

Opinion issued April 26, 2022



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

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NO. 01-21-00318-CV

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**CITY OF HOUSTON, Appellant**  
**V.**  
**GEOFFREY FRAZIER, Appellee**

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**On Appeal from the 125th District Court**  
**Harris County, Texas**  
**Trial Court Case No. 2020–02409**

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**MEMORANDUM OPINION**

In this interlocutory appeal,<sup>1</sup> appellant, City of Houston (the “City”), challenges the trial court’s order denying its summary-judgment motion filed in the suit of appellee, Geoffrey Frazier, against the City for negligence, negligence per se,

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<sup>1</sup> See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5).

and gross negligence. In two issues, the City contends that the trial court lacks subject-matter jurisdiction over Frazier's suit.

We reverse and render.

### **Background**

In his petition, Frazier alleged that on January 31, 2019, he was driving his car southbound on Telephone Road. When he passed through the intersection at Telephone Road and East Orem Drive, Frazier's car was hit by a Houston Police Department ("HPD") patrol car driven by HPD Officer B. Groves, a City employee. According to Frazier, he "had a green light and was already moving through the intersection when [Groves] sped into the intersection erratically and at [a] high rate of speed running [a] red light." Frazier alleged that Groves was "speeding" and "negligently failed to properly clear the intersection of on-coming traffic before entering it" in his patrol car. The impact between Frazier's car and Groves's patrol car was "so severe that both [cars] spun out of control and collided with other nearby vehicles." As a result of the collision, Frazier sustained injuries.

Frazier brought claims against the City for negligence, negligence per se, and gross negligence. Frazier alleged that Officer Groves was negligent in:

- "Failing to operate [a patrol car] in a safe manner as would a person exercising ordinary care and prudence under the same or similar circumstances";

- “Failing to keep such a lookout or pay attention as would have been kept by a person exercising ordinary care and prudence under the same or similar circumstances”;
- “Failing to discontinue driving when not physically or mentally alert to safely continue driving”;
- “Failing to proceed into an intersection safely causing interference or a collision”;
- “Failing to yield right-of-way”;
- “Failing to comply with a traffic-control device”;
- “Failing to control speed and traveling at a faster rate of speed than a person exercising ordinary care and prudence would have traveled under the same or similar circumstances”;
- “Failing to make such a timely and proper application of the brakes as would have been made by a person exercising ordinary care and prudence under the same or similar circumstances”;
- “Failing to turn or swerve to avoid [a] collision as would have been made by a person exercising ordinary care and prudence under the same or similar circumstances”; and
- Violating “the Texas Drivers Handbook, [the] Texas Transportation Code, and/or any other rule, regulation or law.”

Frazier alleged that Groves’s negligence proximately caused his injuries, and Frazier sought damages.

The City answered, generally denying the allegations in Frazier’s petition, and asserting governmental immunity, official immunity, and “exemptions and

exceptions from, and limitations on, liability” provided by the Texas Tort Claims Act (“TTCA”).<sup>2</sup>

The City then moved for summary judgment, arguing that it was entitled to judgment as a matter of law because the trial court lacks subject-matter jurisdiction over Frazier’s suit. The City asserted that it was entitled to governmental immunity, and the TTCA did not waive the City’s governmental immunity in a suit arising from the negligent operation or use of a motor-driven vehicle by a governmental employee acting within the scope of his employment when the employee was not personally liable to the plaintiff under Texas law.<sup>3</sup> Relevant to this case, a governmental employee is not personally liable to the plaintiff if he is protected by official immunity. According to the City, Officer Groves was protected from liability by official immunity because he was acting within the scope of his authority, performing a discretionary duty, and acting in good faith when the collision occurred.

The City also asserted that it was entitled to governmental immunity, and the TTCA did not waive the City’s governmental immunity, because although the TTCA waives immunity for personal injuries proximately caused by the negligence of a government employee acting in the scope of his employment if the injuries “arise[]

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<sup>2</sup> See *id.* §§ 101.001–.109.

<sup>3</sup> See *id.* § 101.021(1)(B).

from the operation or use of a motor-driven vehicle,”<sup>4</sup> exempted from the TTCA’s waiver of immunity are claims included in the TTCA’s “emergency exception.”<sup>5</sup> The underlying policy of the “emergency exception” is to balance the safety of the public with the need for prompt response from emergency-assistance personnel. Imposing liability for a mere failure in judgment could deter emergency-assistance personnel from acting decisively and taking calculated risks, and it would allow for judicial second guessing of the split-second and time-pressured decision that emergency-assistance personnel must make.

The City explained that this case falls into the TTCA’s “emergency exception” because Officer Groves was responding to an emergency call or reacting to an emergency situation at the time of the collision. Groves was responding to a request for assistance from another law enforcement officer, “which [was] treated as [the] equivalent to a priority 1, life-threatening issue in progress,” and Groves was required to respond on an urgent basis. Additionally, Groves complied with the applicable statutes regarding emergency action. He “activated all available emergency equipment on [his patrol car], i.e., [the] emergency lights and siren.” He drove at a maximum speed of eighty miles per hour when responding to the request for assistance, but as his patrol car approached the intersection at Telephone Road

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<sup>4</sup> *See id.* § 101.021(1)(A).

<sup>5</sup> *See id.* § 101.055(2).

and East Orem Drive, he slowed down significantly because “he was planning to turn north[] and could not safely make the turn” driving eighty miles per hour. Groves noted that the traffic light for “his lane of travel was red,” and he “checked for cross-traffic.” Groves “knew there was some degree of risk in responding to the call [for assistance] in the manner that he did, but he did not believe that the way he responded . . . created a high risk of serious injury.” In responding to the call for assistance from the requesting law enforcement officer, “he cared what happened to other motorists and pedestrians in the area.” Groves “took steps to mitigate the risk by activating his emergency equipment” on his patrol car, “taking into consideration all the other factors for everybody else driving on the road who may not [have] be[en] paying attention.”

The City attached to its summary-judgment motion the deposition of Officer Groves. In his deposition, Groves testified that in January 2019, he was involved in a car collision with Frazier. At the time of the collision, he was employed as an HPD law enforcement officer, and his duties included patrolling the area of Houston to which he was assigned and maintaining and upholding the safety and security of the community members. The car collision occurred at night at about 11:30 p.m. or 11:45 p.m. It was dark, and the roads were slick because it had rained earlier in the evening. The collision involved Groves’s patrol car and Frazier’s car, and Groves

had his partner, HPD Officer T. Post, as a passenger in his patrol car at the time of the collision. There were no passengers in Frazier's car.

Officer Groves explained that on the night of the collision, he and Officer Post were on duty and about to leave the HPD station in Groves's patrol car when he heard another law enforcement officer, Officer Bounds, over the radio, request assistance from other law enforcement officers in the area. Bounds asked for assistance because he had found a stolen vehicle that had multiple people inside, and Bounds needed assistance from other law enforcement officers to conduct a felony traffic stop of the stolen vehicle. At the time, Groves knew that he and Post were the closest law enforcement officers to Bounds's location, so Groves went to assist Bounds with the felony traffic stop.

While Officer Groves drove his patrol car to Officer Bounds's location in response to the call for assistance, he focused on getting to Bounds's location "as quickly and safely as" he could. Groves activated his patrol car's emergency lights and siren, which was the proper procedure when responding to the type of call made by Bounds. Groves wanted to make sure that he was "very visible" and "very audible" while responding to the request for assistance because he did not know how well other motorists would be paying attention.

Officer Groves chose his route to Bounds's location based on his own judgment and experience. There were multiple routes for him to choose from, and

the initial route he planned to take was blocked by a train. Thus, Groves altered his route to Bounds's location. In determining which route to take to reach Bounds, Groves considered that it had been raining and that it was dark outside. As he drove, Groves "tr[ie]d to pay attention to other people on the road" because although he was "paying attention to everything [that] d[id] [not] mean that everybody else [was] paying attention to everything." Groves was not distracted as he drove, and Officer Post, who was a passenger in Groves's patrol car, did not distract Groves while he was driving. The maximum speed that Groves drove on the way to Bounds's location was eighty miles per hour.

According to Officer Groves, the collision occurred at the intersection of Telephone Road and East Orem Drive. Just before the collision, Groves was driving his patrol car eastbound on East Orem Drive, and Frazier was driving his car southbound on Telephone Road. At the intersection, Groves planned to turn left and proceed north on Telephone Road. As he approached the intersection, Groves slowed his patrol car "way down" and "slowed significantly" because he could not make the left turn while driving eighty miles per hour. Groves looked both ways at the intersection to see if there was traffic on the cross street. A car dealership obstructed his view, making it difficult to see any cars driving southbound on Telephone Road. At the intersection, Groves noted that the traffic light controlling his lane of travel was red. Groves did not stop his patrol car completely at the



intersection, but he followed HPD's policy for when an officer approaches a traffic light that is red. Groves slowed his patrol car "to a reasonable speed," "show[ed] [him]self [by having his] emergency [lights and siren] activated," and proceeded through the intersection because it was safe. Groves did not see Frazier's car until just before impact. According to Groves, Frazier's car struck the patrol car near the front tire on the driver's side.

Officer Groves explained that at the time of the collision, he, an on-duty officer, was responding to a call for assistance from another law enforcement officer in need. Under HPD's policies and procedures, a request by a law enforcement officer for assistance is "a Code 1 response" or a "Priority 1 [call]," which "is the highest response code." This is because of the "danger and the severity of the situation that the [requesting law enforcement] officer [is] involved in." According to Groves, "whenever a fellow [law enforcement] officer asks for assistance . . . it [is] presumed that he . . . is in a dangerous situation" because "[t]hat's why th[e] [officer] ask[s] for assistance." And in this particular instance it was a "very dangerous situation" for Officer Bounds "to be out there by [him]self." Thus, when Bounds requested assistance from other officers to make a felony traffic stop of a stolen vehicle with multiple occupants, "that[] [was] a life-threatening issue in progress." Bounds's request for assistance required Groves to respond on an urgent basis.

As to other HPD policies and procedures, Officer Groves testified that when responding to a call for service, law enforcement officers are required to drive with regard for everyone's safety. Groves also explained that it is HPD's policy that at least three officers must be present to conduct a felony traffic stop. And the officer making the stop may have as many additional officers as he deems necessary to be safe. It is also HPD's policy for multiple law enforcement officers to respond to a request for assistance in making a felony traffic stop because it helps maintain the safety and security of the officers, innocent bystanders, and the suspect.

Finally, Officer Groves stated that in responding to Officer Bounds's call for assistance, he knew that there was some degree of risk in responding to the call in the manner that he did, but he did not believe that the way that he responded to Bounds's request for assistance created a high risk of serious injury. According to Officer Groves, even if he had not come to a complete stop at the intersection, "a[] reasonably prudent [law enforcement] officer [would] have believed that the need to reach the scene of the felony [traffic] stop outweighed the risk of harm to any others from [his] driving through the intersection."

In his response to the City's summary-judgment motion, Frazier asserted that the TTCA waived governmental immunity for the City. According to Frazier, the TTCA waived the City's governmental immunity in a suit arising from the negligent operation or use of a motor-driven vehicle by a governmental employee acting

within the scope of his employment if the governmental employee was personally liable. And here, Officer Groves was not entitled to official immunity—making him personally liable—because the City could not establish that he was acting in good faith at the time of collision.

Frazier also asserted that the TTCA waived the City’s governmental immunity because the TTCA’s “emergency exception” did not apply to this case. According to Frazier, Officer Groves was not responding to an emergency call or reacting to an emergency situation at the time of the collision because Groves was responding to a call for assistance from another law enforcement officer conducting a felony traffic stop of a stolen vehicle, the “request for assistance did not come from [the] dispatch” operator, other officers were heading in the direction of the requesting officer, the stolen vehicle was stationary, the requesting officer wanted “assistance to finish conducting the traffic stop,” there was “no chase” nor “threat to human welfare,” “no violence,” and “no urgency.” The requesting law enforcement officer also did not say that he was in danger and did not “state any code for his request.” Frazier, citing an HPD June 19, 2020 General Order titled “Response Priority Codes,” asserted that a “Priority 1” “Emergency Response” call “assumes that a potential threat of life or a potential threat of serious bodily injury is in progress.” But Frazier believed that Groves was responding to a “Priority 8” call which “consists of self-initiated activities that originate with an officer rather than the dispatcher or

other external sources” when the activities “are initiated solely by an officer’s own actions.” Frazier also argues that Groves acted with conscious indifference or reckless disregard because “the roads were slick that night,” he was driving up to eighty miles per hour in his patrol car, he had an obstructed view at the intersection of Telephone Road and East Orem Drive, he did not come to a complete stop before entering the intersection, and he entered the intersection “without being able to see if there was on-coming traffic.”

Frazier attached to his summary-judgment response, among other things, a copy of an HPD General Order, dated June 19, 2020, a copy of a “Texas Peace Officer’s Crash Report” for the collision, and certain excerpts from Officer’s Groves’s deposition.<sup>6</sup> The June 19, 2020 HPD General Order states that it concerns “[r]esponse [m]anagement” and consists of HPD’s “standards and procedures for

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<sup>6</sup> See *Warnke v. Nabors Drilling USA, L.P.*, 358 S.W.3d 338, 345 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (trial court can rely on entire record, including evidence attached to response as basis for ruling on summary-judgment motion). We note that the City objected to certain evidence attached to Frazier’s summary-judgment response, including the HPD General Order dated June 19, 2020, which it asserted constituted unauthenticated hearsay and was facially inapplicable. The City states that although the trial court did not rule on its objections to Frazier’s evidence, it preserved error by filing an objection in the trial court to the trial court’s failure or refusal to rule. To the extent that the City complains that the trial court erred in failing to rule on its objections to certain evidence attached to Frazier’s summary-judgment response and that such evidence should not be considered, due to our ultimate disposition in this case, we need not address this complaint. See TEX. R. APP. P. 47.1.

managing responses to calls for service and events and [HPD] unit activity.”

(Emphasis omitted.) According to the HPD General Order,

[r]esponse priority is designated by the priority response code . . . and dictates whether an emergency, immediate, direct, delayed, or diverted . . . response is most appropriate . . . . When responding to any call for service or event, officers shall drive using the most direct and expedient route, recognizing that an unknown amount of time may have elapsed before notification was given to the police department. Officers shall drive with due regard for the safety of themselves, fellow officers, and citizens.

(Emphasis omitted.) The HPD General Order lists the following “Response Priority” types:

Priority “E” (Emergency):

Priority “E” represents assist the officer . . . , and assumes that a potential threat to life or the potential threat of serious bodily injury to an officer . . . is in progress.

Response to priority “E” calls for service is by uniformed officers in marked vehicles with the use of emergency lights and a siren and who remain at this response level until a supervisor, a unit, or dispatcher advises the situation is under control. When advised of such, officers who have not arrived at the scene shall reduce their response to the priority dictated by the dispatcher, but shall continue to the scene unless otherwise instructed by a field supervisor or dispatcher.

. . . .

Priority One (Emergency Response):

Priority one assumes that a potential threat to life or the potential threat of serious bodily injury is in progress, and is used for all urgent calls other than assist the officer . . . calls.

Response to priority one calls for service is by uniformed officers in marked vehicles with the use of emergency lights and a siren. . . .

. . . .

Priority Eight (Direct Response):

Priority eight consists of self-initiated activities that originate with an officer rather than the dispatcher or other external sources. These activities do not involve on-view investigations in which an officer is “flagged down,” but are initiated solely by an officer’s own actions. The officer shall advise the dispatcher of the nature of the event. The dispatcher can then create an event slip containing the appropriate priority eight call code.

(Emphasis omitted.) As to law enforcement officers’ responsibilities when responding to Priority E or Priority 1 calls, the HPD General Order states that officers should use emergency equipment and should “drive with due regard for the safety of themselves, fellow officers, and citizens.”

The “Texas Peace Officer’s Crash Report” for the collision states that the collision involved a patrol car driven by Officer Groves, with Officer Post as a passenger, as well as a car driven by Frazier. It states that Groves was: “Pol[ice], Fire, EMS on Emergency.” As to what happened, the report explains that Frazier’s car was traveling southbound at the 9600 block of Telephone Road and Groves’s car was traveling eastbound at the 7600 block of East Orem Drive. The road was wet from rain. Groves’s patrol car’s emergency lights and siren were activated, and Groves was turning left to drive north on Telephone Road. Groves’s patrol car was “an emergency vehicle [en route] to a call.” Frazier’s car “failed to yield the right

of way to an emergency vehicle and was struck” by Groves’s patrol car. At the time of the collision, Groves’s patrol car was traveling at “a low speed” of less than five miles per hour.

In its reply to Frazier’s summary-judgment response, the City reiterated that the TTCA did not waive the City’s governmental immunity in a suit arising from the negligent operation or use of a motor-driven vehicle by a governmental employee acting within the scope of his employment when the employee was not personally liable to the plaintiff under Texas law. And here, Officer Groves was protected from liability by official immunity.

The City also reasserted that the TTCA did not waive the City’s governmental immunity because the TTCA’s “emergency exception” applied in this case. Although Frazier asserted that “no life-threatening emergency” existed, Frazier relied on an HPD General Order dated June 19, 2020, which post-dated the January 2019 collision between Officer Groves and Frazier. And the “Texas Peace Officer’s Crash Report” for the collision that Frazier attached to his summary-judgment response, established that Groves was driving “an emergency vehicle en route to an emergency call” at the time of the collision and that Frazier’s “failure to yield to an emergency vehicle [was] a contributing factor to the” collision. The City also noted that Frazier did not assert that Groves had not complied with the applicable statutes regarding emergency action, and an analysis of whether Groves acted with conscious

indifference and reckless disregard was unnecessary. The City requested that the trial court dismiss Frazier's suit for lack of subject-matter jurisdiction.

The trial court denied the City's summary-judgment motion.

### **Standard of Review**

Sovereign immunity and its counterpart, governmental immunity, exist to protect the State and its political subdivisions from lawsuits and liability for money damages. *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012); *Tex. Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002); *see also Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Pol. Subdivisions Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320, 323–24 (Tex. 2006) (“Sovereign immunity protects the State, its agencies, and its officials from lawsuits for damages.”). Although the terms “sovereign immunity” and “governmental immunity” are often used interchangeably, sovereign immunity “extends to various divisions of state government, including agencies, boards, hospitals, and universities,” while governmental immunity “protects political subdivisions of the State, including counties, cities, and school districts.” *See Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist.*, 212 S.W.3d at 323–24; *see also Odutayo v. City of Houston*, No. 01-12-00132-CV, 2013 WL 1718334, at \*2 n.8 (Tex. App.—Houston [1st Dist.] Apr. 18, 2013, no pet.) (mem. op.). We interpret statutory waivers of sovereign immunity and governmental immunity narrowly, as the Texas



Legislature’s intent to waive immunity must be clear and unambiguous. *See LMV-AL Ventures, LLC v. Tex. Dep’t of Aging & Disability Servs.*, 520 S.W.3d 113, 120 (Tex. App.—Austin 2017, pet. denied); *see also* TEX. GOV’T CODE ANN. § 311.034. Without an express waiver of sovereign immunity or governmental immunity, courts do not have subject-matter jurisdiction over suits against the State or its political subdivisions. *State v. Shumake*, 199 S.W.3d 279, 283 (Tex. 2006); *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224–25 (Tex. 2004); *see also Harris Cty. v. S. Cty. Mut. Ins. Co.*, No. 01-13-00870-CV, 2014 WL 4219472, at \*2 (Tex. App.—Houston [1st Dist.] Aug. 26, 2014, no pet.) (mem. op.) (“Governmental immunity from suit deprives a trial court of subject-matter jurisdiction.”).

A governmental unit may raise the affirmative defense of sovereign immunity or governmental immunity and challenge the trial court’s jurisdiction “through a plea to the jurisdiction or other procedural vehicle, such as a motion for summary judgment.” *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018). We review a trial court’s decision on summary judgment de novo. *Tex. Mun. Power Agency v. Pub. Util. Comm’n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007).

To prevail on a summary-judgment motion, the movant has the burden of establishing that it is entitled to judgment as a matter of law and there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339,

341 (Tex. 1995). When a governmental unit, as the movant, raises the affirmative defense of sovereign immunity or governmental immunity and challenges the trial court’s subject-matter jurisdiction in a summary-judgment motion, it must establish that it is entitled to immunity as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Rivera v. City of Houston*, No. 01-19-00629-CV, 2020 WL 7502054, at \*3 (Tex. App.—Houston [1st Dist.] Dec. 22, 2020, no pet.) (mem. op.); *Oakbend Med. Ctr. v. Martinez*, 515 S.W.3d 536, 542 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Once the governmental unit conclusively establishes its entitlement to sovereign immunity or governmental immunity, the burden shifts to the non-movant to present evidence sufficient to create a fact issue on at least one element of either the affirmative defense or an exception to that defense. *City of Houston v. Carrizales*, No. 01-20-00699-CV, 2021 WL 3556216, at \*3 (Tex. App.—Houston [1st Dist.] Aug. 12, 2021, pet. denied) (mem. op.); *Oakbend*, 515 S.W.3d at 542. If the non-movant cannot meet his burden, the suit is barred because of sovereign immunity or governmental immunity, and summary judgment is proper. *Carrizales*, 2021 WL 3556216, at \*3; *Oakbend*, 515 S.W.3d at 542; *see also Shives v. State*, 743 S.W.2d 714, 715 (Tex. App.—El Paso 1987, writ denied) (“[A] motion for summary judgment may be based on a showing that the cause of action is barred as a matter of law by the affirmative defense of governmental immunity.”).

## Governmental Immunity

In its second issue, the City argues that the trial court erred in denying its summary-judgment motion because the trial court lacks subject-matter jurisdiction over Frazier’s suit. The City asserts that it is entitled to governmental immunity, and although the TTCA waives immunity for personal injuries proximately caused by the negligence of a government employee acting in the scope of his employment, if the injuries “arise[] from the operation or use of a motor-driven vehicle,” exempted from the TTCA’s waiver of immunity are claims included in the TTCA’s “emergency exception.” *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021(1), 101.055(2).

The TTCA provides a limited waiver of immunity for certain suits against governmental units. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001–.109; *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008); *City of Dallas v. Hillis*, 308 S.W.3d 526, 530 (Tex. App.—Dallas Mar. 30, 2010, pet. denied). The City is a governmental unit protected by governmental immunity, absent waiver. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(3)(A); *see also Carrizales*, 2021 WL 3556216, at \*4. Relevant here, the TTCA waives a governmental unit’s immunity for personal injuries proximately caused by the negligence of a governmental employee, such as a law enforcement officer, acting in the scope of his employment, if the injuries arise from the operation or use of a

motor-driven vehicle and the employee would be personally liable to the plaintiff under Texas law. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1); *City of San Antonio v. Riojas*, 640 S.W.3d 534, 536 (Tex. 2022); *Hinojosa v. Metro. Transit Auth. of Harris Cty.*, No. 01-17-00824-CV, 2018 WL 4131890, at \*2 (Tex. App.—Houston [1st Dist.] Aug. 30, 2018, no pet.) (mem. op.); *Tex. Dep’t of Pub. Safety v. Rodriguez*, 344 S.W.3d 483, 488 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

But the TTCA also lists circumstances in which its waiver of immunity provisions do not apply. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.051–.067; *City of San Antonio v. Hartman*, 201 S.W.3d 667, 671–72 (Tex. 2006); *City of Houston v. Hussein*, No. 01-18-00683-CV, 2020 WL 6788079, at \*6 (Tex. App.—Houston [1st Dist.] Nov. 19, 2020, pet. denied) (mem. op.). Exempted from the TTCA’s waiver of immunity are claims included in the TTCA’s “emergency exception.” *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2); *City of San Antonio v. Maspero*, 640 S.W.3d 523, 525, 529 (Tex. 2022) (noting if plaintiff’s claims fall within TTCA’s “emergency exception,” TTCA does not waive immunity for those claims “regardless of whether they would otherwise fall within the scope of th[e] [TTCA’s] waiver.”); *Hussein*, 2020 WL 6788079, at \*6; *Galveston Cty. Health Dist. v. Hanley*, No. 01-14-00166-CV, 2014 WL 6853608, at \*2 (Tex. App.—Houston [1st Dist.] Dec. 4, 2014, no pet.) (mem. op.); *see also City of El Paso v. Hernandez*, 16 S.W.3d 409, 415 (Tex. App.—El Paso 2000, pet. denied)

(Texas Civil Practice and Remedies Code section 101.055(2) allows governmental unit to retain its immunity even though waiver may exist under section 101.021). Under Texas Civil Practice and Remedies Code section 101.055(2), a governmental unit’s immunity is not waived in a case where a claim arises “from the action of a[] [governmental] employee while responding to an emergency call or reacting to an emergency situation if the [employee’s] action is in compliance with the laws and ordinances applicable to emergency action.”<sup>7</sup> See TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2); see also *Maspero*, 640 S.W.3d at 529; *Hussein*, 2020 WL 6788079, at \*6; *Hanley*, 2014 WL 6853608, at \*2; *City of Beaumont v. Brocato*, No. 09-10-00473-CV, 2011 WL 4716296, at \*3 (Tex. App.—Beaumont Oct. 6, 2011, no

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<sup>7</sup> Texas Civil Practice and Remedies Code section 101.055(2) also states that a governmental unit’s immunity is not waived in a case where a claim arises “from the action of a[] [governmental] employee while responding to an emergency call or reacting to an emergency situation if the [employee’s] action,” in the absence of laws or ordinances governing emergency action, “is not taken with conscious indifference or reckless disregard for the safety of others.” See TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2); see also *City of Houston v. Hussein*, No. 01-18-00683-CV, 2020 WL 6788079, at \*6 n.16 (Tex. App.—Houston [1st Dist.] Nov. 19, 2020, pet. denied) (mem. op.); *City of San Angelo Fire Dep’t v. Hudson*, 179 S.W.3d 695, 699 n.4 (Tex. App.—Austin 2005, no pet.). Because the Texas Transportation Code governs the operation of emergency vehicles in situations like the one present in this case, the conscious indifference or reckless disregard provision in section 101.055(2) does not apply. See *Hussein*, 2020 WL 6788079, at \*6 n.16; *Hudson*, 179 S.W.3d at 699 n.4; see also *Galveston Cty. Health Dist. v. Hanley*, No. 01-14-00166-CV, 2014 WL 6853608, at \*5 (Tex. App.—Houston [1st Dist.] Dec. 4, 2014, no pet.) (mem. op.). To the extent that the City argues that its governmental immunity is not waived because Officer Groves “did not act with conscious indifference or reckless disregard,” we need not address that argument. See TEX. R. APP. P. 47.1; see also TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2); *Hussein*, 2020 WL 6788079, at \*6 n.16.

pet.) (mem. op.) (“[T]he [TTCA] does not waive governmental immunity for claims asserting only negligence arising from the action of a government employee who is responding to an emergency call or reacting to an emergency situation.” (internal quotations omitted)). The underlying policy of the “emergency exception” to the TTCA’s limited waiver of immunity is “to balance the safety of the public with the need for prompt response” from emergency-assistance personnel. *City of Amarillo v. Martin*, 971 S.W.2d 426, 429 (Tex. 1998); *see also Hussein*, 2020 WL 6788079, at \*6 n.15; *City of San Angelo Fire Dep’t v. Hudson*, 179 S.W.3d 695, 699 (Tex. App.—Austin 2005, no pet.). Imposing liability for a mere failure in judgment could deter emergency-assistance personnel from acting decisively and taking calculated risks. *See Martin*, 971 S.W.2d at 430; *Hussein*, 2020 WL 6788079, at \*6 n.15; *Hudson*, 179 S.W.3d at 699. This would also “allow for judicial second guessing of the split-second and time-pressured decisions” emergency-assistance personnel are forced to make. *Hudson*, 179 S.W.3d at 699; *see also Hussein*, 2020 WL 6788079, at \*6 n.15.

**A. Responding to Emergency Call or Reacting to Emergency Situation**

In a portion of its second issue, the City argues that it presented “evidence that Officer Groves was either responding to an emergency call or reacting to an emergency situation at the time of the [collision]” because Groves “was responding to a request for assistance from another [law enforcement] officer, which is treated

as equivalent to a [P]riority 1 [call], life-threatening issue in progress” and the request for assistance from Officer Bounds required Groves to “respond on an urgent basis.”

To meet its initial summary-judgment burden, the City was required to present evidence establishing that Officer Groves was responding to an emergency call or reacting to an emergency situation. *See Hussein*, 2020 WL 6788079, at \*7. The TTCA does not define the terms “emergency call” or “emergency situation,” but Texas courts have interpreted the term “emergency” broadly. *See Hussein*, 2020 WL 6788079, at \*8 (internal quotations omitted); *Zapata v. City of Gonzales*, No. 13-18-00065-CV, 2020 WL 486489, at \*4 (Tex. App.—Corpus Christi—Edinburg Jan. 30, 2020, no pet.) (mem. op.) (internal quotations omitted); *Juarez v. Harris Cty.*, No. 01-18-00690-CV, 2019 WL 5699741, at \*6 (Tex. App.—Houston [1st Dist.] Nov. 5, 2019, no pet.) (mem. op.) (internal quotations omitted); *see, e.g., Hartman*, 201 S.W.3d at 672–73 (noting “emergency exception” had been held to apply to traffic accidents involving law enforcement, or emergency vehicles and also concluding city’s reaction to widespread roadway flooding constituted reaction to “an emergency situation”); *Pakdimounivong v. City of Arlington*, 219 S.W.3d 401, 410–11 (Tex. App.—Fort Worth 2006, pet. denied) (officers were responding to emergency situation when suspect in back of patrol car tried to escape through car window); *see also City of Coll. Station v. Kahlden*, No. 10-12-00262-CV, 2014 WL

1269026, at \*5 (Tex. App.—Waco Mar. 27, 2014, pet. denied) (mem. op.) (defining “emergency,” in context of Texas Civil Practice and Remedies Code section 101.055(2), as “an unforeseen combination of circumstances or the resulting state that calls for immediate action” (internal quotations omitted)); *Jefferson Cty. v. Hudson*, No. 09-11-00168-CV, 2011 WL 3925724, at \*3 (Tex. App.—Beaumont Aug. 25, 2011, no pet.) (mem. op.) (noting Texas Legislature did not intend exception to apply only in limited circumstances and defining “emergency” as used in Texas Civil Practice and Remedies Code section 101.055(2) to “refer[] to unforeseen circumstances that call for immediate action” (internal quotations omitted)).

In his deposition, Officer Groves testified that on the night of the collision, he was on duty and about to leave the HPD station in his patrol car, along with his partner, Officer Post, when he heard another law enforcement officer, Officer Bounds, over the radio, request assistance from other law enforcement officers in the area. Bounds asked for assistance because he had found a stolen vehicle that had multiple people inside, and Bounds needed the assistance of other law enforcement officers to conduct a felony traffic stop of the stolen vehicle. At the time of the call, Groves knew that he and Post were the closest law enforcement officers to Bounds’s location, so Groves went to assist Bounds with the felony traffic stop.



While driving his patrol car to Officer Bounds's location in response to the call for assistance, Groves activated his patrol car's emergency lights and siren, which was the proper procedure when responding to the type of call made by Bounds. Groves drove quickly while en route to Bounds's location. At the time of the collision, Groves, an on-duty law enforcement officer, was responding to a call for assistance from another law enforcement officer in need.

According to Officer Groves, under HPD's policies and procedures, a request by a law enforcement officer for assistance is "a Code 1 response" or a "Priority 1 [call]," which "is the highest response code." This is because of the "danger and the severity of the situation that the [requesting law enforcement] officer [is] involved in." According to Groves, "whenever a fellow [law enforcement] officer asks for assistance . . . it [is] presumed that he . . . is in a dangerous situation" because "[t]hat's why th[e] [officer] ask[s] for assistance." And in this particular instance it was a "very dangerous situation" for Officer Bounds "to be out there by [him]self." Thus, when Bounds requested assistance from other officers to make a felony traffic stop, "that[] [was] a life-threatening issue in progress." Bounds's request for assistance required Groves to respond on an urgent basis.

Officer Groves also testified that it is HPD's policy that if a law enforcement officer wants to conduct a felony traffic stop, there needs to be at least three officers present to conduct the stop. The officer making the stop can have as many other

officers as he deems necessary to be safe. The reason for HPD’s policy for multiple law enforcement officers to respond to a request for assistance in making a felony traffic stop is because it helps maintain the safety and security of the officers, innocent bystanders, and the suspect.

The City’s summary-judgment evidence shows that Officer Groves, an on-duty law enforcement officer, at the time of the collision, was responding, with his patrol car’s emergency lights and siren activated, to Officer Bounds’s request for assistance in making a felony traffic stop of a stolen vehicle containing multiple occupants. *See Brocato*, 2011 WL 4716296, at \*4 (“A radio call from an officer who has stopped a vehicle containing multiple occupants may necessitate an immediate or urgent response by the police . . . .”); *see also Torres v. City of Corpus Christi*, No. 13-14-00506-CV, 2016 WL 4578392, at \*4 (Tex. App.—Corpus Christi–Edinburg Sept. 1, 2016, no pet.) (mem. op.) (law enforcement officer was responding to emergency call or emergency situation when he received “a call that a stolen vehicle was approaching his area”). Bounds’s request for assistance was considered urgent and life-threatening and required an immediate response. *See Tex. Dep’t of Pub. Safety v. Kendziora*, No. 09-19-00432-CV, 2020 WL 6494210, at \*1, \*4 (Tex. App.—Beaumont Nov. 5, 2020, no pet.) (mem. op.) (law enforcement officer was responding to emergency call when he received “a priority one call” and he activated his emergency lights and siren); *Harris Cty. v. Spears*, No.

14-17-00662-CV, 2018 WL 4571841, at \*4 (Tex. App.—Houston [14th Dist.] Sept. 25, 2018, no pet.) (mem. op.) (evidence established law enforcement officer was responding to emergency at time of situation when he was responding to “a priority two call”); *City of San Antonio v. Reyes*, No. 04-16-00748-CV, 2017 WL 3701772, at \*3–5 (Tex. App.—San Antonio Aug. 23, 2017, no pet.) (mem. op.) (law enforcement officer was responding to emergency situation when he responded to “City-wide Emergency Tone that an officer needed assistance” (internal quotations omitted)); *Quested v. City of Houston*, 440 S.W.3d 275, 284–85 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (considering nature of call to which law enforcement officer responded); *Tex. Dep’t of Pub. Safety v. Little*, 259 S.W.3d 236, 237, 239–40 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (concluding law enforcement officer was responding to emergency call when he received “a ‘10-99’” call, which was call requesting assistance with “a wanted person” and he testified that “law enforcement officers consider[ed] such a request to be an emergency”); *see also City of Houston v. Davis*, No. 01-13-00600-CV, 2014 WL 1678907, at \*4 (Tex. App.—Houston [1st Dist.] Apr. 24, 2014, pet. denied) (mem. op.) (“[W]e cannot construe [Texas Civil Practice and Remedies Code] section 101.055(2) to exclude emergencies the [Texas] Legislature might have intended to include.” (internal quotations omitted)); *Jefferson Cty.*, 2011 WL 3925724, at \*3 (“A felony warrant may present a necessity of immediate or urgent response by police” and thus

constitute “[an] emergency.”). We conclude that the evidence is sufficient to show that Groves was responding to an emergency call or reacting to an emergency situation at the time of the collision and the City met its initial burden. *See Hussein*, 2020 WL 6788079, at \*9.

Because the City met its initial burden, the burden then shifted to Frazier to raise a genuine issue of material fact as to whether Officer Groves was responding to an emergency call or reacting to an emergency situation at the time of the collision. *See id.* Frazier argues that a “genuine issue[] of material fact exist[s] as [to whether] Groves was even responding to an emergency situation to begin with” because Officer Bounds’s call for assistance related to a felony traffic stop involving a stolen vehicle that was stationary, Bounds did not say that there was “an emergency” or that he was in danger, Groves believed that other law enforcement officers were responding to Bounds’s call for assistance, and there was not “a[] chase, threat to human welfare, or any signs or threat of violence.”<sup>8</sup> *But see Caldwell Cty. v. Genfan*, 2021 WL 4306215, at \*3 (Tex. App.—Amarillo Sept. 22, 2021, no pet.) (mem. op.) (“[Extended] [t]ime to react does not necessarily make a situation

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<sup>8</sup> Frazier does not refer this Court to any relevant authority to support his argument. *See* TEX. R. APP. P. 38.2(a)(1) (requiring appellee’s brief to comply with requirements of appellant’s brief in Texas Rule of Appellate Procedure 38.1); *see also id.* 38.1(i) (requiring appellant’s brief to “contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record”).

any less of an emergency.”); *Reyes*, 2017 WL 3701772, at \*3 (law enforcement officer was responding to emergency situation when he responded to “City-wide Emergency Tone that an officer needed assistance” (internal quotations omitted)); *Davis*, 2014 WL 1678907, at \*4–5 (concluding law enforcement officer was reacting to emergency situation even though officer did not “use[] the term ‘emergency’”); *Kahlden*, 2014 WL 1269026, at \*4–6 (law enforcement officer responding to emergency situation when he volunteered to take call about “a bag” on highway causing drivers to swerve (internal quotations omitted)); *Brocato*, 2011 WL 4716296, at \*4 (“A radio call from an officer who has stopped a vehicle containing multiple occupants may necessitate an immediate or urgent response by the police . . . .”); *Jefferson Cty.*, 2011 WL 3925724, at \*3 (noting “[a]n emergency situation” may exist when law enforcement officer responds to another officer with stopped vehicle and passenger with felony warrant because urgent response may be required even if “someone [is not] at risk of death or serious-injury”); *Tex. Dep’t of Pub. Safety v. Sparks*, 347 S.W.3d 834, 836, 841 (Tex. App.—Corpus Christi—Edinburg 2011, no pet.) (law enforcement officer who joined other officers in pursuit of motorcycle that had been speeding and driving recklessly was “responding to an emergency call”); *Little*, 259 S.W.3d at 239–40 (holding law enforcement officer responding to emergency call even though officer himself questioned “the emergency nature of the call” and “dispatcher miscoded the call”). Frazier’s

argument misunderstands the meaning of “emergency call” or “emergency situation” under the TTCA’s “emergency exception.”

Texas courts have rejected the notion that “emergency” as used in section Texas Civil Practice and Remedies Code section 101.055(2) requires “a situation where immediate [law enforcement] presence is necessary to protect someone from death or serious injury.” *See Jefferson Cty.*, 2011 WL 3925724, at \*3; *see also Hartman*, 201 S.W.3d at 672–73 (rejecting court of appeals’s holding that “emergency” does not include “what might be colloquially referred to as an emergency” (internal quotations omitted)); *White v. City of Houston*, 624 S.W.3d 28, 33–34 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (“[B]y its plain language, the [‘]emergency exception[’] is not confined to the manner in which emergency vehicles are operated in an emergency situation.”); *Brocato*, 2011 WL 4716296, at \*3–4 (trial court erroneously ruled “there was no emergency as a matter of law” when law enforcement officers responded to radio call from another officer in which he “stated that he had stopped a vehicle that contained multiple occupants” and law enforcement officers responded to radio call by driving toward location of requesting officer). This is because the Texas Legislature did not intend the TTCA’s “emergency exception” to apply only in limited circumstances. *See Jefferson Cty.*, 2011 WL 3925724, at \*3 (defining “emergency” as used in section 101.055(2) to “refer[] to unforeseen circumstances that call for immediate action” (internal

quotations omitted)); *see also Hartman*, 201 S.W.3d at 673 (“We must construe [Texas Civil Practice and Remedies Code section 101.055(2)] according to what it says, not according to what we think it should have said. And because the [TTCA] creates governmental liability where it would not otherwise exist, we cannot construe section 101.055(2) to exclude emergencies the [Texas] Legislature might have intended to include.” (internal quotations omitted)); *Hussein*, 2020 WL 6788079, at \*8 (“Texas courts have interpreted the term ‘emergency’ broadly.”).

Although not referenced in his brief, in his summary-judgment response in the trial court, Frazier relied on an HPD General Order dated June 19, 2020 and a copy of a “Texas Peace Officer’s Crash Report” for the collision, which he attached to his summary-judgment response, to support his assertion that Officer Groves was not responding to an emergency call or reacting to an emergency situation at the time of the collision. Yet, the HPD General Order, dated June 19, 2020, that Frazier relied on and attached to his summary-judgment response, post-dates the collision in this case, which occurred in January 2019.<sup>9</sup> Additionally, the “Texas Peace Officer’s Crash Report” for the collision states that the collision involved a patrol car driven by Groves, with Officer Post as a passenger, as well as a car driven by Frazier. It

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<sup>9</sup> We note that the HPD General Order, dated June 19, 2020, lists a call to assist another law enforcement officer as “Priority ‘E’ (Emergency),” stating:

Priority “E” represents assist the officer . . . , and assumes that a potential threat to life or the potential threat of serious bodily injury to an officer . . . is in progress.

states that Groves was: “Pol[ice], Fire, EMS on Emergency.” *Cf. Hussein*, 2020 WL 6788079, at \*4, \*10 (plaintiffs raised genuine issue of material fact as to whether ambulance driver was responding to emergency call or reacting to emergency situation where Texas Peace Officer’s Crash report related to collision “included an un-checked box indicating that there was not an emergency”). And as to what happened, the report explains that Frazier’s car was traveling southbound at the 9600 block of Telephone Road and Groves’s car was traveling eastbound at the 7600 block of East Orem Drive. Groves’s patrol car’s emergency lights and siren were activated, and Groves was turning left to drive north on Telephone Road. Groves’s patrol car was “an emergency vehicle [en route] to a call.” Frazier’s car “failed to yield the right of way to an emergency vehicle and was struck” by Groves’s patrol car. Neither of these pieces of evidence relied on by Frazier in the trial court create a genuine issue of material fact as to whether Groves was responding to an emergency call or reacting to an emergency situation at the time of the collision.

Based on the foregoing, we conclude that the City’s evidence was sufficient to show that Officer Groves was responding to an emergency call or reacting to an emergency situation at the time of the collision, and Frazier did not raise a fact issue as to whether Groves was responding to an emergency call or reacting to an emergency situation. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2).



## **B. Compliance with Law Applicable to Emergency Vehicles**

In another portion of its second issue, the City argues that it presented evidence that Officer Groves “complied with [the applicable] statutes regarding emergency action” because “[t]o try and be safe[,] . . . Groves activated all available emergency equipment on [his patrol car], i.e., [the] emergency lights and siren,” Groves “slowed way down” as he approached the intersection at Telephone Road and East Orem Drive, he recognized that the traffic light “controlling his lane of travel was red,” and although Groves could not recall whether he made a complete stop at the intersection, he “slowed down significantly” and “checked for cross-traffic” before proceeding into the intersection to turn left onto Telephone Road.

To meet its initial summary-judgment burden, the City was required to present evidence establishing that Officer Groves’s actions complied with the laws and ordinances applicable to emergency action. *See Hussein*, 2020 WL 6788079, at \*7. The law applicable to the operation of emergency vehicles is found in Chapter 546 of the Texas Transportation Code. *See* TEX. TRANSP. CODE ANN. ch. 546 (governing operation of emergency vehicles); *see also Hussein*, 2020 WL 6788079, at \*7; *Zapata*, 2020 WL 486489, at \*4. Texas Transportation Code section 546.001 states that the driver of an “emergency vehicle,” when “responding to an emergency call,” may “proceed past a red or stop signal, after slowing as necessary for safe operation”

and may “exceed a maximum speed limit, except as provided by an ordinance adopted under [s]ection 545.365, as long as the [driver] does not endanger life or property.” See TEX. TRANSP. CODE ANN. §§ 546.001(2), (3), 546.002(b)(1); see also *Juarez*, 2019 WL 5699741, at \*7. When doing so, the driver of the emergency vehicle “shall use, at the discretion of the [driver] in accordance with policies of the department or local government that employs the [driver], [emergency] audible or visual signals.” See TEX. TRANSP. CODE ANN. § 546.003; see also TEX. TRANSP. CODE ANN. § 546.004 (“Exceptions to Signal Requirement”); *Juarez*, 2019 WL 5699741, at \*7. Yet, a driver of an emergency vehicle is not relieved of “the duty to operate the vehicle with appropriate regard for the safety of all persons” or of “the consequences of reckless disregard for the safety of others.” See TEX. TRANSP. CODE ANN. § 546.005; see also *Maspero*, 640 S.W.3d at 529; *Hussein*, 2020 WL 6788079, at \*7; *Juarez*, 2019 WL 5699741, at \*8 (“[T]o recover damages from a collision resulting from the emergency operation of an emergency vehicle, a plaintiff must show reckless disregard for the safety of others and establish that the emergency vehicle’s operator committed an act that the operator knew or should have known posed a high degree of risk of serious injury.” (internal quotations omitted)); *Davis*, 2014 WL 1678907, at \*6 (“[T]he Texas Supreme Court has held that although this provision imposes a duty to drive with due regard for others by avoiding negligent behavior, it only imposes liability for reckless conduct.” (internal quotations

omitted)); *Lafferty v. Jasper Cty. Sheriff's Dep't*, No. 09-13-00039-CV, 2013 WL 6146049, at \*5 (Tex. App.—Beaumont Nov. 21, 2013, no pet.) (mem. op.). The action of an emergency-vehicle driver constitutes reckless disregard for the safety of others when the driver knows or should have known that the action in question posed a high risk of serious injury to others. *See Davis*, 2014 WL 1678907, at \*6; *Hudson*, 179 S.W.3d at 700; *Smith v. Janda*, 126 S.W.3d 543, 545 (Tex. App.—San Antonio 2003, no pet.); *see also Hartman*, 201 S.W.3d at 672 n.19 (Texas Supreme Court has often interpreted term “reckless disregard” “to require proof that a party knew the relevant facts but did not care about the result” (internal quotations omitted)). In other words, the standard “requires a showing of more than a momentary judgment lapse.” *Juarez*, 2019 WL 5699741, at \*8 (internal quotations omitted); *see also Maspero*, 640 S.W.3d at 531 (“[R]ecklessness reflects more than a momentary judgment lapse and instead requires a showing that the driver committed an act he knew or should have known posed a high degree of risk of serious injury.” (internal quotations omitted)); *Davis*, 2014 WL 1678907, at \*6 (“The reckless disregard test requires a showing of more than a momentary judgment lapse.” (internal quotations omitted)).

In his deposition, Officer Groves testified that he was involved in a car collision with Frazier in January 2019. The car collision occurred at night at about 11:30 p.m. or 11:45 p.m. At the time, it was dark, and the roads were slick because

it had rained earlier that evening. On the night of the collision, Groves was on duty and about to leave the HPD station in his patrol car, along with his partner, Officer Post, when he heard another law enforcement officer, Officer Bounds, over the radio, request assistance from other law enforcement officers in the area. Bounds asked for assistance because he had found a stolen vehicle that had multiple people inside, and Bounds needed the assistance of other law enforcement officers to conduct a felony traffic stop of the stolen vehicle. At the time of the call, Groves knew that he and Post were the closest law enforcement officers to Bounds's location, so Groves went to assist Bounds with the felony traffic stop.

While driving his patrol car to Officer Bounds's location in response to the call for assistance, Officer Groves focused on getting to Bounds's location "as quickly and safely as" he could. He activated his patrol car's emergency lights and siren, which was the proper procedure when responding to the type of call made by Bounds. Groves wanted to make sure that he was "very visible" and "very audible" while responding to the request for assistance because he did not know how well other motorists would be paying attention. As he drove, Groves "tr[ied] to pay attention to other people on the road" because although he was "paying attention to everything[, that] d[id] [not] mean that everybody else [was] paying attention to everything." Groves was not distracted as he drove, and Officer Post, who was a passenger in Groves's patrol car, did not distract Groves as he was driving. The

maximum speed that Groves drove while responding to the call for assistance was eighty miles per hour.

According to Officer Groves, the collision occurred at the intersection of Telephone Road and East Orem Drive. Just before the collision, Groves was driving his patrol car eastbound on East Orem Drive, and Frazier was driving his car southbound on Telephone Road. At the intersection, Groves planned to turn left to go north on Telephone Road. As he approached the intersection, Groves slowed his patrol car “way down” and “slowed significantly” because he could not make the left turn while driving eighty miles per hour. Groves looked both ways at the intersection to see if there was traffic on the cross street. According to Groves, a car dealership obstructed his view, making it difficult to see any cars driving southbound on Telephone Road. At the intersection, the traffic light controlling Groves’s lane of travel was red. Groves did not stop his patrol car completely at the intersection, but he followed HPD’s policy for when an officer approaches a traffic light that is red. Groves slowed his patrol car “to a reasonable speed,” “show[ed] [him]self [by having his] emergency [lights and siren] activated,” and proceeded through the intersection because it was safe. Groves did not see Frazier’s car until just before impact. According to Groves, Frazier’s car struck the patrol car near the front tire on the driver’s side.

Officer Groves also testified that under HPD’s policies and procedures, a request by a law enforcement officer for assistance is “a Code 1 response” or a “Priority 1 [call],” which “is the highest response code.” This is because of the “danger and the severity of the situation that the [requesting law enforcement] officer [is] involved in.” According to Groves, “whenever a fellow [law enforcement] officer asks for assistance . . . it [is] presumed that he . . . is in a dangerous situation” because “[t]hat’s why th[e] [officer] ask[s] for assistance.” And in this particular instance it was a “very dangerous situation” for Officer Bounds “to be out there by [him]self.” Thus, when Bounds requested assistance from other officers to make a felony traffic stop, “that[] [was] a life-threatening issue in progress.” Bounds’s request for assistance required Groves to respond on an urgent basis. Groves stated that in responding to Bounds’s call for assistance, he knew there was some degree of risk in responding to the call in the manner that he did, but he did not believe that the way that he responded to Bounds’s request for assistance created a high risk of serious injury.

Here, we conclude that the City’s summary-judgment evidence is sufficient to show that Officer Groves’s actions complied with the law applicable to the operation of emergency vehicles and the City thus met its initial burden of proof. *See* TEX. TRANSP. CODE ANN. §§ 546.001(2), (3), 546.002(b)(1), 546.003 546.005; *Kendziora*, 2020 WL 6494210, at \*4 (determining governmental unit met its initial

burden by presenting evidence that law enforcement officer was responding to emergency call with his car's emergency lights and siren activated and officer "came to a near stop to clear the intersection and . . . slowed down and looked both ways before entering the intersection one lane of traffic at a time"); *Sparks*, 347 S.W.3d at 841–42 (determining governmental unit met its initial burden by presenting evidence that law enforcement officer was responding to emergency call with his emergency lights and siren activated and officer slowed down and looked both ways before entering intersection); *Hudson*, 179 S.W.3d at 700–01 (holding governmental unit conclusively demonstrated that firetruck driver complied with applicable statutes and ordinances where driver was responding to emergency call with truck's emergency lights and sirens activated, driver slowed down as he reached intersection, driver looked both directions before going through intersection, and truck's speed through intersection was ten miles per hour); *Janda*, 126 S.W.3d at 545–46 (determining governmental unit met its initial burden by presenting evidence that ambulance driver was driving ambulance in emergency situation with lights and sirens activated as he approached intersection, at intersection driver slowed down and looked around, and driver proceeded into intersection without making complete stop); *see also Gillespie v. Galveston Cty. Health Dist.*, 639 S.W.3d 815, 822 (Tex. App.—Houston [14th Dist.] 2021, no pet.) (mem. op.) (noting "[i]n cases in which an emergency vehicle with its lights and siren activated entered an intersection

against a red light, the [‘]emergency exception[’] [has been] applied where the [driver] slowed before entering the intersection or was already traveling below the posted speed limit”).

Because the City met its initial burden, the burden then shifted to Frazier to raise a genuine issue of material fact as to whether Officer Groves’s actions complied with the laws and ordinances applicable to emergency action. *See Kendziora*, 2020 WL 6494210, at \*4. But, in his summary-judgment response, Frazier did not argue that the TTCA’s “emergency exception” did not apply and the City’s governmental immunity was waived because Groves’s actions failed to comply with the laws and ordinances applicable to emergency action. Instead, Frazier, in his summary-judgment response, argued that the TTCA’s “emergency exception” did not apply and the City’s governmental immunity was waived because Groves had “acted with conscious indifference or reckless disregard.” *See* TEX. CIV. PRAC. & REM. CODE. ANN. § 101.055(2) (stating governmental unit’s immunity is not waived in case where claim arises “from the action of a[] [governmental] employee while responding to an emergency call or reacting to an emergency situation if the [employee’s] action,” *in absence of laws or ordinances governing emergency action*, “is not taken with conscious indifference or reckless disregard for the safety of others”). But, as explained above, because the Texas Transportation Code governs the operation of emergency vehicles in situations like the one present in this case,



the “conscious indifference or reckless disregard” prong in section 101.055(2) does not apply to this case. *See Hussein*, 2020 WL 6788079, at \*6 n.16; *Hudson*, 179 S.W.3d at 699 n.4; *see also City of Killen Police Dep’t v. Fonseca*, No. 03-19-00898-CV, 2021 WL 6105569, at \*4 (Tex. App.—Austin Dec. 23, 2021, pet. filed) (mem. op.) (“The limitation on the emergency-response exception is phrased in the disjunctive. The [governmental employee] undertaking the action must either comply with all applicable laws and ordinances, or, *if no such law or ordinance applies*, avoid acting with conscious indifference or reckless disregard for the safety of others.” (emphasis added)); *Hanley*, 2014 WL 6853608, at \*5.

In his brief, Frazier argues that a genuine issue of material fact exists “as to whether Officer Groves acted with reckless disregard when he approached the intersection at Telephone Road and East Orem [Drive] and proceeded through the intersection” because Groves had “an obstructed view.” Presumably, Frazier is asserting, that Groves, while responding to Officer Bounds’s request for assistance, failed to comply with Texas Transportation Code section 546.005, which states that a driver of an emergency vehicle is not relieved of “the duty to operate the vehicle with appropriate regard for the safety of all persons” or of “the consequences of reckless disregard for the safety of others.”<sup>10</sup> *See* TEX. TRANSP. CODE ANN.

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<sup>10</sup> We note that a non-movant must expressly present to the trial court any reason for avoiding the movant’s right to summary judgment. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993); *City of Houston v. Clear Creek Basin*

§ 546.005. To support his position, Frazier relies on *Rivera v. City of Houston*, No. 01-19-00629-CV, 2020 WL 7502054 (Tex. App.—Houston [1st Dist.] Dec. 22, 2020, no pet.) (mem. op.).

*Rivera* arose out of a car collision between an HPD officer and another car. 2020 WL 7502054, at \*1–2. In that case, around midnight, HPD Officer V. Romero was driving outside of her regular patrol area on her way to the station to pick up her partner. *Id.* at \*1. After picking up her partner, she planned to answer “a non-emergency priority-three call [about] an auto theft.” *Id.* While driving to the station, she heard “a radio announcement of an emergency priority-two call involving a suspect with a weapon.” *Id.* At the time, Romero was about ten to fifteen minutes away from that location, but she was not assigned the priority-two call and she “was not asked to back that call up.” *Id.* Yet, Romero decided to

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*Auth.*, 589 S.W.2d 671, 678–79 (Tex. 1979) (“With the exception of an attack on the legal sufficiency . . . , the non-movant must expressly present to the trial court any reasons seeking to avoid [the] movant’s entitlement [to summary judgment].” (emphasis omitted)). Frazier, in his summary-judgment response, did not argue that the TTCA’s “emergency exception” did not apply and the City’s governmental immunity was still waived because Officer Groves’s actions failed to comply with Texas Transportation Code section 546.005. But because Frazier’s argument on appeal implicates the trial court’s subject-matter jurisdiction, we will consider it. *See Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444–45 (Tex. 1993) (subject-matter jurisdiction is essential to authority of court to decide case, is never presumed, and may be raised for first time on appeal by party or sua sponte by reviewing court); *City of Houston v. Kim*, No. 01-20-00333-CV, 2021 WL 5774173, at \*5 n.7 (Tex. App.—Houston [1st Dist.] Dec. 7, 2021, no pet. h.) (mem. op.) (although non-movant did not make argument to trial court, addressing argument on appeal because it implicated trial court’s subject-matter jurisdiction).

“check-by” the priority-two call after going to the station to pick up her partner. *Id.* (internal quotations omitted.) Romero activated her patrol car’s emergency lights and siren as she drove to pick her partner up. *Id.* At the first intersection she approached after activating her patrol car’s emergency lights and siren, Romero noted that the traffic light for her lane of travel was red. *Id.* at \*2. She “came to a complete stop to ensure the intersection was clear,” saw that other cars had yielded to her right of way even though she had the red light, and drove through the intersection. *Id.* (internal quotations omitted). At the next intersection, Romero “slowed down as she approached the intersection but did not stop.” *Id.* At the time, “she was typing a message to the dispatch[] [operator] on her mobile data terminal (MDT) device about checking on the priority-two call later” as she entered the intersection. *Id.* Romero did not know whether the traffic light for her lane of travel was red or green “when she entered the intersection typing on her MDT.” *Id.* Romero’s patrol car struck another car traveling along the intersecting roadway. *Id.* “The undisputed summary-judgment evidence [was] that Romero, in fact, had a red light, even though she was not aware that she did, and . . . the other driver . . . had a green light.” *Id.*

After the plaintiffs—the driver and the passengers in the car struck by Officer Romero—sued the City for injuries suffered as a result of the collision, the City moved for summary judgment asserting, among other things, that it was entitled to

governmental immunity and the TTCA did not waive its governmental immunity because the TTCA’s “emergency exception” applied. *Id.* The trial court granted the City summary judgment but on different grounds. *Id.* at \*2, \*6. On appeal, in addressing whether the TTCA’s “emergency exception” applied to the case, we explained that the TTCA’s limited waiver of immunity does not apply to a claim arising from “the action of a[] [governmental] 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.” *Id.* at \*6 (quoting TEX. TRANSP. CODE ANN. § 101.055(2)). And we noted that the law governing the operation of emergency vehicles is found in Chapter 546 of the Texas Transportation Code. *Id.* Under Texas Transportation Code section 546.005, “an emergency vehicle driver must drive ‘with appropriate regard for the safety of all persons’ and is not relieved of the ‘consequences of reckless disregard for the safety of others.’” *Id.* (quoting TEX. TRANSP. CODE ANN. § 546.005).

As evidence for establishing that the “emergency exception” applied because Officer Romero had acted in compliance with the Texas Transportation Code, the City pointed only to Romero’s affidavit in which she stated that “she slowed down before entering the intersection” where the collision occurred. *Id.* We noted that the evidence showed that Romero did slow her patrol car down before proceeding through the second intersection, but it also showed that “she did not look to see if

she had a red light to evaluate the risk of proceeding through the intersection.” *Id.* “In fact, she had no idea if she had the right of way or if other [cars] did, yet she proceeded through the intersection looking—not at the road, but—at her MDT.” *Id.* Thus, we held that the plaintiffs had raised a genuine issue of material fact as to whether Romero acted, in violation of Texas Transportation Code section 546.005, with reckless disregard for the plaintiffs and other drivers in the area “by failing to observe, appreciate, or weigh the risk of entering th[e] intersection against a red light and with her eyes diverted.” *Id.* at \*7.

Here, we are not presented with the same situation that existed in *Rivera*. Unlike Officer Romero, Officer Groves testified that as he drove to Officer’s Bounds’s location in response to a call for assistance in making a felony traffic stop of a stolen vehicle with multiple people inside, he focused on getting to Bounds’s location “as quickly and safely as” he could. Groves activated his patrol car’s emergency lights and siren and made sure that he was “very visible” and “very audible” while responding to the request for assistance because he did not know how well other motorists would be paying attention. In determining which route to take to reach Bounds’s location, Groves considered the conditions at the time, and he “tr[ie]d to pay attention to other people on the road” because although he was “paying attention to everything[, that] d[id] [not] mean that everybody else [was] paying attention to everything.” Groves was not distracted as he drove.

As Officer Groves reached the intersection at Telephone Road and East Orem Drive, he slowed his patrol car “way down” and “slowed significantly.” He looked both ways at the intersection to see if there was traffic on the cross street. Groves also saw that the traffic light controlling his lane of travel was red, and he noted that there was a car dealership that made it difficult for him to see if there were any cars driving southbound on Telephone Road. In accord with HPD’s policy for an officer approaching a traffic light that is red, Groves slowed his patrol car “to a reasonable speed,” “show[ed] [him]self [by having] his emergency [lights and siren] activated,” and proceeded through the intersection because it was safe. Groves stated that in responding to Officer Bounds’s call for assistance, he knew there was some degree of risk in responding to the call in the manner that he did, but he did not believe that the way that he responded to Bounds’s request for assistance created a high risk of serious injury.

Frazier asserts that Officer Groves acted with reckless disregard because he “proceeded through the intersection with an obstructed view.” But we have previously held that a law enforcement officer does not act with reckless disregard simply because the officer enters an intersection containing a “blind spot.” *See City of Pasadena v. Kuhn*, 260 S.W.3d 93, 98–101 (Tex. App.—Houston [1st Dist.] 2008, no pet.). In *Kuhn*, a law enforcement officer was responding in a patrol car to an emergency involving a house fire. *Id.* at 95. He activated his emergency lights and

approached an intersection. *Id.* at 98. He recognized that he had a red light, he slowed his patrol car down or possibly stopped it and evaluated whether the intersection appeared to be clear to cross, and he then entered the intersection. *Id.* at 98–100. Yet, there was a “blind spot” at the intersection and the law enforcement officer did not see another car coming, and the two cars collided. *Id.* In that case, we held that there was no evidence of reckless disregard because the law enforcement officer slowed as necessary and the existence of the “blind spot” was not determinative. *Id.* at 100–01. After all, the “reckless disregard test” requires a showing of more than a momentary judgment lapse. *Id.* at 99 (internal quotations omitted).

We further note that Frazier’s own evidence—the “Texas Peace Officer’s Crash Report” for the collision which he attached to his summary-judgment response—states that before the collision Frazier’s car was traveling southbound at the 9600 block of Telephone Road and Officer Groves’s car was traveling eastbound at the 7600 block of East Orem Drive. At the intersection, Groves’s patrol car’s emergency lights and siren were activated, and Groves was turning left to drive north on Telephone Road. Groves’s patrol car was “an emergency vehicle [en route] to a call.” Frazier’s car “failed to yield the right of way to an emergency vehicle and was struck” by Groves’s patrol car. At the time of the collision, Groves’s patrol car was traveling at “a low speed” of less than five miles per hour.

We conclude that the City’s evidence was sufficient to show that Groves’s actions complied with the law applicable to the operation of emergency vehicles and Frazier did not raise a fact issue as to whether Groves’s actions failed to comply to the law applicable to the operation of emergency vehicles. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2).

In sum, because the City conclusively proved that the TTCA’s “emergency exception” applies to this case, it retains its governmental immunity, and we hold that the trial court erred in denying the City’s summary-judgment motion.

We sustain the City’s second issue.<sup>11</sup>

### **Conclusion**

We reverse the trial court’s order denying the City’s summary-judgment motion and render judgment dismissing Frazier’s suit against the City for lack of subject-matter jurisdiction.

Julie Countiss  
Justice

Panel consists of Justices Hightower, Countiss, and Guerra.

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<sup>11</sup> Due to our disposition, we need not address the City’s first issue or any other remaining arguments. *See* TEX. R. APP. P. 47.1.