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

M A J O R I T Y   O P I N I O N

Appellant Klein Independent School District appeals the denial of its immunity-based motion for summary judgment.[1] John Wardlaw sued Klein ISD after he was involved in a car accident with a Klein ISD police officer who was responding to an emergency. Klein ISD contends it is entitled to immunity under

[1] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(5); *Austin State Hosp. v. Graham*, 347 S.W.3d 298, 300 (Tex. 2011).

the emergency response exception to the Texas Tort Claims Act. We reverse and render judgment for Klein ISD.

Background

Klein ISD police officer Thomas Ybarra responded to a report of a person with a gun at an elementary school. Driving a marked police vehicle, Officer Ybarra activated the emergency lights and siren. He drove southbound on Hutsmith-Kohrville Road at less than the 45 mile per hour speed limit. As he approached a lighted intersection with Spring Cypress, he slowed because westbound and eastbound traffic on Spring Cypress had the green light. He saw the southbound vehicles in front of him clear a path by pulling over. Closer to the intersection, Officer Ybarra saw traffic traveling both westbound and eastbound on Spring Cypress had completely stopped. He reduced his speed further prior to entering the intersection. Crossing the westbound lanes of Spring Cypress, he saw traffic remained at a stop. He estimated that he was traveling at least ten to fifteen miles per hour as he drove through the intersection, with his emergency lights and siren still activated. Checking eastbound traffic again, he saw the headlights of stopped cars as well as the headlights of Wardlaw's car approaching from the southernmost eastbound lane. Wardlaw's car struck the passenger side front end of Officer Ybarra's car. Both drivers were transported to the hospital.

Department of Public Safety Trooper Mackenzie Brown arrived on the scene and investigated the accident. Though Officer Ybarra's vehicle was not equipped with a dashboard camera, Trooper Brown viewed security camera footage of the accident captured at a nearby gas station. According to Trooper Brown, the footage showed that Officer Ybarra's emergency lights were activated as he approached the intersection and that he "slowed down completely" before entering the intersection. At his deposition, Trooper Brown acknowledged that Officer

Ybarra appeared to slow down more for the westbound lanes of Spring Cypress than he did for the eastbound lanes. Trooper Brown said that, had he been in Officer Ybarra's position, he would have slowed down more than Officer Ybarra did for the eastbound lanes. Nevertheless, in Trooper Brown's opinion, and based on the security footage, Officer Ybarra was not reckless and slowed his vehicle as necessary for safe operation. Trooper Brown determined that Wardlaw caused the accident because he failed to yield the right-of-way to an emergency vehicle.[2]

Wardlaw asserted a negligence claim against Klein ISD. Klein ISD filed a no-evidence and traditional motion for summary judgment, contending that it was immune from suit under the Tort Claims Act's emergency response exception[3] because Officer Ybarra was responding to an emergency and his actions complied with applicable law and were not reckless. The trial court denied the motion for summary judgment, and Klein ISD timely appealed.

Standard of Review

Governmental units are immune from suit unless immunity is waived by state law. *City of San Antonio v. Maspero*, 640 S.W.3d 523, 528 (Tex. 2022). The Texas Tort Claims Act ("TTCA") waives immunity for the negligent acts of government employees in specific, narrow circumstances. *Id.*; *see* Tex. Civ. Prac. & Rem. Code § 101.021. The party suing a governmental unit bears the burden of affirmatively showing a waiver of immunity. *Maspero*, 640 S.W.3d at 528.

Governmental immunity is a jurisdictional question that may be raised by motion for summary judgment, which we review de novo. *See Tex. Dep't of Parks*

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[2] Trooper Brown formed these opinions without having interviewed either Officer Ybarra or Wardlaw, both of whom had been transported to the hospital by the time he arrived at the scene.

[3] Tex. Civ. Prac. & Rem. Code § 101.055.

& Wildlife v. Miranda, 133 S.W.3d 217, 226 (Tex. 2004). To obtain a traditional summary judgment, a movant must produce evidence showing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 551 (Tex. 2019). The nonmovant may raise a genuine issue of material fact by producing "'more than a scintilla of evidence establishing the existence of the challenged element.'" *Id.* (quoting *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004)). We take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Miranda*, 133 S.W.3d at 228.

Analysis

Klein ISD contends that the trial court erred in denying its summary-judgment motion because it has immunity from Wardlaw's claims under the emergency response exception to the TTCA's immunity waiver.

A. The record establishes that the emergency response exception applies.

The relevant waiver of immunity provision is found in Civil Practice and Remedies Code section 101.021, which provides:

> 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).

Klein ISD contends that, despite section 101.021(1)'s immunity waiver, it retains immunity from suit as a matter of law based on the emergency response exception contained in section 101.055(2).[4] For the emergency response exception to apply, the record must establish that the governmental employee was responding to an emergency and either (a) the employee was "in compliance with the laws and ordinances applicable to emergency action," or (b) in the absence of such a law or ordinance, the employee was not consciously indifferent or reckless. *See id.* § 101.055(2); *Rattray v. City of Brownsville*, 662 S.W.3d 860, 865-66 (Tex. 2023). Klein ISD urged in its summary-judgment motion and urges on appeal that Officer Ybarra was responding to an emergency call and that his actions were compliant with applicable Transportation Code provisions, namely sections 546.001(2), 546.003, and 546.005. Sections 546.001(2) and 546.003 permit emergency vehicle operators to "proceed past a red or stop signal or stop sign, after slowing as necessary for safe operation,"[5] and "use, at the discretion of the operator in accordance with [applicable] policies . . . audible or visual signals."[6] Section 546.005 states that the chapter "does not relieve the operator of an authorized emergency vehicle from: (1) the duty to operate the vehicle with appropriate regard for the safety of all persons; or (2) the consequences of reckless disregard for the safety of others."[7] Klein ISD contends that Officer Ybarra acted consistently with these provisions because he slowed his vehicle before proceeding through the intersection, he activated his lights and siren, and he was not reckless. Klein ISD

[4] That section states: "This chapter does not apply to a claim arising . . . 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 § 101.055(2).

[5] Tex. Transp. Code § 546.001(2).

[6] *Id.* § 546.003.

[7] *Id.* § 546.005.

relies on Officer Ybarra's affidavit and Trooper Brown's crash report, summarized above. Both were attached to its summary-judgment motion.

We first consider whether the summary-judgment record demonstrates Officer Ybarra's compliance with the cited Transportation Code provisions in this emergency situation.[8] The "reckless disregard" standard in section 546.005, as the supreme court has repeatedly stated, involves more than a "momentary judgment lapse." *City of Houston v. Green*, 672 S.W.3d 27, 30 (Tex. 2023); *Maspero*, 640 S.W.3d at 531. It requires a "willful or wanton disregard for the safety of persons or property," exhibiting "conscious indifference" while having "subjective awareness of an extreme risk." *Green*, 672 S.W.3d at 30. To drive with reckless disregard, the driver must commit "an act he knew or should have known posed a high degree of risk of serious injury" to others. *Id.*; *Harris County v. Spears*, No. 14-17-00662-CV, 2018 WL 4571841, at *3 (Tex. App.—Houston [14th Dist.] Sept. 25, 2018, no pet.) (mem. op.).

Before Officer Ybarra reached the intersection with Spring Cypress, he was driving less than the speed limit of forty-five miles per hour. He testified that he slowed down before reaching the intersection, as other cars in front of him moved aside. Trooper Brown confirmed that Officer Ybarra "slowed down completely" before entering the intersection based on the gas station security camera video. Before entering the intersection, Officer Ybarra looked and saw that traffic traveling both westbound and eastbound on Spring Cypress had completely stopped. He reduced his speed further and proceeded through the intersection at approximately ten to fifteen miles per hour. He saw that eastbound traffic had also stopped but did not see Wardlaw's car approaching until just before impact. Trooper Brown opined that Officer Ybarra was not reckless and that he slowed his

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[8] Wardlaw does not dispute that Officer Ybarra was responding to an emergency.

vehicle as necessary for safe operation. Additionally, Officer Ybarra activated his emergency lights and siren at the moment he received the call to respond, and they remained activated throughout the incident. Trooper Brown testified that the security video showed that Officer Ybarra's lights were activated when the crash occurred.

This evidence shows that Officer Ybarra did not act with reckless disregard for the safety of others in violation of section 546.005. Our conclusion comports with the holdings of the supreme court and many intermediate courts, including this one, on comparable facts. *See, e.g.*, *Green*, 672 S.W.3d at 29, 31; *City of Houston v. Frazier*, No. 01-21-00318-CV, 2022 WL 1216181, at *13-16 (Tex. App.—Houston [1st Dist.] Apr. 26, 2022, no pet.) (mem. op.); *Spears*, 2018 WL 4571841, at *6-7; *Tex. Dep't of Pub. Safety v. Sparks*, 347 S.W.3d 834, 841-42 (Tex. App.—Corpus Christi 2011, no pet.); *City of Laredo v. Varela*, No. 04-10-00619-CV, 2011 WL 1852439, at *4 (Tex. App.—San Antonio May 11, 2011, pet. denied) (mem. op.); *City of Pasadena v. Kuhn*, 260 S.W.3d 93, 99-100 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *City of San Angelo Fire Dep't v. Hudson*, 179 S.W.3d 695, 701-02 (Tex. App.—Austin 2005, no pet.); *Smith v. Janda*, 126 S.W.3d 543, 545-46 (Tex. App.—San Antonio 2003, no pet.).

Moreover, the above evidence establishes compliance with Transportation Code section 546.001(2) because Officer Ybarra did not exceed the speed limit when approaching the intersection, slowed his vehicle and looked both ways before entering the intersection, saw that cross-traffic from both directions had stopped, and drove ten to fifteen miles per hour through the intersection. *See Green*, 672 S.W.3d at 31; *Frazier*, 2022 WL 1216181, at *12-14; *Spears*, 2018 WL 4571841, at *6-7; *Sparks*, 347 S.W.2d at 841; *Hudson*, 179 S.W.3d at 700-01; *Smith*, 126 S.W.3d at 546. The evidence also shows compliance with section

546.003 because Officer Ybarra's emergency lights and siren were activated from the time he received the call until the collision. *See Frazier*, 2022 WL 1216181, at *12-14; *Hudson*, 179 S.W.3d at 700-01.

Thus, we conclude that the summary-judgment record demonstrates Officer Ybarra's compliance with Transportation Code sections 546.001(2), 546.003, and 546.005. Because he was responding to an emergency, his compliance with these applicable laws entitles Klein ISD to summary judgment under the emergency response exception unless Wardlaw has negated the exception's applicability. *See Maspero*, 640 S.W.3d at 529 (plaintiff bears burden to negate applicability of emergency response exception).

B. Wardlaw's evidence does not create a fact issue regarding the exception's applicability.

Wardlaw asserts that fact questions exist concerning violations of each of the Transportation Code provisions at issue. His argument regarding reckless disregard under section 546.005 overlaps with his arguments concerning sections 546.001(2) and 546.003. Specifically, Wardlaw says that fact questions remain as to Officer Ybarra's compliance with sections 546.001(2) (slow as necessary for safe operation) and 546.003 (emergency equipment), and that Officer Ybarra's failure to comply with those provisions are the reasons why he was reckless. As summary-judgment evidence, Wardlaw relied on Officer Ybarra's affidavit and Trooper Brown's deposition transcript.

1. Section 546.001(2)

Considering all uncontroverted evidence and affording Wardlaw the benefit of any disputed evidence, we conclude that neither Officer Ybarra's affidavit nor Trooper Brown's deposition contain a scintilla of evidence that Officer Ybarra failed to slow his vehicle as necessary for safe operation in violation of section

546.001(2). To begin with, Wardlaw has not come forward with any witness testimony or other evidence to controvert the facts as described by Officer Ybarra and Trooper Brown that Officer Ybarra continued to slow down, or "slowed down completely," before entering the intersection and drove approximately ten to fifteen miles per hour through the intersection. Instead, Wardlaw cites Trooper Brown's testimony where he stated: (1) that he "would have slowed down more" than Officer Ybarra did before crossing the second part of the intersection; (2) that Officer Ybarra "could have done a little bit more due diligence to try and like make sure he clears the intersection properly"; and (3) that "especially in large intersections like this, you got to pay a little bit more attention because some people just don't pay attention or they're in their own little world."

Trooper Brown's testimony is insufficient to create a fact question as to compliance with section 546.001(2). *See Green*, 672 S.W.3d at 31 (no fact question on compliance with sections 546.001(2) or 546.005 when officer's average speed was thirty-five to forty miles per hour and he slowed his speed before each intersection); *Spears*, 2018 WL 4571841, at *7 (when officer slowed to "almost complete stop" before entering intersection, and drove through red light at ten to fifteen miles per hour, court held such evidence did not raise a fact question on recklessness or failure to comply with section 546.001(2)); *Sparks*, 347 S.W.2d at 841; *Kuhn*, 260 S.W.3d at 100. Testimony that Trooper Brown would have driven slower or that, in Trooper Brown's view, Officer Ybarra "could have" shown more "due diligence" at most raises only an issue of Officer Ybarra's negligence. But any momentary lapse in judgment does not create a genuine issue of material fact that he acted with conscious indifference or reckless disregard or otherwise failed to slow the vehicle as necessary for safe operation. *See Green*, 672 S.W.3d at 31 (evidence that officer proceeded against red light at intersection

without coming to a complete stop may support momentary lapse of judgment, but not reckless disregard); *Spears*, 2018 WL 4571841, at *7 (accident review board's notice showing that deputy "failed to exercise due care when operating a county patrol vehicle by running a Red Light" was no evidence that the deputy acted recklessly); *City of Arlington v. Barnes*, No. 02-07-00249-CV, 2008 WL 820385, at *4-5 (Tex. App.—Fort Worth Mar. 27, 2008, pet. denied) (mem. op.) (written reprimand that officer "failed to exercise due care" and did not comply with section 546.005 showed only that officer acted negligently and did not raise fact issue on reckless disregard).

We hold that Wardlaw's evidence does not raise a genuine issue of material fact that Officer Ybarra either failed to comply with section 546.001(2) or acted with reckless disregard based on a purported violation of section 546.001(2).

2. Section 546.003

We next consider whether Wardlaw presented evidence creating a genuine issue of material fact that Officer Ybarra failed to comply with section 546.003.

As part of this argument, Wardlaw challenges Officer Ybarra's affidavit as incompetent summary-judgment evidence because it is self-serving, not credible, assumes the truth of disputed facts, and fails to demonstrate personal knowledge. We disagree.

Summary judgment may be granted based on uncontroverted testimonial evidence of an interested witness if that evidence "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); *see Casso v. Brand*, 776 S.W.2d 551, 558 (Tex. 1989); *Brandes v. Rice Tr., Inc.*, 966 S.W.2d 144, 149 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Whether testimony satisfies this

rule and is sufficient to support summary judgment is decided on a case-by-case basis. *Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 399 (Tex. App.—San Antonio 2000, no pet.). The language "'could have been readily controverted' does not simply mean that the movant's summary judgment proof could have been easily and conveniently rebutted. Rather, it means that testimony at issue is of a nature which can be effectively countered by opposing evidence." *Brandes*, 966 S.W.2d at 149 (quoting *Casso*, 776 S.W.2d at 558). Allowing interested witness testimony that satisfies the rule to support summary judgment is particularly appropriate "when the opposing party has the means and opportunity of disproving the testimony, if it is not true, and fails to do so." *See Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 91 (Tex. App.—Dallas 1996, writ denied) (citing *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 882 (Tex. 1990)). Summary judgment is inappropriate, however, if the credibility of the affiant is likely to be a dispositive factor in the resolution of the case. *Casso*, 776 S.W.2d at 558.

Wardlaw asserts that Officer Ybarra's affidavit is incompetent because it is self-serving. The mere fact that summary-judgment proof is self-serving does not necessarily make the evidence an improper basis for summary judgment. *See Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997) (per curiam). Interested witness testimony is often "self-serving"; but so long as an interested witness affidavit satisfies rule 166a(c), it may support summary judgment. *See id.*

Wardlaw contends the affidavit is incompetent because it lacks credibility. As support for this argument, he cites Trooper Brown's testimony that the trooper attempted to contact both Officer Ybarra and Wardlaw a "couple of days" after the

crash and was advised that they did not remember the crash. Trooper Brown explained that this is not uncommon in major crashes.[9]

The key facts at issue are whether Officer Ybarra activated his lights and siren and whether he slowed his vehicle as necessary for safe operation. Klein ISD's evidence establishes that he did. These are matters susceptible of objective proof and are of a "nature which can be effectively countered by opposing evidence." *Casso*, 776 S.W.2d at 558; *Brandes*, 966 S.W.2d at 149. Significantly, Wardlaw did not present his own controverting affidavit disputing these facts, even though he was involved in the crash. There were numerous other drivers who potentially witnessed the accident, yet Wardlaw did not come forward with a controverting affidavit from any other driver or bystander to dispute Officer Ybarra's version. There is no deposition testimony from Wardlaw or Officer Ybarra in the summary-judgment record. According to Trooper Brown, Officer Ybarra's description of the accident was confirmed by the gas station security video.

We do not view these circumstances as presenting a situation where Officer Ybarra's credibility as to the material facts is a "dispositive factor" in the resolution of the case. *See Casso*, 776 S.W.2d at 558; *Packer v. The Travelers Indem. Co. of R.I.*, 881 S.W.2d 172, 175 (Tex. App.—Houston [1st Dist.] 1994, no writ). Officer Ybarra's affidavit is clear, positive and direct, free from contradictions and inconsistencies, and could have been readily controverted. Tex. R. Civ. P. 166a(c). Wardlaw had the means and opportunity to disprove Officer Ybarra's testimony, if it was not true, but failed to do so. *See Hanssen*, 938 S.W.2d at 91.

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[9] Officer Ybarra had surgery the day of the accident.

Next, Wardlaw contends that Officer Ybarra's affidavit is incompetent because it assumes the truth of disputed facts. Wardlaw, however, does not specify the particular facts in the affidavit that he contends are disputed. As explained, he presented no evidence to controvert the material facts. No witness testified that Officer Ybarra's emergency equipment was not activated or that he failed to slow down before entering the intersection.

Finally, Wardlaw says the affidavit is incompetent because it fails to demonstrate Officer Ybarra's personal knowledge of the stated facts. To the contrary, Officer Ybarra averred that he was employed as a Klein ISD police officer on the date in question and that he had personal knowledge of the facts stated in the affidavit, which he swore were true and correct. Further, he gave a detailed account of his own actions after receiving the emergency call. Both the assertions contained in the affidavit and the description of events and actions taken by Officer Ybarra are more than sufficient to demonstrate his personal knowledge of the facts. *See* Tex. R. Civ. P. 166a(f); *Rubio v. Shields*, No. 01-22-00084-CV, 2022 WL 17981665, at *3-4 (Tex. App.—Houston [1st Dist.] Dec. 29, 2022, no pet.) (mem. op.).

Thus, we conclude that Officer Ybarra's affidavit is competent summary-judgment evidence and is properly considered. *See Lukasik*, 21 S.W.3d at 399-400; *Brandes*, 966 S.W.2d at 149-50; *Packer*, 881 S.W.2d at 175.

Wardlaw suggests that fact questions exist as to compliance with section 546.003 because Trooper Brown testified that he did not personally see that Officer Ybarra's lights were on because they had been deactivated by the time he arrived on the accident scene. According to Wardlaw, Trooper Brown "conceded that he never actually saw the lights or heard the sirens himself." That Trooper Brown did not personally witness any part of the accident does not constitute evidence that

Officer Ybarra in fact did not activate his emergency equipment. Trooper Brown saw from the gas station video that the lights on Officer Ybarra's vehicle were on at the time of the collision, and Wardlaw did not offer any controverting proof. Trooper Brown's cited testimony does not raise a genuine issue of material fact that Officer Ybarra failed to comply with section 546.003.

Wardlaw urges us to affirm the order based on court decisions denying summary judgment when the use of emergency lights or sirens was a disputed fact. He cites *Rivera v. City of Houston*, No. 01-19-00629-CV, 2022 WL 2163025, at *8 (Tex. App.—Houston [1st Dist.] June 16, 2022, no pet.) (mem. op.); *City of Missouri City v. Passante*, No. 14-09-00634-CV, 2010 WL 2998777, at *8 (Tex. App.—Houston [14th Dist.] Aug. 3, 2010, no pet.) (mem. op.), and *City of Pasadena v. Belle*, 297 S.W.3d 525, 535 (Tex. App.—Houston [14th Dist.] 2009, no pet.). These cases are factually distinguishable because in each instance the nonmovant presented controverting evidence that the official was not operating emergency lights and sirens. Wardlaw filed no affidavits or depositions that Officer Ybarra failed to activate his lights and siren.

In sum, considering the uncontroverted evidence and accepting all disputed facts in Wardlaw's favor, the record does not contain a scintilla of evidence that Officer Ybarra acted with reckless disregard for the safety of others in violation of Transportation Code section 546.005 or that he failed to comply with sections 546.001(2) or 546.003. The record establishes as a matter of law that the emergency response exception applies, and Wardlaw did not meet his burden to negate its applicability. We therefore sustain Klein ISD's issue on appeal and conclude that the TTCA does not waive Klein ISD's immunity from suit as to Wardlaw's claims.

Conclusion

We reverse the trial court's order denying Klein ISD's motion for summary judgment, and we render judgment dismissing Wardlaw's claims against Klein ISD.

/s/ Kevin Jewell
Justice

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