supervision, and vicarious liability for Seward's conduct.

Point 2 Point asserted a single summary-judgment ground: all of appellants' claims against Point 2 Point failed because "Seward was acting within the course and scope of his employment for the City of Dallas and/or Dallas Police Department during the relevant time frame." Point 2 Point sought both a no-evidence summary judgment based on Seward's "employment status" and a traditional summary judgment based on the evidence Seward filed in support of his motion to dismiss.

Home Depot asserted several summary-judgment grounds, one of which was that appellants' vicarious-liability claims failed because Home Depot could not be vicariously liable for Seward's conduct undertaken in his capacity as a police officer.

The trial court granted both summary-judgment motions without stating the specific grounds for doing so.

C. Applicable Law

Both Point 2 Point and Home Depot rely on cases from this Court for the premise that the private employer of an off-duty police officer is not liable for the officer's conduct if the officer was acting as an on-duty officer at the time of the conduct. *See Ogg v. Dillard's, Inc.*, 239 S.W.3d 409, 418 (Tex. App.—Dallas 2007,

pet. denied); *Leake v. Half Price Books, Recs., Mags., Inc.*, 918 S.W.2d 559, 564 (Tex. App.—Dallas 1996, no writ).

In *Ogg*, we explained that the private employer of an off-duty police officer is not vicariously liable for the officer's acts and omissions if the officer was performing a public duty, such as enforcing general laws, but a fact question on vicarious liability would be presented if the officer was protecting the private employer's property, ejecting trespassers, or enforcing the private employer's rules and regulations. *Ogg*, 239 S.W.3d at 418. This rule mirrors the rule for immunity under § 101.106(f). *See Garza*, 574 S.W.3d at 402–04. Thus, if the officer is immune under § 101.106(f), the officer's private employer is also not vicariously liable for the officer's conduct in question. *Compare id*. *with Ogg*, 239 S.W.3d at 418.

Additionally, *Ogg* and *Leake* hold that the private employer of an off-duty police officer is not liable for negligent hiring or negligent retention of that officer if the officer commits tortious conduct after the officer's on-duty capacity has been triggered. *See Ogg*, 239 S.W.3d at 422 ("Dillard's cannot be directly liable for negligent hiring or retention based on alleged acts Officer Lujan performed as an on-duty police officer."); *Leake*, 918 S.W.2d at 564 (addressing negligent-retention claim). In *Leake*, we explained that, as a matter of law, the private employer's retention of the officer is not the proximate cause of any injuries that the officer causes after going on duty. 918 S.W.2d at 564.

D. Application of the Law to the Facts

In their second issue, appellants address the *Leake* and *Ogg* cases by summarizing their arguments under issue one—that Seward did not enter the scope of his governmental employment until he went to Santander and Almeida's squad car and confirmed that Juarez had an outstanding warrant. Until that time, they contend, Seward was not acting in his police-officer capacity because he neither witnessed Juarez commit a crime nor had reasonable suspicion to investigate Juarez for a crime. Thus, according to appellants, Point 2 Point and Home Depot were not entitled to summary judgment on their theory that Seward was acting as an on-duty police officer when he committed all of his allegedly tortious conduct.

1. Point 2 Point

Point 2 Point relied on Seward's evidence and on essentially the same arguments as Seward in seeking summary judgment on the theory that Seward was acting as a Dallas police officer at all relevant times during the events in question. On appeal, Point 2 Point urges that Seward was on-duty at all relevant times because he had reasonable suspicion a crime was being committed.

Our analysis above of Seward's on-duty status applies equally to Point 2 Point's summary-judgment ground, and Point 2 Point gives us no reason to vary from it. We conclude that the evidence shows conclusively that Seward entered the scope of his governmental employment when he made the radio call to determine whether Juarez had any outstanding warrants, but genuine fact issues remain as to

when and where he made the call, and whether he entered the scope of his governmental employment before that moment. Accordingly, we conclude that the trial court erred by granting summary judgment as to all of appellants' claims against Point 2 Point to the extent they are based on Seward's acts and omissions that occurred before his radio call, and we reverse the summary judgment in favor of Point 2 Point to that extent.

2. Home Depot

Unlike Point 2 Point, Home Depot attached additional evidence to its summary-judgment motion, but Home Depot relied on essentially the same summary-judgment grounds with respect to Seward's employment capacity when he encountered and interacted with Juarez. Home Depot argued that appellants' vicarious-liability theories relating to Seward's conduct failed because Seward was acting within the scope of his governmental employment at all relevant times.

We see nothing in Home Depot's additional summary-judgment evidence to change our conclusion that genuine fact issues exist whether Seward was acting within the scope of his governmental employment during his interactions with Juarez up to the point Seward made his radio call to determine whether Juarez had any outstanding warrants. Accordingly, we conclude that the summary judgment in Home Depot's favor was improper to the extent it was based on the premise that Seward was acting within the scope of his government employment before the radio call.

But the trial court properly granted summary judgment as to appellants' claims against Home Depot to the extent they are based on vicarious liability for (i) Seward's radio call to determine whether Juarez had any outstanding warrants or (ii) Seward's subsequent acts and omissions on the occasion in question. The evidence conclusively established that Seward was acting within the scope of his government employment at those times, and, under *Ogg* and *Leake*, this negates vicarious liability for Seward's conduct on the part of Home Depot. *See Ogg*, 239 S.W.3d at 420; *Leake*, 918 S.W.2d at 564.

E. Conclusion

We sustain appellants' second issue in part. We hold that the trial court properly granted summary judgment for Point 2 Point as to all of appellants' claims to the extent that those claims are based on Seward's radio attempt to confirm whether Juarez had any outstanding warrants or on Seward's subsequent acts and omissions during and after that attempt. Likewise, the trial court properly granted summary judgment for Home Depot as to appellants' claims that Home Depot was vicariously liable for Seward's conduct including and after his radio attempt to confirm whether Juarez had any outstanding warrants.[3]

[3] Appellants argue that it is contrary to public policy to hold that Point 2 Point and Home Depot are not liable for Seward's conduct under these facts, but they cite no authority in support. Accordingly, we do not consider this argument. *See* TEX. R. APP. P. 38.1(i).

As to Point 2 Point, we hold that the trial court erred by granting summary judgment to the extent that appellants' claims are based on Seward's conduct before he attempted to check Juarez's warrant status via radio.

Similarly, as to Home Depot, the trial court erred by granting summary judgment on appellants' vicarious-liability claims based on Seward's conduct before he attempted to check Juarez's warrant status via radio.

IV. ISSUE THREE: WHETHER APPELLANTS' CLAIMS AGAINST HOME DEPOT SOUND ONLY IN PREMISES LIABILITY

Home Depot sought summary judgment on all of appellants' claims on the ground that those claims could properly be asserted only as premises-liability claims. It cited no evidence in this part of its summary-judgment motion, relying instead solely on appellants' live petition. Appellants address this ground in their third issue on appeal.

A. Applicable Law

Under Texas law, a person who claims to have been injured on another's property may have either a negligence claim or a premises-liability claim against the property's owner. *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 471 (Tex. 2017). A claim sounds in negligence if the injury resulted from a contemporaneous, negligent activity on the property. *Id*. The claim sounds in premises liability if the injury resulted from the property's condition rather than an activity. *Id*. Negligence and premises-liability claims are thus separate and distinct theories of recovery requiring proof of different, though similar, elements. *Id*. Generally, the theories can

be distinguished on the principle that "negligent activity" encompasses malfeasance theories based on affirmative, contemporaneous conduct by the owner that caused the injury, while "premises liability" encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe. *Id*.

"A complaint that a landowner failed to provide adequate security against criminal conduct is ordinarily a premises liability claim." *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998) (footnote omitted). This determination is informed by the malfeasance–nonfeasance distinction mentioned above. For example, in one case, a bar patron sued the bar's owner for injuries the patron suffered during a brawl involving roughly twenty to forty men. *See Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 766 (Tex. 2010). The supreme court concluded that the case was properly tried and submitted to the jury as a premises-liability case rather than a negligent-activity case because the plaintiff complained primarily of the bar owner's nonfeasance in failing to intervene while the fight was brewing and failing to react promptly once it started. *Id*. at 776.

B. Application of the Law to the Facts

Appellants argue that Home Depot was not entitled to summary judgment on its premises-liability-only argument because appellants alleged many contemporaneous acts of malfeasance by Home Depot and its employees that led up to and caused the shooting of Santander and Almeida. Home Depot responds that appellants are attempting to avoid the proper characterization of their claims by

artful pleading—by describing a mere failure to provide proper security on the premises in terms that sound like active malfeasance.

We agree with appellants. In many cases involving third-party criminal acts, the criminal act takes place with no contemporaneous contributing activity of any kind by the premises owner. The *Timberwalk Apartments* case is an example; the plaintiff sued the apartment complex where she lived after an intruder raped her in her apartment. 972 S.W.2d at 751. Her claim was properly submitted to the jury as a premises-liability claim because she contended the apartment failed to provide adequate security measures, such as security guards. *See id*. at 751, 753. In *Del Lago*, the criminal act was an assault during a large bar brawl that erupted in the presence of the bar owner's employees. *See* 307 S.W.3d at 765–67. But because the bar owner allegedly did nothing to remedy the situation during the ninety minutes the fight was brewing and then allegedly failed to react promptly once the fight began, the supreme court said that the injured patron's claim was still properly characterized as a premises-liability claim rather than a negligent-activity claim because the claim was based primarily on nonfeasance. *Id*. at 776.

In this case, by contrast, appellants alleged that Home Depot and its personnel contributed to causing appellants' harm by affirmatively interacting with the third-party criminal Juarez in a negligent way. For example, appellants alleged that Home Depot was negligent because it:

a. Failed to exercise reasonable discretion in detaining [Juarez] given the facts and circumstances known and existing at the time;

b. Detained [Juarez] for the purposes of issuing a criminal trespass warning when it was not reasonable to do so;

c. Failed to adequately search and disarm Juarez at the time of detention;

d. Failed to adequately restrain Juarez after he was detained;

e. Increased the likelihood and risk of violent resistance by seizing property from Juarez;

f. Increased the likelihood and risk of violent resistance by detaining Juarez for an unreasonable period of time given the facts and circumstances under which Juarez was detained;

g. Increased the likelihood and risk of violent resistance by searching Juarez for outstanding warrants . . . .

Seward testified that he frisked Juarez for weapons but did not find Juarez's gun. And, concerning the manner and circumstances of Juarez's detention, Painter testified that he told Juarez that he would be free to go after he was given a criminal-trespass warning and then later told him that he was going to jail, which immediately preceded the shootings. Thus, there were allegations and evidence that Home Depot acted negligently by actively detaining Juarez and keeping him on the premises without adequately searching him for weapons or restraining him so that he could not injure others. These features distinguish this case from *Timberwalk Apartments* and *Del Lago*.

We have not found any cases closely on point, but the court of appeals considered the merits of a negligent-activity claim alongside a premises-liability

claim involving third-party criminal acts in *Taylor v. Louis*, 349 S.W.3d 729 (Tex. App.—Houston [14th Dist.] 2011, no pet.). Taylor was at the home of his girlfriend, Louis, when Louis's ex-husband showed up. *Id*. at 732. Louis's ex-husband assaulted Taylor, and Taylor sued Louis for his injuries on both premises-liability and negligent-activity theories of liability. *Id*. Louis won summary judgment, and Taylor appealed. *Id*. The court of appeals affirmed, concluding first that Taylor's premises-liability claim failed because he adduced no evidence that the ex-husband's attack on him was foreseeable to Louis. *Id*. at 737. As to Taylor's negligent-activity claim, the court of appeals held there was no evidence that Louis's actions proximately caused her ex-husband to act violently or that Louis acted negligently when she told her ex-husband to leave. *Id*. at 738. Notably, the court of appeals did not reject Taylor's negligent-activity claim because the case sounded only in premises liability. Thus, *Taylor* suggests that, on the right facts, a premises owner can be liable for the criminal acts of others on a negligent-activity theory.

C. Conclusion

In sum, we conclude that appellants alleged sufficient facts to support the propriety of a negligent-activity theory of liability against Home Depot. The record also contains summary-judgment evidence supporting such a theory. Accordingly, we sustain appellants' third issue on appeal.

V. ISSUE FOUR: WHETHER THE FIREFIGHTER'S RULE DEFEATS APPELLANTS' CLAIMS AGAINST HOME DEPOT

In its summary-judgment motion, Home Depot also presented the following ground: if appellants' negligence claims are properly considered as premises-liability claims, then those claims fail because (i) under the Firefighter's Rule, Home Depot owed Santander and Almeida only the limited duties owed to licensees and (ii) appellants had no evidence that Home Depot breached the duties owed to licensees. Appellants address this ground in their fourth issue on appeal.

At the outset, we note that although appellants did not label any of their claims as "premises-liability claims" in their live petition, they argue in their appellants' brief that their claims survive even if those claims are properly classified as premises-liability claims.[4] We conclude that some of the conduct that they alleged to constitute negligence does fall into the category of nonfeasance and thus under the umbrella of premises liability. *See Del Lago*, 307 S.W.3d at 776 (using the nonfeasance–malfeasance distinction to classify a claim as sounding in premises liability). For example, appellants alleged that Home Depot "[f]ailed to provide adequate supervision of Juarez while he was detained," which is an allegation of nonfeasance. Accordingly, we conclude that appellants alleged premises-liability claims against Home Depot, even though they did not label them as such. *See*

[4] At oral argument, appellants' counsel argued that appellants had not alleged premises-liability claims, but we do not construe that argument to mean that appellants were abandoning the clear alternative arguments made in their appellants' brief.

Thomas v. CNC Invs., L.L.P., 234 S.W.3d 111, 115 n.4 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (claim that plaintiffs labeled "negligence" would be analyzed as a premises-liability claim because it was properly categorized as such); *see also Parsons v. Queenan*, No. 05-15-01375-CV, 2017 WL 360673, at *2 (Tex. App.—Dallas Jan. 23, 2017, no pet.) (mem. op.) (label that plaintiff attaches to claim is not controlling for purposes of governing law and analysis).

A. Applicable Law

In a premises-liability action, the duty that a property owner owes to someone on the property depends on the person's status. *Cath. Diocese of El Paso v. Porter*, 622 S.W.3d 824, 829 (Tex. 2021). The duty owed to an invitee is to exercise reasonable care to protect against danger from a condition on the premises that creates an unreasonable risk of harm the owner knew about or by the exercise of reasonable care would discover. *Id*. Lesser duties are owed to a licensee. *Id*. As to a licensee, the owner must use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not. *Id*. Additionally, the owner may not injure a licensee by willful, wanton, or grossly negligent conduct. *Id*. at 829 n.15.

The Firefighter's Rule provides that, under certain circumstances, firefighters and police officers are considered licensees for premises-liability purposes. One case formulates the Rule this way:

> In cases involving public-safety officers, Texas courts typically have applied the duties owed to an ordinary licensee, including the duty to

> warn of known, dangerous conditions. . . . Under the common-law "firefighter's rule," firefighters and police officers are barred from recovering in premises-liability cases for injuries that result from risks inherent in responding to an emergency if the injuries are caused by only ordinary negligence.

Thomas, 234 S.W.3d at 120 (footnote and citations omitted). But another case omits any reference to an "emergency" situation: "[A] fireman who enters on a premises to perform duties as a fire fighter is a licensee with respect to the duty of the owner or occupier to keep the premises in a safe condition." *Peters v. Detsco, Inc.*, 820 S.W.2d 38, 40 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (citations omitted). According to *Thomas*, there are two exceptions to the Firefighter's Rule: (i) when the licensor commits wanton, willful, or intentional behavior, and (ii) when acts of negligence occur after the public-safety officer reaches the scene. 234 S.W.3d at 120–21.

B. Application of the Law to the Facts

Appellants present several arguments that the trial court could not properly grant summary judgment based on Home Depot's invocation of the Firefighter's Rule. We agree with one of their arguments and need not address the others.

Even if the Firefighter's Rule applies, thereby making Santander and Almeida licensees, appellants' premises-liability claims survive Home Depot's summary-judgment attack if the evidence raises a genuine fact issue whether Home Depot was aware of a dangerous condition that the officers were not and Home Depot failed to

warn the officers. *See Cath. Diocese of El Paso*, 622 S.W.3d at 829. We conclude that the evidence raises such a genuine fact issue.

As discussed above, Seward testified that he frisked Juarez before Juarez was taken to the back office, but Painter testified that he never saw Seward search Juarez, and Juarez later produced a gun from his pocket. Thus, there is a genuine fact issue as to whether Juarez was searched for weapons before he was taken to the back office. And, resolving that issue in appellants' favor, we further conclude that the evidence supports a reasonable inference that Painter therefore knew that Juarez had not been searched for weapons before Santander and Almeida arrived at the store. Painter further testified that after Santander and Almeida arrived at the store, Seward went out to their squad car, and Painter said nothing to Santander and Almeida until Seward called Painter on his cell phone and told Painter to tell the officers that Juarez had an active warrant and the officers should "hook him up." Then Juarez said, "So I'm going to jail?" Painter responded, "yes." Juarez then produced the gun and began shooting. So the evidence supports an inference that during the incident Painter never warned Santander and Almeida that Juarez had not been searched.

Home Depot argues that the evidence does not support a reasonable inference that the failure to search or restrain Juarez rose to the level of a dangerous condition. We disagree. There was evidence of the following facts:

- Juarez acted in a manner that a reasonable person could construe, and Painter did construe, as showing an intention to shoplift.

- Juarez was carrying mace on his belt loop, which was taken away from him before Juarez was taken to the back office.
- Before Santander and Almeida arrived at the store, Painter heard Seward say that there was possibly a warrant for Juarez's arrest.
- While Santander and Almeida were at the store, Seward called Painter from their squad car and told him that Juarez had an active warrant.

Together, these facts would allow a reasonable factfinder to conclude that detaining Juarez without having searched him constituted a dangerous condition known to Painter and unknown to Santander and Almeida. And the evidence also supports a finding that Painter did not warn Santander and Almeida of this condition before telling them Seward's message that Juarez had an active warrant and should be arrested.

C. Conclusion

The evidence raised a genuine fact issue whether Home Depot breached its premises-liability duty to Santander and Almeida even if they are considered licensees under the Firefighter's Rule.[5] *See id*. Accordingly, we sustain appellants' fourth issue.

[5] According to *Thomas*, the Firefighter's Rule also does not apply to negligence committed by the premises owner after the public-safety officers arrive at the scene. 234 S.W.3d at 120–21. The above-described evidence also raises a genuine fact issue on that exception.

VI. ISSUE FIVE: WHETHER HOME DEPOT WAS ENTITLED TO SUMMARY JUDGMENT ON APPELLANTS' NEGLIGENT-UNDERTAKING CLAIMS

In its summary-judgment motion, Home Depot raised no-evidence challenges to every element of appellants' negligent-undertaking claims. Appellants address this ground in their fifth issue on appeal.

A. Applicable Law

Texas law generally imposes no duty to take action to prevent harm to others absent certain special relationships or circumstances. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000). For example, a duty to use reasonable care may arise when a person undertakes to provide services to another, either gratuitously or for compensation. *Id*. To establish such a negligent-undertaking claim, a plaintiff must establish that (1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and (3) either the plaintiff relied on the defendant's performance or the defendant's performance increased the plaintiff's risk of harm. *Freyer v. Lyft, Inc.*, 639 S.W.3d 772, 789 (Tex. App.—Dallas 2021, no pet.); *see also Torrington Co.*, 46 S.W.3d at 838.

Appellants sued Home Depot on a negligent-undertaking theory, alleging that Home Depot undertook to provide "security services" that it knew or should have known were necessary to protect people on Home Depot's premises. In its summary-judgment motion, Home Depot asserted that appellants could produce no evidence to support any of the elements of a negligent-undertaking claim.

B. Application of the Law to the Facts

Appellants address each negligent-undertaking element in turn.

1. Element One

The first element is whether Home Depot undertook to perform services that it knew or should have known were necessary for the plaintiffs' protection. *See Freyer*, 639 S.W.3d at 789.

Appellants assert that, prior to the incident in question, Home Depot adopted security policies intended to protect not only Home Depot's assets but also people present on Home Depot's properties. For support, appellants cite three pages of summary-judgment evidence that appear to be PowerPoint slides prepared by Home Depot to inform its personnel about changes in certain company policies. One of those three pages, dated August 2016, is entitled "Safety Stand Down | Handcuff Policy Change." The first paragraph on the slide notes, "People are willing to go to extreme measures to avoid being apprehended." The first bullet point on the slide states that only certain trained AP associates are allowed to make apprehensions. Another bullet point reads, "AP Associates must discontinue an apprehension if the subject is a safety risk to the AP Associate, themselves or others; if the subject runs; has weapon . . . ." According to appellants, the quoted bullet point shows that Home Depot adopted its security policies for the protection of people on its property.

Home Depot argues that this evidence does not show that it adopted its policy for the protection of police officers like Santander and Almeida. It argues that the

policy is clearly intended to guide Home Depot personnel during a possible apprehension and *before* any police officers are called to the scene.

We agree with appellants. The evidence they cite shows that Home Depot adopted a policy regarding asset protection that limited its employees' discretion to apprehend suspected shoplifters. The policy specifically instructed "AP Associates," which can reasonably be inferred to mean asset-protection associates, to discontinue an apprehension whenever a suspected shoplifter posed a safety risk to others. The statements on the slide support a reasonable inference that Home Depot believed that apprehending suspected shoplifters could pose a danger to others and that its policy should be tailored to reduce that danger. We reject Home Depot's contention that the policy's purpose is limited to the protection of people present before police officers can arrive on the scene. Rather, the policy can reasonably be construed to enhance the safety of any "others" on the premises who could be affected when a suspected shoplifter poses a safety risk. We conclude that a reasonable factfinder could infer from this evidence that Home Depot knew or should have known that its security policies with respect to handling suspected shoplifters were necessary for the protection of anyone present on Home Depot's property. Thus, appellants raised a genuine fact issue as to the first element of their negligent-undertaking claims against Home Depot.

2. Element Two

The second element is whether Home Depot failed to exercise reasonable care in performing its security services. *See Freyer*, 639 S.W.3d at 789. Whether conduct amounts to a failure to exercise reasonable care is generally a fact question for the factfinder to resolve. *In re Molina*, 575 S.W.3d 76, 81 (Tex. App.—Dallas 2019, orig. proceeding [mand. denied]).

We agree with appellants that there is some evidence that Home Depot, through Painter, did not use ordinary care in handling the detention of Juarez. As discussed above in our analysis of the Firefighter's Rule, there was evidence of the following facts:

- Juarez acted in a manner that a reasonable person could construe, and Painter did construe, as showing an intention to shoplift.
- Juarez was carrying mace on his belt loop, which was taken away from him before Juarez was taken to the back office.
- Before Santander and Almeida arrived at the store, Painter heard Seward say that there was possibly a warrant for Juarez's arrest.
- While Santander and Almeida were at the store, Seward called Painter from their squad car and told him that Juarez had an active warrant.
- Painter did not warn Santander and Almeida that Juarez had not been searched.

Additionally, there was evidence that Home Depot employees were not allowed to restrain suspected shoplifters with handcuffs.

Together, these facts would allow a reasonable factfinder to conclude that Home Depot, through Painter, did not exercise reasonable care in detaining Juarez.

Thus, appellants raised a genuine fact issue as to the second element of their negligent-undertaking claims against Home Depot.

3. Element Three

The third element of a negligent-undertaking claim can be satisfied with evidence either that the plaintiff relied on the defendant's performance or that the defendant's performance increased the plaintiff's risk of harm. *Freyer*, 639 S.W.3d at 789.

Appellants rely on the second prong of element three, that Home Depot's handling of Juarez increased the risk of harm to Santander and Almeida. They point specifically to the evidence that Home Depot policy prohibited employees from using handcuffs to restrain suspected shoplifters and also implemented a "No Touch Policy" that prevented employees from searching suspected shoplifters and thus from discovering any weapons they might have. Home Depot argues that appellants' argument fails because Home Depot had no duty to search suspects for weapons or to confiscate them if found.

We agree with appellants. A reasonable factfinder could conclude that Home Depot's implementation of its policies on this occasion increased the risk of danger to Santander and Almeida. For example, a reasonable factfinder could conclude from the evidence that the failure to search or handcuff Juarez increased the risk of danger that he would harm others if he eventually became violent while being detained.

Thus, the evidence sufficed to raise a genuine fact issue as to the third element of appellants' negligent-undertaking claims against Home Depot.

C. Conclusion

We sustain appellants' fifth issue on appeal.

VII. Issue Six: Whether Home Depot Was Entitled to Summary Judgment on Appellants' Vicarious-Liability Claims

In its summary-judgment motion, Home Depot raised no-evidence challenges to appellants' claims that Home Depot was vicariously liable for the negligence of Seward, Painter, and Lateef. Specifically, Home Depot argued (1) it was not vicariously liable for Seward's conduct because Seward was acting as a police officer at all relevant times; (2) it was not vicariously liable for the conduct of Painter and Lateef because there was no evidence that either was negligent or that any negligence by them was a proximate cause of any damages to the appellants; and (3) Lateef was not negligent as a matter of law based on the summary-judgment motion and evidence filed by another defendant, Allied Universal Security Services, LLC. Appellants address these arguments in their sixth issue on appeal.

A. Vicarious Liability for Seward's Conduct

We have already determined that (1) the evidence conclusively establishes that Seward was acting in his capacity as a police officer from the moment he radioed in to check Juarez's warrant status but (2) there is a genuine fact issue as to whether that is true for his conduct before that time. Thus, Home Depot was entitled to summary judgment on appellants' claims that it was vicariously liable for Seward's

conduct from the moment he radioed in to check Juarez's warrant status, but it was not entitled to summary judgment on those claims as to Seward's previous conduct. *See Ogg v. Dillard's, Inc.*, 239 S.W.3d 409, 418 (Tex. App.—Dallas 2007, pet. denied) ("If the officer was acting as an on-duty officer at the time the acts were committed, then respondeat superior will not extend liability to the employer.").

B. Vicarious Liability for Painter's Conduct

Next we consider Home Depot's summary-judgment ground that appellants produced no evidence that Painter was negligent or that his negligence was a proximate cause of any damages to appellants.

Negligence means (1) doing something that a person of ordinary prudence would not have done in the same or similar circumstances or (2) failing to do something that a person of ordinary prudence would have done under the same or similar circumstances. *See Timberwalk Apartments*, 972 S.W.2d at 753. "Whether conduct amounts to negligence is generally a question for the factfinder." *In re Molina*, 575 S.W.3d at 81.

The element of proximate cause consists of two sub-elements: cause in fact and foreseeability. *Id*. Negligence is a cause in fact of an injury if the injury would not have occurred without the negligence and the negligence was a substantial factor in causing the injury. *Id*. Harm is foreseeable if a person of ordinary intelligence should have anticipated the danger created by the negligent act or omission. *Bos v.*

Smith, 556 S.W.3d 293, 303 (Tex. 2018). Like negligence, proximate cause is usually a fact question for the jury. *In re Molina*, 575 S.W.3d at 82.

Appellants argue that the evidence raised a genuine fact issue on Painter's negligence and proximate causation. Specifically, they argue that the evidence shows that Painter failed to adequately search Juarez and did not inform Santander and Almeida that weapons had been found in Juarez's possession. Home Depot responds that Painter had no legal duty to search Juarez or to tell the officers about the mace and knife that had been taken from Juarez. It also argues that appellants presented no evidence that the failure to tell the officers about the weapons found on Juarez was a proximate cause of the shooting or Almeida's decision not to search or handcuff Juarez.

We agree with appellants. The evidence includes Painter's detailed testimony about the events in question, and he did not mention that he ever searched Juarez. And the evidence indicates that Home Depot had a "No Touch Policy" in place at the time. A reasonable factfinder could conclude that Painter did not search Juarez during the incident. And, notwithstanding Home Depot's assertion that Painter had no duty to conduct such a search, we conclude that a reasonable factfinder could find that Painter's failure to search Juarez was negligent under the circumstances. Likewise, a reasonable factfinder could conclude (1) that appellants would not have suffered damages if Painter had performed such a search and (2) that the harm allegedly suffered by appellants was foreseeable. Thus, Home Depot was not entitled

to summary judgment on the theory that there was no evidence that Painter was negligent or that his negligence was a proximate cause of appellants' injuries.

We sustain appellants' sixth issue as to their claims against Home Depot for vicarious liability for Painter's conduct.

C. Vicarious Liability for Lateef's Conduct

Finally we consider whether Home Depot was entitled to summary judgment on appellants' claims that Home Depot was vicariously liable for the conduct of Elijah Lateef. As to those claims, Home Depot brought both (1) no-evidence challenges regarding negligence and proximate cause and (2) a traditional ground that incorporated the summary-judgment motion and evidence filed by a co-defendant, Allied. According to Home Depot's motion, Allied's motion and evidence proved as a matter of law that Lateef was not negligent on the occasion in question.

Home Depot's traditional ground is dispositive. As to that ground, appellants argue (1) Allied did not raise a summary-judgment ground that Lateef, as a matter of law, was not negligent; (2) Allied produced no evidence regarding Lateef's negligence; and (3) there is no order in which the trial court found that Lateef, as a matter of law, was not negligent.[6]

[6] Appellants do not argue that it was improper for Home Depot to incorporate Allied's motion and evidence by reference, so we do not consider that possibility. *See, e.g.*, *Richardson E. Baptist Church v. Phila. Indem. Ins. Co.*, No. 05-14-01491-CV, 2016 WL 1242480, at *6 n.5 (Tex. App.—Dallas Mar. 30, 2016, pet. denied) (mem. op.).

The clerk's record does not contain Allied's summary-judgment motion or evidence. This is fatal to appellants' first two arguments because they bore the burden to bring forward an appellate record sufficient to show harmful error. *See Enter. Leasing Co. of Houston v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004) (per curiam) ("[Appellant] bears the burden to bring forward the record of the summary judgment evidence to provide appellate courts with a basis to review his claim of harmful error."). Because Allied's summary-judgment motion and evidence are not in the clerk's record, we cannot determine whether appellants are correct that Allied did not argue that Lateef was not negligent or that Allied's evidence did not establish the absence of such negligence, and we must presume the contrary. *See id*. at 550 ("If the pertinent summary judgment evidence considered by the trial court is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court's judgment."). As for appellant's third argument, we conclude that it is immaterial whether the trial court ever ruled on Allied's motion. The material question is whether the summary-judgment evidence, including Allied's evidence, conclusively proved that Lateef was not negligent, and, as previously stated, appellants have not brought forward a record sufficient to permit review of that question.

Accordingly, we overrule appellants' sixth issue as to their claims against Home Depot based on vicarious liability for Lateef's conduct.

VIII. Issue Seven: Whether Home Depot Was Entitled to Summary Judgment Because Seward's On-Duty Conduct Was a Superseding Cause of the Shootings

Finally, Home Depot sought summary judgment on all of appellants' claims on the theory that Seward's conduct after he went on-duty and began acting within the scope of his governmental employment was an intervening and superseding cause of the shootings. Appellants address this ground in their seventh issue on appeal.

A. Applicable Law

Proximate cause is an element of all of appellants' claims against Home Depot: negligence, negligent undertaking, negligent training and supervision, and premises liability. *See Gomez v. Sani*, No. 05-20-00201-CV, 2023 WL 370179, at *4 (Tex. App.—Dallas Jan. 24, 2023, no pet.) (mem. op.) (negligence); *Doe I v. Ripley Ent., Inc.*, No. 05-18-00470-CV, 2020 WL 57339, at *2 (Tex. App.—Dallas Jan. 6, 2020, no pet.) (mem. op.) (negligent undertaking); *Harris v. Mastec N. Am., Inc.*, No. 05-19-00955-CV, 2020 WL 6305028, at *7 (Tex. App.—Dallas Oct. 28, 2020, no pet.) (mem. op.) (negligent training and supervision); *Woods v. BW Midtown Cedar Hill, L.L.C.*, No. 05-21-00615-CV, 2022 WL 4298554, at *3 (Tex. App.—Dallas Sept. 19, 2022, pet. denied) (mem. op.) (premises liability).

There can be more than one proximate cause of an injury. *Stanfield v. Neubaum*, 494 S.W.3d 90, 97 (Tex. 2016). But sometimes one cause of an injury is considered to be a new and independent, or superseding, cause that intervenes

between the original wrong and the ultimate injury such that the injury is attributed to the new cause rather than the earlier and more remote cause. *Id*. A new and independent cause destroys any causal connection between the defendant's negligence and the plaintiff's harm, precluding the plaintiff from establishing the defendant's negligence as a proximate cause. *Id*.

In determining whether a cause constitutes a superseding cause or merely a concurring cause that does not break the chain of causation, we consider several factors. *Id*. at 98. One is foreseeability—if the intervening cause and its probable consequences are a reasonably foreseeable result of the defendant's negligence, then the intervening cause is a concurring rather than superseding cause. *Id*. But if "nothing short of prophetic ken could have anticipated . . . the combination of events by which the original negligence led to an intervening force that resulted in the plaintiff's injury, the harm is not reasonably foreseeable." *Id*. (internal quotation and citation omitted). Still, even an unforeseeable intervening cause may be a concurring cause if the chain of causation flowing from the defendant's original negligence is continuous and unbroken. *Biaggi v. Patrizio Rest. Inc.*, 149 S.W.3d 300, 309 (Tex. App.—Dallas 2004, pet. denied).

We also consider whether the original negligence caused the intervening force to occur and whether the original negligence operated with the intervening force to create the harm. *Stanfield*, 494 S.W.3d at 98–99. Other relevant factors include the following:

> (1) the fact that the intervening force brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (2) the fact that the intervening force's operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the force's operation;
>
> (3) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (4) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
>
> (5) the fact that the intervening force is due to a third person's act which is wrongful toward the other and as such subjects the third person to liability to him; [and]
>
> (6) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Biaggi, 149 S.W.3d at 306. The last three of these factors focus on the "wrongful conduct and degree of culpability" of the intervener, *Phan Son Van v. Peña*, 990 S.W.2d 751, 756 (Tex. 1999), which in this case is Seward after he began acting as an on-duty police officer.

B. Application of the Law to the Facts

Appellants argue that Seward's conduct was not a superseding cause of the shooting that broke the chain of causation between Home Depot's own negligence and the shooting. We agree.

As for foreseeability, we conclude that Seward's conduct—in calling in for a warrant check, detaining Juarez while a cover unit was summoned to complete the check, failing to handcuff Juarez, possibly failing to search Juarez, and failing to

warn Santander and Almeida if Juarez had in fact not been searched—was not so unforeseeable as to make Seward's on-duty conduct a superseding cause. Indeed, there is evidence that Home Depot, through Painter, was aware of Seward's conduct while it was happening, and that Home Depot's alleged negligence continued during, and cooperated with, Seward's own conduct in bringing about the result. There was evidence that Painter decided to involve Seward in issuing Juarez a criminal-trespass warning, did not handcuff or search Juarez, did not see Seward search Juarez, and did not warn Santander and Almeida that Juarez had not been searched. The fact that these acts and omissions occurred during and alongside Seward's own on-duty conduct weighs against treating Seward's on-duty conduct as a superseding cause. *See Stanfield*, 494 S.W.3d at 99 (explaining when a defendant's original negligence enables the intervening force to occur and still contributes to the resulting harm).

Some of the factors we listed in *Biaggi* also weigh in appellants' favor. The same kind of harm (assaults on others by Juarez) could have resulted from Home Depot's allegedly negligent conduct even without Seward's on-duty conduct, given that Home Depot personnel confronted Juarez, a suspected shoplifter, without searching him for weapons or restraining him. The "intervening force" of Seward's on-duty conduct did not operate independently of the situation caused by Home Depot's alleged negligence but rather cooperated with Home Depot's ongoing, allegedly negligent, conduct. Seward's on-duty conduct was not caused solely by a third-party's act but rather was also caused by Home Depot's involving him in the

confrontation with Juarez. Although Seward's conduct may have been wrongful as toward Santander and Almeida—as appellants themselves allege—his culpability is not alleged to exceed simple negligence. *See Biaggi*, 149 S.W.3d at 306.

For all these reasons, we conclude that the evidence did not establish as a matter of law that Seward's on-duty conduct was a superseding cause that negated the element of proximate cause with respect to appellants' claims against Home Depot.

C. Conclusion

We sustain appellants' seventh issue on appeal.

IX. DISPOSITION

We reverse the trial court's judgment in part and affirm it in part. In light of the separate opinions issuing in this case, we explain which panel members join in each part of the judgment as follows.

We reverse the judgment dismissing appellants' claims against Chad Seward to the extent those claims are based on Seward's conduct on the occasion in question before Seward made his radio call to determine whether Juarez had any active warrants. Justice Carlyle and I join in this part of the judgment and in the decision to remand the case for further proceedings on those claims.

We likewise reverse the summary judgment in favor of Point 2 Point Global Security, Inc. to the extent that judgment orders appellants to take nothing from Point 2 Point Global Security, Inc. on their claims based on Seward's conduct on the

occasion in question before Seward made his radio call to determine whether Juarez had any active warrants. Justice Carlyle and I join in this part of the judgment and in the decision to remand the case for further proceedings on those claims.

We reverse the summary judgment in favor of Home Depot USA, Inc. to the extent that judgment orders appellants to take nothing from Home Depot USA, Inc. on their vicarious-liability claims based on Seward's conduct on the occasion in question before Seward made his radio call to determine whether Juarez had any active warrants. Justice Carlyle and I join in this part of the judgment and in the decision to remand the case for further proceedings on those claims.

We also reverse the summary judgment in favor of Home Depot USA, Inc. to the extent that judgment orders appellants to take nothing from Home Depot USA, Inc. on (1) their negligence, negligent-undertaking, negligent-training, and negligent-supervision claims; (2) their premises-liability claims; and (3) their claims based on vicarious liability for the conduct of Scott Painter. The panel unanimously joins this part of the judgment and in the decision to remand for further proceedings on those claims.

We affirm the judgment dismissing appellants' claims against Chad Seward to the extent those claims are based on Seward's radio attempt to confirm whether Juarez had any outstanding warrants or on Seward's subsequent acts and omissions. Justice Rosenberg and I join in this part of the judgment.

We affirm the summary judgment in favor of Point 2 Point Global Security, Inc. to the extent appellants' claims against Point 2 Point Global Security, Inc. are based on Seward's radio attempt to confirm whether Juarez had any outstanding warrants or on Seward's subsequent acts and omissions. Justice Rosenberg and I join in this part of the judgment.

We affirm the summary judgment in favor of Home Depot USA, Inc. to the extent that judgment orders appellants to take nothing from Home Depot USA, Inc. on their vicarious-liability claims based on Seward's radio attempt to confirm whether Juarez had any outstanding warrants or on Seward's subsequent acts and omissions. Justice Rosenberg and I join in this part of the judgment.

We unanimously affirm the summary judgment in favor of Home Depot USA, Inc. on appellants' claims that Home Depot USA, Inc. was vicariously liable for the conduct of Elijah Lateef.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE

Carlyle, J., concurs in part and dissents in part
Rosenberg, J., concurs in part and dissents in part

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ROGELIO SANTANDER SR. AND JULIA GARCIA, INDIVIDUALLY AND AS CO-ADMINISTRATORS OF THE ESTATE OF ROGELIO SANTANDER JR., AND CRYSTAL ALMEIDA, Appellants

No. 05-21-00911-CV V.

CHAD SEWARD, HOME DEPOT U.S.A., INC., AND POINT 2 POINT GLOBAL SECURITY, INC., Appellees

On Appeal from the 192nd Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-19-07132. Opinion delivered by Justice Garcia. Justices Carlyle and Rosenberg participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part.

We **REVERSE** the trial court's judgment dismissing appellants' claims against appellee Chad Seward to the extent those claims are based on Seward's conduct on the occasion in question before Seward made his radio call to determine whether Armando Luis Juarez had any active warrants.

We **REVERSE** the trial court's summary judgment in favor of appellee Point 2 Point Global Security, Inc. to the extent that judgment orders appellants to take nothing from Point 2 Point Global Security, Inc. on appellants' claims based on appellee Chad Seward's conduct on the occasion in question before Seward made his radio call to determine whether Armando Luis Juarez had any active warrants.

We **REVERSE** the trial court's summary judgment in favor of appellee Home Depot USA, Inc. to the extent that judgment orders appellants to take nothing from Home Depot USA, Inc. on (1) appellants' vicarious-liability claims based on appellee Chad Seward's conduct on the occasion in question before Seward made his radio call to determine whether Armando Luis Juarez had any active warrants; (2) appellants' negligence, negligent-undertaking, negligent-training, and negligent-supervision claims; (3) appellants' premises-liability claims; and (4) appellants' claims based on vicarious liability for the conduct of Scott Painter.

In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 18th day of July 2023.