



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00309-CV

CITY OF SAN ANTONIO,
Appellant

v.

Patrick **TORRES** and Johnnie Dears,
Appellees

From the County Court at Law No. 2, Bexar County, Texas
Trial Court No. 391356
Honorable Karen Crouch, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: November 15, 2017

AFFIRMED

This case arises out of a collision between a City of San Antonio police vehicle and a pickup truck in which appellees Patrick Torres and Johnnie Dears were passengers. In this interlocutory appeal, the City of San Antonio contends the trial court erred by denying its plea to the jurisdiction based on the emergency exception to the waiver of immunity in the Texas Tort Claims Act. We hold the trial court did not err in denying the City's plea.

BACKGROUND

Patrick Torres and Johnnie Dears were passengers in a truck traveling eastbound on Nolan Street in San Antonio. As the truck entered the intersection at Mittman, it was struck by a vehicle driven by San Antonio police officer Francisco Galvan. Officer Galvan was driving southbound on Mittman without his emergency lights or sirens activated, and he failed to heed the stop sign at the intersection of Mittman and Nolan, resulting in the collision. Officer Galvan testified he was responding to an “officer in trouble” call. Torres and Dears sued the City of San Antonio for personal injury damages, alleging that Officer Galvan negligently caused the collision. The City filed a plea to the jurisdiction, asserting its governmental immunity from suit had not been waived because at the time of the collision, Officer Galvan was responding to an emergency situation, his actions were in compliance with the applicable statutes and ordinances, and he did not act with conscious indifference or reckless disregard for the safety of others. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.055 (West 2011). Torres and Dears amended their petition and responded to the plea. After a hearing, the trial court denied the City’s plea to the jurisdiction and this interlocutory appeal followed. *See id.* § 51.014(a)(8) (West Supp. 2016).

On appeal, the City argues the trial court erred because (1) Torres and Dears failed to plead facts demonstrating jurisdiction exists, (2) the City presented sufficient evidence to support its plea that Galvan complied with applicable laws and did not act with conscious indifference or recklessly in responding to an emergency, and (3) Torres and Dears failed to present evidence raising a fact issue regarding the jurisdictional facts.

GOVERNMENTAL IMMUNITY AND PLEA TO THE JURISDICTION

As a governmental unit, the City is immune from suit unless that immunity has been waived. Because governmental immunity defeats a trial court’s subject matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *See Tex. Dep’t of Parks & Wildlife v. Miranda*, 133

S.W.3d 217, 225-26 (Tex. 2004). The Texas Tort Claims Act waives governmental immunity for claims for personal injury arising from the operation or use of a vehicle if the government employee would be personally liable to the claimant according to Texas law. TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1) (West 2011). However, the Act modifies that waiver of immunity when the claim arises “from the action of an employee while responding to an emergency call or reacting to an emergency situation.” *Id.* § 101.055(2). The governmental unit’s immunity is not waived in those cases if the employee’s “action is in compliance with the laws and ordinances applicable to emergency action, or in the absence of such law or ordinance, if the action is not taken with conscious indifference or reckless disregard for the safety of others.” *Id.*

The laws applicable to emergency vehicles allow the operator of an authorized emergency vehicle to exceed the maximum speed limit “as long as the operator does not endanger life or property,” and to proceed past a stop sign “after slowing as necessary for safe operation.” TEX. TRANSP. CODE ANN. § 546.001(2), (3) (West 2011). Although the operator of an emergency vehicle has a duty to operate the vehicle “with appropriate regard for the safety of all persons,” liability is imposed only for reckless conduct. *Id.* § 546.005(1); *City of Amarillo v. Martin*, 971 S.W.2d 426, 429-230 (Tex. 1998) (interpreting TEX. REV. CIV. STAT. art. 6701d, § 24(e), repealed by Act of May 1, 1995, 74th Leg., R.S., ch. 165, §§ 1, 24, 1995 TEX. GEN. LAWS 1025, 1870 (current version at TEX. TRANSP. CODE ANN. § 546.001-.005)). An operator of an emergency vehicle is reckless if he commits an act he knows or should know poses a high degree of risk of serious injury. *Martin*, 971 S.W.2d at 430.

A plea to the jurisdiction may assert the plaintiff failed to allege facts demonstrating the court’s jurisdiction to hear the case and may also challenge the existence of jurisdictional facts. *Miranda*, 133 S.W.3d at 226-27. We review the challenge to the pleadings to determine whether the plaintiffs allege sufficient facts to affirmatively demonstrate the trial court’s jurisdiction to hear

the case. *Id.* at 226. In our review, we construe the pleadings liberally in the plaintiffs' favor and look to the pleaders' intent. *Id.*

When the plea challenges jurisdictional facts that are inextricably bound to the merits of the controversy, the trial court must examine the evidence presented and determine if a fact issue exists. *Id.* at 227. The procedure and our review mirror that of summary judgment practice. *See id.* at 228. Initially, the governmental unit "carries the burden to meet the summary judgment proof standard for its assertion that the trial court lacks jurisdiction." *Mission Consol. Indep. Sch. Dist. v. Garcia*, 372 S.W.3d 629, 635 (Tex. 2012). If the governmental unit presents evidence meeting that burden, the plaintiffs must show there is a disputed material fact regarding the jurisdictional issue. *Id.* "If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder. However, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea to the jurisdiction as a matter of law." *Miranda*, 133 S.W.3d at 227-28.

We review de novo the trial court's ruling on the plea to the jurisdiction. *Id.* at 228. We take as true all evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.*

DISCUSSION

On appeal, the City challenges the sufficiency of Torres's and Dears's pleadings and their ability to factually defeat governmental immunity. The City contends that it presented sufficient evidence to support its plea and that Torres and Dears failed to raise a fact issue regarding the application of the emergency exception.

Sufficiency of Pleading

The City argues appellees' pleading is insufficient to confer jurisdiction on the trial court because their Second Amended Petition does not contain allegations that Officer Galvan acted with conscious indifference or reckless disregard for the safety of others. In response to the City's plea to the jurisdiction and before the trial court's ruling on the plea, Torres and Dears filed their Third Amended Petition. That petition alleges that Officer Galvan, while acting within the scope of his employment, caused the accident and their injuries. It alleges Officer Galvan drove inattentively, failed to keep a proper lookout, failed to control his speed, failed to heed a stop sign, and failed to operate his vehicle with appropriate regard for the safety of others. In addition to alleging Officer Galvan acted negligently, the Third Amended Petition alleges Officer Galvan "operate[d] his motor vehicle with reckless disregard for the safety of others." Liberally construing the pleading, as we are required to do, we conclude appellees stated a claim against the City arising from its employee's driving with reckless disregard for the safety of others. *See id.*

Sufficiency of City's evidence to support plea

The City's challenge to the jurisdictional facts was premised on its assertions that Officer Galvan was responding to an emergency call, complied with applicable laws, and did not drive recklessly or with conscious indifference to the safety of others. Because this element of the immunity inquiry is inextricably bound to the merits of appellees' claim, the burdens and our review mirror summary judgment practice. *See Mission*, 372 S.W.3d at 635; *Miranda*, 133 S.W.3d at 228. The City contends it supported its plea to the jurisdiction with sufficient evidence to meet its burden and shift the burden to appellees to present evidence creating a fact issue.

To meet its initial burden, the City was required to present evidence establishing Officer Galvan was responding to an emergency call, complied with the laws applicable to an emergency, and did not operate his vehicle recklessly or with conscious indifference to the safety of others.

See Mission, 372 S.W.3d at 635, 637 (plaintiff is required to submit evidence in response to plea only if defendant first presents evidence meeting summary judgment standard that negates jurisdictional factual element of case). In support of its plea, the City submitted Officer Galvan's affidavit with a copy of a Texas Peace Officer's Crash Report attached and short excerpts from Officer Galvan's deposition. Appellees' response included an excerpt from Patrick Torres's deposition. No further evidence was presented to the trial court.

The City's evidence

Officer Galvan states in his affidavit that he was on patrol in his City vehicle at 5:40 p.m. when he received a dispatch that an officer had three suspects at gunpoint and was "in trouble." Officer Galvan also states he turned his car around to travel southbound on Mittman Street to the location of the incident. Officer Galvan "decided not to engage his lights or sirens" because he was in "close proximity to the dangerous situation" and did not want to escalate the situation or to spook or frighten the suspects. The affidavit states generally that Officer Galvan "continued to evaluate the traffic conditions," "[t]he traffic conditions were good," "[t]he road was not heavily traveled at the time," "[t]here were no pedestrians in the area," and "[t]he weather was clear and dry." The only facts in the affidavit specifically about the accident are Officer Galvan's statements:

After receiving the dispatch, I turned my vehicle around and approached the intersection of Mittman and Nolan. While responding to the "Code 3" or "Officer in Trouble" dispatch, I was involved in an accident with Plaintiffs Patrick Torres and Johnnie Dears. I decided to not stop or yield at the posted Stop Sign in order to respond more expeditiously to the "Code 3" or "Officer in Trouble" dispatch.

The rest of the affidavit conveys and explains Officer Galvan's belief that he was responding to an emergency and needed to respond as quickly and quietly as possible. The affidavit contains no additional facts¹ about the intersection, Officer Galvan's actions, or the accident.

The excerpts from Officer Galvan's deposition do not contain any additional facts about the intersection where the accident occurred or about Officer Galvan's actions. The excerpts confirm Officer Galvan did not turn on his emergency lights or sirens and that he does not believe the accident was his fault or that it was possible for him to avoid the collision. However, the excerpts do not provide any factual bases for these beliefs.

The Texas Peace Officer's Crash Report contains the investigating officer's narrative of what occurred. The investigator wrote that Officer Galvan "stated that as he approached the intersection he realized there was a stop sign. He then stated that he stopped immediately before entering the intersection but his vehicle continued on. He then stated that he tried to avoid a black truck that was traveling eastbound on Nolan street but was not able to avoid the collision."

Compliance with laws applicable to emergency action

The City presented prima facie evidence that Officer Galvan was responding to an emergency call or reacting to an emergency situation.² The law applicable to emergency action law required Officer Galvan "to slow as necessary for safe operation" before proceeding past a stop sign. TEX. TRANSP. CODE ANN. § 546.001(2). However, the City did not present any evidence that Officer Galvan looked for oncoming traffic at the intersection or that he took any other action to determine whether slowing was necessary to protect the safety of others. And the City presented

¹ Instead of facts, the affidavit contains vague and conclusory statements such as, "I was operating my patrol car in a safe manner," "[a]t no time . . . was I operating the patrol car in a reckless manner," and "I used due regard for the safety of other traffic."

² Appellees did not present evidence controverting the "emergency" element in their response to the plea to the jurisdiction.

conflicting evidence about whether Officer Galvan slowed down. The affidavit states Officer Galvan “decided to not stop or yield at the posted [s]top [s]ign,” suggesting he was aware of the stop sign and made a conscious decision not to slow. However, the investigating officer’s narrative suggests Officer Galvan became aware of the stop sign shortly before reaching the intersection and attempted to stop, but was unable to avoid the collision. Although the petition also alleges Officer Galvan failed to control his speed, the City’s evidence contains no information regarding the speed limit or how fast Officer Galvan was travelling. *See id.* § 546.001(3) (authorizing operator of emergency vehicle to exceed a maximum speed limit “as long as the operator does not endanger life or property”). We conclude the City’s evidence is insufficient to establish that Officer Galvan complied with the laws and ordinances applicable to emergency action. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2).

Conscious indifference or reckless disregard for safety of others

In order to show recklessness at trial, the plaintiffs would need to show Officer Galvan committed an act he knew or should have known posed a high degree of risk of serious injury. *See Martin*, 971 S.W.2d at 430; *see Perez v. Webb Cty.*, 511 S.W.3d 233, 236 (Tex. App.—San Antonio 2015, pet. denied). In order to *negate* recklessness, the City was required to submit evidence of the actual facts and circumstances of the accident, including what Officer Galvan saw, knew, and did. Typically, that would include facts such as the speed limit and speed the officer was driving, whether the officer used lights and sirens, the appearance of the intersection and traffic control signs at the intersection, the amount of oncoming traffic and the degree to which the officer could see it, whether and where the officer looked for traffic before proceeding through the intersection, and whether and when he slowed before entering the intersection. Here, the City’s evidence establishes only that Officer Galvan did not use his emergency lights or sirens, traffic was not heavy, and there were no pedestrians. And the City’s own evidence is contradictory

regarding whether Officer Galvan was aware of the stop sign and chose to disregard it or whether he failed to realize it was present until it was too late to safely stop.

The City's evidence does not contain factual detail about the intersection where the accident occurred or specifics about Officer Galvan's own actions leading up to the accident. There is no description of the intersection, no information about the speed limit or the speed at which Officer Galvan was traveling, no indication of whether cross-traffic was visible as he approached the intersection or whether there were obstacles, and no indication whether he looked either way for oncoming traffic or whether he made any other attempt to become aware of what traffic was in or approaching the intersection. Although the affidavit conclusorily states Officer Galvan "balanced the need to get to the officer [in trouble] against the possible risks to the safety of others," the only facts recited relate to the need to get to the "officer in trouble." The evidence in support of the plea contains no facts demonstrating Officer Galvan actually identified or considered any possible risks to the safety of others.

We conclude the City's evidence is insufficient to meet its burden to negate that Officer Galvan operated his vehicle recklessly or with conscious disregard for the safety of others. *See Hidalgo Cty. v. Calvillo*, No. 13-15-00261-CV, 2016 WL 552086, at *4-5 (Tex. App.—Corpus Christi Feb. 11, 2016, no pet.) (mem. op.) (holding county failed to meet its burden to show deputy did not act with conscious indifference or reckless disregard for safety of public where its evidence established deputy was responding to emergency when he was involved in accident, but county offered no factual evidence regarding circumstances of accident such as traffic conditions, whether deputy slowed as he passed plaintiff on shoulder, or whether he took other actions that demonstrated concern for welfare of other motorists). The City's evidence thus failed to establish the applicability of the emergency exception to waiver of immunity in section 101.055(2).

Sufficiency of Torres's and Dears's Response

In response to the plea to the jurisdiction, Torres and Dears relied on the City's evidence and filed an excerpt from Torres's deposition. Torres testified he was in the front passenger seat of the truck, looking around as they approached the intersection. Torres testified he saw the police car as it was "coming to the stop sign" and observed that the police officer was looking at the computer in his car and had his hand on it. Torres stated that "[w]hen [the officer] glanced up and he saw us, it was too late, and boom. He T-boned us."

Torres and Dears were required to submit evidence only if the City presented evidence establishing immunity. *See Mission*, 372 S.W.3d at 637-38. As we held above, the City did not meet this burden. However, if we assume the burden shifted to appellees to raise a genuine issue of material fact regarding the jurisdictional issues, we hold the burden was met. Viewing the evidence in the light most favorable to the plaintiffs and indulging all inferences in their favor, the evidence shows that Officer Galvan made conscious decisions to respond quickly, to not activate his emergency lights or sirens, and to proceed through a stop sign without stopping or yielding, and that he was looking at his on-board computer when he entered the intersection instead of looking at the road or at cross-traffic. We hold this evidence raises a material fact issue as to whether Officer Galvan acted recklessly or with conscious disregard for the safety of others. *See Tex. Dep't. of Pub. Safety v. Bonilla*, 481 S.W.3d 646, 654-55 (Tex. App.—El Paso 2014) (holding plea to jurisdiction based on emergency exception properly denied where there was conflicting evidence about whether trooper slowed as necessary before running red light and evidence trooper was distracted by turning on his in-car camera when he entered intersection), *rev'd & remanded on other grounds* by 481 S.W.3d 640 (Tex. 2015); *Gwynn v. Tobin*, No. 03-02-00759-CV, 2003 WL 21554331, at *4 (Tex. App.—Austin July 11, 2003, no pet.) (mem. op.) (holding evidence ambulance driver did not slow as necessary before proceeding through intersection, there were

visual obstructions, and sirens and emergency lights were not activated was sufficient to raise fact issue as to whether driver acted recklessly, and trial court did not err to deny motion for summary judgment based on emergency exception to waiver of immunity).

CONCLUSION

We hold the appellees' pleadings, liberally construed, allege that Officer Galvan acted recklessly in responding to an emergency call, thus alleging a claim within the Tort Claims Act's waiver of immunity. We further hold the City did not meet its burden to present evidence establishing either that Officer Galvan complied with the laws applicable in an emergency or that he did not act recklessly. Moreover, Torres's and Dears's evidence, together with the City's own evidence, demonstrates there is a material fact question regarding the jurisdictional issues. When there are material fact questions regarding jurisdictional issues that implicate the merits of the claim, the trial court has broad discretion to determine "that the inquiry is reaching too far into the substance of the claims and should therefore await a fuller development of the merits." *Mission*, 372 S.W.3d at 637-38. We therefore affirm the trial court's order denying the City's plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 227-28 (when "the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder").

Luz Elena D. Chapa, Justice