

Affirmed and Opinion filed December 2, 1999.



In The

Fourteenth Court of Appeals

NO. 14-98-01264-CV

CITY OF HOUSTON, Appellant

V.

YOLANDA MENDOZA, MARY JANE RAMIREZ, ET AL., Appellees

**On Appeal from the 125th District Court
Harris County, Texas
Trial Court Cause No. 96-58070**

OPINION

The City of Houston (City) appeals the denial of a motion for summary judgment based on sovereign immunity derived from the official immunity of the police officers involved in a high-speed chase. The trial court denied this motion.

On appeal, the City contends the trial court abused its discretion by: 1) denying its motion for summary judgment; 2) allowing as proof the affidavit of the appellees' expert; and 3) refusing to grant the City derivative immunity based on the official immunity of the police officers. We affirm the judgment of the trial court.

On November 25, 1994, the Friday after Thanksgiving, Officer Odon Belmarez was on patrol in a marked Houston Police Department (HPD) vehicle close to downtown Houston. Around 4:00 PM, he observed a black pickup truck driven by Arturo Medina run a stop sign at the intersection of Gulf Creek and Office City Drive. Officer Belmarez followed this truck onto the feeder of Interstate 45 North, put on his overhead lights, and sounded his emergency horn in an attempt to stop the vehicle. The vehicle ignored these signals and entered the freeway. Officer Belmarez radioed a dispatcher to notify him that the vehicle was refusing to stop, turned on his siren, and began to pursue the vehicle. The dispatcher notified Officer Belmarez that the truck was stolen and requested a police helicopter, which began to head toward the fleeing vehicle. The chase continued at faster than freeway speeds until Medina exited the freeway across a grassy median driving back to the feeder. Officer Belmarez followed and was joined by a Metro police officer, Craig Lee.

On the feeder, Medina ran through a red light at Wayside and another HPD officer, Officer Mares, joined the chase. Medina turned the truck north on Telephone Road, at which point the officers entered into an unfamiliar police district. This area is largely commercial, but Telephone Road passes through a residential area containing a school zone. Officer Lem, who was familiar with the roads in this district, joined the chase and took over radio contact. At some point close to downtown, Telephone Road becomes Leeland Street.

Yet another HPD officer, Officer Flores, joined in the procession, pulling in front of Officer Mares and causing him to fall back out of fear for his safety.

At the intersection of Leeland and Cullen Streets, Medina ran through another light that was turning red. Officer Belmarez and the others slowed, allowing Medina to gain a lead on the police. It is at this point that the facts begin to widely diverge, although it is undisputed that at the next intersection, Leeland and Scott, Medina hit a Honda Accord, killing Robert Romero, Laura Madrid, Victoria Romero, and severely injuring Lisa Madrid, who was eight years old at the time. The force of the impact was enough to throw Laura Madrid free of the vehicle, where the car landed on top of her.

Officer Belmarez claims that he was anywhere from fifteen to six car lengths behind Medina when the collision occurred. Eyewitnesses, however, place him around six feet behind the car three-tenths of a

mile before the collision occurred, and Medina claims that Belmarez hit the truck with his police cruiser, knocking or pushing him into the intersection and the appellees' vehicle. This statement is supported by a dent on the rear bumper of the stolen vehicle that was not present prior to the vehicle's being stolen.

There is also a dispute about when the police helicopter arrived on the scene, with an eyewitness placing the helicopter at the scene when the collision occurred and other proof placing its arrival time at less than a minute after the collision. Although a time stamp is generally put on dispatch tapes which would resolve this dispute, no time stamp was placed on the tape of this event because the tape was defective.

Another disputed fact is the speeds attained by the officers during the chase. The City offers proof that the speeds never exceeded 40 to 45 miles per hour on Telephone Road or Leeland Street. However, Officer Lee, the Metro police officer involved in the chase, stated during the chase that he was traveling 60 miles per hour on Telephone Road.

The appellees filed suit against the City, alleging personal injury, survival and wrongful death causes of action. After conducting discovery, the City moved for summary judgment based on derivative immunity. In support of its motion, the City filed ten affidavits, several deposition excerpts, and numerous other documents. The plaintiffs answered, alleging that the affidavit of its expert created a genuine issue of material fact. The City moved to strike this affidavit.

The trial court denied both of the City's motions without specifying the grounds. On appeal, the City contends that the trial court abused its discretion by denying its motion for summary judgment and failing to strike the affidavit of Plaintiff's expert.

The City first argues that the trial court abused its discretion by denying its motion for summary judgment since the police officers in question were entitled to official immunity under the facts of this case. After reviewing all of the proof presented by the City and appellees, we find that genuine issues of material fact exist as to whether or not the officers were acting in good faith, making the trial court's denial of the City's motion appropriate.

Generally, the denial of a summary judgment is interlocutory and unappealable. *Schlipp v. Exxon Corp.*, 644 S.W.2d 453, 454 (Tex.1982). However, appellants brought this appeal pursuant to section

51.014(5) of the Texas Civil Practice and Remedies Code, which allows officers or employees of the state or its political subdivision to appeal a denial of a motion for summary judgment based on an assertion of immunity. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon 1997). Because of the limited appellate jurisdiction of this appeal, we will only address the immunity defense and not the merits of the case.

The standard we follow when reviewing a summary judgment is well established. Summary judgment is proper only when the movant establishes there are no genuine issues of material fact and proves he is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c). To be entitled to summary judgment, a defendant must either (1) conclusively negate at least one essential element of each of the plaintiff's causes of action, or (2) conclusively establish each element of an affirmative defense to each claim. *See American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex.1997). In deciding whether there exists a disputed fact issue precluding summary judgment, we treat evidence favorable to the non-movant as true and indulge all reasonable inferences in the non-movant's favor. *See id.*

The City's motion for summary judgment is based on the affirmative defense of official immunity. Under Texas law, a defendant seeking a summary judgment on an affirmative defense of immunity must prove, without dispute and as a matter of law, that when the event in question occurred, he or she was: (1) performing a discretionary function, (2) acting in good faith, and (3) acting within the scope of authority. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994). If any element is not proved as a matter of law or is factually disputed, the summary judgment must be denied. *See id.* However, if the officer is entitled to official immunity, then the governmental entity employing him retains its sovereign immunity.¹

The City presents the affidavits of four officers involved in this pursuit, as well as affidavits of four experts. We note that affidavits of interested or expert witnesses will support a motion for summary judgment only if they are clear, positive, and direct; otherwise credible and free from contradictions and inconsistencies; and could be readily controverted. TEX. R. CIV. P. 166a(c).

¹ *See DeWitt v. Harris County*, 904 S.W.2d 650, 653 (Tex.1995) (holding that governmental immunity is contingent on the officer's immunity).

In support of the discretionary nature of Officer Belmarez's actions and the other officers' decision to pursue Medina, the City points this court to *Chambers*. The supreme court there stated:

"The decision to pursue a particular suspect will fundamentally involve the officer's discretion, because the officer must, in the first instance, elect whether to undertake pursuits. Beyond the initial decision . . . a high speed pursuit involves the officer's discretion on a number of levels, including, which route should be followed, at what speed, should back-up be called for, and how closely should the fleeing vehicle be pursued." *Chambers*, 883 S.W.2d at 665.

The City presented the affidavits of Officer Belmarez and several other HPD officers to show that the pursuit policy of HPD makes the decision to engage in a high-speed chase discretionary. These affidavits disclose that on the date in question, Officer Belmarez was performing a discretionary act under this policy. The affidavits further disclose that Officer Belmarez initially attempted to stop the suspect because of a traffic violation. This court has held that the enforcement of traffic regulations by a police officer is discretionary. *Harris County v. Ochoa*, 881 S.W.2d 884, 887 (Tex. App.–Houston [14th Dist.] 1994, writ denied). Appellees do not challenge this proof. Accordingly we find that HPD has proven this element of its defense.

Whether or not Officer Belmarez and the other officers were acting within the scope of their authority as HPD officers is also not challenged. In support of this element, the City points this court to the officers' acts during the course of this pursuit and the circumstances under which those acts were performed. The officers were on duty, in marked vehicles, and trying to stop a suspect who was driving a stolen vehicle and violating traffic laws. We agree with the City that these actions were clearly within the scope of the officer's authority, especially since they were acting as employees of the City in their performance. *See Travis v. City of Mesquite*, 830 S.W.2d 94, 103 (Tex. 1992); *Ochoa*, 881 S.W.2d at 888.

While the appellees do not challenge whether the HPD officers were performing discretionary acts within the scope of their authority, they do strongly contest the issue of good faith. Our analysis, therefore, will focus on this issue.

In *City of Lancaster v. Chambers*, the Texas Supreme Court adopted the following balancing

test to determine good faith in pursuit cases. "[A]n officer acts in good faith in a pursuit case 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 [rather than terminating] the pursuit." *Chambers*, 883 S.W.2d at 656. The test of good faith immunity is one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith. *See id.* Good faith depends on how a reasonably prudent officer could have assessed both the need to which an officer responds and 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 Wadewitz v. Montgomery*, 951 S.W.2d 464, 467 (Tex.1997). Thus, the good faith of an officer is not assessed at a specific instance, but must be continually assessed based on an objective weighing of the need versus the risk as the circumstances change during the pursuit.

The Texas Supreme Court recently clarified the summary judgment burden for a defendant police officer claiming official immunity. *See id.* at 466-67. An expert or interested witness's conclusory statement that a reasonable officer could or could not have taken some action will neither establish good faith at the summary judgment stage nor raise a fact issue to defeat summary judgment. *See id.* at 466. Instead, expert testimony regarding good faith must address what a reasonable officer could have believed under the circumstances and must be substantiated with reference to each aspect of the *Chambers* balancing test. *See id.* at 467 (citing *Chambers*, 883 S.W.2d at 656-57).

In *Wadewitz*, the court further explained the "need" versus the "risk" factors of the good faith test. The need aspect of the test refers to the urgency of the circumstances requiring police intervention. *See id.* In the context of an emergency response, need is determined by factors such as the seriousness of the crime or accident to which the officer responds, 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. *See id.* The risk aspect of good faith, on the other hand, refers to the countervailing public safety concerns: the nature and severity of harm that the officer's actions could cause, including injuries to bystanders and 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. *See id.* A court must then balance the need to which an officer responds against 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 id.* at 466.

Although none of the eight individual affidavits presented by the City addresses all of the elements of the *Chambers* balancing test, we find that the affidavits taken as a whole sufficiently address the balancing of the need to apprehend the suspect against the risk of the pursuit.

Officer Belmarez's affidavit substantiates his balancing of the *Chambers* factors by showing that he felt that the suspect's running of a red light endangered the public. This belief was heightened when he was notified that the suspect was driving a stolen vehicle. Further, Officer Mares' affidavit reflects that, since the vehicle contained multiple suspects, the need for multiple officers was substantiated. The affidavits of Officers Lem and Curran address the viability of alternative courses of action. Both affidavits state that roadblocks were impossible under the circumstances due to the large number of intersections on the route of the chase. Officer Curran's affidavit indicates that a police helicopter was notified and was on its way to the scene, which necessitated the officers keeping the suspect's vehicle in sight. The affidavits of the City's experts also address the need to keep the suspect's vehicle in sight until the helicopter arrived on the scene.

This need was balanced against the risk of pursuit—a collision with another vehicle. Officer Belmarez states that the risk was low because of the weather, light traffic, and the fact that neither he nor the suspect had lost control of his vehicle. Officer Belmarez further states that he slowed down or stopped prior to entering at least one intersection, sounded his horn, and insured that it was safe to continue before prolonging the pursuit. This proof is supported by the affidavit of Officer Mares. Officer Belmarez's affidavit and other proof shows that the suspect ran through only two red lights during the chase, one of which resulted in the collision. The affidavit of the City's expert Officer Albert Rodriguez, a police officer with the Texas Department of Public Safety, indicates that Officer Belmarez's acts reflect that he drove with due regard for the safety of others. He further claims that the suspect's braking at intersections and maintenance of a relatively slow speed did not make his actions at the final intersection foreseeable. Randall Dodd, another of the City's experts, states in his affidavit that the low speeds of the pursuit

decreased the likelihood of harm. The City's other expert, Harry Ryon, also agreed with these expert opinions for largely the same reasons.

Each officer, as well as the City's experts, concluded that the officers acted reasonably and in good faith under the circumstances and that any reasonably prudent officer under the same or similar circumstances could have believed that the need to apprehend the suspect outweighed the clear risk of harm to the public. Based on the factual analysis undertaken by each of the City's affiants, we conclude that the City sufficiently addressed each element of the *Chambers* test and met its burden of proof on the issue of good faith.

Once the defendant/movant has met the burden of proof on good faith, the plaintiff/non-movant may attempt to controvert the existence of the defendant's good faith. *Texas Dep't of Public Safety v. Tanner*, 928 S.W.2d 731, 736 (Tex. App.–San Antonio 1996, no writ). To avoid a summary judgment based on official immunity, however, the plaintiff carries a much higher burden of proof. *Id.* In order to raise a fact issue, a plaintiff is required to prove that "no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts." *Chambers*, 883 S.W.2d at 657. "[W]e look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Id.* at 656. Upon this controverting proof, the question of good faith must go to a jury to resolve the fact issue. *Id.*

As controverting proof, the appellee presented the seventeen-page affidavit of its expert, Dan Ramsey. This affidavit was supplemented with numerous exhibits, including the deposition and criminal trial testimony of Officer Belmarez, the HPD accident report, radio transcripts of the chase from HPD and Metro Police, and the affidavits of eyewitnesses to the collision. Ramsey's affidavit points out several issues of material fact in the City's proof.

First, Ramsey points out that an issue of fact exists as to whether or not the police helicopter was on the scene at the time of the collision. Although all of the police officers involved claim that the helicopter arrived "shortly after the collision," eyewitnesses claim that the helicopter was already on the scene when the accident occurred. Although this issue could be conclusively proven by transcripts from time-stamped

radio transmission tapes, the City's own custodian of records averred that this information was not produced because the tapes were in such poor condition when created that no time stamp was placed on them and they were unintelligible. The tape transcripts that were produced provide no help in resolving this issue. Further, Ramsey points out that the officers' claims that traffic was light would increase the chances that the helicopter would be able to spot the suspect, making the officers' decision to follow the suspect so closely unreasonable.

Second, Ramsey points out the inconsistencies in Officer Belmarez's affidavit about the suspect's behavior to contradict the City's experts' contentions that the act of the suspect in running the red light of the intersection was unforeseeable. Although his affidavit states that the suspect was not traveling in a dangerous or reckless manner, Belmarez testified at Medina's criminal trial that Medina drove through the original intersection without slowing down. He further testified that Medina was traveling at a high rate of speed. Further, though the HPD officers claimed that the suspect only ran two red lights, the radio transcript and report of Metro Officer Lee states the suspect ran at least seven red lights during the course of the pursuit. These facts, Ramsey contends, make the suspect's running of the light at the Leeland and Scott intersection foreseeable, though all of the City's affiants claim that this act was unforeseeable.

Third, Ramsey's affidavit raises the issue of whether or not the police officers were driving reasonably under the circumstances. Though the officers claim that the pursuit speeds never exceeded 45 miles per hour, Ramsey points out that the Metro police radio transcript of the chase reveals that the speeds reached at least 60 miles per hour. Ramsey also points out that the fact that the officers traveled the pursuit route slowly is contravened by the fact that they traveled over four miles in under four minutes. Ramsey also states that a videotape of the chase route reveals that the officers passed through a school zone, a fact not mentioned in any police report. He further states that the businesses on Leeland Street and Telephone Road are situated close to the street, obscuring the view of vehicular traffic on the cross streets. Also, he states that the road was bumpy and full of potholes in some areas, making high speed travel treacherous. These facts, coupled with the additional fact that most of the officers were traveling in an unfamiliar area, raise an issue about the riskiness and reasonableness of the officers' driving.

Finally, Ramsey states in his affidavit that proof shows that Officer Belmarez's vehicle struck the

suspect's vehicle immediately prior to the suspect's vehicle entering the intersection where the collision occurred. He bases this statement on several facts. First, the suspect's vehicle had an unexplained dent in its rear bumper, which the City's investigating officer testified could be consistent with the bumper being struck by Officer Belmarez's car.² The investigating officer also stated in his deposition that if Officer Belmarez actually rammed the suspect's vehicle he would not be acting in good faith. Further, Arturo Medina, the suspect driving the stolen vehicle, testified in a deposition taken after his criminal trial that his vehicle was struck by a police vehicle prior to entering the intersection. Moreover, Officer Belmarez had been disciplined by HPD for colliding with civilian cars while in the course of duty prior to this occasion. Finally, an eyewitness stated that less than half a mile before the intersection of Leeland and Scott, a police car was less than six feet behind the suspect's vehicle.

Based on these facts, which balance the needs of the pursuit against the risks in accordance with *Chambers*, Ramsey concludes that "no reasonable police officer, under the same or similar circumstances could have believed that the need to apprehend a stolen vehicle outweighed the risk to the public."

The City controverts nearly all of the facts relied upon by Ramsey in his affidavit, claiming, for example, that no contact occurred between the police vehicle and the stolen vehicle. The City also contends that the testimony of Medina, the suspect driving the stolen vehicle, is inconsistent and unreliable, therefore, making it an unacceptable basis for Ramsey's opinions. By accepting as true proof favorable to the non-movant, and resolving any doubts in the non-movant's favor, however, we believe that the factual allegations contained in Ramsey's affidavit are sufficient to raise a genuine issue of material fact and support his conclusion that no reasonable person could have believed that the benefits of continuing the chase outweighed the risks to the public. Accordingly, appellant's first point of error is overruled.

The second issue raised by the City is the competency of Ramsey's affidavit. The City claims that Ramsey's affidavit does not qualify him as an expert under *E.I. duPont de Nemours & Co. v. Robinson*. 923 S.W.2d 556 (Tex. 1995). We disagree.

² Officer Belmarez's car was equipped with a "buddy bumper," a flexible metal bar on the front of his car used to push stranded vehicles off the road.

The City's argument assumes without analysis that Ramsey's affidavit is scientific in nature. Based on this assumption, the City argues that Ramsey lacked practical knowledge of police procedures and police work, disqualifying him from rendering expert opinion in this case. The City also attacks the basis of Ramsey's opinions, namely the reliance on the testimony of convicted felon Medina, as subjective and inconsistent. In support of this argument, the City points to the factors outlined in *Robinson* for determining the reliability of scientific evidence.³

Whether a witness is qualified to offer expert opinion is a matter committed to the trial court's sound discretion. *Broders v. Heise*, 924 S.W.2d 148 (Tex.1996). The trial court must determine if the expert has "knowledge, skill, experience, training, or education" regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject, and whether that testimony would "assist the trier of fact." TEX. R. EVID. 702; *Broders*, 924 S.W.2d at 153. The burden of establishing an expert's qualifications is on the offering party. *Id.* at 151. We gauge abuse of discretion by determining whether the trial court acted without reference to any guiding rules or principles. *Robinson*, 923 S.W.2d 549, 558 (Tex.1995).

Here, Ramsey's affidavit shows that he is a licensed police officer who has worked for the Temple and McGregor police departments. During his employment with these entities, he investigated between 4000 and 5000 accidents. His affidavit also shows that he has over 290 hours of specialized training in accident reconstruction and he is certified by Texas A&M University as a Specialized Driving Instructor relating to the operation of police vehicles.

Since Ramsey was averring about his reconstruction of the collision between the suspects' vehicle and that of the appellees, as well as the reasonableness of the police officers' driving and decisions, we find that the trial court did not abuse its discretion in finding Ramsey qualified, especially since he has virtually

³ "These factors include, but are not limited to: 1) the extent to which the theory had been or can be tested; 2) the extent to which the technique relies upon the subjective interpretation of the expert; 3) whether the theory has been subjected to peer review; 4) the technique's potential rate of error; 5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and 6) the non-judicial uses which have been made of the theory or technique." *Robinson*, 923 S.W.2d at 557 (citations omitted).

the same qualifications as the City's experts. Further, we find that the trial court found Ramsey's testimony would assist the trier of fact in this case.

The City further complains that the trial court erred in admitting Ramsey's affidavit because it rests on an incompetent and unreliable scientific foundation. Although the City claims that Ramsey's affidavit is scientific in nature, we hold that it is not. Not all expert opinion is scientific in nature. Here, Ramsey's opinion is largely based on his experience as a police officer, as well as his experience in accident investigation and reconstruction. While accident reconstruction involves some scientific elements, it is not science. *See Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998) (finding that a mechanical engineer's testimony regarding seatbelts based largely on his own tests and observations need not meet the *Robinson* factors).

Recently, the Texas Supreme Court addressed the issue of scientific and non-scientific evidence under *Robinson* and found that all expert testimony must be relevant and reliable, but the factors affecting relevance outlined in *Robinson* are not applicable to all expert testimony. *See id.* Since the City does not attack the relevance of Ramsey's affidavit, the only issue presented to us is his reliability as an expert witness. Accordingly, we will apply the "analytical gap" test utilized in *Gammill* rather than the factor-based *Robinson* test since we find his affidavit to be non-scientific in nature. *See id.* at 727-28 (citing *General Electric Co. v. Joiner*, 522 U.S. 136, ___, 118 S.Ct. 512, 519, 139 L.Ed.2d 508 (1997)).

In *Gammill*, the court analyzed expert testimony by looking to see how large an analytical gap existed between the expert's opinions and the data. *Id.* Here, Ramsey bases his conclusion that Officer Belmarez struck the suspect's vehicle prior to the intersection on several different factors. First, Ramsey points to the physical evidence of the dent on the suspect's car as evidence that Officer Belmarez's vehicle struck the suspect's vehicle prior to the intersection. He also cites the fact that the truck's owner stated no such dent existed prior to the truck's theft as evidence that Belmarez struck the rear end of the truck. These facts are paired with the suspect's testimony that a police officer hit the truck, as well as Officer Cinco's testimony that the dent in the fender could have been caused by contact with the front of Officer Belmarez's police cruiser. Finally, Ramsey cites an eyewitness statement that Officer Belmarez was following too closely immediately prior to the collision, as well as Officer Belmarez's prior on-duty collisions, in his

analysis.

While there may be other explanations for the presence of the damage, we do not feel that the trial court abused its discretion in admitting this affidavit, especially since proof other than the vehicular damage corroborates Ramsey's opinion about the reasonableness of the police officer's behavior. Though Ramsey does not detail the other explanations for the damage in his affidavit, nor does he explain the likelihood of each explanation, we do not feel that this is enough to exclude his opinion from appellee's response to the City's motion for summary judgment. *See Gammill*, 972 S.W.2d at 728 (finding the trial court's exclusion of an affidavit containing a similar, but more egregious, lack of explanation a close case, but not an abuse of discretion).

The City's chief complaint is that Ramsey bases his opinion on the criminal trial and deposition testimony of the suspect, as well as other proof that conflicts with the City's view of the facts. We point out that Ramsey's affidavit is based on more information than that of any of the City's experts. Further, the foundations of the affidavits of the City's own experts are subject to the same criticisms raised by the City in its motion. For example, the City's experts never mention the statements and radio transmissions of the Metro police officers that contradict many of their own assertions. All expert proof in this case is based on the observations and assumptions of persons other than the experts, as well as the experience of each expert. In fact, the City's experts also reviewed Medina's deposition before rendering their opinions. Further, since Ramsey's conclusions are based on the same methodology and materials as the City's experts, we do not find that the trial court abused its discretion in admitting Ramsey's affidavit.

While we admit that some of Ramsey's assertions have a noticeable analytical gap between proof and opinion, we find that most of them do not. His opinions about the reasonableness of the HPD officers' behavior are based on other circumstances, including the presence of the helicopter, the officers' lack of familiarity with the area where a large portion of the chase occurred, the nature of the road conditions, the speeds of the vehicles, and the chance the suspects would have abandoned the truck if the officers would have pulled back. Accordingly, we do not find that the trial court abused its discretion in admitting the affidavit of appellee's expert.

The final issue raised by the City is its entitlement to summary judgment based on sovereign

immunity. Because the City's immunity defense is contingent on the official immunity of the officers involved in the chase, and their entitlement to immunity was not established in this case, we need not decide if the trial court erred in failing to grant summary judgment for the City. *See Wadewitz*, 951 S.W.2d at 467.

Because genuine issues of material fact exist regarding whether or not the HPD officers acted in good faith, the trial court did not abuse its discretion in denying the City's motion for summary judgment. Also, since sufficient proof of reliability is found in the affidavit of appellees' expert, we find its admission was not an abuse of discretion. Finally, since the officers were not entitled to summary judgment, we find that denial of the City's motion for summary judgment based on sovereign immunity was not an abuse of discretion. Accordingly, we affirm the judgment of the trial court and remand this cause for further proceedings consistent with this opinion.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed December 2, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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