

Opinion issued August 18, 2011



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-10-00973-CV

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**MEMORIAL VILLAGES POLICE DEPARTMENT, Appellant**

**V.**

**WESLEY GUSTAFSON, III, ERIC GUSTAFSON, AND SUSAN  
WADLINGTON, AS ADULT CHILDREN & HEIRS OF THE ESTATE OF  
WESLEY GUSTAFSON, JR., Appellees**

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**On Appeal from the 127th District Court  
Harris County, Texas  
Trial Court Case No. 2010-09792**

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**MEMORANDUM OPINION**

Appellant Memorial Villages Police Department challenges the trial court's order denying its plea to the jurisdiction in favor of appellees, Wesley

Gustafson, III, Eric Gustafson, and Susan Wadlington. The Gustafsons filed a wrongful death and survival action against MVPD after their father, Wesley Gustafson, Jr., sustained fatal injuries in a collision involving a vehicle pursued by Officer W. R. Woodall. In one issue, MVPD argues that the trial court erred in denying its plea to the jurisdiction. Because we conclude that Officer Woodall was entitled to official immunity for his actions, and for that reason MVPD was entitled to assert governmental immunity, we reverse and render a judgment of dismissal.

### **Background**

On the morning of July 28, 2008, after several burglaries were reported in the Memorial Villages area, MVPD officers were instructed to be on the lookout for a dark blue sport utility vehicle with a temporary dealer's license plate. While driving on Piney Point Road, Woodall heard a radio message in which a fellow officer stated that he had spotted the suspect vehicle in the area. The officer informed Woodall that the suspect vehicle had evaded him and was likely traveling on Piney Point Road. Woodall passed a vehicle traveling in the opposite direction and matching the description of the one used in the burglaries. He turned around to follow the suspect vehicle, and the driver, who was later identified as Danny Shipp, turned sharply onto a side street. Woodall reported his position and waited on the corner of Piney Point Road and Williamsburg Drive for the suspect vehicle to reemerge. After less than a minute, Shipp, driving the suspect vehicle, pulled

out of the driveway, sped past Woodall, ran a stop sign, and turned onto Piney Point Road. Woodall activated his emergency flashing lights and siren and pursued Shipp. During the chase, which lasted approximately four minutes, Shipp exceeded the speed limit, drove on the wrong side of the road, ran several red lights, and collided with several vehicles stopped at an intersection. The chase ended when Shipp's vehicle collided with the car driven by Wesley Gustafson, Jr., who later died as a result of his injuries.

Gustafson's children, as heirs of his estate, sued MVPD for wrongful death under section 101.021 of the Texas Tort Claims Act, which waives governmental immunity from suit in certain circumstances. *See* TEX. CIV. PRAC. & REM. CODE § 101.021 (West 2011). MVPD filed a plea to the jurisdiction, asserting immunity from the claim. The Gustafsons filed an amended petition and a response. After a hearing, the trial court denied the plea to the jurisdiction, and MVPD appealed. MVPD argues that the trial court erred in denying the plea because it established as a matter of law that Woodall was entitled to official immunity and that its governmental immunity had not been waived. MVPD further contends that the emergency situation exception found in section 101.055(2) of the Civil Practice and Remedies Code applies, and that the Gustafsons' claims do not involve the "use" of a motor-vehicle.

## Analysis

### I. Standard of review

An appeal may be taken from an interlocutory order granting or denying a plea to the jurisdiction filed by a governmental unit. TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.014(a)(8), 101.001(3)(D) (West 2008 & 2011). We review the trial court's ruling on a plea to the jurisdiction de novo. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The plaintiff must allege facts that affirmatively establish the trial court's subject matter jurisdiction. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *City of Pasadena v. Kuhn*, 260 S.W.3d 93, 95 (Tex. App.—Houston [1st Dist.] 2008, no pet.). In determining whether this burden has been satisfied, we must construe the pleadings liberally in the claimants' favor and deny the plea if the claimant has alleged facts affirmatively demonstrating jurisdiction to hear the case. *Miranda*, 133 S.W.3d at 226–27; *Smith v. Galveston Cnty.*, 326 S.W.3d 695, 698 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

If the plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court must consider relevant evidence submitted by the parties. *Miranda*, 133 S.W.3d at 227. When 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. If, however, the evidence creates a fact question regarding jurisdiction, then the trial court must deny the plea, and the fact issue will be resolved by the fact-finder. *Id.* at 227–28. In reviewing the evidence presented, we take as true all evidence favorable to the plaintiff, indulging every reasonable inference in the plaintiff’s favor. *Id.* at 228.

Because MVPD challenged the existence of jurisdictional facts, we must consider the relevant evidence submitted by the parties and determine whether the Gustafsons raised a question of fact as to the applicability of governmental immunity under section 101.021 of the Texas Tort Claims Act. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2011); *see, e.g., Univ. of Houston v. Clark*, 38 S.W.3d 578, 579 (Tex. 2000); *Junemann v. Harris Cnty.*, 84 S.W.3d 689, 694–95 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

## **II. Governmental immunity**

Under the doctrine of governmental immunity, political subdivisions of the State, including municipalities, cannot be held liable for the actions of their employees unless a constitutional provision or statute waives such immunity. *See, e.g., City of Houston v. Williams*, No. 09-0770, 2011 WL 923980, at \*3 (Tex. Mar. 18, 2011); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994). The Texas Tort Claims Act waives governmental immunity in certain limited

circumstances. *See Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 342–43 (Tex. 1998). Section 101.021 of the Act provides:

A governmental unit in the state is liable for:

- (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
  - (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
  - (B) the employee would be personally liable to the claimant according to Texas Law; and
- (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021. The Act also provides for exceptions to the waiver of immunity. *See id.* §§ 101.051–.067 (West 2011).

Because the Act provides that a governmental unit may only be liable when “the [negligent] employee would be personally liable to the claimant,” *id.* § 101.021(1)(B), whether the employee is entitled to official immunity may also affect whether the Act’s limited waiver of governmental immunity applies. *See DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995). “If the employee is protected from liability by official immunity, the employee is not personally liable to the claimant and the government retains its sovereign immunity under

subsection 1.” *Id.* at 653 (citing *K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994), and *City of Houston v. Kilburn*, 849 S.W.2d 810, 812 (Tex. 1993)). “A governmental employee is entitled to official immunity: (1) for the performance of discretionary duties; (2) within the scope of the employee’s authority; (3) provided the employee acts in good faith.” *Clark*, 38 S.W.3d at 580.

Because the parties agree that Woodall was performing a discretionary duty within the scope of his authority as a police officer, the question we must determine is whether the Gustafsons, in responding to the plea to the jurisdiction, raised a fact issue on the element of good faith. *See Miranda*, 133 S.W.3d at 227–28 (“[W]hen the facts underlying the merits and subject matter jurisdiction are intertwined, [the plaintiff must] show that there is a disputed material fact regarding the jurisdictional issue.”). In order to establish good faith as a matter of law, and to therefore be entitled to an official immunity defense, a police officer must prove that a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit. *Clark*, 38 S.W.3d at 581; *Junemann*, 84 S.W.3d at 693–94. The evidence is not required to establish that it would have been unreasonable to stop the pursuit or that all reasonably prudent officers would have continued the pursuit. *Clark*, 38

S.W.3d at 581. But it must demonstrate that a reasonably prudent officer might have believed that it was prudent to continue the pursuit. *Id.*

To conclusively prove good faith in the police-pursuit context, an officer must substantiate his determination with facts showing that he sufficiently assessed both the need and risks of the pursuit. *Id.* “Need” refers to the urgency of the circumstances requiring the emergency response and requires the officer to assess the need to apprehend the suspect immediately. *Id.* at 581–82, 584–85. The need aspect is measured by factors such as the seriousness of the emergency to which the public official is responding, whether the official’s immediate presence is necessary to prevent injury or loss of life, and what alternative courses of action, if any, are available to achieve a comparable result. *Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 (Tex. 1997). The “risk” aspect refers to the countervailing public safety concerns, including the nature and severity of harm his actions could cause, including possible injuries to bystanders, the likelihood that any harm would occur, and whether any risk of harm would be clear to a reasonably prudent official. *Id.* To controvert proof of good faith, it is not enough for the nonmovant to show that a reasonably prudent officer could have decided to discontinue or to not initiate the pursuit. *Clark*, 38 S.W.3d at 581. The nonmovant must show that no reasonable person in the officer’s position could have thought that the facts justified the



officer's actions. *Id.*; *City of Lancaster v. Chambers*, 883 S.W.2d 650, 657 (Tex. 1994).

**A. MVPD's evidence of good faith**

In support of its plea to the jurisdiction, MVPD attached Woodall's affidavit, a photograph of the suspect vehicle taken by a security camera, a copy of the incident report describing the police chase and collision, a video recording of the pursuit taken from the video recorder mounted in Woodall's patrol vehicle, and a street map of the area of the pursuit.

In his affidavit, Woodall averred that on the morning of July 28, 2008, the on-duty officers were instructed to be on the lookout for a dark blue sport utility vehicle with paper plates used in the commission of several burglaries. Woodall was provided with a photograph of the vehicle, but because of the poor resolution of the image, he was unable to decipher any indentifying information. He averred that neither the vehicle nor the burglary suspect had been identified. While on patrol, Woodall received a radio transmission in which a fellow officer stated that he had spotted the suspect vehicle in the area. The officer informed Woodall that the suspect vehicle had evaded him and was likely traveling on Piney Point Road. Soon thereafter, Woodall saw a dark blue sport utility vehicle, which matched the description of the suspect vehicle, driving south on Piney Point Road. Woodall, who was driving north, turned his vehicle around to follow the suspect vehicle. He

saw Shipp, who was still unidentified, turn onto a side-street and park in a circular driveway. Woodall stated that “the combination of the driver and vehicle meeting the physical description of the burglary suspect and the driver’s behavior in [his] presence” caused him to believe that “[Shipp] was the burglar [the MVPD] was looking for.” Within 30 seconds of turning onto the side street, Shipp left the driveway, speeding past Woodall and running a stop sign. Woodall averred that he immediately activated his emergency lights and siren and began his pursuit of Shipp.

Woodall stated that in deciding whether to initiate and continue his pursuit of Shipp, he considered both the need to pursue the suspect in terms of the severity and dangerousness of the suspected crimes and the risk to the public of allowing an unidentified burglar to evade identification and apprehension. In addition to failing to stop at a stop sign, Shipp disregarded Woodall’s lights and siren. At the time Shipp’s identity was not known, he was a suspect in three burglaries, and he was believed to be a relatively sophisticated criminal likely to continue burglarizing homes in the area. Woodall averred that a reasonably prudent officer in the same or similar circumstances would have believed, as he did, that the need to immediately apprehend Shipp outweighed the risk to the public in continuing the pursuit.

In his affidavit, Woodall stated that in initiating and continuing the pursuit he considered whether his immediate presence was necessary to apprehend Shipp, as well as the alternative courses of action available to him. Because Shipp was unidentified and driving a vehicle with no decipherable identifying markers, Woodall believed that his presence was necessary and that discontinuing the pursuit was not a viable alternative. Woodall radioed for back-up and for helicopter surveillance, but the other officers did not arrive on the scene until after the accident had occurred. Woodall stated that he “could not have identified [Shipp] based on anything visible on the paper tags.” He believed “there was no option of attempting to drive close enough to read the tags and then arrange for an arrest of the suspect at a later time and place.”

Woodall also assessed the risks involved in the pursuit. The chase took place during the mid-morning, after rush hour. He stated that the road conditions were dry, visibility was excellent, the volume of vehicular traffic was “low,” and “pedestrian traffic appeared non-existent.” Woodall further averred:

From the beginning of the pursuit to the end, my siren and overhead flashing emergency lights were activated. . . . The pursuit took place on major road arteries. The last 15 seconds occurred on the 9500 block of Richmond Avenue, a straight, six-lane avenue through a commercial area. When it became apparent to me that Shipp would accelerate as I closed the distance between my vehicle and his, I dropped back to give him more room. By increasing my following distance, I also attempted to reduce the risk of him becoming distracted by me. I never attempted to pass him in order to block his flight, and I did not tailgate him. . . . [W]hen [Shipp] reached the

intersection of Westheimer and Westerland and encountered other vehicles partially blocking his path, he slowed and nudged the other cars out of the way; he did not smash into them at high speed. The accident occurred when Mr. Gustafson unexpectedly failed to yield the right-of-way by driving from a parking lot into the lane of traffic in which Shipp was driving.

At the time of the collision, Woodall's vehicle was more than a full city block behind Shipp. In total, the chase lasted less than four minutes.

Woodall substantiated the statements in his affidavit with facts showing that he assessed both the need to apprehend the suspect and the risk of harm to the public when he initiated pursuit of Shipp and when he chose to continue his pursuit. *See Clark*, 38 S.W.3d at 581. Woodall addressed the need to stop Shipp based on the seriousness of the situation as a whole; he stated how Shipp, who was unidentified at the time, was a suspect in a string of burglaries and was attempting to evade identification and arrest; and he discussed his evaluation of the risks to the public. *See id.* He also stated that conditions were good and traffic was light. Based on his evaluation of the needs and risks, Woodall believed that the need to initiate and continue his pursuit of Shipp outweighed the risk of harm to the public. *See id.* at 586.

**B. The Gustafsons' evidence disputing good faith**

The Gustafsons argue that the MVPD did not conclusively establish the elements of good faith and that the evidence attached to their response raised a question of fact as to Woodall's good faith. The Gustafsons submitted the

following exhibits to controvert MVPD's evidence: the plaintiffs' first amended petition; MVPD's responses to requests for disclosure, admissions, and interrogatories; photos of the accident; incident reports; Memorial Villages' written policy on police-pursuit driving; photos of the area of the chase; a transcript of Woodall's testimony at Shipp's criminal trial; and the affidavit of proposed expert witness James L. Greenstone.

In his affidavit, Greenstone opined that "[a] reasonably prudent officer, when confronted with the facts [in this case], would or should have known that the apprehension of [] Shipp did not outweigh the risk of harm to the general public." The Gustafsons produced evidence to show that Woodall pursued Shipp, who was driving at a high rate of speed, through a residential neighborhood. During the pursuit, Woodall chased Shipp out of MVPD's jurisdiction, drove in the wrong lane, and entered an intersection where cars were waiting at a red light. The Gustafsons and Greenstone contend that Woodall, in initiating and in continuing the pursuit, violated MVPD policies when he pursued Shipp for committing a minor traffic violation. The Gustafsons also argue that Woodall acted "with reckless disregard or conscious indifference to the safety of persons in the area, including Wesley Gustafson." Although MVPD's driving policies provide that a pursuit should not be initiated for a non-hazardous misdemeanor, and although Woodall's affidavit did not rely solely on Shipp's traffic violation as justification for initiating

a pursuit, an officer's good faith is not rebutted by evidence that he violated the law or department policy in making his response. *See Campbell v. Jones*, 264 S.W.2d 425, 427 (Tex. 1954); *Johnson v. Campbell*, 142 S.W.3d 592, 596 (Tex. App.—Texarkana 2004, pet. denied). Moreover, evidence of recklessness is immaterial when determining if an officer acted in good faith. *City of Fort Worth v. Robinson*, 300 S.W.3d 892, 900 (Tex. App.—Fort Worth 2009, no pet.) (citing *Johnson*, 142 S.W.3d at 596).

Greenstone also stated that “there was no immediate incident which necessitated the pursuit.” He further opined that “there was an alternative course for Officer Woodall in order to investigate this situation and to do it in a safe manner while accomplishing his function as a police officer.” Greenstone pointed to the fact that Woodall waited on the corner of Piney Point Road and Williamsburg Drive for Shipp to reemerge, and he argued that a reasonably prudent officer would have blocked Shipp in and prevented his exit from the circular driveway. He contends that Woodall’s “failure to block-in” Shipp’s vehicle created a likelihood of harm to bystanders and that “blocking the roadway would have prevented possible harm to bystanders and been a reasonable way of confronting” Shipp. But the facts and circumstances known to Woodall at the time he initiated his pursuit were that Shipp was a suspect in a string of house burglaries; he had not been identified; he had recently evaded another officer; he

had demonstrated a degree of sophistication in his crimes; he was presumably casing the neighborhood; and he was driving a vehicle with paper plates, which made identification through means other than arrest impossible.

We judge an officer's good faith on the basis of what he perceived to be the facts at the time of his response. *Johnson*, 142 S.W.3d at 596; *see also Harris Cnty. v. Ochoa*, 881 S.W.2d 884, 888–89 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Evidence to controvert good faith must do more than merely show that a reasonably prudent officer could have reached a different decision. *See Chambers*, 883 S.W.2d at 657; *Telthorster v. Tennell*, 92 S.W.3d 457, 465 (Tex. 2002). To controvert MVPD's evidence of good faith, the Gustafsons were required to show that no reasonably prudent officer could have thought that the facts justified Woodall's actions. *See Clark*, 38 S.W.3d 581. An officer is not required to consider every conceivable alternative course of conduct. *See id.* at 584. Woodall's affidavit establishes that he considered alternative courses of action, including allowing Shipp to escape, and that the facts, as known to him, demonstrated a need to immediately apprehend Shipp. Although Greenstone's affidavit suggests a possible alternative course of action, it is insufficient to controvert MVPD's evidence of good faith. *See id.* at 581.

Greenstone's affidavit and the other evidence proffered by the Gustafsons is insufficient to raise a fact question on the issue of whether Woodall acted in good

faith in initiating and continuing his pursuit of Shipp. *See id.* at 587. Indulging every reasonable inference in favor of the Gustafsons, we conclude that their evidence is insufficient to controvert MVPD's proof on the element of good faith. *See Miranda*, 227–28. Accordingly we hold that the trial court erred in denying the plea to the jurisdiction, and we sustain MVPD's sole issue. Because we hold that the trial court erred in denying MVPD's plea to the jurisdiction on this basis, we need not address MVPD's other arguments about the applicability of exceptions under the Texas Tort Claims Act.

### **Conclusion**

We reverse the order denying MVPD's plea to the jurisdiction, and we render judgment dismissing the Gustafsons' claims against MVPD for want of jurisdiction.

Michael Massengale  
Justice

Panel consists of Justices Jennings, Bland, and Massengale.