Affirmed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-99-00103-CV

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CITY OF HOUSTON AND GARY MICHAEL STOREMSKI, Appellants

V.

MILDRED HALL FAGAN, Appellee

On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Cause No. 694,408

O P I N I O N

The City of Houston and Gary Michael Storemski, a Houston Police Officer, bring this appeal from the denial of a motion to dismiss for lack of jurisdiction, and, in the alternative, a motion for summary judgment. We affirm.

On March 13, 1996, Officer Storemski was dispatched to pursue a stolen vehicle in the Heights district in the city of Houston. Storemski was southbound on Yale and his emergency lights were flashing. There is a dispute as to whether his siren was activated. When he entered the intersection with 11th street, he collided with Mildred Fagan who was traveling westbound. Ms. Fagan was cited for the accident, but

the ticket was later dismissed. She filed suit and the appellants moved to dismiss for lack of jurisdiction, and, in the alternative, for summary judgment. The motion was denied and this appeal ensued.

Plea to the Jurisdiction

The first issue presented is whether the trial court properly exercised subject matter jurisdiction. Appellants (hereafter referred to collectively as "the City") allege that a plea to the jurisdiction was appropriate and should have been granted by the trial court. They contend that because Fagan failed to plead that governmental immunity had been waived, the court lacked subject matter jurisdiction and had no authority to act. A governmental unit may appeal an interlocutory order that "grants or denies a plea to the jurisdiction." TEX. CIV. PRAC. & REM. CODE Ann. § 51.014(a)(8) (Vernon Supp.1999). We conclude that the trial court properly exercised subject matter jurisdiction.

There are two conflicting views on governmental immunity as a bar to subject matter jurisdiction. One view is that sovereign immunity may not be asserted as a jurisdictional obstacle to a trial court's power to hear cases against governmental defendants. *See Davis v. City of San Antonio*, 752 S.W.2d 518, 520 (Tex. 1988); *Smith v. State*, 923 S.W.2d 244, 246 (Tex. App.–Waco 1996, writ denied). Instead, erroneous judgments against governmental units may be corrected, as in other cases, on appeal. *Davis*, 752 S.W.2d at 520.

The opposing view is that absent some waiver of sovereign immunity, a trial court lacks subject matter jurisdiction over the case. *See Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997); *Hencerling v. Texas A & M University*, 986 S.W.2d 373, 375 (Tex. App.–Houston [1st Dist.] 1999, writ denied); *Southwest Airlines v. Texas High-Speed Rail Auth.*, 867 S.W.2d 154, 158 n. 6 (Tex. App.–Austin 1993, writ denied). These cases generally divide governmental immunity into immunity from suit and immunity from liability. The Austin court has suggested that *Davis* is precedential as to the waiver of immunity from liability, but only dicta as to waiver of immunity from suit. *See Southwest Airlines*, 867 S.W.2d at 158 n. 6.

Under either view, the trial court properly denied the appellants' Plea to the Jurisdiction. Under *Davis*, the issue cannot act as a bar. Moreover, for the reasons set forth below, we find Fagan properly pled an express waiver of sovereign immunity.

The Texas Tort Claims Act ("TTCA") creates a limited waiver of sovereign immunity. The statute provides 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; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. §101.021 (Vernon 1998).

The City concedes the acts complained of in this case are a governmental function and that an automobile collision falls under § 101.021(1). Its argument is that this case falls under an exception set out in the same act. Under § 101.055, the act provides that:

> This chapter *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 is not taken with *conscious indifference or reckless disregard* for the safety of others.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.055 (Vernon's 1998) (emphasis added).

The plaintiff bears the burden of alleging facts affirmatively showing the trial court has subject-matter jurisdiction. *See Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex.1993). When deciding whether to grant a plea to the jurisdiction, the trial court must look solely to the allegations in the petition. *See Liberty Mut. Ins. Co. v. Sharp,* 874 S.W.2d 736, 739

(Tex. App.–Austin 1994, writ denied). We take allegations in the pleadings as true and construe them in favor of the pleader. *See Texas Ass'n of Business*, 852 S.W.2d at 446. Appellees, in their second amended original petition, pled that immunity was not a bar to the suit because "[t]he act of defendants were not in compliance with the laws and ordinances and were taken with *conscious indifference or reckless disregard* for the safety of [appellee]"(emphasis added). Fagan, through her pleadings, has alleged that governmental immunity from suit has been statutorily waived. As such, the trial court was not without jurisdiction, and it properly denied the City's plea to the jurisdiction.

Summary Judgment

The second issue presented by the City is whether Officer Storemske was entitled to the affirmative defense of official immunity as a matter of law. The City's alternative motion for summary judgment was denied. A governmental unit may appeal an interlocutory order denying a motion for summary judgment based on an assertion of official immunity. *See* TEX. CIV. PRAC. & REM. CODE Ann. § 51.014(a)(5) (Vernon Supp.1998).

Summary judgment is proper when a movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex.1995); *Bangert v. Baylor College of Med.*, 881 S.W.2d 564, 566 (Tex. App.–Houston [1st Dist.] 1994, writ denied). Defendants are entitled to summary judgment if they conclusively establish all elements of an affirmative defense as a matter of law. *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex.1991); *Bangert*, 881 S.W.2d at 566. However, we make every reasonable inference in favor of the nonmovant and resolve any doubts in their favor. *See Randall's Food Mkts., Inc.*, 891 S.W.2d at 644; *Bangert*, 881 S.W.2d at 565-66. If the movant establishes a right to summary judgment, the non-movant must produce summary judgment proof showing the existence of an issue of material fact to preclude summary judgment. *See Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 907 (Tex. 1982); *Cummings v. HCA Health Servs. of Texas*, 799 S.W.2d 403, 405 (Tex. App.–Houston [14th Dist.] 1990, no writ).

A police officer has official immunity for the performance of discretionary duties within the scope of the his authority, provided he acts in good faith. *See Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex.1997); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994). Whether or not to pursue a fleeing suspect is clearly a discretionary act within the scope of a police officer's authority. *See Chambers*, 883 S.W.2d at 655 (holding that "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); *Harris County v. Garza*, 971 S.W.2d 733, 736 (Tex. App.–Houston [14 Dist.] 1998, no writ) (holding that "driving at high speed to the scene of reported violence was a discretionary act" because the officer "had to determine what route to follow, at what speed, and should back-up be called for on the way to the disturbance"); *City of Pharr v. Ruiz*, 944 S.W.2d 709, 715 (Tex. App.–Corpus Christi 1997, no writ) (holding that, based on an examination of relevant city policies, an officer's decision to initiate a high-speed chase is discretionary). The remaining element in the affirmative defense of official immunity is good faith. In a pursuit context, "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 (rather than terminating) the pursuit." *See Wadewitz*, 951 S.W.2d at 466 (citing the "*Chambers* balancing test" *Chambers*, 883 S.W.2d at 656).

The City relies on affidavits by Officers Storemski and Tyler to establish good faith. In order to substantiate the officer's contention of good faith, these affidavits must "address what a reasonable officer could have believed under the circumstances, and be substantiated with reference to each aspect of the *Chambers* balancing test." *Clark v. University of Houston*, 979 S.W.2d 707, 711 Tex. App.–Houston [14th Dist.] 1998, no pet. h.) (op. on reh'g) (en banc). Officer Storemski's affidavit states:

> I was dispatched to pursue a stolen vehicle . . . the dispatcher stepped it up to an urgent situation . . . I was heading northbound . . . my overhead lights and siren [were] activated. I was fully in compliance with the Codes and policies of the Houston Police Department at the time of the accident. As I approached the intersection, I slowed the vehicle to ensure that the other vehicles on the street had stopped for me. I came to a complete stop prior to entering the intersection and used the manual horn on the police vehicle, which I blew several times to alert the other drivers of my presence. Once I noticed that the other vehicles on both streets had

> stopped and yielded the right of way to me, I preceded into the intersection.
>
> I do not believe that my actions were reckless or that I drove without due regard for the safety of others . . . I was fully in compliance with the laws and ordinances applicable to the emergency situation. I believe that I acted in good faith in that a reasonable police officer could have chosen to take the same course of action that I took. I assessed the need to respond to the situation and the risk involved in responding while I was driving.

We first examine the "need" aspect, i.e., the need to immediately apprehend the suspect. In the context of a pursuit of a stolen vehicle, absent any new crimes being committed in the course of the pursuit, the need to pursue a particular suspect will remain constant. This is not to say that every stolen vehicle chase has the same amount of need, only that within one particular chase, the need to arrest the suspect will not diminish as the chase progresses. The police officer has both a duty and a need to recover the stolen vehicle, stop any reckless driving, and arrest the perpetrator. Officer Storemski's affidavit references the need to immediately apprehend the suspect. He specified the crime involved and noted that his dispatcher "stepped up" the call to urgent. This is sufficient.

The risks involved, by contrast, are in constant flux. Weather, traffic patterns, pedestrians, school crossings, time of day, etc., all interact to present a risk to the officer, the suspect, and bystanders. The risk can change from moment to moment. The most critical moment, of course, is the one immediately preceding the accident. Officer Storemski has articulated in great detail the precautions he took immediately before the accident to minimize any harm the pursuit may have caused to other motorists or pedestrians. He stated that his lights were on, that his siren was on, that he came to a complete stop, that he blew the car's horn, and that he visually checked to confirm that traffic had stopped in both directions. Finally, Officer Storemski details what he actually saw before he entered the intersection. This is determinative of what a reasonably prudent officer could have believed as to the propriety of entering the intersection.

Accordingly, the City's affidavits were sufficient to establish that Officer Storemski acted in good faith, because the affidavits address what a reasonably prudent officer could have believed under the same

or similar circumstances and are substantiated with reference to each aspect of the Chambers balancing test. Thus, the City has established all the elements of the affirmative defense of official immunity.

To preclude summary judgment, the non-movants must produce summary judgment proof showing the existence of an issue of material fact.[1] *See Westland Oil Dev. Corp.*, 637 S.W.2d at 907 (Tex. 1982); *Cummings*, 799 S.W.2d at 405 (Tex. App.–Houston [14th Dist.] 1990, no writ); *Colvin v. Alta Mesa Resources, Inc.*, 920 S.W.2d 688, 690 (Tex. App.–Houston [1st Dist.] 1996, writ denied); *Gonzalez v. City of Harlingen*, 814 S.W.2d 109, 112 1(Tex. App.–Corpus Christi 1991, writ denied). In deciding whether a fact issue exists, we take all evidence favorable to the nonmovant as true and indulge every reasonable inference in the nonmovant's favor. *See Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex.1985).

Here, we are presented with a factual dispute as to whether Officer Storemski had his siren on at the time of the accident. His affidavit says the siren was on, but Ms. Fagan's affidavit says it was not. We also have before us the deposition testimony of Sandra Morse, a witness, who testified that she did not hear a siren. This factual dispute is material because Officer Storemski was responding to a priority one call. Houston Police Department procedures require that a response to such a call be with lights and siren. While the department's rules provide for a silent response under some circumstances, the officer is required to notify his dispatcher that he is proceeding silently. Moreover, it is not Officer Storemski's contention that he was running silent. Thus, the issue of whether or not his siren was activated is relevant to whether or not he was acting in full compliance with police regulations.

The City of Houston's Immunity

The third issue in this appeal is whether or not the City of Houston is entitled to immunity. The City's immunity, however, is derived from the official immunity of Officer Storemski. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997); *Chambers*, 883 S.W.2d at 658; *Kilburn*, 849

[1] E.g., facts which would bring the matter within an exception or defense to the movant's affirmative defense. *Palmer v. Ensearch Corp.*, 728 S.W.2d 431, 435 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

S.W.2d at 812. Since Officer Storemski failed to establish that he was entitled to summary judgment, the City of Houston is likewise not entitled to summary judgment.

Accordingly, the trial court's order denying summary judgment is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed December 2, 1999.

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

Do Not Publish — TEX. R. APP. P. 47.3(b).