Opinion issued August 18, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00397-CV

TEXAS DEPARTMENT OF PUBLIC SAFETY, Appellant

V.

ANITA JOHNSON AND TAMEKI TAYLOR, Appellees

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Case No. 2017-76040

MEMORANDUM OPINION

In this interlocutory appeal, appellant Texas Department of Public Safety ("DPS") challenges the trial court's order denying its plea to the jurisdiction in favor of appellees, Anita Johnson ("Johnson") and Tameki Taylor ("Taylor")

(collectively, "Appellees").[1] Appellees filed suit against DPS for injuries they sustained when DPS Trooper J. Rodriguez ("Trooper Rodriguez") drove his patrol car into their home during a pursuit of a fleeing suspect. In three issues, DPS argues that DPS retained sovereign immunity, and thus, the trial court erred in denying its plea to the jurisdiction. Because we conclude that Trooper Rodriguez was entitled to official immunity for his actions, and for that reason DPS did not waive its governmental immunity, we reverse and render a judgment of dismissal.

Background

On November 14, 2015, at approximately 10:52 p.m., Trooper Rodriguez was driving a DPS marked patrol car while on routine patrol with Trooper A. Perrault. Trooper Rodriquez was traveling on Veterans Memorial Drive in Harris County, Texas when he and Trooper Perrault noticed a blue Nissan Altima with a defective stop lamp. Trooper Rodriquez activated his overhead lights and pulled behind the Nissan to conduct a traffic stop. The driver of the Nissan turned on its turn signal and waited at the red light at Antoine Drive, appearing as if he would pull over for the stop. However, once the driver of the Nissan turned right onto Antoine Drive, the driver accelerated and refused to stop. Trooper Rodriguez then turned on his sirens and notified DPS Houston Communications that he was pursuing the vehicle. During the pursuit, which lasted between four to five minutes, the Nissan driver ran

[1] *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8).

multiple stop signs, failed to signal lane changes and turns, and failed to keep his lane. After making several evasive turns in and out of a residential neighborhood, the Nissan driver turned southbound onto Antoine Drive before making a hard right turn onto Suttonford Drive. Trooper Rodriguez began to apply his brakes and attempted to make the same turn onto Suttonford Drive. However, even under hard braking, Trooper Rodriguez was unable to decelerate, and his patrol car went off the road and struck a stop sign, bushes, and a brick column located on the front porch of Johnson's rental home. The DPS crash report indicated that although Trooper Rodriguez "attempted to brake for the right turn" onto Suttonford Drive, "its brakes did not respond." The DPS crash report listed "vehicle defects" as a contributing factor to the accident.

On November 13, 2017, Johnson and Johnson's daughter-in-law, Taylor, filed suit against DPS for personal injuries.[2] In their supplemental petition, Appellees alleged that the collision and their resulting injuries were due to Trooper Rodriguez's "failure to keep a proper lookout," "failure to maintain a safe speed,"

[2] Appellees also sued Trooper Rodriguez. DPS moved to dismiss Trooper Rodriguez pursuant to the election-of-remedies provision, Section 101.106(e), of the Texas Tort Claims Act. TEX. CIV. PRAC. & REM. CODE § 101.106(e) ("If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit."). The trial court granted DPS's motion and dismissed Appellees' causes of action against Trooper Rodriguez with prejudice.

and "failure to obey a traffic control device." Appellees also alleged that Trooper Rodriguez was "negligent in failing to provide medical care by calling for an ambulance or either intentionally or negligently interfer[ing] with the call for an ambulance placed by [Appellees] to receive medical treatment."[3]

DPS filed a plea to the jurisdiction and brief in support, asserting that it retained its immunity to Appellees' claims under the Texas Tort Claims Act ("TTCA"). Appellees filed an initial response and requested additional time to conduct discovery, including the deposition of Trooper Rodriguez. The trial court continued the hearing on the plea to the jurisdiction to allow Appellees to depose Trooper Rodriguez.[4]

After Trooper Rodriguez's deposition, Appellees filed a second response to DPS's plea to the jurisdiction and attached Trooper Rodriguez's deposition

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[3] For the purposes of this opinion, we assume without deciding that all of Appellees' allegations in their supplemental petition fall within the scope of Section 101.021(1)(A) of the TTCA, which provides that a governmental unit 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[.]

TEX. CIV. PRAC. & REM. CODE § 101.021(1)(A).

[4] The trial court also granted DPS's motion to compel discovery from Taylor.

transcript as evidence. DPS filed a reply in support of its plea. Following a hearing, the trial court denied DPS's plea. This appeal followed.[5]

Plea to the Jurisdiction

DPS argues that the trial court erred in denying its plea to the jurisdiction for three reasons. First, DPS contends that it retained its immunity under the TTCA because Section 101.055(2), the emergency exception to the waiver of sovereign immunity under the TTCA, applies.[6] Second, DPS contends that it retained its immunity under the TTCA because Trooper Rodriguez is protected by official immunity and therefore could not "be personally liable to the claimant according to Texas law," as required for the waiver of immunity under Section 101.021(1)(B). TEX. CIV. PRAC. & REM. CODE § 101.021(1)(B). And third, DPS contends that it retained its immunity, at least with respect to Taylor, because Taylor failed to provide the pre-suit notice required by the TTCA.

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5 This appeal was abated in June 2021 to allow Appellees the opportunity to retain substitute counsel following the death of their prior counsel. The case was reinstated in January 2022 following the appearance of substituted counsel on Appellee's behalf.

6 Section 101.055 applies to claims against a governmental unit arising "from the action of an employee while responding to an emergency call or reacting to an emergency situation if the action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such a law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others[.]" TEX. CIV. PRAC. & REM. CODE § 101.055(2).

A. Standard of Review

Governmental units are immune from suit unless immunity is waived by state law. *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003) (citing *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999)). The TTCA waives immunity for the negligent acts of government employees in specific, narrow circumstances. *See* TEX. CIV. PRAC. & REM. CODE § 101.021.

Because governmental immunity is jurisdictional, it is properly raised through a plea to the jurisdiction, which we review de novo. *State v. Holland*, 221 S.W.3d 639, 642 (Tex. 2007). The party suing the governmental unit bears the burden of affirmatively showing waiver of immunity. *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*, 578 S.W.3d 506, 512 (Tex. 2019). "To determine whether the party has met this burden, we may consider the facts alleged by the plaintiff and the evidence submitted by the parties." *Id.* (citing *Tex. Nat. Res. & Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001)). When a plea challenges jurisdictional facts, our review mirrors that of a traditional summary judgment motion. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *see* TEX. R. CIV. P. 166a(c).

To that end, in evaluating the parties' evidence, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133

S.W.3d 217, 228 (Tex. 2004). When the pleadings and evidence generate a "fact question on jurisdiction," dismissal on a plea to the jurisdiction is improper. *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 116 (Tex. 2010); *see also Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) (noting that "the proper function of a dilatory plea does not authorize an inquiry so far into the substance of the claims presented that plaintiffs are required to put on their case simply to establish jurisdiction"). However, "if the evidence is undisputed or fails to raise a fact question," the plea must be granted. *Hayes*, 327 S.W.3d at 116.

B. TTCA Waiver of Immunity

Although DPS raised three grounds for relief in its plea to the jurisdiction, we address only the second issue relating to Trooper Rodriguez's official immunity because it is dispositive. *See* TEX. R. APP. P. 47.1. DPS argues that it maintains its governmental immunity under the TTCA because Trooper Rodriguez is shielded by official immunity. DPS contends that Trooper Rodriguez, in pursuing the suspect, was performing a (1) discretionary function, (2) in the course and scope of his employment, and (3) his actions were made in good faith.

1. Doctrine of Official Immunity

As a governmental unit, DPS is immune from suit and liability unless the State has waived immunity. *See* TEX. GOV'T CODE § 411.002(a) (establishing DPS as agency of State); TEX. CIV. PRAC. & REM. CODE § 101.001(3)(a) (defining

"governmental unit" to include state agencies); *Ryder Integrated Logistics, Inc. v. Fayette Cnty.*, 453 S.W.3d 922, 926–27 (Tex. 2015) (per curiam) (stating that unit of government is immune unless State consents)). One such waiver can be found under the TTCA, which provides that a governmental unit is liable for personal injury proximately caused by an employee's tort, if the personal injury arises out of the operation of a motor vehicle and "the employee would be personally liable to the claimant according to Texas law." *See* TEX. CIV. PRAC. & REM. CODE § 101.021(1)(B).

A governmental employee cannot be personally liable, however, if he is protected by official immunity. *See DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995). That doctrine is born out of "the necessity of public officials to act in the public interest with confidence and without the hesitation that could arise from having their judgment continually questioned by extended litigation." *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 424 (Tex. 2004). An employee's official immunity therefore becomes relevant to the liability of his employer because a governmental unit "is vicariously liable for the acts of its employees only to the extent its employees are not entitled to official immunity." *See K.D.F. v. Rex*, 878 S.W.2d 589, 597 (Tex. 1994); *see also Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000) ("When official immunity shields a governmental employee from liability, sovereign immunity shields the governmental employer from vicarious

liability."); *Williams v. City of Baytown*, 467 S.W.3d 566, 572–73 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("Because the Tort Claims Act provides that a government is liable when its employee is liable, whether the government employee is entitled to official immunity affects whether the Act's limited waiver of governmental immunity applies to a governmental unit when the employee's conduct is under scrutiny.").

DPS argued in its plea to the jurisdiction that Trooper Rodriguez was entitled to official immunity. If DPS conclusively proved the defense, then Trooper Rodriguez's official immunity would negate an essential jurisdictional fact, thereby depriving the trial court of subject-matter jurisdiction. *See Harris Cnty. v. Avila*, No. 14-18-00182-CV, 2019 WL 1030332, at *2 (Tex. App.—Houston [14th Dist.] Mar. 5, 2019, no pet.) (mem. op.).

To prove the official immunity defense, DPS had the burden of establishing the following essential elements: (1) Trooper Rodriguez was acting within the scope of his authority, (2) Trooper Rodriguez was performing a discretionary duty, and (3) Trooper Rodriguez was acting in good faith. *See Tex. Dep't of Pub. Safety v. Bonilla*, 481 S.W.3d 640, 642–43 (Tex. 2015) (per curiam); *Wadewitz v. Montgomery*, 951 S.W.2d 464, 465–66 (Tex. 1997); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

2. Good Faith Element Generally

Good faith is measured against a standard of objective reasonableness. *Bonilla*, 481 S.W.3d at 643; *Wadewitz*, 951 S.W.2d at 466. Under this objective standard, the government employee's subjective state of mind or motive is irrelevant. *Bonilla*, 481 S.W.3d at 643–44; *Ballantyne*, 144 S.W.3d at 426–27 (Tex. 2004). The test for good faith is whether a reasonably prudent government employee operating in like circumstances could have believed that the need for the officer's actions outweighed a clear risk of harm to the public from those actions. *Bonilla*, 481 S.W.3d at 643; *Martinez v. Harris Cnty.*, 526 S.W.3d 557, 562 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

The Supreme Court of Texas has identified factors that courts should consider when assessing a law-enforcement officer's good faith in the context of a police pursuit. *See Clark*, 38 S.W.3d at 580–83. In analyzing law enforcement's need to intervene, we consider the seriousness of the crime to which the officer responded, whether the officer's immediate presence was necessary to prevent injury or loss of life or to apprehend a suspect, and any alternative courses of action that may have been available to achieve a comparable result. *Id.* at 581; *Wadewitz*, 951 S.W.2d at 467. Against these considerations, we balance the risks the pursuit entailed, the likelihood that these risks could have been realized, and whether these risks would be clear to a reasonably prudent officer. *Clark*, 38 S.W.3d at 581–82. However, we

bear in mind that the circumstances may prevent an officer from being able to analyze thoroughly each factor affecting the needs and risks associated with a pursuit and that this inability does not preclude a finding of good faith. *Id.* at 583. Good faith does not require consideration of risks that did not exist in a particular case. *Id.* at 586. An assessment of road, weather, and traffic conditions may suffice if the record does not indicate that other circumstances affected the risks. *Id.*

This inquiry does not concern carelessness or negligence, *see Ballantyne*, 144 S.W.3d at 426, and evidence of negligence does not negate good faith. *Telthorster*, 92 S.W.3d at 467. The question is not what a reasonable person would have done, but rather what a reasonable person could have believed. *Ballantyne*, 144 S.W.3d at 426. In this regard, the good-faith standard is akin to the standard of review for abuse of discretion; only those who are "plainly incompetent" or "knowingly violate the law" lack the good faith necessary to be shielded by official immunity. *Bonilla*, 481 S.W.3d at 643; *see also City of San Antonio v. Ytuarte*, 229 S.W.3d 318, 321 (Tex. 2007) (per curiam).

When the record contains competent proof of good faith and the other elements of official immunity, the burden shifts to the plaintiff to introduce controverting proof that no reasonable person in the officer's position could have thought the circumstances justified his actions. *Clark*, 38 S.W.3d at 581; *Adams v. Downey*, 124 S.W.3d 769, 772 (Tex. App.—Houston [1st Dist.] 2003, no pet.). This

burden may be satisfied by presenting expert or other testimony that balances both the need and risk factors described above to conclude that no reasonably prudent officer could have believed the actions were justified. *See Ytuarte*, 229 S.W.3d at 321 (explaining that expert testimony on good faith "must consider both the need and risk factors to prove the expert had a suitable basis for concluding that a reasonable prudent officer in the same position could or could not have believed the actions were justified," and holding that because plaintiff's expert "assessed the risks but never considered the need factor," plaintiff's summary judgment evidence was insufficient to controvert city's proof on good faith); *Jackson v. City of Baytown*, No. 14-14-00231-CV, 2015 WL 2169509, at *6 (Tex. App.—Houston [14th Dist.] May 7, 2015, no pet.) (mem. op.) (considering plaintiff's expert report and deposition testimony, as well as applicable police department orders and procedures, offered by plaintiff to refute city's evidence of good faith).

3. Analysis of DPS's Plea to the Jurisdiction

As noted above, a governmental entity raising the defense of official immunity has the burden of establishing the following essential elements: (1) the officer was acting within the scope of his authority, (2) the officer was performing a discretionary duty, and (3) the officer was acting in good faith. *Chambers*, 883 S.W.2d at 653.

a. Acting within the scope of authority and discretionary duty

The first element—whether the officer was acting within the course and scope of his authority—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." TEX. CIV. PRAC. & REM. CODE § 101.001(5). A peace officer who discharges duties generally assigned to him acts within the course and scope of employment. *Chambers*, 883 S.W.2d at 658.

Here, Trooper Rodriguez stated in his affidavit that on the evening of November 14, 2015, he was on routine patrol in his assigned area in a marked patrol vehicle when he initiated a traffic stop on the driver of the Nissan and, when the driver did not stop, he engaged in a vehicle pursuit. Appellees also alleged in their petition that Trooper Rodriguez was acting within the scope of his authority at the time of the accident. We conclude that Trooper Rodriguez was acting within the scope of his authority. *Chambers*, 883 S.W.2d at 658 (holding officers were acting within scope of authority because each was on duty, in squad car, and pursing suspect).

As to the second element—whether the officer was preforming a discretionary duty—the Texas Supreme Court has held that an officer's decision to engage in pursuit is a discretionary function. *Id.* at 655. The court explained:

> The decision to pursue a particular suspect will fundamentally involve the officer's discretion, because the officer must, in the first instance, elect whether to undertake pursuit. Beyond the initial decision to engage in the chase, a high[-]speed pursuit involves the officer's discretion on a number of levels, including, which route should be followed, at what speed, should back-up be called for, and how closely should the fleeing vehicle be pursued.

Id. Trooper Rodriguez testified in his affidavit that he performed a discretionary duty in pursuing the suspect, and that he considered both the need to pursue the suspect and the potential risk the pursuit posed to the public and made the discretionary decision to continue the pursuit. Appellees do not argue that Trooper Rodriguez was not performing a discretionary act by engaging in the pursuit. Thus, we hold that Trooper Rodriguez's pursuit of the driver of the Nissan was a discretionary act. *Chambers*, 883 S.W.2d at 655.

b. Good Faith

Turning to the element of good faith, DPS supported its good-faith argument in its plea to the jurisdiction primarily with the affidavit of Trooper Rodriguez and the video from Trooper Rodriguez's patrol car ("dash cam video").

Trooper Rodriguez testified that he has been employed by DPS since 2010 and was a trooper in the Highway Patrol Division for six years and eight months, including at the time of the accident.[7] Trooper Rodriguez testified that he received training on emergency response procedures; emergency communications; patrol

[7] Trooper Rodriguez now works in the Criminal Investigation Division of DPS.

procedures; defensive driving; driving instruction for pursuits and emergency response; and policies, procedures, and techniques pertaining to pursuits. As a DPS trooper, he made numerous traffic stops and was involved in several emergency responses and suspect pursuits.

On the night of the accident, Trooper Rodriguez testified he was on routine patrol with Trooper Perrault when he observed a blue Nissan passenger car with a defective stop lamp traveling on Veterans Memorial Drive. Trooper Rodriguez pulled behind the Nissan and activated his overhead red and blue lights in preparation for a traffic stop. The dash cam video confirmed that Trooper Rodriguez's emergency lights were activated.

Trooper Rodriguez testified that the driver of the Nissan turned right onto Antoine Drive, accelerated, and refused to stop. Trooper Rodriguez testified he immediately activated his siren and notified DPS Houston Communications of the commencement of a vehicle pursuit. Even with his lights and sirens on, Trooper Rodriguez testified that the Nissan driver continued to attempt to evade the stop.

During the pursuit, which lasted from four to five minutes, the dash cam video reflects that the Nissan driver ran multiple stop signs, failed to signal lane changes and turns, and failed to maintain his lane. After making "several evasive turns," the Nissan driver turned southbound onto Antoine Drive and then made a right turn onto Suttonford Drive. Trooper Rodriguez testified that he continued his pursuit, "began

to apply [his] brakes, and attempted to negotiate the same turn onto Suttonford Drive." However, Trooper Rodriguez testified that, "even under hard braking," he was unable to slow down, and his patrol car "struck a stop sign and went off road into a residential front yard," coming to "a rest after hitting several planted bushes and colliding with a brick column on a residential front porch."

According to Trooper Rodriguez, based on his experience patrolling that area of Harris County and his knowledge of the time of day (between 10:00 and 11:00 p.m.), he believed traffic on the local roadways would be relatively light. He stated that throughout the time he followed the Nissan, "the roads were dry and visibility was clear, such that [he] could see the car throughout the [pursuit]." The weather, road, and traffic conditions are confirmed by the dash cam video. He further testified that because the Nissan "continuously attempted to evade the traffic stop at a high rate of speed late at night," he was responding to an emergency.

Trooper Rodriguez also testified that he considered the risk of harm to the public that the pursuit might present and determined that the risk was minimized by the light traffic conditions, dry road conditions, and good visibility. He also testified that he maintained his emergency lights and sirens throughout the pursuit. The dash cam video confirmed that his lights and sirens remained on throughout the pursuit. Based on the above information, including the light traffic conditions, clear visibility, and dry road conditions, Trooper Rodriguez testified he believed the need

to continue the pursuit outweighed the risk of harm to the public posed by continuing the pursuit.

Trooper Rodriguez further testified that he considered the alternative course of action of terminating the pursuit. However, he believed that terminating the pursuit posed a high degree of risk to the public, as the Nissan driver was evading a traffic stop and traveling at an unsafe speed. He testified that he believed continuing the pursuit posed less risk of harm to the public, taking into consideration the light traffic conditions, clear visibility, and dry road conditions. He further testified that the only other methods of ending the pursuit—using his vehicle to ram the suspect vehicle or shooting the suspect vehicle's tires—would involve deadly force that was not justified by the information he had at the time. Thus, based on his training and experience, he believed the fleeing suspect and surrounding circumstances created serious risk of harm to the public which necessitated his continued pursuit. Based on the foregoing facts, Trooper Rodriguez opined a reasonably prudent officer in the same or similar circumstances could have believed that "the need to apprehend the suspect outweighed any clear risk of harm to the public posed by continuing the pursuit."

The evidence presented by DPS shows that Trooper Rodriguez assessed the need for police intervention and pursuit. Trooper Rodriguez observed a defective stop lamp and initiated a traffic stop. The Nissan driver used his turn signal and

waited at the red light at Antoine, appearing as if he would pull over for the traffic stop. However, after turning right onto Antoine Drive, the driver accelerated away from Trooper Rodriguez. During his attempts to evade Trooper Rodriguez, the Nissan driver ran multiple stop signs, failed to signal lane changes and turns, and failed to keep his lane. According to Trooper Rodriguez, the Nissan driver made "several evasive turns," was "evading a traffic stop," and was traveling at an "unsafe" or "high rate of speed late at night." The driver's speed and commission of multiple moving violations that put other drivers at risk demonstrated a need for Trooper Rodriguez to apprehend the driver. *See Avila*, 2019 WL 1030332, at *5 (considering evidence of need in form of testimony that officer pursued suspect who had committed traffic violations, refused to stop when officer activated emergency lights, accelerated to speeds over 100 miles per hour, and officer was only official in direct pursuit); *Jackson*, 2015 WL 2169509, at *4 (need demonstrated by officer's testimony that driver violated multiple traffic laws in effort to evade stop and was driving recklessly); *City of Richmond v. Rodriguez*, No. 01-08-00471-CV, 2009 WL 884810, at *5 (Tex. App.—Houston [1st Dist.] April 2, 2009, no pet.) (mem. op.) (need demonstrated when officer observed motorcycle travelling at night without headlight at high rate of speed, posing danger to himself, other motorists, and nearby property).

The evidence also shows that Trooper Rodriguez considered available alternatives. Trooper Rodriguez testified that he considered terminating the pursuit but concluded "that alternative posed a high degree of risk to the public, as the driver of the suspect car was evading a traffic stop and traveling at an unsafe speed." Trooper Rodriguez also considered other possible alternatives, including ramming the suspect's vehicle or shooting out the suspect's tires, but determined those methods, which involved the use of deadly force, were not justified under the circumstances. *See Avila*, 2019 WL 1030332, at *5 (testimony that officer considered abandoning pursuit or reducing speed, but concluded these alternatives would have "impeded [officer's] effort to contain the suspect, whose hazardous driving already presented an immediate danger to others," demonstrated that officer considered alternative courses of action to pursuit); *Jackson*, 2015 WL 2169509, at *4 (concluding evidence showed officer adequately considered other alternatives, including use of spike strips, ramming the suspect, and requesting roadblock).

The evidence shows that Trooper Rodriguez assessed the risks of the pursuit. Trooper Rodriguez acknowledged in his affidavit the risk of harm to the public presented by a pursuit. He stated that the roads were dry and visibility was clear throughout the pursuit, and that he considered the traffic conditions in the area. The dash cam video likewise showed that visibility was good, the weather was clear, and the pavement was dry. When the pursuit began, the video confirmed that the streets

were well lit and traffic was relatively light. Trooper Rodriguez testified, and the video confirmed, that he activated his lights and sirens when the pursuit began and kept them on throughout the pursuit. The video also shows that Trooper Rodriguez slowed down as he approached intersections with stop signs, indicating that he was considering the possibility of a collision and taking precautions to avoid one. *See Avila*, 2019 WL 1030332, at *5 (concluding officer assessed risks of pursuit by taking into consideration weather, lighting, and traffic, and by activating his lights and sirens); *Jackson*, 2015 WL 2169509, at *4 (concluding evidence showed officer assessed risks of pursuit by considering weather, visibility, and traffic conditions; activating his lights and sirens throughout pursuit; and slowing as he approached intersections with red lights or stop signs); *Royal v. Harris Cnty.*, No. 14-08-00551-CV, 2010 WL 610604, at *5 (Tex. App.—Houston [14th Dist.] Feb. 23, 2010, pet. denied) (mem. op.) (concluding county's evidence indicating officer assessed road conditions, weather, time of night, lighting, and traffic conditions was sufficient to demonstrate officer considered risk factors associated with pursuit); *cf. City of San Antonio v. Maspero*, 640 S.W.3d 523, 532 (Tex. 2022) (in analysis of emergency exception to TTCA, concluding officer did not act with reckless disregard, in part, because evidence showed officer assessed risks of pursuit by slowing down at intersections, which demonstrated intent to minimize potential harm).

Based on this evidence, we conclude that DPS met its burden of showing that a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to apprehend the suspect outweighed the risks of harm to the public. *See Ytuarte*, 229 S.W.3d at 321 (evidence established good faith as matter of law where there was testimony officer had evaluated both needs and risks); *see also Avila*, 2019 WL 1030332, at *5; *Jackson*, 2015 WL 2169509, at *4.

4. Appellees' Response

Having concluded that DPS satisfied its initial burden of showing that Trooper Rodriguez acted in good faith, we must now determine whether Appellees raised a genuine issue of material fact in their response. To controvert DPS's evidence of good faith, Appellees were required to show more than just that a reasonably prudent officer could have decided to stop the pursuit. *See Chambers*, 883 S.W.2d at 657. Their burden was much more demanding: They had to show that no reasonable officer in Trooper Rodriguez's position could have believed that the facts justified his actions. *Id.*

In their brief, Appellees do not address good faith or any of the elements of DPS's official immunity defense. Instead, Appellees make two arguments. First, Appellees appear to interpret DPS's official immunity argument to be that DPS cannot be held liable because Trooper Rodriguez was dismissed from the case pursuant to the TTCA's election-of-remedies provision, *see* TEX. CIV. PRAC. & REM.

CODE § 101.106(e), and thus, dismissal is mandated against DPS as well. Based on that interpretation, Appellees contend that DPS's official immunity argument is not supported by the case law, and should be rejected, because Trooper Rodriguez was not dismissed from the case based on official immunity. Second, Appellees argue that official immunity refers to an "affirmative defense available for governmental employees sued in their individual capacities" and does not "address the liability for reckless actions taken with conscious indifference or reckless disregard for the safety of others."

With respect to the election-of-remedies argument, it is undisputed that Appellees filed suit against both Trooper Rodriguez and DPS. DPS moved to dismiss Trooper Rodriguez pursuant to Section 101.106(e) of the TTCA, which provides that "[i]f a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit." TEX. CIV. PRAC. & REM. CODE § 101.106(e). The trial court granted DPS's motion to dismiss Trooper Rodriguez and dismissed Appellees' causes of action against him with prejudice.

But Appellees misinterpret DPS's argument with respect to Trooper Rodriguez's official immunity. DPS is not asserting that because Trooper Rodriguez was previously dismissed pursuant to Section 101.106(e), and therefore is no longer named in the lawsuit, it cannot be held liable under the TTCA. Instead, DPS argues

that it maintains sovereign immunity under the TTCA because, even if Trooper Rodriguez were still named as a defendant, he would be entitled to official immunity based on his actions and the evidence in the record. And because Trooper Rodriguez would be protected from liability by official immunity if he were still named as a defendant, and therefore could not be personally liable to Appellees under Texas law, DPS retains its governmental immunity pursuant to Section 101.021(1)(B) of the TTCA. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(1)(B) (providing that governmental unit is only liable "if the employee would be personally liable to the claimant according to Texas law")

We agree with DPS that the fact that Trooper Rodriguez was dismissed under Section 101.106(e) has no bearing on whether DPS can raise the issue of official immunity. Therefore, we reject Appellees' interpretation of DPS's argument and conclude that, in the event DPS conclusively established that Trooper Rodriguez was entitled to official immunity and therefore not "personally liable to the claimant" under Section 101.021(1)(B), DPS is immune from suit. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(1)(B); *see also Clark*, 38 S.W.3d at 580; *DeWitt*, 904 S.W.2d at 653; *K.D.F.*, 878 S.W.2d at 597; *Williams*, 467 S.W.3d at 572–73.

With respect to their second argument, Appellees claim that official immunity "does not address the liability for reckless actions taken with conscious indifference or reckless disregard for the safety of others." We interpret this argument to mean

that, according to Appellees, the affirmative defense of official immunity cannot apply to shield actions of governmental employees who act recklessly. Appellees do not cite any authority for this proposition, and we do not find support for this proposition in our case law. In fact, relevant case law from the Texas Supreme Court and this Court forecloses this argument. *See Bonilla*, 481 S.W.3d at 643 (stating that official immunity protects "all but the plainly incompetent or those who knowingly violate the law"); *City of Houston v. Nicolai*, No. 01-20-00327-CV, 2022 WL 960650, at *16 (Tex. App.—Houston [1st Dist.] Mar. 31, 2022, no pet.) (mem. op.) ("[R]ecklessness in the performance of the officer's duty [does not] belie her good faith. Recklessness is negligence, and negligence is immaterial when determining if a law enforcement officer acted in good faith." (internal citations omitted)); *Martinez*, 526 S.W.3d at 563 (good faith inquiry "does not concern carelessness or negligence"); *Mem'l Villages Police Dep't v. Gustafson*, No. 01-10-00973-CV, 2011 WL 3612309, at *6 (Tex. App.—Houston [1st Dist.] Aug. 18, 2011, no pet.) (mem. op.) ("Moreover, evidence of recklessness is immaterial when determining if an officer acted in good faith."). Thus, we reject Appellees' argument.

Apart from these two arguments, Appellees do not otherwise address DPS's claim that Trooper Rodriguez was entitled to official immunity in their appellate brief. Appellees make no argument that Trooper Rodriguez was not acting in good faith in pursuing the suspect and do not point to any controverting proof in the record

that shows no reasonable person in Trooper Rodriguez's position could have thought the circumstances justified his actions. *Clark*, 38 S.W.3d at 581; *Adams*, 124 S.W.3d at 772.

They also did not address official immunity generally, or good faith specifically, in their response to DPS's plea below, instead focusing on the inapplicability of the emergency exception. Appellees' focus on the emergency exception was made clear at the trial court's hearing on the plea to the jurisdiction, when specifically asked by the trial court to respond to the official immunity argument, Appellees' counsel responded:

> It's a matter of whether or not the trooper was operating in a reckless manner. That was the first part of our argument. The emergency defense exists, but it does not exist if the trooper is operating with conscious disregard to the safety of others or in a reckless manner.

To controvert DPS's evidence of good faith, Appellees were required to show that no reasonably prudent officer in Trooper Rodriguez's position could have thought that the facts justified Trooper Rodriguez's actions. *See Bonilla*, 481 S.W.3d at 643; *Chambers*, 883 S.W.2d at 657. Because Appellees did not do so, they have failed to carry their burden to raise a fact issue on good faith. *Cf. Ytuarte*, 229 S.W.3dat 321 (explaining that expert testimony on good faith "must consider both the need and risk factors to prove the expert had a suitable basis for concluding that a reasonable prudent officer in the same position could or could not have believed the actions were justified," and holding that because plaintiff's expert "assessed the

risks but never considered the need factor," plaintiff's summary judgment evidence was insufficient to controvert city's proof on good faith); *City of Pharr v. Ruiz*, 944 S.W.2d 709 (Tex. App.—Corpus Christi 1997, no writ) (holding that plaintiff's evidence, consisting of testimony of law enforcement officer with substantial experience in field of driver training indicating that police officers were negligent in high-speed pursuit of suspect, that city was negligent in failing to properly train officers, that training given to officers was grossly inadequate, that officers should have recognized need to terminate pursuit because hazards to public outweighed need to apprehend suspect, and that officers' failure to adhere to department policy related to pursuits was unreasonable under circumstances, was sufficient to raise fact issue on city's claim that officers conducted pursuit in good faith). Thus, Trooper Rodriguez is entitled to official immunity.

We sustain DPS's second issue.[8]

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[8] Appellees, in two cross points, also argue that DPS failed to address on appeal Appellees' argument that the plea to the jurisdiction was not timely filed, as well as the additional causes of action alleged in the supplemental petition related to Trooper Rodriguez's alleged failure to provide medical care and interference with medical treatment. To the extent Appellees argue that DPS has waived consideration of DPS's plea to the jurisdiction because it failed to address these issues in its opening brief, we note that the Texas Supreme Court has held that an appellate court may consider challenges to the trial court's subject matter jurisdiction, even when raised for the first time on appeal. *See Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2012). Additionally, as already noted, for the purposes of this opinion, we assumed that all causes of action alleged by Appellees in their supplemental petition fell within the scope of Section 101.021(1)(A) of the TTCA. But even assuming they do not, we have concluded that DPS is still entitled to governmental immunity under Section 101.021(1)(B).

Conclusion

We conclude that DPS satisfied its burden of showing that Trooper Rodriguez was entitled to official immunity, and that Appellees failed to present any controverting proof that raised a fact issue on the applicability of this affirmative defense. Because Trooper Rodriguez is protected from personal liability based on official immunity, DPS is protected from liability under the TTCA. *See* TEX. CIV. PRAC. & REM. CODE § 101.021(1)(B); *Clark*, 38 S.W.3d at 580; *DeWitt*, 904 S.W.2d at 653; *K.D.F.*, 878 S.W.2d at 597; *Williams*, 467 S.W.3d at 572–73. Trooper Rodriguez's official immunity therefore negates an essential jurisdictional fact and, on that basis, we conclude the trial court erred in denying DPS's plea to the jurisdiction. *See Avila*, 2019 WL 1030332, at *7. We therefore reverse the trial court's order and render judgment dismissing Appellees' suit against DPS.[9]

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[9] Because we have concluded that DPS retained (and did not waive) its governmental immunity under Section 101.021(1) of the TTCA, we do not reach DPS's alternative arguments related to the applicability of the emergency exception in Section 101.055(2) or Taylor's failure to provide pre-suit notice. *See* TEX. R. APP. P. 47.1; *Martinez v. Harris Cnty.*, 526 S.W.3d 557, 571 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (concluding that emergency exception in Section 101.055 is exception to TTCA's waiver of governmental immunity, and therefore, does not provide alternative basis for waiver of county's immunity); *Gipson v. City of Dallas*, 247 S.W.3d 465, 471 (Tex. App.—Dallas 2008, pet. denied) ("We conclude sections 101.055(2) and 101.062(b) are relevant only after the threshold issue of the existence of a waiver of immunity pursuant to section 101.021 is met"); *cf. City of El Paso v. Hernandez*, 16 S.W.3d 409, 416 (Tex. App.—El Paso 2000, pet. denied) ("[W]e hold that the City has sovereign immunity in an action involving a claim related to 9–1–1 emergency service only where governmental immunity is waived under Section 101.021[.]").

Amparo Guerra
Justice

Panel consists of Justices Kelly, Goodman, and Guerra.