NUMBER 13-15-00122-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

BAY CITY, TEXAS, **Appellant,**

v.

WADE MCFARLAND, **Appellee.**

On appeal from the 23rd District Court
of Matagorda County, Texas.

MEMORANDUM OPINION

Before Chief Justice Valdez and Justices Rodriguez and Perkes
Memorandum Opinion by Chief Justice Valdez

Appellee Wade McFarland filed suit against appellant Bay City (City) for injuries arising out of a vehicular collision with Kimberly Kunz, a City police officer. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021, 101.055 (West, Westlaw through 2015 R.S.). The City filed a plea to the jurisdiction and motion for summary judgment seeking dismissal of McFarland's suit on grounds of government and official immunity. The trial court denied both motions and this interlocutory appeal followed. *See id.* § 51.014(a)(8) (West,

Westlaw through 2015 R.S.). By two issues, the City contends that the trial court erred in denying its: (1) plea to the jurisdiction alleging government immunity; and (2) motion for summary judgment alleging official immunity. We affirm.

I. BACKGROUND

During the evening hours of June 5, 2011, Officer Kunz was dispatched to the scene of a residence where two siblings had been reported fighting with deadly weapons. While in route to the scene, Officer Kunz collided with a motorcycle driven by McFarland at an intersection. The evidence is undisputed that Officer Kunz proceeded through the intersection without stopping at a stop sign, which governed the flow of traffic into the intersection.

McFarland brought suit against the City, alleging that the City was vicariously liable for Officer Kunz's negligence and that the City itself was negligent in its hiring and training of Officer Kunz. In response to McFarland's suit, the City filed a plea to the jurisdiction on the basis that section 101.055 of the Texas Civil Practice and Remedies Code barred McFarland's suit because the negligence claims arose out of Officer Kunz's action in responding to an emergency call. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2) (immunizing the government from a suit for its employee's response to an emergency call, subject to applicable exceptions). The City also filed a motion for summary judgment on the basis that the City was immune from McFarland's suit based on Officer Kunz's official immunity. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994) (immunizing the government from a suit arising out of an employee's good faith performance of a discretionary duty within the employee's scope of authority).

The City attached the following relevant evidence in support of its plea to jurisdiction and motion for summary judgment: (1) Officer Kunz's affidavit and deposition

testimony recounting the incident; (2) a dash-cam video from Officer Kunz's police vehicle that purports to capture the collision; and (3) McFarland's deposition testimony recounting the incident. Officer Kunz testified, in relevant part, as follows regarding her recollection of the incident:

> [After] receiving the call from dispatch, I activated my lights and sirens and then [turned onto Avenue M]. Officer O' Bryant [with the City's police department] was ahead of me when I turned onto Avenue M. Officer O' Bryant was also operating with his lights and sirens as he was traveling north on Avenue M.
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> I believed that it was a priority for me to arrive at the call as quickly as possible because it had been reported that there were multiple combatants and weapons were present and only [Officer O' Bryant] was going to be on the scene. I continued down Avenue M and began to slow prior to the intersection [] where the accident occurred, to check for traffic. I believe that I began to slow approximately three to four car lengths prior to the intersection.
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> . . . .
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> When I saw [McFarland's motorcycle] and first realized he might be proceeding through the intersection, I would estimate that he was approximately three car lengths from entering into the intersection and I was approximately three to four car lengths from entering into the intersection. As the driver of an emergency vehicle operating with lights and sirens, I believed that I had the right-of-way in that situation and that my car should have been visible and the siren should have been able to be heard by the driver of the motorcycle. Under the circumstances I needed to make a judgment call and I made the judgment call to slow but proceed through the intersection.[1] I saw the motorcycle immediately prior to the impact and I did not know if [McFarland] was trying to stop or to change gears. I attempted to avoid the accident but the accident occurred.
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> . . . .
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> I made the decision to proceed through the stop sign in light of the facts and circumstances known to me including the fact that other vehicles were required to yield the right-of-way to emergency vehicles. The residential

[1] At her deposition, Officer Kunz testified that she had slowed "almost to a halt" at the moment she collided with McFarland's motorcycle. Later during her deposition, however, Officer Kunz estimated that she was traveling twenty-five miles per hour immediately prior to the collision.

> street had very little traffic and my police car was operating with lights and sirens. In addition, [Officer O' Bryant's vehicle] which had just gone down Avenue M should have alerted vehicles to possible emergency vehicle activity in the area.

Chief Doug Kowalski, McFarland's expert in police procedures, took issue with Officer Kunz's testimony regarding her recollection of the incident. Importantly, Chief Kowalski testified that the dash-cam video contradicted Officer Kunz's testimony that she slowed as necessary before entering the intersection. Specifically, Chief Kowalski noted that the dash-cam video showed that Officer Kunz did not slow her vehicle prior to entering the intersection and that she had been traveling at a "reckless" speed through several intersections prior to the collision. Chief Kowalski further elaborated that "a mere four seconds before colliding into McFarland, Officer Kunz's patrol car [was] seen bouncing into the air as it travel[ed] over a hump at a reckless speed." Chief Kowalski concluded that Officer Kunz's operation of her vehicle was reckless and that no reasonably prudent officer could believe that her conduct was necessary under the circumstances.

After considering the evidence, the trial court denied the City's plea to the jurisdiction and motion for summary judgment. This appeal followed.

II. Government Immunity

By its first issue, the City contends that the trial court erred in denying its plea to the jurisdiction because the evidence it offered to support the plea conclusively established government immunity.

A. Applicable Law and Standard of Review

A plea to the jurisdiction challenges the trial court's jurisdiction over the subject-matter of a claim. *See Tex. Dept. of Pub. Safety v. Sparks*, 347 S.W.3d 834, 837 (Tex.

App.—Corpus Christi 2011, no pet.). The government's assertion of immunity is properly brought through a plea to the jurisdiction because it challenges the trial court's subject-matter jurisdiction. *Id.*

We review de novo a trial court's ruling on a plea to the jurisdiction alleging government immunity. *Id.* We assume the truth of the jurisdictional facts alleged in the plaintiff's pleadings unless the defendant-government presents evidence to negate their existence. *Id.* If the defendant-government provides evidence supporting immunity, the plaintiff may defeat the defendant's plea to the jurisdiction by showing that a material fact is in dispute regarding the issue of immunity. *Id.* If the plaintiff provides evidence raising a fact question on the issue of immunity, then the issue of immunity cannot be decided by the trial court on a plea to the jurisdiction but instead must be taken to the fact-finder for resolution. *Id.* For this reason, it has been said that the standard for reviewing a plea to the jurisdiction "generally mirrors" that of a traditional motion for summary judgment. *See id.*; *see also* TEX. R. CIV. P. 166a(c) (providing that the existence of a genuine material fact issue precludes summary judgment on a claim or affirmative defense).

Subject to certain exceptions, the government generally enjoys immunity from suits brought by private citizens. *See Sparks*, 347 S.W.3d at 837. One relevant exception applies when a private citizen seeks to recover for personal injuries caused by the negligence of a government employee who responds to an emergency call. *Id.* In such a situation, the government's cloak of immunity must yield to the right of the private citizen to maintain an action in tort if: (1) the emergency responder violates the law applicable to the emergency situation; or (2) in the absence of such law, the emergency responder acts with "conscious indifference" or "reckless disregard" for the safety of others. *See id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.055(2). The terms "conscious

indifference" and "reckless disregard" in this context describe an emergency responder who knows but does not care that her emergency response threatens the safety of others. *See City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 n.19 (Tex. 2006).

The Texas Transportation Code supplies the law applicable to the emergency situation in this case; specifically, the transportation code provides that while responding to an emergency call, an emergency responder:

a. has a duty to operate her vehicle with appropriate regard for the safety of all persons;

b. is not relieved of the consequences of reckless disregard[2] for the safety of others;

c. generally should use her vehicle's audible or visual signals; and

d. may proceed past a stop sign after slowing as necessary for safe operation.

TEX. TRANSP. CODE ANN. §§ 546.001(2), 546.002(b)(1), 546.003, 546.005 (West, Westlaw through 2015 R.S.).

B. Analysis

On appeal, the City contends that Officer Kunz complied with these sections of the transportation code and was not reckless because she: (1) responded to an emergency call; (2) used her vehicle's audible or visual signals; and (3) slowed down before passing the stop sign and entering the intersection. Although it is undisputed that Officer Kunz (1) responded to an emergency call, and (2) used her vehicle's audible or visual signals,

[2] The Texas Supreme Court has stated that the "reckless disregard" test "requires a showing of more than a momentary judgment lapse" and that "[t]o recover damages resulting from the emergency operation of an emergency vehicle, a plaintiff must show that the operator has committed an act that the operator knew or should have known posed a high degree of risk of serious injury." *City of Pasadena v. Kuhn*, 260 S.W.3d 93, 99 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (quoting *City of Amarillo v. Martin*, 971 S.W.2d 426, 429–30 (Tex. 1998)).

there is a factual dispute as to whether she slowed down as necessary for safe operation before proceeding past the stop sign and entering the intersection. Specifically, Officer Kunz states in her affidavit that she slowed down before proceeding past the stop sign, while Chief Kowalski states that she did not slow down based on his review of the dash-cam video.[3]

Regarding the materiality of this disputed fact, we observe that the cases offered by the City to support its assertion of immunity involved emergency responders who, among other things, slowed down before proceeding through intersections. *See Sparks*, 347 S.W.3d at 842 (holding that emergency responder was not reckless as a matter of law because, among other things, there was no competent evidence indicating that he failed to slow down as necessary for safe operation before entering the intersection); *City of Pasadena v. Kuhn*, 260 S.W.3d 93, 100 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (concluding that emergency responder was not reckless as a matter of law because, among other things, there was no dispute that he slowed down before entering the intersection); *City of San Angelo Fire Dept. v. Hudson*, 179 S.W.3d 695, 701–02 (Tex. App.—Austin 2005, no pet.) (determining that emergency responder was not reckless as a matter of law after disregarding conclusory eyewitness testimony that responder failed to slow down before entering the intersection); *Smith v. Janda*, 126 S.W.3d 543, 546 (Tex. App.—San Antonio 2003, no pet.) (emergency responder held not reckless as a matter of law because, among other things, responder undisputedly slowed down before

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[3] The City argues that Chief Kowalski's opinion should be disregarded because there was no way for him to accurately gage Officer Kunz's speed simply by reviewing the dash-cam video; according to the City, the dash-cam video conclusively shows that Officer Kunz demonstrated compliance with the transportation code by slowing down at the intersection. However, based on our review of the dash-cam video, evidence that Officer Kunz slowed down at the intersection, or slowed down as necessary, is not conclusively shown.

entering the intersection). Because there is a disputed issue as to whether Officer Kunz slowed down before entering the intersection, the cases relied on by the City to support government immunity are distinguishable.

In view of the forgoing authority, we find that McFarland has successfully provided evidence raising a fact question regarding whether Officer Kunz slowed down or slowed down as necessary for safe operation. *See Sparks*, 347 S.W.3d at 842. This fact question is material to the ultimate jurisdictional issue regarding whether she violated the law applicable to the emergency situation or otherwise showed a conscious indifference or reckless disregard for the safety of others. *See id.*; *Kuhn*, 260 S.W.3d at 100; *Hudson*, 179 S.W.3d at 701–02; *Janda*, 126 S.W.3d at 546. Accordingly, we conclude that the trial court properly denied the City's plea to the jurisdiction. We overrule the City's first issue.

III. Official Immunity—Good Faith

By its second issue, the City contends that the trial court erred in denying its motion for summary judgment based on Officer Kunz's official immunity.

A. Applicable Law and Standard of Review

Official immunity is an affirmative defense that protects a police officer from personal liability for the good faith performance of a discretionary duty within the scope of the officer's authority. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). When official immunity shields a police officer from personal liability, government immunity shields the officer's employer from vicarious liability for the officer's actions. *DeWitt v. Harris County*, 904 S.W.2d 650, 653 (Tex. 1995).

For purposes of official immunity, a police officer acts in "good faith" in responding to an emergency call if a reasonably prudent officer under the same or similar

circumstances could have believed that the need for the emergency response outweighed the risk of the officer's course of action based on the officer's perception of the facts at the time of the event. *See Chambers*, 883 S.W.2d at 656–57 (adopting a need-versus-risk test for assessing good faith in the context of official immunity). "Good faith" in the official-immunity context is defined in a somewhat counter-intuitive fashion because it disregards the officer's subjective state of mind and instead refers to a standard of objective reasonableness—i.e., the "reasonably prudent officer." *See* 42 TEX. JUR. 3D GOVERNMENT TORT LIABILITY § 79. The "need" aspect of the test refers to the urgency of the circumstances requiring police intervention. *See Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 (Tex. 1997) (citing *Chambers*, 883 S.W.2d at 656–57). On the other hand, the "risk" aspect of good faith refers to the countervailing safety concern that police intervention presents to the general public. *See id*.

When, as here, the defendant-government moves for summary judgment based on official immunity, the government must show that there is no genuine issue of material fact regarding official immunity and that it is therefore entitled to judgment as a matter of law. *See Hudson*, 179 S.W.3d at 698*; see also* TEX. R. CIV. P. 166a(c). Stated another way, the government must conclusively establish official immunity in order to obtain summary judgment as to that affirmative defense. *See Hudson*, 179 S.W.3d at 698. In reviewing the summary judgment record, we take as true all competent evidence negating a finding of official immunity and resolve any doubts against the government. *Id*.

B. Analysis

The issue on appeal is whether the City conclusively proved that a reasonably prudent officer in Officer Kunz's shoes could have believed that the need to respond to

the emergency call outweighed the risk that her response might injure others or cause an accident.

1. Need

As previously mentioned, the “need” aspect of the good-faith test addresses the relative urgency of police intervention. *See Wadewitz*, 951 S.W.2d at 467. In the context of an emergency response, need is determined by factors such as: (1) the seriousness of the crime or accident to which the officer responds; (2) whether the officer's immediate presence is necessary to prevent injury or loss of life or to apprehend a suspect; and (3) what alternative courses of action are available to achieve a comparable result. *See id.*

Regarding the first and second need-factors listed above, Officer Kunz attested to the seriousness of the emergency call and to the necessity for immediate police intervention to prevent injury or loss of life. Specifically, Officer Kunz testified that she was following Officer O’ Bryant to the scene of an altercation involving two siblings with deadly weapons. Officer Kunz further testified that it was her priority to get to the scene as soon as possible to prevent Officer O’ Bryant from encountering a potential two-on-one situation against the siblings.

McFarland does not appear to dispute the first and second need-factors—i.e., that the sibling altercation was a serious matter that called for urgent police intervention. Instead, McFarland focuses on the third need-factor—arguing that Officer Kunz failed to recognize the availability of a safer alternative course of action that could have achieved a comparable emergency response. Specifically, McFarland asserts that Officer Kunz could have slowed down before she disregarded the stop sign and entered the intersection. To support this assertion, McFarland relies on Chief Kowalski’s testimony that had Officer Kunz slowed down before entering the intersection, her arrival to the

scene of the altercation would have been delayed by only seconds. According to McFarland, a delay of only seconds is so *de minimis* that it would not have compromised law enforcement's need for urgent police intervention. McFarland further asserts that this *de minimis* delay in arrival-time would not have exposed Officer O' Bryant to a two-on-one situation against the siblings because, according to Chief Kowalski, officer-safety protocol demanded that Officer O' Bryant wait for Officer Kunz to arrive to the scene of the altercation before engaging the siblings. Based on this evidence, McFarland argues that Officer Kunz disregarded an alternative to her course of action, which was safer and which could have achieved a comparable emergency response.

We find that the issue regarding whether Officer Kunz slowed down is material to the third need-factor concerning whether a safer alternative course of action was available that could have produced a comparable emergency response. *See Green v. Alford*, 274 S.W.3d 5, 18 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (holding that the emergency responder did not conclusively prove good faith in entering the intersection where, among other things, the evidence showed that his arrival-time would have been delayed by no more than thirty seconds had the officer slowed at the intersection to ascertain that all traffic had yielded).

2. Risk

As previously mentioned, the "risk" aspect of the good-faith test addresses the extent to which the need for police intervention in a given situation threatens countervailing public safety interests. *See Wadewitz*, 951 S.W.2d at 467. In the context of an emergency response, risk is determined by factors such as: (1) the nature and severity of harm that the officer's actions could cause, including injury to bystanders as well as the possibility that an accident would prevent the officer from reaching the scene

of the emergency; (2) the likelihood that any harm would occur; and (3) whether any risk of harm would be clear to a reasonably prudent officer. *See id.*

Regarding the first risk-factor listed above, the parties do not appear to dispute that a police officer who disregards a stop sign on the way to an emergency call could cause a vehicular accident and that such an accident could harm bystanders and could ultimately prevent the police officer reaching the scene of the emergency. Instead, the dispute centers on the second and third risk-factors—i.e., whether Officer Kunz was likely to cause an accident with McFarland and whether such an accident would have been clear to a reasonably prudent officer in Officer Kunz's shoes.

The City asserts that the likelihood of an accident was low and would not have been clear to a reasonably prudent officer because, among other things, Officer Kunz slowed down before entering the intersection. As previously noted, the summary judgment evidence does not conclusively prove that Officer Kunz slowed down. We conclude that the issue regarding whether Officer Kunz slowed down is material to the risk factors concerning whether the harm associated with Officer Kunz's action was likely to occur or would have been clear to a reasonably prudent officer. *See Hudson*, 179 S.W.3d at 706–07 (analyzing the risk-factors and holding that the emergency responder acted in good faith as a matter of law where, among other things, no competent evidence contradicted the responder's testimony that he slowed down before entering the intersection).

Taking, as true, all competent evidence negating a finding of official immunity and resolving any doubts against the City, we hold that the summary-judgment evidence does not conclusively prove that a reasonably prudent officer in Officer Kunz's shoes could have believed that the need to respond to the emergency situation outweighed the risk

that her response created. *See Hudson*, 179 S.W.3d at 698; *see also* TEX. R. CIV. P. 166a(c). Therefore, the trial court was correct to deny the City's motion for summary judgment alleging official immunity. We overrule the City's second issue.

IV. CONCLUSION

We affirm the trial court's denial of the City's plea to jurisdiction and motion for summary judgment.

/s/ Rogelio Valdez
ROGELIO VALDEZ
Chief Justice

Delivered and filed the
13th day of October, 2016.