Reversed and Remanded and Memorandum Opinion filed February 1, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00764-CV

RAUL GARZA, Appellant

V.

HARRIS COUNTY, Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2009-54159

MEMORANDUM OPINION

Raul Garza appeals from the trial court's order granting Harris County's plea to the jurisdiction. The trial court found that the County was entitled to governmental immunity based on the official immunity of one of its employees. In a single issue, Garza argues that the trial court erred in granting the plea because the employee was not performing a discretionary function. We reverse and remand.

BACKGROUND

Deputy Jose Gonzalez was an employee of Harris County Constable Precinct Six and a certified peace officer in March 2008 when he arrested Garza. Deputy Gonzalez

placed Garza in the back of his squad car and was transporting him to the County's jail. While in transport, Deputy Gonzalez observed what he believed to be a felony in progress. He saw a man with a crowbar who appeared to be attempting to break into a bar. Deputy Gonzalez radioed for back-up, but the suspect saw the deputy and got into a Mustang with two other passengers. The Mustang drove away quickly, and Deputy Gonzalez decided to follow. He was driving at approximately the speed limit with his emergency lights and siren turned off. His goal was to maintain a visual on the Mustang, observe the license plate number, and radio-in the vehicle's location so another officer could initiate a stop. While attempting to follow the Mustang, Deputy Gonzalez took a turn at thirty miles per hour, and his vehicle slid off the street and hit a wooden pole. Garza was injured.

Garza sued for personal injury, and the County filed a plea to the jurisdiction, attaching several affidavits, accident reports, and a portion of Garza's deposition. Garza responded and attached as evidence a copy of a Harris County Constable Precinct Six "Instructional Guideline" with the subject "Transportation of Prisoners." The policy provides in part as follows:

> Purpose: To provide guidance relative to Officer Safety and Safe Delivery of Prisoners
>
> The transporting officer of any prisoner shall adhere to the following unless directed otherwise by The Chain of Command:
>
> . . .
>
> - THE TRANSPORTING OFFICER SHALL NOT PARTICIPATE IN ANY VEHICULAR PURSUITS, SPECIAL ASSIGNMENTS, CALL OUT FOR MEALS, HANDLE PERSONAL BUSINESS WHILE IN TRANSPORT MODE.

The district court granted the County's plea without specifying the grounds and dismissed the case. Garza appealed.

ANALYSIS

Garza argues that the trial court erred in granting the County's plea to the jurisdiction because the County failed to prove that it was entitled to governmental immunity as a result of Deputy Gonzalez's official immunity. Specifically, Garza argues that Deputy Gonzalez was not entitled to official immunity because he was performing a ministerial function when he engaged in a vehicular pursuit while transporting a prisoner, which he was specifically prohibited from doing under the County policy. The County responds that the policy did not remove Deputy Gonzalez's discretion to engage in a pursuit, but even if it did, Deputy Gonzalez was not engaged in a pursuit when he followed the Mustang from a distance and traveled within the speed limit without activating his emergency lights or siren. We hold that the County failed to establish that it was entitled to immunity as a matter of law.

A. Standard of Review

We review de novo questions of law decided by a trial court on a plea to the jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). A plea to the jurisdiction may challenge the pleadings, or the plea may rely upon relevant evidence to challenge jurisdictional facts. *Id.* at 226–27. If this evidence leads to a disputed issue of fact regarding jurisdiction that does not implicate the merits of a claim or defense, then the trial court resolves the fact issue. *See id.* at 226–27; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). If, however, a disputed issue of fact implicates the merits of a claim or defense, the trial court must employ the standard applicable to summary judgment. *Miranda*, 133 S.W.3d at 227–28. Under these circumstances, the plea to the jurisdiction would be granted if the defendant conclusively established all fact issues that preclude jurisdiction and the plaintiff failed to raise a genuine issue of material fact. *Id.* Further, the court is required to assume the truth of all the evidence that favors the plaintiff and to indulge every reasonable inference

and resolve any doubts in the plaintiff's favor. *Id.* We review de novo the trial court's application of the summary judgment standard. *Id.*

The County has conceded in this case that it bears the burden of conclusively establishing the affirmative defense of official immunity to prevail on its assertion of governmental immunity. Therefore, a jurisdictional fact implicates the merits of a defense, and we review the trial court's determination on the County's plea under the summary judgment standard.

B. Immunity: Discretionary or Ministerial Functions and the Effect of a Departmental Policy

A county is entitled to immunity from suit and liability if immunity is not waived by statute. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374–75 (Tex. 2006). In Texas, a governmental unit's immunity is waived when (1) its employee acts within the scope of employment, (2) the employee negligently acts or omits from acting, (3) the act or omission proximately causes personal injury, (4) the injury arises from the operation or use of a motor-driven vehicle, and (5) the employee would be personally liable to the claimant according to Texas law. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (West 2005); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (West 2005) (waiving immunity to suit whenever liability is created under Chapter 101). An employee is not "personally liable" under this statute when he or she is entitled to official immunity. *DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. Crim. App. 1995). An employee is entitled to official immunity if he or she proves that the allegedly wrongful act or omission was committed while the employee was (1) performing a discretionary function, (2) acting in good faith, and (3) operating within the scope of his or her authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. Crim. App. 1994).

On appeal, Garza contends only that the trial court erred in dismissing the case because Deputy Gonzalez was not performing a discretionary function. Accordingly, we limit our discussion to this issue. The Texas Supreme Court distinguishes between two

types of functions: discretionary and ministerial. *Id.* at 654. The court has explained that discretionary functions are those actions that involve personal deliberation, decision, and judgment. *Id.* Ministerial functions are those actions that require obedience to orders or to the performance of a duty for which the actor has no choice. *Id.* When a police officer is driving a vehicle in a non-emergency setting, he or she is performing a ministerial function. *Harris Cnty. v. Gibbons*, 150 S.W.3d 877, 886 (Tex. App.—Houston [14th Dist.] 2004, no pet.). But when an officer engages in a high-speed vehicular pursuit, the officer is usually performing a discretionary function. *Chambers*, 883 S.W.2d at 655.

The threshold issue presented by this appeal is whether the departmental policy at issue eliminated any discretion Deputy Gonzalez had while transporting his prisoner, Garza. Statutes and policies describing and prohibiting negligent conduct in general terms will not make an officer's conduct ministerial if it would otherwise be discretionary. *See Chambers*, 883 S.W.2d at 655 (noting that statutes dictating general conduct of safety, speed, and traffic obligations of operators of emergency vehicles were "not sufficiently specific so as to leave no choice to an officer in the performance of these duties," and thus, did not affect the discretionary nature of the conduct of police in pursuing a vehicle).

However, we have previously held that local governmental units may enact departmental policies to remove an officer's discretion to enter into a vehicular pursuit. *See Brown v. Ener*, 987 S.W.2d 66, 69 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Under these circumstances, an officer's decision to enter into a pursuit becomes a ministerial act. *Id.*; *City of Pharr v. Ruiz*, 944 S.W.2d 709, 713–14 (Tex. App.—Corpus Christi 1997, no writ).[1] This is so because the officer has no opportunity to deliberate,

[1] *See also Travis v. City of Mesquite*, 830 S.W.2d 94, 103 (Tex. 1992) (Cornyn, J., concurring) (noting, in support of conclusion that an officer was engaged in discretionary function when the officer pursued a suspect, that the departmental policy left the decision of whether to pursue up to the pursuing officers); *Chambers*, 883 S.W.2d at 655 n.3 (noting the reference in *Travis* to the departmental guidelines and stating that the appellant did not raise in this case the issue of whether "the specific pursuit guidelines of any of the municipalities involved affects our inquiry into whether actions in pursuit are discretionary or ministerial"); *Mumm v. Mornson*, 708 N.W.2d 475, 491–92 (Minn. 2006) (holding that, although

decide, or judge whether to engage in the pursuit; the officer has no choice but to obey orders. *See Brown*, 987 S.W.2d at 69.

In *Brown v. Ener*, we encountered facts remarkably similar to those in this case and held that a deputy in the Harris County Constable's Office was not entitled to summary judgment on the defense of official immunity when the undisputed evidence showed that (1) the County had policies that required deputies to obtain permission from a superior before carrying a civilian passenger and that prohibited emergency pursuits while transporting a civilian passenger, and (2) the deputy had brought a civilian passenger for a "ride-along" without prior authorization from superiors and engaged in a high-speed pursuit. *Id.* at 67, 69. Because the County failed to introduce any evidence to suggest that its policy was not mandatory, and because we were required to view the evidence in the light most favorable to the nonmovant, we determined that we were required to assume that the policy was mandatory. *Id.* at 69. With this assumption, the policy "would require the performance of a duty about which the Deputy Ener [sic] had no choice, or in other words, Deputy Ener acted against department mandates and performed an act, a high speed chase, in which he had no discretion." *Id.*[2]

During oral argument, the County urged that this case is distinguishable from *Brown* because the policy at issue in this case is not mandatory. The policy, though styled as an "Instructional Guideline," uses the mandatory "shall" to forbid a "transporting officer" from engaging in a vehicular pursuit. As in *Brown*, the policy in question, on its face, appears to completely remove any discretion from officers to engage in a vehicular pursuit while transporting a prisoner—it does not merely proscribe how an officer should make the decision to pursue or provide general standards of negligence.

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officers engaged in vehicular pursuits generally perform discretionary functions, officers were not engaged in discretionary function when they pursued a suspect in violation of a departmental policy prohibiting pursuits when the suspect did not commit an enumerated crime and the identity of the suspect was known).

[2] Neither party brought our decision in *Brown* to the trial court's attention.

Unlike the record in *City of Pharr v. Ruiz*, this record contains insufficient evidence to eliminate the genuine issue of fact that the policy was not intended to be mandatory. *See* 944 S.W.2d at 714–15. The County submitted no evidence in response to Garza's proffer of the policy, and none of the evidence submitted initially by the County references the policy in any way. Thus, viewing the plain language of the policy in the light most favorable to the nonmovant, we must assume the policy was mandatory. As such, Deputy Gonzalez had no discretion to engage in a vehicular pursuit while transporting a prisoner without receiving authorization from a superior officer.

Further, the County argues that "there is no evidence that Deputy Gonzalez violated the policy." The County asks us to infer that Deputy Gonzalez was not "pursuing" the Mustang because of the relatively low speed and lack of emergency lights and siren.[3] The County's argument and, more importantly, its evidence are directed to establishing the absence of a high-speed or hot pursuit. Again, however, we are required to resolve any doubts in the evidence in Garza's favor. The evidence shows that the occupants of the Mustang fled the scene after seeing Deputy Gonzalez, and he was following the Mustang and trying to get close enough to read their license plate. He attempted to turn a corner at a speed of thirty miles per hour. A reasonable fact finder could infer from this record that Deputy Gonzalez was engaged in a "vehicular pursuit" in violation of the policy. We must credit Garza with this inference.

Finally, the County directs our attention to Article 2.13 of the Texas Code of Criminal Procedure, which establishes the general duties of peace officers in Texas and requires them to "interfere without warrant to prevent or suppress crime" and "arrest offenders without warrant in every case where the officer is authorized by law." TEX. CODE CRIM. PROC. ANN. art. 2.13(b) (West 2005). The County essentially argues that

[3] We note that conduct incident to the investigation of a crime is generally considered discretionary. *See Davis v. Klevenhagen*, 971 S.W.2d 111, 118 (Tex. App.—Houston [14th Dist.] 1998, no pet.); *City of Hempstead v. Kmiec*, 902 S.W.2d 118, 121 (Tex. App.—Houston [1st Dist.] 1995, no writ).

this provision of the Code provided Deputy Gonzalez with unfettered discretion to apprehend the fleeing suspects, and the County cannot prohibit officers from exercising this discretion. We decline to interpret this statute as vitiating the power of county constables to specifically mandate or prohibit certain conduct by its deputies or to remove deputies' discretion.

Accordingly, the County did not meet its burden to conclusively establish that Deputy Gonzalez was performing a discretionary function, and the trial court erred in granting the County's plea. We reverse the trial court's judgment and remand for further proceedings.

/s/ Sharon McCally
Justice

Panel consists of Justices Anderson, Seymore, and McCally.