

**Reversed and Rendered and Majority Opinion and Dissenting Opinion filed
November 30, 2023.**



In The

Fourteenth Court of Appeals

NO. 14-22-00223-CV

KLEIN INDEPENDENT SCHOOL DISTRICT, Appellant

V.

JOHN WARDLAW, Appellee

**On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 2020-23508**

DISSENTING OPINION

According to Klein ISD, Ybarra was responding to a report of a man with a gun at an elementary school on the night of November 29, 2018. Klein ISD avers that Ybarra was driving to the school with the emergency lights and siren on his police car activated, attempting to cross Spring Cypress Road's four lanes and two turn lanes. At the intersection, Ybarra's southbound traffic light was red. Although the westbound lanes of traffic on Spring Cypress Road stopped for Ybarra, not all

the eastbound lanes of traffic stopped. Wardlaw, who was in the farthest eastbound lane and whose traffic signal was green, drove into the intersection and collided with Ybarra's police car.

The trial court denied Klein ISD's motion for summary judgment, which asserted immunity based on the emergency exception in the Texas Tort Claims Act:

This chapter does not apply to a claim arising:

....

(2) from the action of an employee while responding to an emergency call or reacting to an emergency situation *if the action is in compliance with the laws and ordinances applicable to emergency action*, or in the absence of such a law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others.

Tex. Civ. Prac. & Rem. Code Ann. § 101.055(2) (emphasis added). Under Texas law applicable to emergency action, the operator of an emergency vehicle responding to an emergency call may “proceed past a red or stop signal or stop sign, after slowing as necessary for safe operation.” Tex. Transp. Code Ann. § 546.001(2). Klein ISD retains immunity if Wardlaw fails to raise a fact issue as to whether Ybarra complied with this section of the Texas Transportation Code. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.055(2); *City of San Antonio v. Maspero*, 640 S.W.3d 523, 529 (Tex. 2022).

Wardlaw argues he raised a fact issue as to whether Ybarra “slow[ed] as necessary for safe operation” under § 546.001(2) based on the trooper's deposition testimony and incident report. *See* Tex. Civ. Prac. & Rem. Code Ann. § 546.001(2). Because the majority disregards the trooper's testimony concerning Ybarra's actions, which provides more than a scintilla of evidence disputing

Ybarra’s compliance with § 546.001(2), and instead focuses on recklessness,¹ the majority reaches the wrong conclusion. According to the deposition testimony of Trooper Brown, the statute “requires you to slow down or either come to a complete stop or at least . . . you’re slowing down to a point where you can properly clear the intersection before continuing through.” Trooper Brown testified this meant “slowing down 100 percent, clearing the intersection completely.” Ybarra thus had to stop or reduce his speed to safely clear two westbound traffic lanes and one turn lane, and then one eastbound turn lane and two traffic lanes of a major intersection. The trooper, who viewed security video of the incident, described how Ybarra reduced his speed for the westbound lanes more than he did for the eastbound lanes. Because their traffic signal was green, the eastbound traffic had already started edging forward. For the eastbound lanes, Trooper Brown testified that “I would have slowed down more.” He explained that “from watching the video, [Ybarra] slowed down completely, went through the first intersection great, good. I’m saying he could have tried a little bit more on the second intersection, that’s all I’m saying.” Trooper Brown further stated that “[Ybarra] could have done a little bit more due diligence to try and like make sure he clears the intersection properly.” But Ybarra did not stop or slow for the eastbound traffic. Instead, Ybarra and Wardlaw collided in the eastbound lanes in what Trooper Brown described as “a massive explosion in the middle of an intersection.”

Further ignoring Trooper Brown’s testimony that the eastbound traffic was already moving, the majority states that Ybarra “saw that cross-traffic from both

¹ See *City of Houston v. Green*, 672 S.W.3d 27, 29–30 (Tex. 2023) (per curiam) (“But this waiver does not apply if the employee was responding to an emergency, complied with applicable laws, and—in the absence of applicable laws—did not act with conscious indifference or reckless disregard for the safety of others . . .”).

directions had stopped.” The majority also wrongly concludes that Ybarra’s speed “establishes compliance with Transportation Code section 546.001(2)” because “he drove ten to fifteen miles per hour through the intersection.” This is a flawed conclusion, based not on Ybarra’s carefully-worded affidavit, which states: “I estimate that as I went through the intersection, I was traveling *at least* 10 mph to 15 mph with my lights and siren on,” (emphasis added), but on a revised account of Ybarra’s statement. Rather than confirming the majority’s conclusion that Ybarra was driving slowly, the evidence shows he was driving at a great enough speed for a major collision. The incident report includes a diagram of the accident scene, showing that the impact with Ybarra’s patrol car forced Wardlaw’s car “into a clockwise spin” back and off the roadway into a grassy ditch, where it “came to a rest facing westbound,” opposite its original eastbound direction.

Moreover, Trooper Brown testified in his deposition that “I called both parties a couple of days after the crash and they advised me they had no recollection of the crash incident.” Trooper Brown repeated this a second time, testifying that “I called both parties a couple of days after — after the crash . . . and I was advised they had — they didn’t remember the crash that day.” He explained that after a major crash it is common for persons to “lose all memory of that bad incident.” This testimony, that Ybarra stated he had no memory of the accident, contradicts Ybarra’s statements in his sworn affidavit that he slowed for both westbound and eastbound traffic, drove through the intersection *at least* ten to fifteen miles per hour, and observed stopped traffic on both sides of Spring Cypress Road.

The majority brushes this contradiction aside and instead faults Wardlaw for not presenting his own controverting affidavit to dispute whether Ybarra slowed as necessary for safe operation. The majority also faults Wardlaw for not obtaining a

controverting affidavit from the “numerous other drivers who potentially witnessed the accident.” However, the majority fails to mention that Wardlaw and Ybarra were transported by ambulance to the hospital from the accident scene and there were no witnesses reported. And the trooper, a disinterested witness with experience in investigating 100 accidents and at least 20 officer-involved collisions, who viewed the collision on video, summarized the actions Ybarra should have taken to safely clear the intersection pursuant to § 546.001(2). Rather than address the fact issue raised by this evidence, the majority focuses on reckless disregard in concluding that Klein ISD is entitled to summary judgment based on immunity.

The evidence shows that eastbound traffic had started moving through a green traffic signal, that Ybarra should have stopped or slowed before entering the eastbound lanes for safe operation; and that Ybarra stated he had no memory of the accident in contradiction of his sworn affidavit. Wardlaw thus presented some evidence that Ybarra did not comply with § 546.001(2) of the Texas Transportation Code. *See Maspero*, 640 S.W.3d at 529; *City of Amarillo v. Martin*, 971 S.W.2d 426, 428 n.1 (Tex. 1998); *see also, e.g., Gwynn v. Tobin*, No. 03-02-00759-CV, 2003 WL 21554331, at *4 (Tex. App.—Austin July 11, 2003, no pet.) (mem. op.) (concluding a fact issue existed where evidence showed in part that ambulance did not slow as necessary for safe operation under § 546.001(2)). Wardlaw raised a fact issue as to whether Ybarra complied with § 546.001(2) of the Transportation Code, which precludes summary judgment for Klein ISD.

Because the trial court correctly denied Klein ISD's motion for summary judgment, I respectfully dissent and would affirm the trial court's denial of summary judgment.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Justices Wise, Jewell, and Poissant (Jewell, J., majority).