TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00300-CV

Texas Department of Public Safety , Appellant

v.

Anisty Mirasol, Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 201ST JUDICIAL DISTRICT
NO. D-1-GN-14-001479, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

The Texas Department of Public Safety appeals from the trial court's order denying its plea to the jurisdiction and alternative motion for summary judgment. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(5) (allowing appeal from interlocutory order denying motion for summary judgment based on assertion of official immunity), (8) (allowing appeal from interlocutory order denying plea to jurisdiction by governmental unit). Following an automobile collision with DPS Trooper Thomas V. Goodson, Anisty Mirasol sued DPS alleging that Trooper Goodson was negligent and seeking damages from DPS under the Texas Tort Claims Act (TTCA). *See id.* § 101.021 (waiving sovereign immunity under certain circumstances). In its plea to the jurisdiction and alternative motion for summary judgment, DPS asserted that Goodson was protected by official immunity and that, consequently, DPS's sovereign immunity was not waived under the TTCA. *See*

id. § 101.021(1). For the reasons that follow, we reverse the trial court's order and dismiss Mirasol's claims for lack of subject matter jurisdiction.

BACKGROUND[1]

In May 2012, DPS Trooper Goodson was on routine patrol in his department-issued, marked patrol car. He was westbound on 11th Street in Austin when he spotted a pickup truck without a front license plate and decided to conduct a traffic stop. *See* Tex. Transp. Code § 504.943 (providing that person commits offense if motor vehicle does not display two compliant, DPS-issued license plates). He made a U-turn from westbound 11th Street to eastbound 11th Street, activated his emergency lights, and traveled a few blocks behind the pickup truck. Soon after the pickup crossed I-35, the driver put on his left turn signal and made a left turn into a parking lot. Trooper Goodson followed the pickup truck, making the left turn behind him. As Trooper Goodson made the turn, Mirasol's vehicle collided with the rear passenger door of Trooper Goodson's patrol car. Mirasol subsequently sued DPS, alleging that Trooper Goodson was negligent and that DPS was liable under the TTCA for injuries she allegedly received in the accident.

After filing an answer, DPS filed a plea to the jurisdiction and alternative motion for summary judgment. DPS asserted that it was protected by sovereign immunity and that its immunity was not waived by the TTCA because of Trooper Goodson's official immunity. As summary judgment evidence, it attached copies of the accident report, Trooper Goodson's report, and the patrol car's dash cam video and an affidavit from Trooper Goodson. The appellate record contains

[1] The facts are taken from DPS's brief and the appellate record. Mirasol did not file an appellate brief.

a copy of DPS's reply to Mirasol's response to DPS's plea and motion, but it does not include a copy of Mirasol's response or any evidence that may have been attached. Mirasol filed a motion for continuance of the hearing on the plea to the jurisdiction and motion for summary judgment and an amended motion, which DPS opposed. The trial court signed an order denying the motion for continuance, cancelling the hearing on the plea and the motion, and taking the matter on submission. The trial court subsequently denied both the plea to the jurisdiction and the alternative motion for summary judgment, and DPS brought this appeal. Mirasol has not filed an appellate brief with this Court.

SOVEREIGN IMMUNITY AND THE TTCA

As a governmental unit, DPS is immune from suit and liability unless the State has waived immunity. *See* Tex. Gov't Code § 411.002(a) (establishing DPS as agency of State); Tex. Civ. Prac. & Rem. Code § 101.001(3)(a) (defining "governmental unit" to include state agencies); *Ryder Integrated Logistics, Inc. v. Fayette Cty.*, 453 S.W.3d 922, 926–27 (Tex. 2015) (per curiam) (citing *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 542 (Tex. 2003) (stating that unit of government is immune unless state consents)). The TTCA provides a limited waiver of sovereign immunity. *See* Tex. Civ. Prac. & Rem. Code § 101.021(1); *Ryder*, 453 S.W.3d at 927. Section 101.021(1) provides, in relevant part, that:

> A governmental unit in the state is liable for:
>
> (1) 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) (emphasis added). Although section 101.021(1) speaks in terms of a waiver of immunity for liability, the TTCA also waives immunity from suit to the same extent. *See id.* § 101.025(a); *Texas Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001). However, "sovereign immunity shields the governmental employer from vicarious liability" if "official immunity shields a governmental employee from liability." *University of Hous. v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000); *see* Tex. Civ. Prac. & Rem. Code § 101.021(1)(B). Official immunity is an affirmative defense that protects government employees from personal liability. *Clark*, 38 S.W.3d at 580 (citing *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994)). Governmental employees are entitled to official immunity from a suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority. *Id.* (citing *Chambers*, 883 S.W.2d at 653).

STANDARD OF REVIEW

Because sovereign immunity deprives a trial court of subject matter jurisdiction, it is properly asserted in a plea to the jurisdiction. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). A plea questioning the trial court's subject matter jurisdiction raises a question of law that we review de novo. *Westbrook v. Penley*, 231 S.W.3d 389, 394 (Tex. 2007). The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction.

Miranda, 133 S.W.3d 226. Where, as here, a plea to the jurisdiction challenges the existence of jurisdictional facts, we may consider relevant evidence submitted by the parties and must do so when necessary to resolve the jurisdictional issue. *Id.* at 227; *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554–55 (Tex. 2000); *Good Shepherd Med. Ctr., Inc. v. State*, 306 S.W.3d 825, 831 (Tex. App.—Austin 2010, no pet.). When, as here, the plea to the jurisdictional challenge implicates the merits of the plaintiff's cause of action, the party has a burden similar to that in a traditional summary judgment. *Suarez v. City of Tex. City*, 465 S.W.3d 623, 632 (Tex. 2015) (holding that because TTCA waives immunity from suit only to extent of liability created by act, immunity waiver is intertwined with merits of claim under act); *Miranda*, 133 S.W.3d at 227–28 (explaining plaintiff's burden when plea to jurisdiction implicates merits); *Good Shepherd Med. Ctr.*, 306 S.W.3d at 831 (analogizing plaintiff's burden to that in summary judgment). If the evidence creates a fact issue as to jurisdiction, the trial court cannot grant the plea to the jurisdiction, and the fact issue must be resolved by the fact finder at trial. *Miranda*, 133 S.W.3d at 227–28; *University of Tex. v. Poindexter*, 306 S.W.3d 798, 807 (Tex. App.—Austin 2009, no pet.). On the other hand, if the undisputed evidence establishes that there is no jurisdiction or fails to raise a fact issue, the trial court rules on the plea to the jurisdiction as a matter of law. *Miranda*, 133 S.W.3d at 228; *Poindexter*, 306 S.W.3d at 807.

DISCUSSION

In its sole issue, DPS argues that the trial court erred in denying its plea to the jurisdiction and alternative motion for summary judgment because DPS is immune based on Trooper Goodson's official immunity. Thus, the question we must resolve is whether

Trooper Goodson is entitled to official immunity. The first and third requirements for official immunity are whether Trooper Goodson was (1) performing a discretionary act (2) within the scope of his authority. *See Clark*, 38 S.W.3d at 580 (citing *Chambers*, 883 S.W.2d at 653). "If an action involves personal deliberation, decision and judgment, it is discretionary . . . ." *Chambers*, 883 S.W.2d at 654. Traffic stops and the decision to pursue a suspect are discretionary acts. *Id.* at 655; *Edgar v. Plummer*, 845 S.W.2d 452, 454 (Tex. App.—Texarkana 1993, no writ) (stating that enforcement of traffic regulations by peace officers involves exercise of discretion and concluding that officer who detained suspect and issued warning for speeding was performing discretionary duty). An on-duty officer in his squad car pursuing a suspect is performing a discretionary duty within the scope of his authority. *Chambers*, 883 S.W.2d at 655, 658 (holding that decision to pursue suspect involves discretion because officer must elect whether to undertake pursuit and that officers discharging duties generally assigned them act within scope of authority); *Chapa v. Aguilar*, 962 S.W.2d 111, 114 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (stating that on-duty officer in squad car is performing discretionary duty within scope of authority when he pursues suspect and noting that parties did not dispute that officer who drove through red light to pursue suspect who ran red light was performing discretionary duty within authority). The fact that the specific act that forms the basis of the suit may have been negligent does not mean that an officer acted outside the scope of his authority. *Harris Cty. v. Ochoa*, 881 S.W.2d 884, 888 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (citing *Baker Hotel of Dallas, Inc. v. Rogers*, 157 S.W.2d 940, 943 (Tex. Civ. App.—Dallas 1941, writ ref'd w.o.m.)).

DPS's evidence included the accident report, Trooper Goodson's report and affidavit, and the dash cam video from the patrol car. The evidence established that when the accident occurred, Trooper Goodson was on duty in his DPS-issued patrol car pursing a suspect in a pickup truck for the purpose of making a traffic stop to enforce a traffic regulation. To the extent Mirasol offered any evidence in an attempt to controvert DPS's evidence on these issues, it is not a part of the appellate record. Based on the record before us, we conclude that DPS established as a matter of law that Trooper Goodson met the first two requirements for official immunity. *See Clark*, 38 S.W.3d at 580.

We turn, then, to whether Trooper Goodson was acting in good faith. The Texas Supreme Court has adopted the following test for determining good faith: An officer acts in good faith if "a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit." *Chambers*, 883 S.W.2d at 656. "Could have believed" means that the State must prove that a reasonably prudent officer might have believed that the pursuit should have been continued. *Id.* at 656–57. "It does not mean that an officer has to prove that it would have been unreasonable to stop the pursuit; nor must the officer prove that all reasonably prudent officers would have continued the pursuit." *Id.* at 657. The need to immediately apprehend a suspect depends in part on whether the suspect has been identified and could be apprehended at a later time. *Clark*, 38 S.W.3d at 584. To controvert the evidence of the officer's good faith, the plaintiff must show that no reasonable person in the officer's position could have thought the facts were such that they justified the officer's acts. *Chambers*, 883 S.W.2d at 657.

"The 'need' aspect of the test refers to the urgency of the circumstances requiring police intervention." *Telthorster v. Tennell*, 92 S.W.3d 457, 461 (Tex. 2002) (explaining *Chambers* test for good faith). Need is assessed by factors such as "the seriousness of the crime . . . , whether the officer's immediate presence is necessary to prevent injury or loss of life or to apprehend a suspect, and what alternative courses of action, if any, are available to achieve a comparable result." *Id.* (citing *Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 (Tex. 1997) (elaborating on need and risk elements of *Chambers* test)). The "risk" aspect of good faith refers to public safety concerns, including "the nature and severity of harm that 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 emergency), the likelihood that any harm would occur, and whether any risk of harm would be clear to a reasonably prudent officer." *Id.* at 461–62 (citing *Wadewitz*, 951 S.W.2d at 467). Balancing need and risk must be done in light of the particular circumstances in each case. *Clark*, 38 S.W.3d at 583 (citing *Chambers*, 883 S.W.2d at 656; *Wadewitz*, 951 S.W.2d at 467).

We must apply the *Chambers* and *Wadewitz* analysis when evaluating the evidence. *See City of San Antonio v. Ytuarte*, 229 S.W.3d 318, 321 (Tex. 2007) (concluding that court of appeals failed to apply *Chambers* and *Wadewitz* analysis when evaluating evidence, holding that evidence reflected without contradiction that officers acted in good faith, reversing appellate court's denial of summary judgment, and rendering judgment dismissing claims). The evidence must address both the need and risk aspects and reflect that the officer considered alternative courses of action. *See id.*; *Clark*, 38 S.W.3d at 582, 588; *Wadewitz*, 951 S.W.2d at 467. "Evidence of negligence will not controvert competent evidence of good faith." *Wadewitz*, 951 S.W.2d at 467 n.1.

The good faith standard recognizes that an officer may act in good faith and still be negligent. *Chapa*, 962 S.W.2d at 115.

DPS produced Trooper Goodson's affidavit, in which he averred, in part:

> 6. A reasonable and prudent officer, in the same or similar circumstances as I was on May 24, 2012, could have believed that the benefit and need of the traffic stop outweighed the minimal to no risks to the public. The benefit of making this traffic stop includes enforcing the traffic laws of the State of Texas since not having a front license plate is a Class C misdemeanor. The importance and purpose of the front license plate is that it identifies the vehicle should it be involved in an accident, a traffic violation or another type of crime.
>
> 7. I evaluated the risks involved in continuing the traffic stop, including the fact that the weather was clear and not raining, the roadways were well paved and dry. It was daylight and my view of the road ahead was unobstructed and it was a straight road. There were no pedestrians on the road. I could see the pickup truck I wanted to stop for the missing front license plate up ahead on the road. When I made the decision to turn left behind the pickup truck, I believed the way was clear.
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> 8. I considered the alternatives available or not available at the time. I thought of not making the traffic stop but there was little to moderate traffic and I believed I could make the traffic stop safely. There were no vehicles in front of my vehicle that had to yield the right of way as I approached the pickup truck. Neither I nor the pickup truck was traveling at an excessive rate of speed under the circumstances. I could always see the pickup truck ahead of me. Then it slowed and turned on its left turn signal. I thought he was pulling over or was going to flee or bail from his vehicle. I had read the license plate number to dispatch a few seconds prior to the accident occurring. I could not see or call in the license plate number when I first saw the pickup truck because I could not see the front plate. When I was close enough to the rear of the truck, I called in the plate number. This was to identify the truck and to let dispatch know I was about to make a traffic stop. I was safely making the left turn, moving slowly and thought that it was clear to turn. Then I saw the other car was going too fast and she collided with my vehicle.

Trooper Goodson's affidavit thus addressed both the need and risk aspects of the *Chambers/Wadewitz* test. As for need, he identified the commission of a Class C misdemeanor, the

importance to law enforcement of front license plates, and his belief that the suspect was pulling over to "flee or bail" from the pickup truck. He also explained his consideration of the alternative of not making the stop and stated that he was unable to see the license plate to call it in sooner.[2] In assessing the risks, he described the clear weather, dry pavement, light traffic, lack of pedestrian traffic, daylight conditions, unobstructed view, low-speed pursuit, his belief that it was clear for him to make the turn, and his subsequent realization that Mirasol was traveling "too fast."[3]

We conclude that Trooper Goodson's affidavit met the elements of the *Chambers/Wadewitz* test and conclusively established that a reasonable officer, under the same or similar circumstances, could have balanced the need and risk as he did. *See Clark*, 38 S.W.3d at 585–87 (concluding that one officer's affidavit satisfied test as to need, including consideration of alternatives, where it described assault suspect fleeing detention at high rate of speed and stated that suspect had not been identified and satisfied test as to risks when it addressed time of day, clear weather, dry pavement, light traffic, and commercial area, and concluding that other officer's affidavit met test where it similarly addressed need and risk, including, as to alternatives, statement that he was unable to get close enough to obtain license plate number); *City of Richmond v. Rodriguez*, No. 01-08-00471-CV, 2009 Tex. App. LEXIS 2226, at *13–15 (Tex. App.—Houston [1st Dist.] Apr. 2, 2009, no pet.) (mem op.) (holding that officer's affidavit properly assessed need

[2] Even if some might argue that the need is low in a stop for lack of a front license plate, Goodson also established that the risk was low under the circumstances of this particular stop.

[3] In addition, in the audio from the patrol car dash camera, which remained on for some time after the accident, Trooper Goodson can be heard stating that his vehicle had been "knocked up on a curb; that's how hard she hit me," that it was a "pretty good force that [put him up on the curb]," that Mirasol "was going a good rate of speed," that her vehicle was going at what "seemed like a high rate of speed," and that he did not see any skid marks.

and risk factors where officer testified he saw motorcycle speeding at night without headlight, determined it necessary to accelerate toward motorcyclist, considered alternative of not pursuing, and determined, based on knowledge of street and traffic and pedestrian conditions, that danger of pursuing was far less than danger posed by motorcyclist); *City of San Antonio v. Trevino*, 217 S.W.3d 591, 596 (Tex. App.—San Antonio 2006, no pet.) (holding that officer established good faith as matter of law where affidavit stated that he saw suspect's car parked at house known for drug and stolen vehicle traffic and later observed suspect run two stop signs and speed, that he was unable to get close enough to read license plate, and that it was approximately 1:00 a.m., there was no traffic or pedestrians, streets were dry and lighted by street lamps, and he was familiar with area); *Chapa*, 962 S.W.2d at 114–15 (holding affidavit sufficient where detail was minimal but officer averred that suspect ran red light, streets were clear and dry, visibility was good, street was divided with three lanes on each side, traffic was light, and that officer determined he needed to apprehend suspect and risk to public was slight).

Because we conclude that Trooper Goodson's affidavit took all of the *Chambers/Wadewitz* factors into account and thus affirmatively established his good faith as a matter of law, *see Clark,* 38 S.W.3d at 584–87, the burden shifted to Mirasol to show that "no reasonable person in the officer's position could have thought that the facts justified the officer's acts," *id.* at 581; *Chambers*, 883 S.W.2d at 657. To the extent Mirasol asserted this argument in her response to DPS's plea to the jurisdiction and alternative motion for summary judgment and produced any controverting evidence in support of the argument, as noted above, neither her response nor any evidence in support is included in the appellate record. Further, Mirasol has not filed an appellate

brief and therefore does not argue on appeal or cite to any evidence that no reasonable officer in Trooper Goodson's position would have thought that the facts justified his acts. *See Clark,* 38 S.W.3d at 581; *Rodriguez*, 2009 Tex. App. LEXIS 2226, at *15 (noting that plaintiff-appellee's arguments did not address good faith need and risk factors). We therefore conclude that Mirasol did not meet her burden to controvert DPS's conclusive evidence on good faith. *See Chambers*, 883 S.W.2d at 657; *Rodriguez*, 2009 Tex. App. LEXIS 2226, at *15 (concluding that plaintiff did not meet burden to controvert evidence of good faith where she asserted no argument that reasonable officer in defendant officer's position would not have thought that facts justified officer's acts and cited as evidence only her deposition testimony contradicting officer's testimony that motorcycle had no headlight and officer's emergency lights were on); *Trevino*, 217 S.W.3d at 596 (holding that plaintiff who offered only conclusory testimony that officer failed to exercise due care but did not substantiate conclusions with reference to need and risk balancing test did not meet burden to controvert evidence of good faith); *Hunt Cty. MHMR Ctr. Bd. of Dirs. v. Johnson*, No. 05-01-00057-CV, 2001 Tex. App. LEXIS 4412, at *5–6 (Tex. App.—Dallas June 29, 2001, pet. denied) (holding that plaintiff failed to meet burden to controvert evidence of good faith where she offered no evidence controverting defendants' evidence).

Because DPS established Trooper Goodson's official immunity from liability to Mirasol as a matter of law, the limited waiver of immunity under Section 101.021(1) of the TTCA does not apply. *See* Tex. Civ. Prac. & Rem. Code § 101.021(1). Mirasol has alleged no other basis for waiver of sovereign immunity. In the absence of legislative consent, DPS retained its immunity, and Mirasol's claims are barred by sovereign immunity. *See Ryder*, 453 S.W.3d at 926. Therefore,

the trial court lacked subject matter jurisdiction to determine Mirasol's claims and erred in denying DPS's plea to the jurisdiction. *Id.* at 927; *Miranda*, 133 S.W.3d at 225–26. We sustain DPS's issue as to its plea to the jurisdiction.[4]

CONCLUSION

Having concluded that the trial court erred in denying DPS's plea to the jurisdiction, we reverse the trial court's order denying DPS's plea to the jurisdiction and dismiss Mirasol's claims for lack of subject matter jurisdiction.

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Melissa Goodwin, Justice

Before Justices Puryear, Goodwin, and Bourland

Reversed and Dismissed

Filed: September 29, 2016

[4] Because our determination as to the trial court's ruling on DPS's plea to the jurisdiction is dispositive, we need not address the question of the trial court's ruling on its motion for summary judgment, asserted in the same issue. *See* Tex. R. App. 47.1.