



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00891-CV

WEBB COUNTY,
Appellant

v.

Juan C. Garcia **LINO**, Individually and as Representative of the Estates of Suleika R. Fonseca Saldivar, Deceased, and A.J.G., Deceased, Sergio Fonseca, San Juana Fonseca, Individually and as Next Friend of A.M.D., a Minor, and Francisco Dominguez, as Next Friend of A.M.D., a
Minor,
Appellees

From the 341st Judicial District Court, Webb County, Texas
Trial Court No. 2017CVA000356D3
Honorable Rebecca Ramirez Palomo, Judge Presiding

Opinion by: Beth Watkins, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Beth Watkins, Justice

Delivered and Filed: July 22, 2020

AFFIRMED

Appellant Webb County appeals an order denying its plea to the jurisdiction. Webb County argues it is immune from appellees' claims because the collision at issue did not arise from its employee's operation or use of his patrol vehicle and Webb County is entitled to official immunity. Webb County also contends appellees' claims should be dismissed based on purported judicial admissions and on the emergency exception to the Texas Tort Claims Act ("TTCA"). We affirm the trial court's order.

BACKGROUND

On February 13, 2017, Webb County Sheriff's Deputy Mauro Lopez was driving his patrol vehicle eastbound on State Highway 359 in Laredo. At the same time, Suleika Fonseca Saldivar was driving a pickup truck in the westbound lane. Deputy Lopez asserts that as Saldivar crested a hill, he saw her pass another vehicle in a no-passing zone. He decided to stop Saldivar and cite her for the alleged passing zone violation, so he applied his brakes and prepared to make a U-turn in order to pull her over. He did not turn on his lights or his siren.

The relevant section of State Highway 359 consists of one eastbound lane, one westbound lane, and a center turn lane, with a speed limit of 75 miles per hour. The video from Deputy Lopez's dash camera shows that while he was still in the eastbound lane of traffic, he slowed from 70 miles per hour to 16 miles per hour in seven seconds. During this time, he began moving into the center turn lane, effectively blocking all traffic behind him. The driver directly behind Deputy Lopez, Adrian Golarte, stated that Deputy Lopez slowed down "drastically" and he "had to slam the brakes and turn to the right[,] almost going off the road" to avoid hitting the patrol vehicle. Alfredo Gonzalez, who was driving an 18-wheeler behind Golarte and Deputy Lopez, turned to the left to avoid hitting Golarte and Deputy Lopez. His truck jackknifed and skidded into the westbound lane, directly into Saldivar's path. Saldivar's truck and the 18-wheeler collided, killing Saldivar, her infant daughter, A.J.G., and her passenger, Berta Ortega de Negrete. The collision occurred twelve seconds after Deputy Lopez first engaged his brakes.

Saldivar's widower and A.J.G.'s father, Juan C. Garcia Lino, filed suit individually and as representative of the estates of Saldivar and A.J.G. Initially, he sued Gonzalez and Gonzalez's employer, V.A.L. Transport, LLC, alleging their negligence caused the deaths of his wife and daughter. Saldivar's parents, Sergio Fonseca and San Juana Fonseca (collectively, "the FONSECAS"), intervened in Lino's lawsuit both individually and as next friend of A.M.D., Saldivar's surviving

child. A.M.D.'s father, Fernando Dominguez, also intervened as next friend of A.M.D. Lino later amended his petition to add Webb County as a defendant, and the Fonsecas and Dominguez followed suit shortly thereafter.

Webb County filed a plea to the jurisdiction arguing it was immune from all claims against it because: (1) the plaintiffs' and intervenors' injuries did not arise from the operation or use of a motor-driven vehicle; and (2) Webb County was entitled to official immunity because Deputy Lopez performed discretionary duties in good faith within the scope of his authority on the day of the collision. In support of its plea, Webb County presented, inter alia, Deputy Lopez's deposition testimony, the dash camera video from Deputy Lopez's patrol vehicle, and an accident report noting a witness's contention that Deputy Lopez "drastically reduced his speed while traveling" in the main lane of traffic. In response, Lino¹ also presented Deputy Lopez's deposition testimony, including his testimony that he: (1) knew tractor-trailers often drove that section of State Highway 359 at speeds of 90 or 95 miles per hour; (2) had personally responded to at least fifteen serious wrecks in that specific area in ten years; and (3) knew slow-moving vehicles in a main lane of traffic posed a hazard to other motorists. He also presented Golarte's witness statement and the police report from the collision indicating that Deputy Lopez "drastically" slowed while traveling in the eastbound lane, partially blocking the center turn lane and "causing the accident" by forcing Gonzalez to turn the 18-wheeler toward Saldivar's lane to avoid hitting Deputy Lopez. Finally, Lino presented the expert declaration of Robert Kelly, a law enforcement officer and transportation and safety consultant, who opined that Deputy Lopez engaged in a "hard brake event" that

¹ Neither the Fonsecas nor Dominguez filed a response to Webb County's plea to the jurisdiction. Webb County did not complain of the Fonsecas' and Dominguez's failure to file a response in either this court or the trial court, and instead treated Lino's response as applying to the intervenors as well. Webb County's appellate briefs identify only Lino as "plaintiffs/appellees," but describe Lino as "represented by" the Fonsecas' and Dominguez's trial attorneys in addition to his own attorneys.

“represented a significant hazard to other motorists.” Based on his review of the evidence, including the video from Deputy Lopez’s dash camera, the witness statements, and Deputy Lopez’s deposition, Kelly concluded:

No reasonably prudent officer under the same or similar circumstances could have believed that drastically reducing the speed of his vehicle in a 75 mph moving lane of traffic to enforce a minor traffic violation, [*sic*] outweighed the clear risk of harm to the public caused by his actions on a roadway with traffic conditions he knew to be dangerous.

After the trial court denied the plea, Webb County filed its notice of interlocutory appeal.

ANALYSIS

Standard of Review

“A plea to the jurisdiction is a dilatory plea that defeats a cause of action whether the claims have merit or not.” *Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 267 (Tex. 2018). This court reviews a trial court’s ruling on a plea to the jurisdiction de novo. *San Antonio Water Sys. v. Smith*, 451 S.W.3d 442, 445 (Tex. App.—San Antonio 2014, no pet.). When a plea to the jurisdiction challenges the existence of jurisdictional facts, our review mirrors that of a traditional summary judgment. *Am. K-9*, 556 S.W.3d at 267. Where the jurisdictional issue implicates the merits of the parties’ claims, “we consider relevant evidence submitted by the parties to determine if a fact issue exists.” *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632–33 (Tex. 2015). “We take as true all evidence favorable to the nonmovant, indulge every reasonable inference, and resolve any doubts in the nonmovant’s favor.” *Id.* at 633. If the evidence is undisputed or does not raise a fact question, the trial court rules on the plea as a matter of law. *Am. K-9*, 556 S.W.3d at 267. However, if the evidence raises a fact question on 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.” *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

“[A]rises from the Operation or Use of a Motor-Driven Vehicle”

In its first issue on appeal, Webb County contends the trial court erred in denying its plea to the jurisdiction because there is no evidence that Saldivar’s and A.J.G.’s deaths arose from Deputy Lopez’s operation or use of his patrol vehicle. In support of this position, it argues there is no causal nexus between the collision and Deputy Lopez’s actions. It also contends Deputy Lopez’s operation or use of his vehicle was not a substantial factor in causing the collision.

Applicable Law

The TTCA provides a limited waiver of immunity for, inter alia, personal injury caused by the negligence of a governmental employee acting within the scope of employment if the injury “arises from the operation or use of a motor-driven vehicle” and “the employee would be personally liable to the claimant according to Texas law.” TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(1). The TTCA does not define “arises from,” but the Texas Supreme Court has held that an injury arises from a governmental employee’s negligence if the plaintiff shows a “nexus between the operation or use of the motor-driven vehicle or equipment and [the] plaintiff’s injuries.” *Dall. Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 543 (Tex. 2003). The Texas Supreme Court has “described the threshold as something more than actual cause but less than proximate cause.” *Ryder Integrated Logistics, Inc. v. Fayette County*, 453 S.W.3d 922, 928–29 (Tex. 2015). “[A]rise out of” means . . . there is but for causation, though not necessarily direct or proximate causation.” *Utica Nat. ’l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004). The necessary causal nexus requires a showing that the use of the vehicle actually caused the injury. *Whitley*, 104 S.W.3d at 543. However, the use of a vehicle “does not cause injury if it does no more than furnish the condition that makes the injury possible.” *Id.* A plaintiff must show “negligent or otherwise improper use of a motor-driven vehicle.” *Ryder*, 453 S.W.3d at 928.

Application

Webb County argues Deputy Lopez’s operation or use of his vehicle was only “remotely linked” to Gonzalez’s loss of control over the 18-wheeler and “did no more than furnish the condition that made the injury possible.” However, during his deposition, Deputy Lopez agreed that a vehicle going far below the speed limit poses a hazard to vehicles traveling behind it. He also testified that vehicles commonly travel on State Highway 359 at speeds in excess of 90 miles per hour. The video from Deputy Lopez’s dash camera shows that approximately five seconds after he engaged his brakes, he decelerated to 37 miles per hour—nearly 40 miles per hour below the posted speed limit. Over the next three seconds, he continued to slow, and was traveling 16 miles per hour—59 miles per hour below the posted speed limit—while blocking both the eastbound and center turn lanes. The wreck occurred two seconds later.

Webb County contends Deputy Lopez’s operation or use of his vehicle “did not lead *directly* to the” collision because Deputy Lopez did not collide with Saldivar, Gonzalez, or Golarte. However, the police report shows both Golarte and Gonzalez told the investigating officer that Deputy Lopez “drastically reduced his speed while traveling on his lane of travel thus causing the accident.” The police report also indicates that both Golarte and Gonzalez took evasive action to avoid hitting Deputy Lopez and that Gonzalez’s evasive action resulted in his 18-wheeler entering Saldivar’s lane of travel. Similarly, Golarte’s witness statement explains that Deputy Lopez’s operation of his vehicle “made the 18-wheeler go more left into the oncoming traffic and that’s when [Gonzalez] hit the vehicle coming westbound.” This is consistent with Kelly’s opinion that “[h]ard brake events, especially at highway speeds, can result in dangerous maneuvers on the part of the driver and the motoring public affected by this event.” While Webb County’s reply brief contends that Golarte’s witness statement is conclusory because Golarte lacked “personal

knowledge of the events that led to Deputy Lopez’s reduction in speed,” it does not dispute that Golarte personally perceived that reduction in speed and the events that immediately followed.

When viewed in the light most favorable to Lino, the evidence in this case raises a fact question about whether Deputy Lopez’s operation or use of his vehicle was “directly, causally linked to the accident and the damages sustained.” *See PHI, Inc. v. Tex. Juvenile Justice Dep’t*, 593 S.W.3d 296, 304 (Tex. 2019). Based on this evidence, a factfinder could conclude: (a) Deputy Lopez negligently used his vehicle by abruptly decelerating while blocking both the eastbound and center turn lanes; (b) the collision would not have occurred but for Deputy Lopez’s abrupt deceleration; and (c) a reasonable officer could have foreseen that Deputy Lopez’s operation or use of his vehicle might lead to a collision. *See Ryder*, 453 S.W.3d at 928–29. Accordingly, we conclude that “a reasonable juror might find the requisite nexus between the use of [Deputy Lopez’s] vehicle” and Saldivar and A.J.G.’s deaths. *Id.* at 929.

We disagree with Webb County’s assertion that this case is factually similar to *Lopez v. Escobar*, No. 04-13-000151-CV, 2013 WL 4679062 (Tex. App.—San Antonio Aug. 28, 2013, no pet.) (mem. op.). While it is true that in *Escobar*, as in this case, the plaintiff alleged that a law enforcement officer’s attempt to perform a traffic stop caused a collision, that is where the similarities end. *Id.* at *1. The officer in that case briefly pursued a pickup truck until it pulled into a median crossover. *Id.* Believing the truck had come to a stop in the crossover, the officer left his vehicle, walked into the road, and began using hand signals to communicate with the truck’s driver. *Id.* at *2. At that point, however, the truck suddenly “darted out into traffic, where it was hit by [the plaintiff’s] vehicle.” *Id.* We concluded the evidence in that case showed the governmental entity was immune because the officer “did not use his car to block or interfere with traffic in a manner to cause the accident; nor did he exercise any control over the movements of the” truck’s driver. *Id.* at *5. Here, in contrast, there is some evidence—including Deputy Lopez’s own

testimony—upon which a reasonable factfinder could rely to conclude Gonzalez’s loss of control over the 18-wheeler directly resulted from Deputy Lopez’s rapid deceleration that blocked the only lanes of travel Gonzalez could use to avoid a collision.

We overrule Webb County’s first issue.

Official Immunity

In its second issue, Webb County argues it is immune from Lino’s claims because Deputy Lopez is entitled to official immunity. Lino responds the evidence raises a fact question about whether Deputy Lopez was performing a discretionary duty in good faith.

Applicable Law

“A governmental employee is entitled to official immunity for the good-faith performance of discretionary duties within the scope of the employee’s authority.” *Tex. Dep’t of Pub. Safety v. Bonilla*, 481 S.W.3d 640, 642–43 (Tex. 2015). An act is discretionary for the purposes of official immunity if it “involves personal deliberation, decision and judgment.” *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex. 1994). But if the act involves “the performance of a duty to which the actor has no choice,” it is ministerial and cannot support a claim of official immunity. *Id.*

A police officer acts in good faith if a reasonably prudent officer under the same or similar circumstances could have believed the need to take the action outweighed the risk of harm that action posed to the public. *See Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). Accordingly, “good faith depends on how a reasonably prudent officer could have assessed both the *need* to which an officer responds 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.” *Id.* at 467 (emphasis in original); *see also Univ. of Hous. v. Clark*, 38 S.W.3d 578, 581 (Tex. 2000) (noting “testimony on good faith must discuss what a reasonable officer could have believed under the circumstances, and must be

substantiated with facts showing that the officer assessed both the need to apprehend the suspect and the risk of harm to the public”).

“The ‘need’ aspect of the test refers to the urgency of the circumstances requiring police intervention.” *Wadewitz*, 951 S.W.2d at 467. Factors to consider in analyzing the “need” prong include the seriousness of the situation, whether the officer’s action is necessary to prevent injury or death, and whether any alternative actions could achieve a comparable result. *Id.* The “risk” prong considers public safety concerns such as the nature and severity of potential harm from the officer’s actions, the likelihood of harm occurring, and “whether any risk of harm would be clear to a reasonably prudent officer.” *Id.* Although an officer can rely on his own testimony to show good faith, his testimony must address both the “need” and “risk” prongs. *Id.*; *Harless v. Niles*, 100 S.W.3d 390, 399–400 (Tex. App.—San Antonio 2002, no pet.).

To be entitled to a jurisdictional dismissal on official immunity grounds, the governmental entity must conclusively establish both prongs of the good faith test. *See Wadewitz*, 951 S.W.2d at 467; *City of Dallas v. Lamb*, No. 05-16-01506-CV, 2017 WL 5987777, at *3 (Tex. App.—Dallas Dec. 4, 2017, no pet.) (mem. op.). “The appropriate focus is what a reasonable officer *could have believed*, and the determinative inquiry is whether any reasonably prudent officer possessed of the same information could have determined the [officer’s] actions were justified.” *Bonilla*, 481 S.W.3d at 644 (emphasis in original). If the governmental entity “produces competent evidence of good faith, the official immunity defense is established unless the plaintiff shows that no reasonable person in the officer’s position could have thought the facts justified the officer’s actions.” *City of Houston v. Collins*, 515 S.W.3d 467, 473 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (citing *Bonilla*, 481 S.W.3d at 643).

Application

*Did Webb County conclusively establish
Deputy Lopez was performing a discretionary duty?*

Lino argues a fact question exists about whether Deputy Lopez's actions were ministerial or discretionary because Saldivar's alleged passing zone violation was not an emergency. He also contends Deputy Lopez's belief Saldivar had committed a traffic violation triggered only a ministerial duty to perform a traffic stop. However, we have previously held that officers retain discretion over how to initiate routine traffic stops. *See Harless*, 100 S.W.3d at 397 (listing "a traffic stop" as example of action for which officer can potentially claim official immunity). We conclude that Deputy Lopez was performing a discretionary duty.

Did Webb County conclusively establish Deputy Lopez acted in good faith?

Our conclusion that Deputy Lopez was performing a discretionary duty does not end the official immunity analysis. Webb County must also demonstrate that he did so in good faith. *See Wadewitz*, 951 S.W.2d at 467. As evidence that Deputy Lopez acted in good faith, Webb County notes his testimony that he believed Saldivar's passing zone violation was a serious offense because illegal passing can cause a collision. It also points to his testimony that traffic violations, DWIs, and wrecks—including fatal wrecks—are common in the area. Webb County also cites the affidavit of its expert, Robert Hauck, who opined that "the actions taken by Deputy Lopez were those that a reasonable and prudent law enforcement officer could have taken under the same or similar circumstances." Based on this evidence, Webb County contends a reasonably prudent officer could have believed Deputy Lopez's actions were justified.

However, while Deputy Lopez described the alleged passing zone violation for which he planned to stop Saldivar as a serious offense, he acknowledged that violation is a Class C misdemeanor—the lowest level offense in Texas. Moreover, while Deputy Lopez testified that

illegal passing is risky because it can potentially cause a collision, he did not identify any immediate risk of harm created by Saldivar's actions, and the video shows there were no oncoming vehicles or other obstacles during her alleged passing zone violation.² As a result, the evidence does not conclusively prove Deputy Lopez's subjective belief about the seriousness of the alleged violation to which he was responding. *See Wadewitz*, 951 S.W.2d at 467; *Harless*, 100 S.W.3d at 399. We hold that Webb County did not conclusively establish that a reasonably prudent officer could have determined Deputy Lopez's actions were justified under these circumstances. *See Bonilla*, 481 S.W.3d at 644; *see also Clark*, 38 S.W.3d at 580 ("Because official immunity is an affirmative defense, to obtain summary judgment on official immunity, the governmental employee must conclusively prove each element of the defense.").

Furthermore, while Webb County points to Deputy Lopez's testimony that wrecks were common in the area as evidence of his good faith, a factfinder could just as easily conclude this testimony shows no reasonable officer would believe the need to immediately apprehend Saldivar under these circumstances outweighed the foreseeable risk of a wreck. *See Chambers*, 883 S.W.2d at 656. This is especially true where, as here, Deputy Lopez also: (1) testified that he knew large trucks like the one Gonzalez was driving frequently traveled the area at speeds up to 95 miles per hour; and (2) agreed that a vehicle going far below the speed limit, as Deputy Lopez was, poses a hazard to vehicles traveling behind it. Moreover, while Deputy Lopez testified he could not safely move completely into the center turn lane to slow before making his planned U-turn, the video is some evidence of a viable alternative he did not consider—whether he could have pulled out of

² In its reply brief, Webb County contends Deputy Lopez could have reasonably concluded that immediate action was necessary because he believed Saldivar "was trying to flee or evade [him]." However, Deputy Lopez also specifically testified that he "didn't say she was fleeing or evading," but that "it cross[ed] [his] mind" because "[t]here's a lot of crime out that way." The only basis Deputy Lopez identified for his concern that Saldivar may have been fleeing was that "she never slowed down as she went by," even though it is undisputed that he never directed her to stop. This evidence does not conclusively show that any need to prevent Saldivar's alleged flight necessitated Deputy Lopez's immediate action.

the main lane of traffic and moved onto the eastbound shoulder, just as Golarte did. *See Bonilla*, 481 S.W.3d at 644 (“Good faith is not necessarily negated if the summary-judgment evidence reveals that the officer had a viable alternative, but the evidence must nevertheless show the officer assessed the availability of any alternative course of action.”); *Harless*, 100 S.W.3d at 400.

Finally, the video shows Deputy Lopez engaged his brakes approximately two seconds after Saldivar’s truck came into view over the hill. Based on his review of the evidence, including the video and Deputy Lopez’s testimony, Kelly opined that Deputy Lopez “left no time between observance and action to properly evaluate the risks he knew to exist on that stretch of roadway . . . versus the need to immediately enforce a minor traffic violation that represented no imminent hazard.” Kelly—a law enforcement officer—concluded that under these circumstances, no reasonably prudent officer would have believed the need to immediately apprehend Saldivar justified the foreseeable risk posed to the motoring public by “drastically reducing the speed of his vehicle in a 75 MPH moving lane of traffic.” This evidence, when viewed in the light most favorable to Lino, would allow a factfinder to conclude that no reasonably prudent officer could have believed the facts of this case justified Deputy Lopez’s conduct. *See Gomez v. City of Houston*, 587 S.W.3d 891, 897 (Tex. App.—Houston [14th Dist.] 2019, pet. filed) (en banc). We therefore hold that the trial court did not err by denying Webb County’s plea to the jurisdiction on the grounds of official immunity. *See Wadewitz*, 951 S.W.2d at 467. Accordingly, we overrule Webb County’s second issue.

Judicial Admission

In its third issue, Webb County argues Lino judicially admitted that Gonzalez’s conduct, not Deputy Lopez’s, proximately caused the collision. “Assertions of fact, not pleaded in the alternative, in the live pleadings of a party are regarded as formal judicial admissions.” *United Parcel Serv., Inc. v. Rankin*, 468 S.W.3d 609, 626 (Tex. App.—San Antonio 2015, pet. denied). It

is well-established, however, that “a judicial admission must be clear, deliberate, and unequivocal.” *Id.* (internal quotation marks omitted). Here, although Lino initially sued only Gonzalez and his employer, nothing in those early pleadings amounts to a clear, deliberate, and unequivocal admission that no other potential defendants bore any responsibility for the collision. *See id.* To the contrary, Webb County’s brief directly quotes Lino’s allegation that Gonzalez is “an individual responsible for the” collision. (emphasis added). Lino’s original petition does not, however, allege that Gonzalez bears *sole* responsibility for the wreck.

“It has long been the law in this state that a defendant’s act or omission need not be the sole cause of an injury, as long as it is a substantial factor in bringing about the injury. There may be more than one proximate cause of an injury.” *Bustamante v. Ponte*, 529 S.W.3d 447, 457 (Tex. 2017) (internal citations omitted). Lino’s allegations of two possible causes for this collision do not constitute a clear, deliberate, and unequivocal admission that Gonzalez’s conduct was the sole cause of Saldivar’s and A.J.G.’s deaths. *See Rankin*, 468 S.W.3d at 626. Accordingly, we overrule this challenge to the trial court’s order.

Conscious Indifference or Reckless Disregard

Finally, Webb County argues the trial court erred by denying its plea to the jurisdiction because Kelly’s expert declaration is conclusory and is therefore legally insufficient to show that Deputy Lopez acted with conscious indifference or reckless disregard. The question of whether an officer acted with conscious indifference or reckless disregard goes to the applicability of the “emergency exception” to the TTCA’s waiver of immunity. TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2); *Perez v. Webb County*, 511 S.W.3d 233, 235 (Tex. App.—San Antonio 2015, pet. denied). The emergency exception provides that the TTCA’s waiver of immunity 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 was not taken was conscious indifference or reckless disregard for the safety of others.

TEX. CIV. PRAC. & REM. CODE § 101.055(2). While neither Webb County’s plea to the jurisdiction nor its opening brief in this court assert that the emergency exception applies here, its reply brief raises that argument. Because the applicability of the emergency exception is a jurisdictional issue, we will address it. *See Manbeck v. Austin Indep. Sch. Dist.*, 381 S.W.3d 528, 530 (Tex. 2012).

When a governmental entity relies on the emergency exception, the plaintiff must raise a fact issue about whether the exception applies. *Perez*, 511 S.W.3d at 236–37. A plaintiff can satisfy that burden by producing some evidence that the officer: (1) was not responding to an emergency call or reacting to an emergency situation; (2) did not comply with the laws and ordinances applicable to the emergency situation; or (3) acted with conscious indifference or reckless disregard for the safety of others. TEX. CIV. PRAC. & REM. CODE § 101.055; *Perez*, 511 S.W.3d at 240 (Barnard, J., concurring). We hold Lino satisfied that burden here.

First, Lino introduced the Webb County Sheriff’s Office Standard Operation Procedures Manual into evidence. While that manual defines several types of incidents as “emergency calls,” routine traffic stops are not included in that list. Furthermore, as Deputy Lopez prepared to pull over Saldivar, he did not activate his lights or siren, nor did he notify a dispatcher he was responding to an emergency situation. *See Collins v. City of Houston*, No. 14-13-00533-CV, 2014 WL 3051231, at *7 (Tex. App.—Houston [14th Dist.] July 3, 2014, no pet.) (mem. op.). Finally, Deputy Lopez explained there was no emergency until the collision occurred, testifying, “[w]hen the accident happened, it was now an emergency situation.”

Finally, while the TTCA does not define “emergency,” Webb County’s cited authority defines an emergency as a situation that requires immediate action. *See, e.g., City of San Antonio*

v. Hartman, 201 S.W.3d 667, 673 (Tex. 2006). As noted above, Deputy Lopez did not identify a risk of harm created by Saldivar's actions that would require immediate action on his part, and the video shows there were no oncoming vehicles in her path during her alleged passing zone violation. Based on his review of the evidence, Kelly opined that Saldivar's alleged violation did not require Deputy Lopez to take immediate action. We conclude that this evidence, taken as a whole, raises a fact question about whether Deputy Lopez was responding to an emergency situation in the moments preceding the collision. *See Jefferson County v. Hudson*, No. 09-11-00168-CV, 2011 WL 3925724, at *4 (Tex. App.—Beaumont Aug. 25, 2011, no pet.) (mem. op.).

Webb County also contends Kelly's declaration is conclusory and therefore legally insufficient to raise a fact question about whether Deputy Lopez acted with conscious indifference or reckless disregard. An expert's affidavit is conclusory if it does not provide any underlying facts to support the conclusions reached. *Trejo v. Laredo Nat'l Bank*, 185 S.W.3d 43, 50 (Tex. App.—San Antonio 2005, no pet.). Here, Kelly's declaration describes the evidence he reviewed, the facts he learned from that evidence, and the law enforcement standards and customs he applied to those facts to reach his ultimate conclusions. Kelly, who is certified as a Commercial Vehicle Enforcement Officer, explained that in a commercial vehicle context, "any deceleration in excess of 7 MPH per second" is considered a hard brake event that "can result in dangerous maneuvers on the part of the driver and the motoring public affected by this event." He noted that both commercial vehicle fleet operators and automobile insurers flag hard brake events as risky behavior. He then explained that the video shows Deputy Lopez decelerated at a rate of between 7.14 and 11.5 MPH per second. Kelly further noted that "Deputy Lopez confirmed that he was aware of the dangerous nature of that stretch of road when he performed his abrupt deceleration in front of vehicles traveling up to 75 MPH or more."

Based on his review of the evidence, his analysis of Deputy Lopez’s rate of deceleration, and his knowledge of industry standards and the Texas Transportation Code, Kelly concluded that Deputy Lopez’s deceleration “represented a significant hazard to other motorists and therefore would be considered reckless driving.” He also concluded Deputy Lopez “applied his brakes in an abrupt manner” immediately upon perceiving Saldivar’s alleged violation, without leaving sufficient “time between observance and action to properly evaluate the risks he knew to exist on that stretch of roadway.” Finally, he concluded these “actions were reasonably foreseeable to result in a crash such as this collision” and that Deputy Lopez’s conduct “recklessly disregarded the safety of the public around him.” Because Kelly’s declaration explains the underlying facts that he relied on to form these conclusions, it is not conclusory. *See Lowry v. Tarbox*, 537 S.W.3d 599, 619 (Tex. App.—San Antonio 2017, pet. denied). While Webb County contends that Kelly’s conclusions conflict with Deputy Lopez’s testimony, those conflicts in the evidence, if any, create genuine issues of material fact that must be resolved by a factfinder. *See Miranda*, 133 S.W.3d at 227–28.

Finally, even if we disregard Kelly’s declaration, there is some evidence that Deputy Lopez acted with conscious indifference or reckless disregard for the safety of others. TEX. CIV. PRAC. & REM. CODE § 101.055(2); *Perez*, 511 S.W.3d at 236. The evidence shows Deputy Lopez knew both speeding and wrecks were common on State Highway 359 and was subjectively aware of the danger posed by a vehicle driving far below the speed limit; however, he remained in the moving eastbound lane of traffic as he slowed to more than fifty miles an hour below the posted speed limit. *See 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.). Based on this evidence, a reasonable factfinder could conclude Deputy Lopez knew or should have known his actions posed

a high degree of risk of serious injury, but he proceeded anyway without regard for the safety of his fellow motorists. *See id.* at *7–8.

We overrule Webb County’s fourth issue.

The Fonseca’s and Dominguez’s Claims

As noted above, the Fonseca’s and Dominguez did not file a response to Webb County’s plea to the jurisdiction. For reasons described above, however, we conclude Webb County’s plea to the jurisdiction did not conclusively negate the trial court’s subject matter jurisdiction and therefore did not impose any burden on the Fonseca’s and Dominguez to produce jurisdictional evidence. *See City of Houston v. Downstream Envtl.*, 444 S.W.3d 24, 39 (Tex. App.—Houston [1st Dist.] 2014, pet. denied). Additionally, because we have already held that fact issues preclude a jurisdictional dismissal of Lino’s claims, we cannot hold the trial court lacks subject matter jurisdiction to hear the Fonseca’s and Dominguez’s claims, which are based on the same facts as Lino’s. *See NBL 300 Grp. Ltd. v. Guadalupe-Blanco River Auth.*, 537 S.W.3d 529, 532 (Tex. App.—San Antonio 2017, no pet.) (noting a plea to the jurisdiction “seeks dismissal of a case for lack of subject matter jurisdiction” without regard to the merits of the claims) (internal quotation marks omitted).

CONCLUSION

We affirm the trial court’s order denying Webb County’s plea to the jurisdiction.

Beth Watkins, Justice