Affirmed and Memorandum Opinion filed February 23, 2010.

In The

Fourteenth Court of Appeals

NO. 14-08-00551-CV

MARY ROYAL AND IRA ROYAL, JR., INDIVIDUALLY AND AS NEXT FRIENDS OF IRA ROYAL, III, Appellants

V.

HARRIS COUNTY AND HARRIS COUNTY CONSTABLE, Appellees

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2007-07453

MEMORANDUM OPINION

This is an appeal from a personal-injury case involving a head-on automobile accident that occurred after a high-speed police pursuit. Injured motorists brought negligence claims against the county and the county constable whose deputy was driving one of the vehicles involved in the collision. The trial court granted a plea to the jurisdiction in favor of the county constable and granted summary judgment in favor of the county. In three issues, the motorists contend that the deputy was not protected by official immunity, the county is not entitled to sovereign immunity, and two affidavits should not have been considered as summary-judgment evidence. In a single cross-issue,

the county asserts that the motorists' expert affidavit is not competent summary-judgment evidence. We affirm.

I. Factual and Procedural Background

Appellant Mary Royal was involved in a vehicle collision on the Sam Houston Tollway. According to the pleadings of Mary Royal, Ira Royal, Jr., individually and as next friends of Ira Royal, III, (collectively "the Royals"), Mary was driving east on the tollway when her vehicle was struck head-on by a vehicle driven by Jowell Hewitt. The Royals alleged that at the time of the collision, Hewitt had been traveling in the wrong direction on the tollway by driving westbound in the eastbound lanes and that Hewitt was being pursued by Harris County Deputy Angel Garcia, whose vehicle also was involved in the collision. Mary sustained a number of injuries and Hewitt was killed in the collision.

In their live petition, the Royals asserted that Mary's injuries arose from the negligent operation or use of the motor vehicle driven by Garcia, who was employed by appellee Harris County and the Harris County Constable's Office.[1] According to the Royals' pleadings, Garcia was acting within the course and scope of his employment and in furtherance of the duties required by his employment. The Royals alleged that at the time of the pursuit and collision, Garcia was "performing a ministerial act and/or was not acting in good faith," and, consequently, Garcia was not entitled to official immunity. The Royals also alleged that sovereign immunity was waived as to Harris County under the Texas Tort Claims Act.

The Royals claimed that the collision was a direct and proximate result of negligence by Harris County and its agents, servants and employees in connection with the use, operation, and control of a motor vehicle. The Royals asserted that Harris

[1] The record reflects that the trial court granted a plea to the jurisdiction filed by the Harris County Constable's Office and ordered a dismissal of this entity. The dismissal of that entity is not an issue in this appeal.

County and its agents, servants and employees violated a duty to exercise ordinary care in the operation of a motor vehicle in the following ways:

- Garcia failed to keep a safe distance between the vehicle he was driving and the vehicle driven by Hewitt;
- Garcia was following the vehicle driven by Hewitt too closely;
- Garcia was driving the wrong way down a tollway in a high-speed chase of the vehicle driven by Hewitt;
- Garcia was driving at an unsafe speed; and
- Garcia was driving the wrong way down a one-way road.

Harris County filed a traditional motion for summary judgment, asserting that Garcia is protected from personal liability by the doctrine of official immunity because he acted (1) within the scope of his employment, (2) by performing as a government employee in a discretionary function, and (3) in good faith. Harris County further asserted that because Garcia was protected by official immunity, Harris County, likewise, was immune from liability under the Texas Tort Claims Act.

In their response, the Royals claimed to have raised genuine issues of material fact as to whether Garcia acted in good faith and whether Garcia was performing a ministerial duty or a discretionary duty. The Royals objected to two affidavits filed by Harris County in support of the summary-judgment motion. The trial court granted summary judgment in favor of Harris County. The Royals now challenge that ruling on appeal.

II. OFFICIAL IMMUNITY

In their first issue, the Royals assert that Harris County did not carry its burden in establishing Garcia was entitled to official immunity on the element of good faith. The Royals also assert, in their third issue, that the affidavits of Garcia and accident investigation expert John Denholm should not have been considered as summary-judgment evidence because the affidavits are conclusory and contradicted.

Official immunity is an affirmative offense that shields government employees from personal liability for the employee's performance (1) of discretionary duties, (2)

within the scope of the employee's authority, (3) undertaken in good faith. *See Univ. of Houston v. Clark*, 38 S.W.3d 578, 580–81 (Tex. 2000); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). To obtain summary judgment on the basis of official immunity, the government employee must prove conclusively each of these elements. *Clark*, 38 S.W.3d at 580. In determining whether the summary-judgment proof conclusively establishes an official-immunity defense, we must consider the existence of disputed facts material to these elements. *See Telthorster v. Tennell*, 92 S.W.3d 457, 461 (Tex. 2002). The Royals do not dispute that Harris County satisfied the first two requirements of official immunity in that they concede that Garcia was performing a discretionary duty within the scope of his authority. However, the Royals claim that genuine issues of material fact remain as to whether Garcia acted in good faith.

The Element of Good Faith

To obtain summary judgment on the element of good faith in a police-pursuit case, Harris County must prove that a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to apprehend the suspect immediately outweighed the clear risk of harm to the public in continuing the pursuit. *See Clark*, 38 S.W.3d at 581; *Chambers*, 883 S.W.2d at 656. We apply an objective standard to determine whether the officer's conduct was justified based on the information that he possessed at the time he engaged in the conduct. *See*; *Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 (Tex. 1997); *Chambers*, 883 S.W.2d at 656–57. An officer acts in bad faith only if the officer could not reasonably have reached the decision in question. *Clark*, 38 S.W.3d at 581.

Testimony on good faith must address what a reasonable officer could have believed under the circumstances, and must be substantiated with facts showing that the officer assessed both the need to apprehend the suspect and the risk of harm to the public. *See id.*; *Chambers*, 883 S.W.2d at 656. Evidence does not have to prove that it would have been unreasonable to end the pursuit or that all reasonably prudent officers would

have continued the pursuit. *Clark*, 38 S.W.3d at 581. Rather, the evidence must prove only that a reasonably prudent officer might have believed that he should have continued the pursuit. *Id.* Conclusory statements that a reasonable officer could or could not have taken some action will neither establish good faith on summary judgment nor raise a fact issue to defeat summary judgment. *Id.* To controvert summary-judgment proof on good faith, the nonmovant must do more than show that a reasonably prudent officer could have decided to stop the pursuit. *Id.* The nonmovant must establish that no reasonable person in the officer's position could have thought that the facts justified the officer's actions. *Id.*; *Chambers*, 883 S.W.2d at 657.

To establish conclusive proof of good faith in the context of a police pursuit, an officer must substantiate his determination with facts showing that he sufficiently assessed both the need and risks of the pursuit. *See Clark*, 38 S.W.3d at 584–85. The "need" aspect refers to urgency of the circumstances requiring the emergency response and is measured by factors such as the seriousness of the emergency to which the public official is responding, whether the official's immediate presence is necessary to prevent injury or loss of life, and what alternative courses of action, if any, are available to achieve a comparable result. *See Wadewitz*, 951 S.W.2d at 467. In a police-pursuit scenario, the "need" element requires an officer to assess the need to apprehend the suspect immediately. *Clark*, 38 S.W.3d at 582. "Risk" refers to the following countervailing public safety concerns: the nature and severity of harm the public official's actions could cause, including injuries to bystanders and the possibility that an accident would prevent the official 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 official. *Wadewitz*, 951 S.W.2d at 467. Police pursuits require a continued assessment of need and risk because information known to a public official may change rapidly and offer little time for deliberation. *Clark*, 38, S.W.3d at 582–83.

Movant's Summary-Judgment Evidence of Good Faith

Harris County attached a number of documents in support of its motion for summary judgment, including an affidavit of Garcia, a statement from Deputy Anton Constantine, who was involved in the tollway pursuit, and an affidavit from Lieutenant John Denholm, an expert trained in accident investigation.

Affidavit and Statement of Deputies

By affidavit, Garcia explained that he was patrolling the eastbound lanes of the Sam Houston Tollway when he heard a radio transmission that a dark-colored truck was traveling the wrong way by driving westbound in the eastbound, inside lane of the tollway. In the context of demonstrating the need to apprehend the driver immediately, Garcia discussed the seriousness of the situation as a whole. *See id.* at 585 (applying seriousness of situation to establish need). After he spotted Hewitt's vehicle, he noted Hewitt's high rate of speed. Garcia suspected that the driver (Hewitt) was intoxicated based on the manner in which he was operating the vehicle by traveling in the wrong direction, in the fast lane, at a high rate of speed. According to Garcia's affidavit, intoxicated drivers are unpredictable, dangerous, and pose a danger on any roadway. Garcia believed that in the interest of public safety, Hewitt should be stopped. Garcia also was aware that Hewitt had caused major and minor accidents on the tollway before Garcia began his pursuit. *See id.* (involving affidavit addressing need to apprehend fleeing suspect based on suspect's involvement in a prior assault and reckless driving). Garcia described seeing Hewitt swerve to evade Deputy Constantine, who also was engaging in a police pursuit in an attempt to stop Hewitt. *See id.* (involving affidavit addressing need to apprehend suspect who attempted to evade other officers). As for whether Garcia's presence was immediately necessary to apprehend Hewitt or whether alternative courses of action were available, Garcia indicated that at the time of the chase he did not know the driver's identity and only "later" did he learn that the driver was

Hewitt. *See id.* (providing that a fleeing suspect's lack of identity supported the need for the officer's response and the officer's consideration of alternative courses of action).

In his affidavit, Garcia also assessed the risks involved in the pursuit. After Garcia spotted Hewitt's vehicle and noted its high rate of speed, Garcia saw Sergeant Cedric Watson, who was traveling east on the feeder road in his vehicle. Garcia saw Watson make a u-turn onto the tollway to follow Hewitt. Garcia also made a u-turn to assist Watson, noting that Hewitt's conduct posed an imminent danger to the public. Watson called out details of the chase. As Hewitt's vehicle approached State Highway 288, Garcia weighed the need to remove Hewitt from the moving lane of traffic against the risk of endangering the public by pursuing Hewitt at high speeds while traveling against the flow of traffic. He listed the following factors as contributing to his decision to continue the pursuit:

- It was late on a Sunday night.
- There was very little other traffic on the road.
- He maintained good visibility of Hewitt and the entire roadway.
- The roadway was dry.
- The weather was clear.
- The area had good artificial lighting.

Garcia continued the pursuit in an attempt to prevent harm that he believed Hewitt's erratic, high-speed driving could cause. In considering facts such as the time of day, traffic, and weather and road conditions, Garcia demonstrated in his affidavit that he assessed the specific circumstances that affected the risk. *See id.* at 586. Although Garcia did not specifically mention the risk of his vehicle colliding with a third-party vehicle, this fact does not mean he did not assess that risk. *See id.* That risk is present, to some degree, in every police pursuit. *See id.*

Garcia admitted that he attempted to maintain a safe distance of 100–150 feet behind Hewitt, the farthest he could be in order to keep Hewitt in his sight. Garcia

admitted that he was 40–50 feet away from Hewitt's vehicle when Hewitt's vehicle collided head-on with Mary's vehicle. Garcia attempted to brake and maneuver between the collision of Hewitt's vehicle and Mary's vehicle, but Garcia's vehicle struck Mary's vehicle. When Garcia's vehicle came to rest, Garcia positioned it to block the accident scene from oncoming traffic.

Garcia noted that during the pursuit, he was constantly weighing the need to stop Hewitt against the risks involved. He cited the dry roadway, good visibility, and very minimal traffic as factors that presented a relatively low risk to the public compared with the great need to stop Hewitt and remove Hewitt from the road.

Although the Royals claim that Garcia's affidavit was conclusory, the statements in Garcia's affidavit were substantiated with facts showing that he sufficiently assessed both the need to apprehend the suspect and the risk of harm to the public. *See Clark*, 38 S.W.3d at 581. In his affidavit, Garcia addressed the need to stop Hewitt based on the seriousness of the situation as a whole; he recounted how he believed Hewitt, whose identity was then unknown to Garcia, was an intoxicated driver traveling at high speeds in the wrong direction on a toll road and who posed a threat to public safety. *See id.* at 585. Garcia indicated that he believed the road conditions, weather, time of night, lighting, and traffic conditions supported little risk. *See id*. at 586.

In his affidavit, Garcia established that he acted in good faith: Garcia considered facts upon which a reasonably prudent officer in the same or similar circumstances could have believed that the need to pursue Hewitt outweighed the risks that the pursuit posed to the public. *See id.* Deputy Constantine's statement similarly supports the chain of events. According to Constantine, two other officers pursued Hewitt by traveling westbound in the eastbound, "speed" lane at a high rate of speed.

The Affidavit of the Accident Investigation Expert

Harris County also submitted the affidavit of Lieutenant John Denholm, an officer with the Sherriff's department trained in accident investigations who offered expert

testimony. An expert's testimony will support summary judgment only if it is "clear, positive and direct, otherwise, credible, and free from contradictions and inconsistencies, and could have been readily controverted." TEX. R. CIV. P. 166a(c); *Wadewitz*, 951 S.W.2d at 466. Expert testimony on good faith must address what a reasonably prudent officer could have believed under the circumstances. *Wadewitz*, 951 S.W.2d at 466–67. The expert report must be substantiated by facts supporting both the "need" and "risk" factors to prove the expert had a suitable basis for concluding that a reasonably prudent officer in the same position could or could not have believed the actions were justified. *Id*.

Denholm opined that Garcia acted in good faith. He based his opinion on Garcia's affidavit, Deputy Constantine's statement, a statement by Sergeant Washington, the crash report and detail report, and the Royals' live pleadings. Denholm addressed the seriousness of the situation warranting the need to apprehend Hewitt. *See Clark*, 38 S.W.3d at 585. Specifically, Denholm opined that an emergency situation was created by Hewitt's speeding while traveling in the wrong direction. Denholm reasoned that the situation warranted the need for law enforcement officers to reach and stop Hewitt as soon as possible. Denholm indicated that, based on his experience and training, it was reasonable to assume that a person driving as Hewitt did could be intoxicated; and Denholm noted that intoxicated drivers pose a serious threat to public safety. Additionally, Denholm opined that whether a driver is sober or intoxicated, a driver who is speeding the wrong way down a major thoroughfare could cause accidents, such as the two accidents Hewitt had caused at the East toll plaza, which increased the potential of harm to civilians and officers. Denholm also noted that the toll road serves as a major artery to other busier highways and that if Hewitt were not apprehended, he would have entered the other major thoroughfares and likely caused a life-threatening collision. In addressing the risks involved, Denholm noted that the crash report indicated that the tollway was well-lit at night and provided good visibility, and that the road conditions were dry. *See id.* at 586 (assessing such facts as the time of day, traffic, and weather and

road conditions demonstrated that officer assessed the specific circumstances that were present that affected the risk).

Denholm described how Garcia clearly evaluated the "need" and "risk" factors, delineating the following factors he believed Garcia weighed:

- Hewitt's driving posed a threat to public safety requiring removal from the road as quickly as possible;
- Garcia kept Hewitt in his sight the entire time;
- Watson called out the chase and also joined the pursuit against the flow of traffic;
- Garcia attempted to maintain a safe distance of 100 feet from Hewitt;
- Garcia was careful to observe the road for traffic and considered other traffic in his decision to continue the pursuit.

Denholm lists the following conditions as contributing to Garcia's analysis in weighing the risks: the time of night on a Sunday, very little other traffic, good visibility, dry road conditions, and clear weather. Denholm opined that Garcia was acting in good faith and that a reasonably prudent officer, under the same or similar circumstances, could have believed the need to reach the scene by traveling the wrong way on a freeway with very little traffic outweighed the risk of harm to the public resulting from that course of action.

Although the Royals contend that Denholm's affidavit is conclusory, the statements in Denholm's affidavit are substantiated with facts showing his belief that Garcia assessed both the need to apprehend the suspect and the risk of harm to the public. *See, e.g.*, *City of San Antonio v. Ytuarte*, 229 S.W.3d 318, 321 (Tex. 2007). In his affidavit, Denholm sufficiently addressed the "need" and the "risk" factors to support his conclusion that a reasonable officer, under the same or similar circumstances, could have balanced the need and the risks as Garcia did and elected to continue the pursuit. *See, e.g.*, *id.*

The Royals also contend that Garcia's deposition testimony, submitted in support of their response to Harris County's motion, contradicted facts in Denholm's affidavit and Garcia's affidavit. They point to portions of these affidavits in which Garcia and Denholm opined that Garcia was "careful to observe the roadway for other traffic" and Garcia's deposition testimony that he did not know how many vehicles he passed during the pursuit. These facts do not contradict each other. *See Harris County v. Ochoa*, 881 S.W.2d 884, 889 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (involving evidence that did not offer alternative version of facts to controvert officers' affidavits). In response to the Royals' argument that Garcia is an interested witness, summary judgment may be based on uncontroverted testimonial evidence of an interested witness if the evidence is clear, positive and direct, otherwise credible, and free from contradiction and inconsistencies, and could have been readily controverted. TEX. R. CIV. P. 166a(c); *see Ochoa*, 881 S.W.2d at 887.

The evidence submitted by Harris County includes proof of facts that a reasonably prudent officer in the same or similar circumstances could have believed that the need to pursue Hewitt outweighed the risk to the public. *See Clark*, 38 S.W.3d at 586. Based on the evidence presented, Harris County met the summary-judgment burden and conclusively established the element of good faith. *See Ytuarte*, 229 S.W.3d at 321. The burden therefore shifted to the Royals, as nonmovants, to show that no reasonable person in the officer's position could have thought that the facts justified the officer's actions. *See Clark*, 38 S.W.3d at 581.

Evidence Submitted by the Non-Movants

In response to Harris County's motion for summary judgment, the Royals submitted the following exhibits: the crash report and all attachments and supplements as produced by Harris County, Garcia's deposition and affidavit, the deposition of investigating officer Sergeant Michael Hartley, the affidavit of expert Andrew Scott, III, and Harris County's written policy on police-pursuit driving.

In his affidavit, Scott opined as an expert that no reasonable officer could have assessed the needs and risks in pursuing Hewitt the wrong way on a major freeway as Garcia did. Scott based his opinion on various factors, which we address in the same order as presented in his affidavit.[2]

Scott first refers to two factors: (1) that Garcia should have been aware from radio transmissions that officers from another agency already were in pursuit and (2) that Harris County's policy on pursuit driving prohibits a pursuit initiated by another agency. However, an officer's good faith is not rebutted by evidence that he violated the law or department policy in making his response. *See Campbell v. Jones*, 153 Tex. 101, 105, 264 S.W.2d 425, 427 (Tex. 1954); *Johnson v. Campbell*, 142 S.W.3d 592, 596 (Tex. App.—Texarkana 2004, pet. denied). Furthermore, Garcia testified in deposition that he was not aware that officers from other agencies were in pursuit, even though he acknowledged it may be reasonable to make that assumption from the radio transmission alerting him that officers from that agency had spotted a "wrong-way" truck on the tollway. Scott also pointed to the fact that Houston Police Department officers were stopped in the westbound lanes immediately following the collision. This evidence shows that officers from the Houston Police Department arrived at the scene in the westbound lanes, and not the eastbound lanes as used by Garcia, Watson, and Constantine. Evidence to controvert good faith must do more than merely show that a reasonably prudent officer could have reached a different decision. *See Chambers*, 883 S.W.2d at 657; *see also Telthorster*, 92 S.W.3d at 465.

Scott next points to the fact that Garcia suspected Hewitt of driving while intoxicated, a non-violent offense, and that Garcia could have checked the license plates on Hewitt's vehicle to apprehend him at a later time rather than continue the pursuit.

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[2] Although Harris County, in a single cross-issue, contends Scott's affidavit is conclusory, we disagree and conclude that, in his affidavit, Scott considered both the "need" and "risk" factors and had a suitable basis for offering his opinion that no reasonable officer could have believed the needs outweighed the risks of pursuit. *See Ytuarte*, 229 S.W.3d at 321.

Later in the affidavit, Scott made two statements: that a "suspected drunk driver does not rise to the level of sufficiently serious offense to warrant" Garcia's high speed pursuit of Hewitt against the flow of traffic and that the "risk to the public in not apprehending a suspected drunk driver pales in comparison to the risk to the public in pursuing a suspect the wrong way down a major freeway at speeds over 100 miles per hour." In this context, Scott does not contemplate the circumstances presented to Garcia: that Garcia suspected Hewitt of driving while intoxicated because Hewitt was traveling a major thoroughfare in the wrong direction at speeds exceeding 100 miles an hour before Garcia began pursuit. *See Clark*, 38 S.W.3d at 581 (requiring evidence to confront the same or similar circumstances in assessing an officer's good faith). Garcia's deposition testimony similarly supports the fact that running Hewitt's license plates was not a viable alternative because the owner of the vehicle may not have been the driver involved in the incident. Garcia acknowledged in his affidavit that Hewitt's identity was unknown at the time of the pursuit. *See Clark*, 38 S.W.3d at 585 (concluding that lack of suspect's identity supported the need for the officer's presence in apprehending a fleeing suspect who was involved in prior assaults and evaded other officers).

Scott indicated that no reasonable officer would continue pursuit at speeds over 100 miles per hour in the wrong way down a major freeway. In his affidavit Scott makes no mention that two other officers—Watson and Constantine—similarly made u-turns and pursued Hewitt against the flow of traffic at high speeds. *See Clark*, 38 S.W.3d at 581 (requiring proof that no reasonable person in the officer's position could have believed that that the facts justified the officer's actions); *see also Telthorster*, 92 S.W.3d at 467 (involving evidence that did not establish that no reasonable officer, in the same circumstances, could have believed actions were justified). Scott also makes reference to the fact, to which Garcia agreed in deposition, that a fleeing suspect will escalate speed to avoid being apprehended. However, it is undisputed that Hewitt was traveling at a high rate of speed and had caused both a major and a minor accident at the East Plaza Toll Center before Garcia engaged in the pursuit.

Scott pointed to the fact that Garcia executed a u-turn on a major freeway to engage in a high-speed pursuit against the flow of traffic instead of exiting and pursuing Hewitt in the westbound lanes as the officers from the Houston Police Department did. In deposition, Garcia acknowledged that had he exited and pursued Hewitt by using the westbound lanes, he would have lost sight of Hewitt because the exits were far apart. Evidence to controvert good faith must do more than just show that a reasonably prudent officer could have reached a different decision. *See Chambers*, 883 S.W.2d at 657; *see also Telthorster*, 92 S.W.3d at 465.

Scott also points to Harris County's policy prohibiting pursuit against the flow of traffic, except in limited circumstances, and that Garcia could not articulate an instance when such a pursuit would be permissible. The policy provides in pertinent part, "At no time will deputies purse [sic] a vehicle against the normal flow of traffic except in those cases that involve serious bodily injury or death or the imminent threat of injury or death." Evidence in the record shows that Hewitt already had caused both a major and a minor accident at the East Plaza Toll Center and that Garcia was aware of these facts. Garcia characterized Hewitt's driving as an imminent danger to the public. To the extent that Garcia may have violated a department policy in his pursuit, an officer's good faith is not rebutted by evidence that he violated the law or department policy in making his response. *See Campbell*, 153 Tex. at 105, 264 S.W.2d at 427; *Johnson*, 142 S.W.3d at 596.

Scott also makes references to the distance of 50 feet between Garcia's vehicle and Hewitt's vehicle just before the collision and opines that the distance "was likely to escalate" Hewitt's speed in fleeing, which posed a greater risk of harm to the public. Evidence in the record indicates that Hewitt already was traveling at a high rate of speed before Garcia began pursuit and that Hewitt's speed fluctuated between 90 and 105 miles an hour during the pursuit even before Garcia closed the gap between the vehicles to 50 feet. Scott also pointed to the crash report indicating that Garcia failed to control his speed and followed too closely. Later in his affidavit, Scott refers to the fact that because

Garcia was required to undergo additional driving training following the incident, Harris County "apparently concluded that Deputy Garcia acted unreasonably." These observations, even if valid, are insufficient to raise a fact issue on the question of whether Garcia acted in good faith in the way he pursued Hewitt. *See Johnson*, 142 S.W.3d at 596 (involving expert evidence that an officer acted recklessly in entering an intersection against a red light and driving past stopped traffic at thirty miles an hour did not raise a fact issue as to good faith). Evidence that an officer violated a law or department policy is insufficient to rebut an officer's good faith. *Id.* At most, these facts would demonstrate that Garcia acted negligently, which is not enough to controvert good faith. *See id.*; *see also Telthorster*, 92 S.W.3d at 465, 467 (noting that test for good faith does not contemplate what a reasonable person "would have done," but rather contemplates what a reasonable person "could have believed").

Scott next points to traffic conditions which he asserts weighed against Garcia's decision to begin pursuit because two to three vehicles passed him every five minutes and there was a high likelihood of causing a serious accident. Conclusory statements that a reasonable officer could or could not have taken some action do not raise a fact issue to defeat summary judgment. *See Clark*, 38 S.W.3d at 581. To controvert Harris County's summary-judgment evidence, the Royals must do more than show that a reasonably prudent officer could have reached a different decision. *See Chambers*, 883 S.W.2d at 657. They must show that no reasonable officer in Garcia's position could have believed that the facts justified his conduct. *See id.* Scott's affidavit on this point does not indicate that no reasonable officer in such traffic conditions could have believed the facts justified Garcia's conduct. *See Clark*, 38 S.W.3d at 587 (involving expert evidence that did not controvert proof of good faith); *see also Telthorster*, 92 S.W.3d at 467 (involving expert evidence that did not establish that no other reasonable officer could have held similar concerns under same circumstances confronting the defendant officer).

Finally, in his affidavit, Scott points to the fact that the accident investigation was reassigned from Sergeant Watson to Sergeant Hartley, and opines that "it is reasonable to

conclude that Harris County needed to have an objective determination of the cause of the accident involving Mary Royal." This evidence does not provide a basis for concluding whether Garcia acted reasonably. *See Clark*, 38 S.W.3d at 587 (providing that expert evidence was not substantiated with reference to the aspects of the "need" and "risk" balancing test, and therefore, insufficient to controvert a defendant's proof on good faith).

The Royals summary-judgment evidence, at best, raises only fact issues as to Garcia's negligence in following too closely and failing to control his speed. *See Johnson*, 142 S.W.3d at 596; *see also Telthorster*, 92 S.W.3d at 467. These matters, however, even if established, are insufficient to raise a fact issue on the question of whether Garcia acted in good faith in the way he pursued Hewitt. *See Johnson*, 142 S.W.3d at 596. Harris County provided summary-judgment evidence that Garcia acted in good faith. *See id.* To defeat that showing, the Royals must have raised a genuine issue of material fact as to what a reasonable officer could have believed under the circumstances, and the facts have to be substantiated with reference to need and risk. *See id.* Indulging every reasonable inference in favor of the Royals, we conclude that the Royals' evidence is insufficient to controvert Harris County's proof on good faith. *See Ytuarte*, 229 S.W.3d at 321; *Johnson*, 142 S.W.3d at 596. Therefore, we overrule the Royals' first and third issues.

III. SOVEREIGN IMMUNITY

A political subdivision of the state is not liable for acts or conduct of its officers or employees unless the entity's common law immunity is waived by the Texas Tort Claims Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 2005); *Chambers*, 883 S.W.2d at 658. Under this statue, a governmental entity's sovereign immunity is not waived when its employee is entitled to official immunity. *See City of Houston v. Kilburn*, 849 S.W.2d 810, 812 (Tex. 1993). Because Garcia is protected from personal liability based on official immunity, Harris County, likewise, is protected under the Texas

Tort Claims Act. *See Ochoa*, 881 S.W.2d at 890. Accordingly, Harris County is not liable under the Texas Tort Claims Act, and therefore, summary judgment in favor of Harris County was proper. *See id*. We overrule the Royals' second issue.

Having overruled each of the Royals' issues on appeal, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Frost and Brown and Senior Justice Hudson.*

* Senior Justice J. Harvey Hudson sitting by assignment.