Opinion issued June 30, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00486-CV

CITY OF HOUSTON, Appellant

V.

JORGE GIRON AND CARLOS AYALA, Appellees

On Appeal from the 125th District Court
Harris County, Texas
Trial Court Case No. 2019-09209

MEMORANDUM OPINION

In this interlocutory appeal,[1] appellant, the City of Houston, challenges the trial court's order denying its motion for summary judgment in a suit for negligence

---

[1] We have jurisdiction to hear an interlocutory appeal from an order that "denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of . . . a political subdivision of the state,"

brought against it by appellees, Jorge Giron and Carlos Ayala. In its sole issue, the City contends that the trial court, based on the City's governmental immunity, lacked subject-matter jurisdiction.

We reverse and render.

Background

In their petition, Giron and Ayala alleged the following background facts:

> Plaintiffs bring suit to recover damages sustained by them in a motor vehicle crash. On November 4, 2018 while on duty and in the course and scope of his employment for the Houston Police Department ["HPD"], Officer [T.] Lindsey crashed into Plaintiffs' vehicle. Plaintiffs were injured in the crash.

Giron and Ayala asserted that Officer Lindsey was negligent in failing to maintain a proper lookout, failing to "pay attention while driving," and driving at "excessive rates of speed." They asserted that the trial court had jurisdiction over their suit pursuant to the Texas Tort Claims Act ("TTCA").[2] They sought personal-injury and property damages.

---

notwithstanding whether the plaintiff sues the individual. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(5); *City of Beverly Hills v. Guevara*, 904 S.W.2d 655, 656 (Tex. 1995) (holding city's interlocutory appeal authorized even though plaintiff did not sue employee); *see also* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(8) (authorizing interlocutory appeal from order denying plea to jurisdiction by governmental unit); *Thomas v. Long*, 207 S.W.3d 334, 339–40 (Tex. 2006) (holding section 51.014(a)(8) authorizes interlocutory appeal irrespective of procedural vehicle, including summary-judgment motion challenging trial court's subject-matter jurisdiction).

[2] *See* TEX. CIV. PRAC. & REM. CODE §§ 101.001–.109.

The City answered, generally denying the allegations and asserting immunity. The City also moved for a summary judgment, arguing that it was entitled to judgment as a matter of law because the trial court lacked subject-matter jurisdiction over Giron and Ayala's suit. The City argued that it was entitled to governmental immunity because Officer Lindsey was entitled to official immunity.

In its summary-judgment motion, the City asserted that this case arises from a motor vehicle collision between an HPD patrol car driven by Officer Lindsey and a Chevrolet Equinox driven by Giron, in which Ayala was a passenger. At around 1:00 a.m. on November 4, 2018, while Lindsey was on patrol, a "priority-one-assist-the-officer" call came over his radio. The City noted that such is considered an "emergency call" and that it requires any available officer in the same district to immediately respond. The City explained that two officers assigned to Lindsey's district were performing a traffic stop and had three suspects at gunpoint. However, one of the suspects fled, necessitating a chase. This left the other officer alone, holding two suspects at gunpoint, which is extremely dangerous. Lindsey, who was the first available officer to respond, had to reach the scene immediately because the safety of another officer was in jeopardy.

The City further asserted that Officer Lindsey radioed dispatch that he was on his way to the scene to assist, activated his emergency lights and siren, and headed toward the scene. He noted that the weather was clear and that the road conditions

were dry. Although it was a Saturday night and there were cars on the road, traffic was not heavy. Just prior to entering North Interstate Highway 610, West Freeway (the "North Loop"), Lindsey encountered a red light at an intersection. He came to a complete stop to ensure that the intersection was clear, then proceeded through and entered a feeder lane onto the North Loop. He had traveled on the North Loop for about two miles, and at approximately 80 miles per hour, when he became situated behind a Cadillac Escalade that failed or refused to yield to his emergency vehicle. After remaining in the lane behind the Escalade for about a mile, Lindsey attempted to pass. As he accelerated and changed lanes, the Equinox driven by Giron moved into the same lane, directly in front of Lindsey's patrol car. Lindsey swerved to attempt to avoid the Equinox, but collided with it.

The City argued that Lindsey is entitled to official immunity because, at the time of the collision, he was exercising discretion in responding to a life-threatening situation and performing his duties in good faith. Accordingly, the City asserts, it is entitled to governmental immunity from Giron and Ayala's suit. In support of its motion, the City attached the affidavits of Lindsey and HPD Sergeant J. Duran.

In their summary-judgment response, Giron and Ayala asserted, as pertinent here, that their suit falls within a limited waiver of governmental immunity under the TTCA. Generally, the legislature has provided a limited waiver of immunity in suits against governmental entities for damages caused by an employee's negligent

operation of a motor-driven vehicle if the employee would be personally liable under Texas law.[3] An employee is entitled to official immunity from suit arising from his performance of discretionary duties that are within the scope of his authority and that he performs in good faith. However, they asserted, the City failed to establish that Officer Lindsey was acting in good faith at the time of the collision.

Giron and Ayala argued that the City failed to meet its initial burden to present evidence conclusively showing its right to judgment because its evidence failed to establish that Officer Lindsey acted in good faith under the factors in *Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 (Tex. 1997). They also asserted that their summary-judgment evidence created genuine issues of material fact as to Lindsey's good faith. To their response, Giron and Ayala attached the affidavits of Lindsey and Sergeant Duran, Lindsey's deposition, Lindsey's body-camera video, and the HPD Crash Report and Crash Questionnaire.

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

Governmental Immunity

In its sole issue, the City argues that the trial court erred in denying its motion for summary judgment because it conclusively established its derivative official-immunity defense, and thus it had governmental immunity from the suit by Giron

[3] *See id.* § 101.021(1).

and Ayala.[4] The City asserts that Giron and Ayala failed to meet their burden to present evidence raising a genuine issue of material fact as to the City's defense.

Standard of Review and Principles of Law

Under the common-law doctrine of sovereign immunity, the state cannot be sued without its consent. *City of Hous. v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011). "Governmental immunity operates like sovereign immunity to afford similar

---

[4] In its summary-judgment motion, the City also asserted that it retained its immunity under TTCA section 101.055, the "emergency exception." In its appellate reply brief, however, the City states that it does not seek review of that issue in this appeal. Ordinarily, when a party moves for summary judgment on multiple grounds, and the trial court's order does not specify the ground upon which it was based, the appealing party must negate all possible grounds upon which the order could have been based. *See Star–Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995). Otherwise, we must simply uphold the summary judgment on the unchallenged ground. *Id.* Here, however, this precept does not apply. The TTCA's "Exclusions and Exceptions" include that the TTCA does not apply to a claim arising from an employee's action while responding to an emergency call, under certain conditions. *See* TEX. CIV. PRAC. & REM. CODE § 101.055(2) ("emergency exception"). Such exceptions are not "prohibition[s] of certain actions against the government." *Delaney v. Univ. of Hous.*, 835 S.W.2d 56, 58 (Tex. 1992). Although the effect of an exception is prohibitory, it is an "exception to the limited waiver of immunity brought about by the Act." *Id.* That is, section 101.055 is an exception *to the waiver* in section 101.021. *See City of Hous. v. Nicolai*, 539 S.W.3d 378, 392 (Tex. App.—Houston [1st Dist.] 2017, pet. denied); *see also Warner v. Orange Cty.*, 984 S.W.2d 357, 359 (Tex. App.—Beaumont 1999, no pet.) (Stover, J., dissenting) ("It is a two-step process. The first step is a determination of whether immunity has been waived under some provision of the act," such as section 101.021. "If the resolution of the first step results in a finding that . . . immunity has been waived, then the second step is to determine if an exception to the waiver applies."). Here, the trial court *denied* summary judgment without stating its ground. We would not consider the effect of the emergency exception unless we first concluded that immunity was waived under section 101.021. Thus, the City was not required to challenge the exception to avoid our upholding the trial court's judgment on an unchallenged ground. *See Doe*, 915 S.W.2d at 473.

protection to subdivisions of the State," including cities. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). "[G]overnmental immunity has two components: immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether." *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). Governmental immunity from suit deprives a trial court of subject-matter jurisdiction. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004).

The City of Houston is a governmental unit generally immune from tort liability except where that immunity has been specifically waived by the legislature. *City of Hous. v. Rushing*, 7 S.W.3d 909, 914 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). Thus, under the doctrine of governmental immunity, the City cannot be held liable for the torts of its employees unless its immunity has been waived. *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989).

Under the TTCA, the legislature has provided a limited waiver of immunity from suits against governmental units for damages and injuries "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 . . . ; and

(B) *the employee would be personally liable* to the claimant according to Texas law; . . . .

TEX. CIV. PRAC. & REM. CODE § 101.021(1) (emphasis added); *Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 927 (Tex. 2015).

Generally, governmental employees are protected from personal liability by official immunity. *Univ. of Hous. v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000). A governmental employee is entitled to official immunity from suit arising from (1) the performance of discretionary duties (2) that are within the scope of the employee's authority, (3) provided that the employee acts in good faith. *Telthorster v. Tennell*, 92 S.W.3d 457, 461 (Tex. 2002). "[O]fficial immunity is designed to protect public officials from being forced to defend their decisions that were reasonable when made, but upon which hindsight has cast a negative light." *Id.* at 463. If the governmental employee is protected from liability by official immunity, then the governmental employer is shielded from liability by governmental immunity. *Clark*, 38 S.W.3d at 580.

A governmental entity may assert the affirmative defense of immunity to challenge a 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); *see also Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012) (noting that review of plea challenging existence of jurisdictional facts mirrors that of traditional summary-

judgment motion); *City of Hous. v. Guthrie*, 332 S.W.3d 578, 587 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("By requiring the [governmental entity] to meet the summary judgment standard of proof . . . , we protect the plaintiffs from having to put on their case simply to establish jurisdiction.").

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). To prevail on a motion for summary judgment, the movant must establish that it is entitled to judgment as a matter of law and that there is no genuine issue of material fact. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A defendant moving for summary judgment on an affirmative defense must plead and conclusively establish each essential element of the defense, thereby defeating the plaintiffs' cause of action. *KPMG Peat Marwick*, 988 S.W.2d at 748. Thus, a governmental entity moving for a summary judgment on an affirmative defense of immunity, challenging the trial court's subject-matter jurisdiction, must conclusively establish that it is entitled to such immunity. *See Telthorster*, 92 S.W.3d at 461. A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

If the governmental entity conclusively establishes its right to judgment, the burden shifts to the non-movant to present sufficient evidence to create a genuine

issue of material fact on at least one element of the affirmative defense. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). In deciding whether a material fact issue precludes summary judgment, we take evidence favorable to the non-movant as true and indulge every reasonable inference, and resolve any doubts, in its favor. *Nixon v. Mr. Prop. Mgmt. Co*., 690 S.W.2d 546, 548–49 (Tex. 1985). Evidence raises a genuine issue of fact if reasonable people could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

Good Faith

The City argues that it is entitled to judgment on its affirmative defense of governmental immunity because it conclusively established the elements of the underlying official immunity of Officer Lindsey.

It is undisputed that, at the time of the collision, Officer Lindsey was performing a discretionary duty within the scope of his authority. *See Telthorster*, 92 S.W.3d at 461. At issue is whether he was acting in good faith. *See id*.

"[A] court must measure good faith in official immunity cases against a standard of objective legal reasonableness, without regard to the officer's subjective state of mind." *Wadewitz*, 951 S.W.2d at 466. In *City of Lancaster v. Chambers*, the Texas Supreme Court articulated a standard of objective reasonableness for the measurement of an officer's good faith. 883 S.W.2d 650, 656 (Tex. 1994). There,

several officers claimed official immunity for their decision to continue a high-speed pursuit of a motorcyclist that resulted in a death. *Id*. at 652. The supreme court sought to "strike the proper balance between two competing interests: the threat of severely hampering police officers' discretion by imposing civil liability for their mistakes, and the rights of bystanders and other innocent parties that may be trampled by an officer's gross disregard for public safety." *Telthorster*, 92 S.W.3d at 461 (discussing *Chambers*, 883 S.W.2d at 656). The supreme court in *Chambers* held that an officer

> acts in good faith, in a pursuit case, if: a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit.

883 S.W.2d at 656.

Later, in *Wadewitz*, the supreme court applied the *Chambers* general good-faith framework to an emergency-response case involving a police officer who, while responding to an emergency call, collided with a third-party motorist. *Wadewitz*, 951 S.W.2d at 466–67; *see also Clark*, 38 S.W.3d at 583 ("[P]ursuing a suspect and responding to an emergency involve the same general risk to the public—collision with a third party."). The *Wadewitz* court explained that "good faith depends on how a reasonably prudent officer could have assessed both the *need* to which an officer responds and the *risks* of the officer's course of action, based on the officer's perception of the facts at the time of the event." 951 S.W.2d at 467

(emphasis in original). In assessing the "need" and "risks," the court articulated the following factors:

> The "need" aspect of the test refers to the urgency of the circumstances requiring police intervention. . . . [N]eed is determined by factors such as the seriousness of the crime or accident to which the officer responds, whether the officer's immediate presence is necessary to prevent injury or loss of life or to apprehend a suspect, and what alternative courses of action, if any, are available to achieve a comparable result. The "risk" aspect of good faith, on the other hand, refers to the countervailing public safety concerns: the nature and severity of harm that the officer's actions could cause (including injuries to bystanders as well as the possibility that an accident would prevent the officer from reaching the scene of the emergency), the likelihood that any harm would occur, and whether any risk of harm would be clear to a reasonably prudent officer.

Id.

In *Texas Department of Public Safety v. Bonilla*, a trooper, while pursuing a reckless driver, drove through a red light and collided with a motorist. 481 S.W.3d 640, 642 (Tex. 2015). The supreme court emphasized:

> As we have consistently held, a law-enforcement officer can obtain a summary judgment in a pursuit or emergency-response case by proving that a reasonably prudent officer, under the same or similar circumstances, could have believed the need for the officer's actions outweighed a clear risk of harm to the public from those actions.

Id. at 643. The good-faith test does not inquire into what a reasonable person would have done, but what a reasonable officer "could have believed." *Id.* at 644. It is an abuse-of-discretion standard, not a negligence test. *Id.* at 643–44. "Good faith does not require proof that all reasonably prudent officers would have resolved the need/risk analysis in the same manner under similar circumstances." *Id.* at 643. The

"determinative inquiry is whether any reasonably prudent officer possessed of the same information could have determined the trooper's actions were justified." *Id.*

Evidence of an officer's good faith must be substantiated with facts showing that the officer assessed both the need for his action and the risk of harm to the public. *Id.* at 644. Summary judgment proof does not offer a suitable basis for determining good faith unless it sufficiently assesses the *Wadewitz* need/risk factors. *Id.* (citing *Wadewitz*, 951 S.W.2d at 467). We consider only the information that the officer had available at the time he made his decisions, not facts that subsequently became known to him. *Telthorster*, 92 S.W.3d at 465.

When the summary-judgment record "bears competent evidence of good faith, that element of the official-immunity defense is established unless the plaintiff shows that *no* reasonable person in the officer's position could have thought the facts justified the officer's actions." *Bonilla*, 481 S.W.3d at 643 (emphasis in original). Evidence of good faith is not controverted merely because a reasonably prudent officer could have resolved the need/risk analysis differently or could have made a different decision. *Id.* at 643–44. Further, "[e]vidence of negligence alone will not controvert competent evidence of good faith." *Id.* at 644.

Here, the City was required to present evidence conclusively establishing that a reasonably prudent officer, under the same or similar circumstances as that facing Officer Lindsey, "could have believed" that the need for his response to the call to

assist the officer outweighed the risk of harm to the public from the course of his response. *See id.* at 643; *Wadewitz*, 951 S.W.2d at 467. The City presented the affidavits of Lindsey and Sergeant Duran. Good faith may be established by an officer's sworn testimony. *See Bonilla*, 481 S.W.3d at 644; *Gidvani v. Aldrich*, 99 S.W.3d 760, 764 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

In his affidavit, Lindsey testified, in pertinent part:

> 3. On November 4, 2018 around 1:00 a.m., I was heading south on Ella Blvd, just inside of 610 the North Loop. I was patrolling my area when a priority one assist the officer call for service dropped. A priority one assist the officer call requires any available officer in the same district to respond immediately. A priority one assist the officer call for service is considered an emergency call. Two officers assigned to my district but in a different beat were performing a traffic stop. One of the most dangerous things we do as patrol officers is to conduct a traffic stop at night. We have no way to know what is awaiting us in the vehicle we are intending to stop. All we can see are heads; we cannot see the hands of people in the car and therefore cannot know whether the suspects are armed or not. One of the officers got on the radio and announced to dispatch that they had three suspects at gunpoint. Shortly after, the other officer got on the radio and announced to dispatch that one of the suspects started running. That left an officer alone with two suspects that she was holding at gunpoint. It is extremely dangerous for officers to be outnumbered and lose contact with their partner.
>
> 4. Over the radio, I told dispatch to show me en route to assist the officer. I was the first available officer to respond to the priority one assist the officer call. I knew I needed to reach the scene immediately because the safety of another officer was in jeopardy. At the time, I was approximately 5 miles away from the scene. But because the call was a priority one assist the officer, and I was available, I needed to respond immediately.

5. Immediately after notifying dispatch to show me en route, I activated my emergency lights and siren. The weather was clear and the road conditions were dry. Traffic was not heavy, but there were cars on the road because it was a Saturday night. I pulled a u-turn on Ella and proceeded north, turned right to enter the North Loop east bound lanes. I had the red light at that intersection, so I came to a complete stop to clear the intersection before getting on the feeder. I entered 610 North Loop east bound. I traveled approximately two miles on the 610 North Loop and was going approximately 80 mph. I was riding in lane 1 behind an Escalade that did not yield for my emergency vehicle. To mitigate the risk of an accident, I probably rode behind the Escalade for about a mile (with my emergency lights and sirens activated) before I tried to pass him. He accelerated but failed to change lanes so that my emergency vehicle could get through. I accelerated as I tried to move into lane 2 and pass the Escalade. At the same time a vehicle in lane 3 moved into lane 2 directly in front of me. I swerved to avoid the vehicle moving into lane 2, but lost control of the vehicle, ultimately hitting the Chevy Equinox in which plaintiffs were riding.

6. It is my opinion that my actions in driving toward the scene of the priority one assist the officer call for service were both reasonable and proper under the circumstances. I considered both the risk of harm to my fellow officer in holding the scene with two suspects as well as risk of harm to other drivers from my driving to assist. I believe that a reasonably prudent law enforcement officer under the same or similar circumstances could have believed that my actions were justified based on my perception of the facts at the time and that the need to immediately assist my fellow officer outweighed any minimal, risk of harm to others from my own driving.

In his affidavit, Duran testified, in pertinent part:

3. On November 4, 2018, Officer Lindsey was on duty as an HPD police officer working the night shift on patrol in the Central patrol area. He was dressed in his HPD police uniform and was driving his assigned and marked HPD patrol vehicle owned by

the City of Houston. Around 1:00 a.m., he received a priority one assist the officer call.

4. A priority one assist the officer call is an emergency call. A priority one assist the officer call requires any available officer in the same district to respond immediately. Two officers were performing a traffic stop in an area that is particularly dangerous because there are a high number of robberies and drug sales. While performing the traffic stop, one suspect fled on foot, leaving one officer alone with two suspects at gunpoint. After the priority one assist the officer call dropped, pretty much the entire district was en route to assist, myself included. The standard response to a priority one assist the officer call for service is with emergency lights and sirens activated.

5. I understand that Officer Lindsey was en route to assist with his emergency lights and sirens activated. While traveling the North Loop, a vehicle failed to yield to his emergency vehicle. Officer Lindsey tried to change lanes and pass the vehicle that failed to yield. At that moment, another vehicle cut him off and Officer Lindsey's patrol cruiser hit the second vehicle.

6. After the collision, I arrived on the scene to investigate. As a part, of my investigation, I spoke to Officer Lindsey regarding the facts and circumstances of the collision.

7. I have reviewed the decisions and actions of Officer Lindsey while driving in response to the priority one assist the officer call for service and concluded that they were both justified and reasonable under the conditions and circumstances. Officer Lindsey properly considered both the need to quickly reach the incident scene and the risk of harm to other drivers and himself from his driving. Officer Lindsey decided, based on the reasons stated above, that any risk of harm to himself and other drivers from his driving was minimal. He also activated his patrol vehicle's emergency overhead lights and siren while responding to mitigate the risk to others and himself. So I have concluded that Officer Lindsey properly and reasonably decided that the need to quickly reach the scene of the assist the officer outweighed any minimal risk of harm to others and himself from his driving.

> 8. In my opinion, based on all the facts stated above, another reasonably prudent law enforcement officer, including myself, under the same or similar circumstances could have believed that the need to quickly reach the incident scene outweighed any minimal risk of harm to others and that all Officer Lindsey's decisions and actions before the accident were justified and reasonable based on his perception of the facts at the time, in addition. Officer Lindsey did not know or believe that his driving to reach the scene posed a high degree of risk of serious injury to others. . . . Rather, he believed that any risk of injury to others was minimal, he took precautions to avoid any such risk by continuing to watch for other drivers while en route to the scene, and activating his vehicle's emergency overhead lights and siren, he did everything that he could to avoid colliding with the Plaintiffs.

In their affidavits, Officer Lindsey and Sergeant Duran addressed both the "need" and "risk" factors of *Wadewitz*. *See* 951 S.W.2d at 467. With respect to the need for Lindsey's response, he testified that it was 1:00 a.m. at night when he received a "priority one" call to assist another officer. He noted that a "priority one assist the officer call" is an "emergency call" and requires any available officer in the same district to respond "immediately." He explained that two officers assigned to his district had performed a traffic stop and had three suspects at gunpoint. One of the suspects fled, necessitating a chase by one officer, leaving the other officer alone holding the two other suspects at gunpoint. Lindsey testified that conducting a traffic stop at night is one of the "most dangerous" tasks of a patrol officer, and he explained why. And, he noted, it is "extremely dangerous for officers to be outnumbered and lose contact with their partner." Lindsey was approximately five

miles away from the scene and the first available officer to respond. And, he "needed to reach the scene immediately because the safety of another officer was in jeopardy." Thus, Lindsey addressed the urgency of the circumstances requiring police intervention, the seriousness of the situation to which he responded, and whether his immediate presence was necessary to prevent injury or loss of life. *See id*.

Although Officer Lindsey's affidavit does not reflect that he explicitly addressed alternative courses of action, such does not render the evidence deficient because his stated belief that immediate action was necessary implicitly discounted the viability of alternatives. *See Bonilla*, 481 S.W.3d at 645 (holding that court of appeals erred in holding that trooper's failure to explicitly identify alternatives rendered evidence deficient because trooper's stated belief that immediate action was necessary implicitly discounted viability of other alternatives).

With respect to the risks of Officer Lindsey's course of action, he testified that he "considered both the risk of harm to [his] fellow officer in holding the scene with two suspects as well as risk of harm to other drivers from [his] driving to assist." Specifically, his affidavit reflects that he considered that the weather was clear and that the road conditions were dry. He considered that it was a Saturday night and cars were on the road, but that traffic was not heavy. An assessment of risk may be established by affidavit testimony showing that the officer assessed the specific

circumstances affecting the risk involved in his chosen course of action such as time of day, traffic, weather, and road conditions. *See Clark*, 38 S.W.3d at 585–86.

Officer Lindsey further testified that, immediately after notifying dispatch that he was heading to the scene, he activated his emergency lights and siren. When he encountered a red light at an intersection along his route to the North Loop, he came to a complete stop and cleared the intersection before proceeding. His affidavit reflects that, once he entered the North Loop, he drove at a rate of approximately 80 miles per hour for about two miles on a multi-lane highway. Lindsey testified that when he encountered the Escalade, he remained behind it for about a mile, waiting for the driver to heed his emergency lights and siren. When there was no response, he attempted to drive around it and continue his course. Lindsey testified that, based on his perception of the facts at the time, the risk of harm to others from his driving was minimal. Thus, Lindsey's affidavit addresses the countervailing public safety concerns, including the possibility that an accident might prevent him from reaching the scene of the emergency and the likelihood that any harm would occur. *See Wadewitz*, 951 S.W.2d at 467.

Sergeant Duran opined, based on his training, skill, and experience, along with his review of Officer Lindsey's affidavit and the Crash Report, and discussions with Lindsey, that "another reasonably prudent law enforcement officer, including [himself], under the same or similar circumstances could have believed that the need

to quickly reach the incident scene outweighed any minimal risk of harm to others and that all Officer Lindsey's decisions and actions before the accident were justified and reasonable based on his perception of the facts at the time." Specifically, with respect to the need, or urgency of the situation to which Lindsey was responding, Duran also testified that it was approximately 1:00 a.m. when the "priority one assist the officer call dropped," that a priority-one-assist-the-officer call is an emergency call, and that it "requires" any available officer in the same district to respond "immediately." He noted that the officer needing assistance was alone, holding two suspects at gunpoint, in an area that is particularly dangerous because there are a high number of robberies and drug sales. *See id*. While Lindsey responded to assist the officer, he traveled with his patrol vehicle's emergency lights and sirens activated to mitigate the risk to others and himself. Duran concluded that Lindsey "properly and reasonably decided that the need to quickly reach the scene of the assist the officer outweighed any minimal risk of harm to others and himself from his driving." *See id.*

In *Harris County v. Southern County Mutual Insurance Company*, this Court held that Harris County conclusively established that a sheriff's deputy acted in good faith. No. 01-13-00870-CV, 2014 WL 4219472, at *9 (Tex. App,—Houston [1st Dist.] Aug. 26, 2014, no pet.) (mem. op.). There, a deputy on patrol was dispatched to an attempted suicide in progress about eight miles from his location. *Id.* at *1.

He drove at an estimated rate of 80 to 90 miles per hour down a street with a posted speed limit of 30 miles per hour. *Id.* After one to two miles, he hit a "bump" in the road, lost control of his car, and hit the plaintiff's parked car. *Id.* With respect to the need for his response, the deputy testified in his affidavit that he received a "priority one" call from the dispatcher about a suicide in progress. *Id.* at *4. He testified that an attempted suicide is a medical emergency and that it was necessary to get to the scene "as soon as possible." *Id*. He made the decision to drive at a speed of 80 miles per hour based on the need to respond to the emergency. *Id.* at *7. We concluded that the deputy's testimony demonstrated that he assessed the need for his action by considering the seriousness of the situation and the necessity for his immediate presence at the scene. *Id*.

Further, with respect to risk, the deputy opined that the risk involved in speeding to the scene was decreased because of the dry weather conditions that existed at the time with clear visibility and very little traffic. *Id.* And, he noted that he activated his emergency lights and siren in order to warn others. *Id.* We held that Harris County's summary judgment evidence addressed the *Wadewitz* factors and included facts that conclusively established that a reasonable police officer, acting under the same or similar circumstances, could have believed that the course of the deputy's response, including his decision to travel at 80 miles per hour, to a suicide in progress was justified. *Id.* at *8.

In *City of Houston v. Collins*, the court of appeals held that the City of Houston conclusively established that a police officer acted in good faith. 515 S.W.3d 467, 480 (Tex. App.—Houston [14th Dist.] 2017, no pet.). There, Officer Brown responded to a call to assist another officer with apprehending a reckless motorcyclist who was standing up on his motorcycle and speeding down a freeway. *Id.* at 470. While en route to assist, Brown encountered the plaintiff, who had driven her car out of a parking lot onto the road ahead of him. *Id.* The plaintiff made a series of lane changes before coming to a stop. *Id.* As Brown attempted to drive around her, his patrol car struck the plaintiff's car, causing it to roll onto its side. *Id.* The plaintiff sued for personal injuries, asserting that Brown's reckless operation of his emergency vehicle caused the collision. *Id.*

In his affidavit in *Collins*, Officer Brown testified that the call for assistance required an immediate response because of the dangers inherent in the circumstances. *Id.* at 475–76. He testified that he considered the dangers posed by his response, including the road conditions, the weather, and the traffic. *Id.* at 476. And, he noted that he engaged his emergency equipment to warn others. *Id.* Based on these factors, he decided that driving over the speed limit would allow him to arrive to assist both quickly and safely under the circumstances. *Id.* Brown noted that he considered alternatives, such as not responding or driving slower, but he "believed that his emergency response was required." *Id.* The court concluded that

Houston met its burden to present evidence that a reasonably prudent officer, under the same or similar circumstances, could have reasonably believed that the need for an immediate response outweighed the risks to the public posed by his response. *Id.* at 479.

In *City of Dallas v. Ross*, the court of appeals held that the City of Dallas conclusively established that a police officer acted in good faith. No. 05-21-00001-CV, 2021 WL 4304478, at *6 (Tex. App.—Dallas 2021, no pet.) (mem. op.). There, the officer testified in his affidavit that he was dispatched to assist at a major freeway accident that occurred in the HOV lanes. *Id.* at *4. He was "one of the closest officers to the accident scene and was summoned to provide 'cover' to other officers and accident victims." *Id.* After being dispatched, he entered the freeway with his lights, siren, and air horn activated and made his way across the lanes. *Id.* And, the traffic yielded to his emergency vehicle. *Id.* When he reached the HOV lane, but before he entered, he saw a white car in the HOV lane blocking his path. *Id.* As that car moved out, the officer looked to the left and moved into the HOV lane. *Id.* However, a black vehicle suddenly appeared and collided with the officer's car. *Id.*

In assessing the need for his action, the officer in *Ross* testified that freeway accidents "need to be responded to immediately." *Id.* His presence was necessary because of the dangers to fellow officers, accident victims, and other motorists of another accident occurring. *Id.* The officer testified that he weighed this need

against the risks of crossing the freeway to get into the HOV land and concluded that the risk was "minimal." *Id.* Although there was some risk in traversing multiple lanes of traffic on a freeway, he activated his emergency lights, siren, and air horn, the traffic yielded, and he looked to his left to ensure that he could safely enter the HOV lane. *Id.* He "did not perceive that traversing across lanes of traffic to enter the HOV lane would cause any danger to any other driver close to [his] location." *Id.* Rather, "after weighing the risk against the need," he "believed in good faith that the need to get to the scene of the accident outweighed the perceived minimal risk of the accident." *Id.* at *5. The court held that Dallas presented evidence conclusively establishing that the officer acted in good faith. *Id.* at *6.

Here, similar to *Harris County*, *Collins*, and *Ross*, the City's summary judgment evidence addresses the *Wadewitz* factors and articulates the facts and factors pertaining to the need for Officer Lindsey's response and the countervailing risks that were relevant in the particular circumstances of this case. *See Wadewitz*, 951 S.W.2d at 467. We conclude that the City conclusively established that a reasonably prudent officer, under the same or similar circumstances, could have reasonably believed that the need for Lindsey's immediate response outweighed the risks to the public posed by the course of his response. *See Bonilla*, 481 S.W.3d at 643.

Giron and Ayala argue on appeal, as they did in their summary-judgment response, that the City did not meet its initial burden to present evidence conclusively showing its right to judgment because the affidavits of both Officer Lindsey and Sergeant Duran are conclusory. Defects in the substance of an affidavit render the evidence legally insufficient. *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.). Such defects include an objection that statements in an affidavit are conclusory. *Green v. Indus. Specialty Contractors, Inc.*, 1 S.W.3d 126, 130 (Tex. App.—Houston [1st Dist.] 1999, no pet.). Testimony is conclusory if it fails to provide the underlying factual basis, that is, if it is "essentially a conclusion without any explanation." *Custom Transit, L.P. v. Flatrolled Steel, Inc.*, 375 S.W.3d 337, 351 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (internal quotations omitted); *see Green*, 1 S.W.3d at 130. Here, the affidavits of Lindsey and Duran are not conclusory because, as discussed above, they supported their conclusions with specific facts.

Giron and Ayala also argue, as they did in the trial court, that Sergeant Duran's affidavit was inadmissible because it was not based on personal knowledge, was contradicted by other evidence, and contained hearsay. Because these constitute objections to form, Giron and Ayala were required not only to object in the trial court but also to obtain a ruling on their objections. *See Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 164 (Tex. 2018) (noting rules of error preservation apply to summary-

judgment proceedings); *Smiley Dental-Bear Creek, P.L.L.C. v. SMS Fin. LA, L.L.C.*, No. 01-18-00983-CV, 2020 WL 4758472, at *3 (Tex. App.—Houston [1st Dist.] Aug. 18, 2020, no pet.) (mem. op.) (discussing defects in form). They do not direct us to any point in the record in which the trial court sustained their objections. Further, because the trial court could have denied the City's motion even without their objections, we cannot clearly infer from the record in this case that the trial court implicitly sustained the objections. *See Seim*, 551 S.W.3d at 166.

Next, Giron and Ayala argue that the affidavits of Lindsey and Duran were "not sufficient to meet the City's burden to conclusively establish the good faith element" because, as to the "urgency of the matter," or need, Lindsey "was not specifically assigned to the call, nor was he assigned as a backup officer." And, Duran testified that "pretty much the entire district was en route to assist."

The record shows that Lindsey and Duran testified in their affidavits that a "priority one assist the officer call" is an "emergency call" and "requires" any available officer in the same district to respond "immediately." Thus, Lindsey, who was in the same district, was required to immediately respond. Lindsey testified: "I was the first available officer to respond to the priority one assist the officer call. I knew I *needed to reach the scene immediately because the safety of another officer was in jeopardy*. At the time, I was approximately 5 miles away from the scene. But because the call was a priority one assist the officer, and I was available, I *needed*

to respond immediately." (Emphasis added.) In assessing what a reasonably prudent officer "could have believed," we consider only the information that the officer had available at the time that he made his decisions, not facts that subsequently became known to him. *See Telthorster*, 92 S.W.3d at 465; *Tex. Dep't of Public Safety v. Rodriguez*, 344 S.W.3d 483, 491 (Tex. App.—Houston [1st Dist.] 2011, no pet.). Nothing in the record before us suggests that, at the time of his response, Lindsey knew that "pretty much the entire district was en route to assist." Furthermore, there is no suggestion that Lindsey knew the proximity of other officers or that they were closer to the scene at issue.

Giron and Ayala also assert that the City's evidence failed to address "the degree, likelihood, and obviousness of the risks created by [Officer Lindsey's] actions on the night in question." They complain that "at no point does Lindsey explain the risks inherent in driving at night at 100 miles per hour . . . on the highway" or the "risks of swerving around vehicles."

Although Officer Lindsey did not, in his affidavit, expressly state the risk of collision with a third party, exact language is not required. *See Bonilla*, 481 S.W.3d at 645 ("Magic words are not required to establish that a law-enforcement officer considered the need/risk balancing factors."); *Clark*, 38 S.W.3d at 585–86. In *Clark*, the supreme court considered the specificity required with respect to the risk factor. 38 S.W.3d at 585–86. It concluded that "exact language" is not required and that

just because an officer's affidavit does not "explicitly mention the risk of colliding with a third party does not mean that he did not assess this risk." *Id.* at 586. The court noted that "[t]his risk is present to some degree in every police pursuit." *Id.* And, in assessing such factors as the time of day and traffic, weather, and road conditions, an officer is assessing the specific circumstances present that affected this risk. *Id.* "Summary judgment requires that a movant establish facts upon which the court could base its legal conclusion, not that the parties use particular words." *Id.* at 585–86. Lindsey's affidavit reflects that he considered the time of day, traffic, weather, and road conditions; that he activated his emergency lights and siren; that his decision to exceed the speed limit was made on a multi-lane highway; and that he considered the risk of collision in coming to a complete stop to clear the intersection and in waiting almost a mile before attempting to pass the Escalade.

Giron and Ayala complain that, "[t]o the extent the affidavits purport to address the risk Officer Lindsey's conduct posed to the other motorists on the road with him that night in contrast with the need for him to respond to the officer-assist call as he did, the opinions offered by Officer Lindsey and Sergeant Duran cannot support summary judgment because they improperly presume the truth of material facts in dispute." An affidavit that fails to state the facts upon which the stated conclusions are based will not establish good faith under the *Wadewitz* standard. *Rodriguez*, 344 S.W.3d at 497. Here, however, as discussed above, the record shows

that Lindsey and Duran did more than simply state their conclusions. They substantiated their conclusions with facts. Further, as discussed below, the facts that Giron and Ayala assert are in dispute are not material to the good-faith analysis.

Having concluded above that the City's evidence conclusively established that Officer Lindsey acted in good faith, the burden shifted to Giron and Ayala to present evidence raising a genuine issue of material fact. *See Bonilla*, 481 S.W.3d at 643. To controvert the City's evidence, Giron and Ayala had to show that "*no* reasonable person in [Officer Lindsey's] position could have thought the facts justified [his] actions." *See id.* (emphasis in original).

Giron and Ayala argue that their summary-judgment evidence raises a fact issue as to Officer Lindsey's good faith because it shows that he was driving over the speed limit, with only one hand on the steering wheel, and that he made a dangerous lane change without ensuring that the roadway ahead of him was clear.

Giron and Ayala assert that, in his affidavit, Officer Lindsey testified that he was driving at approximately 80 miles per hour at the time of the collision. However, in his deposition testimony, he admitted that he exceeded 100 miles per hour. The record shows that Lindsey testified in his affidavit that, at the time of the collision, he was traveling on the North Loop at approximately 80 miles per hour. In his deposition, he testified that the posted speed limit in the area was 60 miles per hour. And, he testified numerous times: "I don't remember exactly how fast I was going."

After reviewing the HPD Crash Questionnaire during his deposition, he testified that he had estimated his speed at the time of the collision at "[a]pproximately 100 miles per hour." He admitted that he was driving in excess of the speed limit.

Giron and Ayala also point to Officer Lindsey's deposition testimony that he did not have both hands on the steering wheel immediately prior to the collision. The record shows that Lindsey also explained in his deposition testimony that his overhead lights and siren were activated, that traffic ahead of him was not yielding, and that, "you have to use one hand to work your actual sirens and your horn" when people do not yield, and "you can't do that with two hands on the wheel."

Giron and Ayala also point to Officer Lindsey's deposition testimony that he could not remember whether he was able to accurately see the traffic ahead of him, whether he flashed his headlights at the traffic, or whether he signaled before changing lanes. He admitted that he did not maintain a safe following distance between his vehicle and the cars in front of him, that he attempted the pass the Escalade while exceeding the speed limit, and that he failed to yield to slower traffic, which culminated in his colliding with the back of the vehicle in which Giron and Ayala were traveling. Giron and Ayala assert that Lindsey's body camera also captured these events.

Thus, Giron and Ayala assert that their evidence raises fact issues as to whether Officer Lindsey was negligent in the operation of his emergency vehicle.

The supreme court has held that "evidence of negligence alone will not controvert competent evidence of good faith." *Id.* at 644 (noting that analysis "is not equivalent to a general negligence test, which addresses what a reasonable person would have done"); *see also Chambers*, 883 S.W.2d at 655 ("The complex policy judgment reflected by the doctrine of official immunity, if it is to mean anything, protects officers from suit *even if they acted negligently*." (emphasis added)). This Court has also held that "evidence of recklessness is immaterial when determining whether an officer acted in good faith." *Memorial Villages Police Dep't. v. Gustafson*, No. 01-10-00973-CV, 2011 WL 3612309, at *7 (Tex. App.—Houston [1st Dist.] Aug. 18, 2011, no pet.) (mem. op.). We note that the Texas Transportation Code authorizes first responders to exceed speed limits in responding to emergencies under certain conditions. *See* TEX. TRANSP. CODE § 546.001(3). Regardless, however, "an officer's good faith is not rebutted by evidence that he violated the law or department policy by taking the chosen action." *Harris Cty.*, 2014 WL 4219472, at *9.

Again, Giron and Ayala's summary-judgment burden was to present evidence that "*no* reasonable person in [Officer Lindsey's] position could have thought the facts justified [his] actions," that is, that "no reasonable prudent officer could have assessed the need and risks as [did Lindsey] in this case." *See Bonilla*, 481 S.W.3d at 643. The facts raised by Giron and Ayala's evidence are not in dispute, and their evidence does not raise fact issues that are material to the good-faith analysis. *See*

id.; *see, e.g.*, *Harris Cty.*, 2014 WL 4219472, at *1, 9 (holding that Harris County conclusively established deputy's good faith, notwithstanding that deputy drove 80 to 90 miles per hour in 30-mile-per-hour zone).

In support of their argument, Giron and Ayala assert that the "facts presented by this case are similar to those recently considered by the Amarillo Court of Appeals in *Jarpe v. City of Lubbock*, No. 07-17-00316-CV, 2019 WL 2529670 (Tex. App.—Amarillo June 19, 2019, pet. denied) (mem. op.)." There, however, unlike in the instant case, the need to which the officer responded was "not a potentially life-threatening robbery since the perpetrator had already left the premises"; the officer was "not the closest available responder"; and "his presence was not immediately necessary to prevent injury or loss of life." *Id.* at *5. Yet, the officer responded by exceeding the speed limit, in the dark, "without his emergency lights or siren," and he admitted that he was distracted and looking down at his on-board computer. *Id.* at *6. Thus, the facts bearing on the need/risk analysis in *Jarpe* differ materially from those in the instant case.

Finally, Giron and Ayala assert that their evidence shows that Officer Lindsey, in his deposition testimony, "expressly conceded that as he was driving towards the call scene, he did not, in fact, think about other motorists on the road." In the cited portion of his testimony, however, the record shows that Lindsey testified as follows:

> Q. And you knew that November 4, 2018, you knew that you were passing cars that had all sorts of people inside of them, right?

. . . .

A. I didn't really think about it honestly.

Q. You did not think about who was in those cars that you might be endangering?

. . . .

A. I was thinking about getting to the officer needing assistance, so, no, I was not.

Q. And that's fair. I get that. . . .

Thus, the question asked was whether Lindsey had contemplated the "sorts of people" or "who" might be traveling in the cars around him. This testimony is simply not evidence that that "no reasonable prudent officer could have assessed the need and risks as [did Lindsey] in this case." *See Bonilla*, 481 S.W.3d at 643.

We conclude that Giron and Ayala did not present evidence raising a genuine issue of material fact as to Officer Lindsey's good faith. *See id*.

Having concluded that the City's summary judgment evidence conclusively established, and that Giron's and Ayala's summary-judgment evidence did not controvert, that a reasonable police officer, acting under the same or similar circumstances, could have believed that the need for Officer Lindsey's response outweighed the risks of the course of his response, we conclude that the City conclusively established that Lindsey acted in good faith. *See id*.; *Telthorster*, 92 S.W.3d at 467. Accordingly, we hold that the trial court erred in denying the City's motion for summary judgment on the ground that the trial court did not have subject-matter jurisdiction over Giron and Ayala's suit.

We sustain the City's sole issue.

Conclusion

We reverse the trial court's order and render judgment dismissing Giron and Ayala's suit against the City for want of jurisdiction.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Countiss and Farris.