

**Affirmed and Majority and Dissenting Opinions filed August 29, 2023.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-21-00761-CV**

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**CITY OF HOUSTON, Appellant**

**V.**

**MARIA CHRISTINA GOMEZ, Appellee**

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**On Appeal from the 333rd District Court  
Harris County, Texas  
Trial Court Cause No. 2013-59953**

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**MAJORITY OPINION**

A motorist was involved in a traffic collision with one of several City of Houston police officers responding to the scene of a robbery in progress. The motorist sued the City, alleging negligence. The City responded by filing a plea to the jurisdiction, asserting immunity from suit. The trial court granted the plea and dismissed the motorist's suit. After a panel of this court decided this appeal, the en banc court voted to grant the City's motion for en banc reconsideration, and the en banc court reconsidered the appeal.

After reconsidering the appeal, the en banc court issued an En Banc Majority Opinion, in which the court reversed the trial court's judgment and remanded the case to the trial court for further proceedings consistent with its opinion. *See Gomez v. City of Houston*, 587 S.W.3d 891, 894 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (en banc). The en banc majority concluded that the City did not conclusively establish the good faith of the officer involved in the collision, and that a material fact issue existed as to whether the officer acted recklessly. *Id.* at 894. In an en banc dissenting opinion joined by Justices Wise and Spain, Justice Jewell concluded that this court should have affirmed the trial court's judgment. *See id.* at 903–10 (Jewell, J., dissenting).

On remand in the trial court the City filed a supplement to its first amended plea to the jurisdiction and motion to dismiss. In its supplemental plea, the City incorporated by reference its original plea and attached a supplemental affidavit of the City's expert. The trial court denied the City's plea to the jurisdiction and the City filed this interlocutory appeal. We conclude that the supplemental affidavit did not conclusively establish the good faith of the officer involved in the collision. In considering whether the emergency exception applies, we further conclude that a material fact issue still exists as to whether the officer acted recklessly. We therefore affirm the trial court's denial of the City's plea to the jurisdiction.

## **BACKGROUND**

Appellee Maria Christina Gomez was driving eastbound on Crosstimbers Road in Houston on a cold and rainy Christmas Eve. As she approached the intersection at Lockwood, the traffic light facing her turned green and she proceeded into the intersection. A City police car slid into the intersection and collided with Gomez's vehicle. According to Gomez, Bobby Joe Simmons, the officer who was driving the police car, was not using the police car's emergency lights or siren when

his car collided with hers.

That morning Simmons was on patrol when he was dispatched to respond to a nearby armed robbery in progress. According to Simmons, an armed robbery is normally a Priority One call, but dispatch reduced this call to Priority Two due to the weather conditions. Simmons testified via affidavit that as he responded to the robbery-in-progress call, he turned on his emergency lights but not his siren. Simmons explained that the Houston Police Department's policy for Priority Two calls normally requires a silent approach. Simmons further explained that an officer retains the discretion to use the emergency lights and siren on a Priority Two call when the officer deems it necessary. Simmons explained that the decision to use emergency equipment must be communicated to the dispatcher. Simmons decided that the need to apprehend the robbery suspect outweighed any minimal risk of harm to others in driving to the scene as quickly as possible. Simmons decided to activate his emergency lights, but not the siren "because of moderate traffic." Simmons did not testify that he notified dispatch of the use of his emergency lights. Simmons stated he did not need to exceed the posted speed limit of 35 miles per hour to arrive safely and quickly at the robbery scene.

Simmons arrived at the robbery-in-progress scene and was instructed to assist in the border of a perimeter to move and apprehend the suspect. Simmons made a legal U-turn to drive to the designated location and his "overhead lights were still on[.]" As his patrol car approached the intersection, Simmons looked down to increase the volume of his police radio. He then observed that the traffic control light for the intersection had turned yellow. Seeing the yellow light, Simmons immediately applied his brakes before entering the intersection. Simmons's patrol car slid on the wet pavement, slid into the intersection, and was hit by the front left of Gomez's car. Simmons repeated, "My emergency lights and car headlights were

on throughout this time.” In Simmons’s deposition, he testified that he was turning up the volume on the radio, and when he looked up, he was startled by the yellow light. Simmons also admitted that he knew the light at that intersection was “a quick light,” indicating that he knew it would not stay green for long.

Simmons completed a Police Officer’s Accident Report after the accident. In the accident report, also known as a “48 Hour Notice,” Simmons repeated that “judging the circumstances, I elected to turn on my lights as an extra precaution.”

The City also attached to its plea the affidavit of police officer Isaac Jefferson, who investigated the collision and prepared the investigation report. Jefferson noted in his affidavit that Simmons was responding to a robbery call when the collision occurred. In Jefferson’s affidavit, he stated that Simmons “decided to activate the emergency lights but not the siren of his HPD patrol vehicle despite the fact that standard response to Priority Two calls is to run silent[.]” Jefferson also stated that when Simmons made the U-turn before the accident, “[h]is overhead emergency lights were still on, as were his headlights.” Jefferson opined that “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 Simmons’[s] decisions and actions before the accident were justified and reasonable based on his perception of the facts at the time.”

In responding to the City’s plea to the jurisdiction, Gomez stated that Simmons was driving without his emergency lights and sirens when he ran a red light and hit her vehicle. Gomez attached to her response Jefferson’s report filed after the accident.

Contrary to Jefferson’s affidavit, he stated in his accident report that Simmons was driving south on Lockwood without his emergency lights or siren engaged when

the signal light changed from green to yellow. Jefferson then stated that Simmons “applied his brakes but because the roads were wet he was unable to stop.” Finally, Jefferson determined that Simmons disregarded a stop-and-go signal and was at fault in the collision.

After Gomez filed suit against the City, the City filed a plea to the jurisdiction asserting that the trial court lacked jurisdiction over the claims because the City had not waived its governmental immunity. The City made two arguments: (1) the City asserted that Simmons was protected by official immunity, which preserved the City’s governmental immunity; and (2) the City argued it was immune because the emergency exception in the Texas Tort Claims Act (the “Act”) barred any possible waiver of its governmental immunity. The trial court granted the City’s plea and dismissed Gomez’s lawsuit. Gomez appealed the trial court’s dismissal.

This court, sitting en banc, concluded that the City’s evidence of good faith in support of its immunity argument assumed the truth of a disputed fact: “that Simmons was using his overhead emergency lights as he approached the Crosstimbers intersection.” *Gomez*, 587 S.W.3d at 899. Because no evidence was presented that the standard for good faith was satisfied if Simmons did not use his car’s overhead emergency lights, we concluded the City did not demonstrate conclusively that Simmons acted in good faith. *Id.* We further concluded that the evidence raised a fact issue as to the application of the emergency exception to waiver of immunity because the evidence raised a fact issue as to whether Simmons acted recklessly. *Id.* at 902.

On remand, the City supplemented its plea to the jurisdiction, attaching Jefferson’s supplemental affidavit. In Jefferson’s supplemental affidavit, he stated, “it is my opinion that even if Officer Simmons had not activated his emergency overhead lights as he approached the intersection of Lockwood and Crosstimbers, a

reasonably prudent police officer, under the same or similar circumstances, could have believed Simmons's actions were justified based on the information that Officer Simmons possessed at the time." Jefferson further stated that "another reasonably prudent officer could have believed that the weather conditions made traveling with lights and sirens unnecessary because Officer Simmons was already engaging in a slower and more careful response."

Gomez filed a supplemental response to the City's supplemental plea in which she objected to Jefferson's supplemental affidavit as unreliable due to the contradiction of Simmons's testimony. Gomez further asserted that Jefferson's supplemental affidavit failed to address the reckless conduct recognized by this court in its decision that the emergency exception doctrine did not apply to Simmons's conduct. The trial court denied the City's supplemental plea to the jurisdiction and this appeal followed.

## ANALYSIS

In two issues on appeal the City asserts (1) the City established that Simmons acted in good faith; and (2) Gomez failed to raise a genuine issue of material fact on Simmons's good faith.

### **I. Standard of Review and Applicable Law**

We review a trial court's ruling on a plea to the jurisdiction de novo. *See Tex. Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). A defendant's plea may challenge either the plaintiffs' pleadings or the existence of jurisdictional facts. *Id.* When, as here, the governmental unit challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties. *See City of Houston v. Ranjel*, 407 S.W.3d 880, 887 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *Miranda*, 133 S.W.3d at 228). If that evidence

raises a fact issue as to jurisdiction, the governmental entity's plea must be denied because the issue must be resolved by the trier of fact. *Miranda*, 133 S.W.3d at 227–28. If the relevant evidence is undisputed or fails to present a jurisdictional fact issue, however, the court should rule on the plea as a matter of law. *Id.* The standard of review for a plea to the jurisdiction based on evidence generally mirrors that of a motion for summary judgment. *Quested v. City of Houston*, 440 S.W.3d 275, 280 (Tex. App.—Houston [14th Dist.] 2014, no pet.). We therefore must credit evidence favoring the nonmovant and draw all reasonable inferences in the nonmovant's favor. *Id.*

**II. The City did not conclusively establish official immunity because there is a disputed fact issue whether Simmons was acting in good faith.**

The City, as a municipality and political subdivision of the State, cannot be vicariously liable for an employee's acts unless its governmental immunity has been waived. *City of Pasadena v. Belle*, 297 S.W.3d 525, 529 (Tex. App.—Houston [14th Dist.] 2009, no pet.). Under the facts of this case, possible waiver of the City's immunity from suit and liability is found in section 101.021 of the Texas Tort Claims Act (the Act), which provides in relevant part:

A governmental unit in the state is liable for . . . property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law[.]

Tex. Civ. Prac. & Rem. Code § 101.021(1).

The parties agree Gomez's claims arise from the use of a motor vehicle. They

also agree that Simmons was acting within the scope of his employment when he responded to the dispatcher's call. One of the matters the parties dispute, which we address here, is whether Simmons "would be personally liable to the claimant[s] under Texas law."

The City contends the evidence, augmented by Jefferson's supplemental affidavit, conclusively establishes that Simmons retained his official immunity because he responded to the robbery call in good faith. According to the City, that means Simmons could not be personally liable to Gomez according to Texas law, and the City retains its governmental immunity. Gomez asserts on appeal that the City failed to establish good faith as a matter of law because the City's proof of good faith falls short because Jefferson's supplemental affidavit, in contradiction to his original affidavit, relies on the disputed fact that Simmons believed use of emergency equipment was not warranted.

Because official immunity is an affirmative defense, the burden rests on the City to establish all elements of the defense. *See Green v. Alford*, 274 S.W.3d 5, 16 n.11 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (en banc); *Belle*, 297 S.W.3d at 530. Under the official-immunity defense, a government employee may be immune from a lawsuit that arises from the performance of the employee's discretionary duties in good faith, provided the employee was acting within the scope of the employee's authority. *Belle*, 297 S.W.3d at 530.

In this context, a court must measure good faith against a standard of objective legal reasonableness, without regard to the police officer's subjective state of mind. *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). To be entitled to summary judgment, the City must carry the burden to prove conclusively that a reasonably prudent police officer, under the same or similar circumstances, could have believed his actions were justified based on the information he possessed at the



time. *Telthorster v. Tennell*, 92 S.W.3d 457, 465 (Tex. 2002). The City need not prove that it would have been unreasonable not to take these actions, or that all reasonably prudent officers would have taken the same actions. *See id.* Rather, the City must prove conclusively that a reasonably prudent officer, under the same or similar circumstances, might have reached the same decision. *See id.* The good-faith standard is analogous to an abuse-of-discretion standard that protects “all but the plainly incompetent or those who knowingly violate the law.” *Texas Dept. of Public Safety v. Bonilla*, 481 S.W.3d 640, 643 (Tex. 2015) (per curiam) (quoting *City of San Antonio v. Ytuarte*, 229 S.W.3d 318, 321 (Tex. 2007) (per curiam)).

In this context, good faith depends on how a reasonably prudent officer could have assessed both the need to which the officer was responding 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. *Wadewitz*, 951 S.W.2d at 467. The “need” aspect of the balancing test refers to the urgency of the circumstances requiring police intervention. *Id.* In the context of an emergency response, need is determined by factors such as: (1) the seriousness of the crime or accident to which the officer is responding; (2) whether the officer’s immediate presence is necessary to prevent injury or loss of life or to apprehend a suspect; and (3) what alternative courses of action, if any, are available to achieve a comparable result. *Id.* The “risk” aspect refers to the countervailing public-safety concerns: (1) the nature and severity of the harm 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 original emergency); (2) the likelihood that any harm would occur; and (3) whether any risk of harm would be clear to a reasonably prudent officer. *Id.*

To prevail, a governmental defendant’s proof must sufficiently address these need/risk factors. *Telthorster*, 92 S.W.3d at 462. An expert giving testimony

regarding good faith must discuss what a reasonable officer could have believed based on the officer's perception of the facts at the time of the event, and this discussion must be substantiated with reference to both the need and risk aspects of the balancing test. *See Wadewitz*, 951 S.W.2d at 466–67; *Belle*, 297 S.W.3d at 531. A reviewing court analyzing these factors first must determine whether the governmental unit met its initial burden to prove conclusively the police officer's good faith. *Id.* Only when it has been determined that the governmental unit met this burden does the court address whether the nonmovant's evidence raises a genuine issue of material fact on the issue of good faith. *Id.* With these principles in mind we address the City's supplemental evidence on remand.

A motorist approaching an intersection is required to stop and “may proceed when the intersection can be safely entered without interference or collision with traffic using a different street or roadway.” Tex. Transp. Code § 545.151(a)(2). Police officers are authorized to violate traffic laws in certain circumstances, but they may do so only when it is safe. *See* Tex. Transp. Code. § 546.001(2) (authorizing police officer to “proceed past a red or stop signal or stop sign, after slowing as necessary for safe operation.”).

The en banc court held that the City's evidence did not conclusively establish that Simmons acted in good faith because the officers' opinions were reached “by assuming the truth of disputed facts.” *Gomez*, 587 S.W.3d at 899.

Simmons stated in his affidavit, “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 . . .” But the actions to which Simmons refers include his driving with his car's overhead emergency lights activated. Jefferson originally offered his opinion that “based on all of the facts stated above, another reasonably prudent law enforcement officer,

including myself, under the same or similar circumstances could have believed that . . . all Officer Simmons'[s] decisions and actions before the accident were justified and reasonable based on his perception of the facts at the time.” One of the facts on which Jefferson based this opinion is that the overhead emergency lights of Simmons’s patrol car were on at all relevant times, despite Jefferson’s earlier accident investigation reporting that Simmons was not using his overhead lights in response to the call.

Thus, the City’s evidence of good faith assumed the truth of a disputed fact—that Simmons was using his overhead emergency lights as he approached the Crosstimbers intersection. Simmons testified that he used overhead emergency lights continuously from the beginning of his response to the armed-robbery call, but the record contains other evidence that he did not do so. This evidence includes (1) Gomez’s affidavit testimony that Simmons was not using his vehicle’s overhead emergency lights and (2) Jefferson’s determination in his investigation report that Simmons was not using his vehicle’s overhead emergency lights before the collision.

The City still does not dispute that the record contains a fact issue as to whether Simmons used his car’s overhead emergency lights, but the City argues that this fact issue is not material because, according to Jefferson’s supplemental affidavit, even if Simmons decided not to use his car’s overhead emergency lights, “the moderate traffic minimized the need to alert other motorists of his presence, and because alerting the suspect of his presence would cause the suspect to evade apprehension.” Jefferson mentioned these same reasons in his original affidavit as reasons Simmons was justified in using overhead lights without the siren. Jefferson’s supplemental affidavit fails to properly assess the needs/risk analysis in the event Simmons was not using his overhead lights. The supplemental affidavit merely states in a conclusory fashion that “another reasonably prudent officer could have believed

that the weather conditions made traveling with lights and sirens unnecessary[.]” *Cf. City of Houston v. Collins*, 515 S.W.3d 467, 478 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (detailing evidence of needs/risks assessment, including supplemental affidavits from responding officers).

Because the City did not conclusively establish Simmons’s good faith, we hold the trial court did not err in denying the City’s supplemental plea to the jurisdiction.

**III. The City did not conclusively establish official immunity because there is a disputed fact issue on whether the emergency exception applies.**

The en banc court held that because the evidence raised a material fact issue as to whether Simmons acted recklessly or with conscious indifference to the safety of others, the emergency exception to section 101.021’s waiver of immunity did not apply. *Gomez*, 587 S.W.3d at 902. On remand, the City admits it did not address this court’s holding that the emergency exception does not apply.

Under Section 101.055 of the Act, the emergency exception does not apply if the action is taken with conscious indifference or reckless disregard for the safety of others. Tex. Civ. Prac. & Rem. Code § 101.055(2). The emergency exception does not apply if the operator of the emergency vehicle acted recklessly by an act or omission the operator knew or should have known posed a high degree of risk of serious injury. *See City of Amarillo v. Martin*, 971 S.W.2d 426, 430 (Tex. 1998); *see also City of Houston v. Green*, No. 22-0295, 2023 WL 4278246, at \*2 (Tex. June 30, 2023). The en banc court cited the following evidence as raising an issue of material fact as to whether the emergency exception applies:

Simmons’s affidavit shows that he subjectively was aware of the risks created when a police officer responds to an emergency call for service. Simmons also was aware of the rainy weather and wet streets, but he did not reduce his speed below the posted speed limit to mitigate these

risks. The evidence also demonstrates that Simmons chose to (1) look down and away from the road as he approached the intersection and (2) refrain from using his patrol car's siren. Further, there is a factual dispute regarding whether Simmons was using his car's overhead emergency lights as he approached the Crosstimbers intersection. Finally, the evidence shows that Simmons applied his brakes but, because the streets were wet, he was unable to stop his patrol car before the intersection, and his car slid into the path of Gomez's car.

*Gomez*, 587 S.W.3d at 902–03 (internal footnote omitted).

The supplemental plea and Jefferson's supplemental affidavit do not address this court's determination on application of the emergency exception doctrine. Rather, the City asserts the supreme court's recent holding in *City of San Antonio v. Maspero*, 640 S.W.3d 523 (Tex. 2022) supersedes this court's holding. The City contends that under the analysis set forth in *Maspero*, there is no genuine issue of material fact because it is undisputed that Simmons engaged in some level of risk assessment precluding a finding of recklessness. In *Maspero*, the supreme court held that the plaintiffs in that case did not meet their burden negating section 101.055's applicability. *Id.* at 529–30. The court's decision was based on the facts in that case and does not affect this court's holding based on the facts in today's case.

We held in an en banc opinion that Gomez met her burden to raise a fact issue on the application of the emergency exception to waiver of governmental immunity. By the City's own admission, there has been no other evidence produced on the issue of recklessness. While recklessness is immaterial when determining whether an officer acted in good faith, *Memorial Villages Police Dept. v. Gustafson*, No. 01–10–00973–CV, 2011 WL 3612309, at \*6 (Tex. App.—Houston [1st Dist.] Aug. 18, 2011, no pet.) (mem. op.), it is part of the statutory analysis when determining whether the emergency exception applies. *See Maspero*, 640 S.W.3d at 529.

The original decision of this court is law of the case and is ordinarily binding

absent a showing that the original decision was clearly erroneous. *KHOU-TV, Inc. v. Status Lounge Inc.*, 639 S.W.3d 752, 759 (Tex. App.—Houston [14th Dist.] 2021, no pet.) (citing *Briscoe v. Goodmark Corp.*, 102 S.W.3d 714, 716 (Tex. 2003)). Because no further evidence was submitted on remand to refute this court’s holding that a material issue of fact exists as to whether Simmons acted recklessly or with conscious indifference to the safety of others, we decline to reconsider this issue.

### CONCLUSION

We overrule the City’s issues on appeal and affirm the trial court’s judgment denying the plea to the jurisdiction.

/s/ Jerry Zimmerer  
Justice

Panel consists of Justices Zimmerer, Hassan, and Wilson. (Wilson, J., dissenting).