

No. 14-19-00904-CV

**In the Fourteenth Court of Appeals
Houston, Texas**

**JOSE ROMERO AND MARGARITA ROMERO, INDIVIDUALLY AND AS
NEXT FRIEND OF IXXXX, IXXXXX, RXXXXX AND MXXXXX, MINORS**

Appellants

v.

HARRIS COUNTY, TEXAS

Appellee.

On Appeal from the 333rd District Court of Harris County, Texas
Trial Court Cause No. 2018-62256

APPELLEE HARRIS COUNTY'S INITIAL BRIEF

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NO ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Harris County does not request oral argument because the dispositive issues have been authoritatively decided by case law, the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. This case involves the simple issue of whether the trial court properly applied the doctrine of sovereign immunity. As a matter of law, Harris County cannot be liable for the alleged negligent acts of a deputy who is entitled to official immunity. Accordingly, the issues for review can be decided on the pleadings.

RECORD AND PARTY REFERENCES AND CITATIONS

Harris County's brief uses the following references, with specific page numbers in brackets, unless otherwise noted.

Record References

The Clerk's record consists of one volume, referenced as follows: C.R. [page]

STATEMENT OF THE CASE

- Nature of the Case:* On September 11, 2018, Deputy Candace Miles was driving her marked patrol car when she made a U-turn to respond to a call. The vehicle belonging to Plaintiff/Appellant Jose Romero struck her vehicle at a low speed. Plaintiffs/Appellants filed suit against Harris County, alleging that Deputy Miles was negligent. Harris County prevailed on a plea to the jurisdiction based on sovereign immunity and on Plaintiffs/Appellants Motion for New Trial.
- Trial Court:* The Honorable Daryl Moore, 333rd District Court of Harris County, Texas. Trial Court Cause No. 2018-62256.
- Trial Court's Disposition:* On August 26, 2019, the trial court granted Harris County's plea to the jurisdiction, and on October 11, 2019, the trial court denied Plaintiffs/Appellants' motion for new trial.

RESPONSE TO STATEMENT OF JURISDICTION

Harris County does not dispute Appellant's statement of jurisdiction and agrees that this Honorable Court has jurisdiction over this appeal.

RESPONSE TO ISSUES PRESENTED

Harris County does not dispute Appellant's statement of Issues Presented.

TO THE HONORABLE JUSTICES:

Appellee Harris County submits this Response and respectfully represents:

I.

INTRODUCTION AND RESPONSE TO STATEMENT OF THE FACTS

On September 12, 2018, Plaintiffs/Appellants filed suit alleging that Deputy Candace Miles was involved in an accident while “operating a Harris County law enforcement vehicle in the course and scope of MILES’ employment with HARRIS COUNTY, TEXAS and MILES was performing a governmental function for Defendant at all times relevant to this lawsuit.” C.R. 4. Plaintiff/Appellants allege that Miles was negligent in causing this accident, and sought damages.

On July 8, 2019, Harris County filed a plea to the jurisdiction asserting that Deputy Miles was entitled to official immunity, and Harris County was entitled to sovereign immunity. C.R. 12-22. Harris County pointed out that Deputy Miles was being dispatched to a priority one family disturbance call and made a U-turn while attempting to get to the scene quickly. While she was executing this maneuver at approximately three to five miles per hour, she was struck by Plaintiff/Appellant’s vehicle. C.R. 12.

II. RESPONSE TO ARGUMENT

A. A Plaintiff has a high burden to defeat sovereign immunity.

A trial court may not allow litigation to proceed without first determining that it has subject matter jurisdiction. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004). Texas governmental units retain sovereign immunity in most cases, and a trial court has no subject matter jurisdiction over claims against governmental units unless the claims fall squarely within the scope of the Texas Tort Claims Act. *Miranda*, 133 S.W.3d at 224–25.

The concept of sovereign immunity began with the English monarchy (“the king cannot be sued”) and was adopted in the United States. Alexander Hamilton noted in the Federalist Papers:

It is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent. This is the general scheme and the general practice of mankind; and the exception, of one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

Federalist No. 81, at 487. Texas first recognized in 1847 that “[a] state cannot be sued in her own courts without her own consent, and then only in the manner indicated by that consent.” *Rufus K. Hosner v. John Deyoung, Surveyor, etc.*, 1 Tex. 764 (1847).

In 1970, Texas passed the Texas Tort Claims Act, which waived government immunity in three areas – use of public automobiles, premise defects, and injuries arising out of the condition of property or use of property. In 1985, the Texas Legislature codified the Texas Tort Claims Act into Section 101, *et seq.*, of the Texas Civil Practices & Remedies Code.

In recent years, the Supreme Court and Legislature reaffirmed the high burden a party asserting a waiver of immunity bears. In 2001, the Legislature codified Texas Gov't Code § 311.034, which requires “clear and unambiguous language” to waive immunity:

In order to preserve the legislature’s interest in managing state fiscal matters through the appropriations process, a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language . . . Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a government entity.

In applying § 311.034, the Texas Supreme Court does not permit damages against a government entity unless an underlying statute waives immunity “beyond doubt.” It has further held “we generally resolve ambiguities by retaining immunity.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003)(emphasis added). The policy rationale behind this is as true today as it was in 1970: “[s]ubjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended purposes toward

defending lawsuits and paying judgments.” *Texas Natural Resources Conservation Com’n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002).

B. Immunity is properly raised by a plea to the jurisdiction or motion for summary judgment.

Political subdivisions in Texas may raise governmental immunity by a plea to the jurisdiction, which challenges either the pleadings or the existence of jurisdictional facts. *Miranda*, 133 S.W.3d at 226-227 (Tex. 2004). When a plea challenges the pleadings, a court must “consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised.” *Id.* at 227. However, it is plaintiff’s duty to affirmatively plead and prove jurisdiction to hear a lawsuit under the Texas Tort Claims Act, and a trial court does not err if it refuses to allow discovery when jurisdiction can be determined from the pleadings. *Donohue v. Butts*, 516 S.W.3d 578, 582 (Tex. App.—San Antonio 2017, no pet.). The plaintiff bears the burden of alleging facts affirmatively showing that the trial court has subject matter jurisdiction. *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

A plea to the jurisdiction raises incurable defects in jurisdiction that are shown on the fact of a plaintiff’s pleading. *Dolenz v. Texas State Bd. Of Med. Examiners*, 899 S.W.2d 809, 811 (Tex. App.—Austin 1995, no writ). Subject matter jurisdiction cannot be presumed and cannot be waived. *Continental Coffee Prods. v. Cazarez*, 937 S.W.2d 444, 449 (Tex. 1996). When reviewing a plea to the

jurisdiction, a court should limit itself to the jurisdictional issue and avoid considering the merits of the claims. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 552 (Tex. 2000). If well taken, the trial court must sustain the plea and dismiss the case. *Dolenz*, 899 S.W.2d at 811, citing *Texas Highway Dep't v. Jarell*, 418 S.W.2d 486, 488 (Tex. 1967). Whether a court has subject matter jurisdiction over a claim is a question of law to be reviewed *de novo*. *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

C. As a matter of law, Harris County is immune from suit if Deputy Miles has official immunity.

The Tort Claims Act permits Harris County to be liable under limited circumstances for injury caused by an employee's operation or use of a motor-driven vehicle, but only if the employee would be personally liable to the claimant under Texas law. In *DeWitt v. Harris County*, 904 S.W.2d 650 (Tex. 1995), the Supreme Court held that if the employee is immune from suit because of official immunity, the government is also immune.

D. Plaintiffs/Appellants failed to plead facts sufficient to overcome Deputy Miles' official immunity.

Public officers and employees are generally not personally liable for acts performed within the scope of their duties. *Tenny v. Brandhove*, 341 U.S. 367 (1951); *Richardson v. Thompson*, 390 S.W.2d 830, 834 (Tex. Civ. App. – Dallas 1965, writ ref'd. n.r.e.). Government employees are afforded this protection

through the doctrine of “official immunity.” *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994). Official immunity, also characterized as “qualified immunity” or “quasi-judicial immunity”, is a defense for officials acting within the course and scope of their office while performing discretionary functions and acting in good faith. *Perry v. Texas A and I University*, 737 S.W.2d 106, 109 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.). Generally, a public official who acts in good faith can rarely, if ever, be personally liable for what later may be determined to be negligent acts. The Texas Supreme Court has explained:

Officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Kasson v. Hatley, 887 S.W.2d 4, 8, citing *Barr v. Matto*, 360 U.S. 564, 571 (1959).

The doctrine of official immunity applies even if the employee is negligent. The “...doctrine of official immunity, if it is to mean anything, protects officers from suit even if they acted negligently.” *Chambers*, 883 S.W.2d at 655. Deputy Miles is immune from suit (and thus, Harris County is immune from suit) if she acted: (1) within the scope of her employment, (2) while performing a discretionary function, and (3) was in good faith. *Loyd v. Eco Resources, Inc.*, 956 S.W.2d 110, 129 (Tex. App.—Houston [14th Dist.] 1997, no writ history).

1. Scope of employment.

It is undisputed that Deputy Miles was acting in the scope of her employment at the time of the accident. In fact, Plaintiffs/Appellants allege in their petition that Deputy Miles was, “operating a Harris County law enforcement vehicle in the course and scope of MILES’ employment with HARRIS COUNTY, TEXAS and MILES was performing a governmental function for Defendant at all times relevant to this lawsuit.” C.R. 4

2. Discretionary function.

The Dallas Court of Appeals has explained:

A discretionary act involves personal deliberation, decision, and judgment. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 654 (Tex.1994). We focus on “whether the officer is performing a discretionary function, not on whether [he] has discretion to do an allegedly wrongful act while discharging that function.” *Id.* at 653.

City of Dallas v. Half Price Books, Records, Magazines, Inc., 883 S.W.2d 374, 376 (Tex. App.—Dallas 1994). Stated another way, an independent decision by an officer is a discretionary discussion, while “an action that requires obedience to orders or the performance of a duty as to which the employee has no choice is ministerial.” *Collins v. City of Houston*, No. 14-13-00533-CV, 2014 WL 3051231, at *4 (Tex. App.—Houston [14th Dist.] 2014).

Police officers engage in discretionary functions when they use their vehicles to conduct investigations, traffic stops, or violate traffic laws to provide

assistance. This Court has held that an officer does not have to be responding to an emergency to perform a discretionary function, because “case law teaches that an officer may perform a discretionary act while driving even in circumstances that do not rise to the level of an emergency.” *Id.*, citing *Ramos v. Tex. Dep’t of Pub. Safety*, 35 S.W.3d 723, 727 (Tex. App—Houston [1st Dist.] 2000, pet denied).

It is undisputed that Deputy Miles used her personal judgment to make a U-turn in a marked patrol car while on duty, and Harris County pleaded in the trial court that this was in response to being dispatched to a call. C.R. 18-19. That is sufficient to establish that Deputy Miles engaged in a discretionary function.¹

While Plaintiffs/Appellants claim Harris County was required to produce evidence of why Deputy Miles made the U-turn, the parties never reached that question, because Plaintiffs/Appellants never alleged (or pleaded facts) that Deputy Miles was acting outside her discretionary function. The live petition avers only that Deputy Miles was negligent. C.R. 5. Negligence alone does not defeat official immunity. To defeat official immunity, Plaintiffs/Appellants would have been required to plead that Deputy Miles was engaged in a ministerial act at the time of the accident. The pleadings fail to do that and are defective on their face.

¹ Although 10 months elapsed between the filing of suit and the filing of Harris County’s Plea to the Jurisdiction, Plaintiffs/Appellants never alleged that Deputy Miles acted outside her discretionary function and never presented any evidence to suggest that Deputy Miles was acting in a ministerial capacity. The hearsay accident report with an unchecked box about a “Priority One” call is a red herring. As long as Deputy Miles made the conscious decision to turn her patrol car around in performance of her duty, she was performing a discretionary function.

3. Good faith.

In the *Chambers* case, the Texas Supreme Court held that an official or employee acts in good faith if a reasonably prudent official or employee could have believed his acts were justified. *Chambers*, 883 S.W.2d at 655. As explained, *supra*, just because an officer is negligent does not mean he is not in good faith. *Id.*

Plaintiffs/Appellants cite the *Collins* case to suggest Harris County was required to present evidence that Deputy Miles acted in good faith. In *Collins*, a police officer was involved in an accident while pursuing a vehicle in violation of Houston Police Department policy (and for which the officer was suspended for three days). There were genuine issues of material fact as to whether the officer was responding to an emergency and whether he acted in bad faith by violating department policy. In that case, the plaintiff pleaded facts necessary to overcome official immunity and developed the record to create genuine issues of material fact as to those allegations.

Plaintiffs/Appellants' live pleading never alleges that Deputy Miles acted in bad faith; it alleges only that she was negligent. C.R. 5. After 10 months, Plaintiffs/Appellants never amended their pleadings or developed any facts to suggest that Deputy Miles acted in bad faith when making the U-turn. The only allegation is that she negligently made a U-turn, and that is not enough to show bad faith or overcome official immunity.

III.
CONCLUSION AND PRAYER

The trial court properly granted Harris County's plea to the jurisdiction challenging the sufficiency of the allegations in Plaintiffs/Appellants' pleadings. Despite having the opportunity to develop facts to overcome official and sovereign immunity, Plaintiffs/Appellants' pleaded only a claim for simple negligence. There is no allegation that Deputy Miles was not acting in her official capacity, was not using her discretionary function, and was not in good faith. Accordingly, the trial court properly granted Harris County's plead to the jurisdiction and denied Plaintiffs/Appellants' motion for new trial. Harris County respectfully requests that this Court affirm the trial court.

Respectfully submitted,

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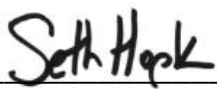
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SETH HOPKINS

CERTIFICATE OF SERVICE

I certify that on the 3rd day of April, 2020, a true and correct copy of the foregoing instrument was served by electronic filing through the electronic filing manager, as required by Texas Rule of Appellate Procedure 9.5(b)(1), and by electronic mail, to the following attorney of record: Richard Paxton, 515 Post Oak Blvd., Suite 510, Houston, Texas 77027.



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