TCAA CITY ATTORNEY ASSOCIATION
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Defending Emergency Exception Cases under the Texas Tort Claims Act

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I. DEFENDING EMERGENCY EXCEPTION CASES

A. Immunity Generally: Cities are Entitled to Government Immunity Under Texas Law, Except for Limited Exceptions Specified by Statute.

In the state of Texas, sovereign immunity deprives a trial court of subject matter jurisdiction for a lawsuit in which the state or certain governmental units have been sued unless the state consents to the suit. *Texas Dept. of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 224 (Tex. 2004). Also, the Texas Tort Claims Act (TTCA) provides for a limited waiver of sovereign immunity. Tex. Civ. Prac. & Rem.Code §§101.001-101.109. Sovereign immunity includes two distinct principals: immunity from suit and immunity from liability. *Miranda,* 133 S.W.3d at 224. Immunity from liability is an affirmative defense, and immunity from suit deprives the court of subject matter jurisdiction. *Id.*

The TTCA creates a unique statutory scheme in which the two immunities are co-extensive: "Sovereign immunity to suit is waived and abolished to the extent liability is created by this chapter." TTCA §101.025(a); *State ex rel. State Dep't of Highways &Pub. Transp. V. Gonzalez,* 82 S.W.3d 322, 326 (Tex. 2002). As such, a City is immune from suit unless the Tort Claims Act expressly waives immunity. *See* TTCA §101.001(3)(B)(defining a governmental unit as a political subdivision of the state including any city).

The Texas Tort Claims Act waives immunity only in the following specific circumstances and 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 his 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; or

(2) personal injury or 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.

This waiver of immunity is a limited one and a City is not liable for personal injury or death unless the injury "arises from" the

operation or use of a motor-driven vehicle. TTCA §101.1021(1)(A). The phrase "arises from" requires a nexus between the injury and the operation or use of a motor-driven vehicle. *Leleaux v. Hamshire-Fannett Independent School Dist*., 835 S.W.2d 49 (Tex. 1992). "This requirement is consistent with the clear intent of the Act that the waiver of sovereign immunity be limited." *LeLeaux*, 835 S.W.2d at 51.

B. The Motor Vehicle Exception and the Requirement of Causation

As indicated above, the Cities retain immunity from potential plaintiffs' claims if there is no sufficient causal nexus between a city employee's use of motor-driven vehicle and the plaintiff's injuries. Under §101.021(1)(A), governmental immunity is waived if several elements are met, one of which is that the injury must "arise[ ] from the operation or use of a motor-driven vehicle or motor-driven equipment." Tex. Civ. Prac. & Rem.Code Ann. §101.021(1)(A) (Vernon 2005); see also *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist*., 835 S.W.2d 49, 51 (Tex.1992) (holding that the "operation or use" in question must be operation or use by the governmental employee). The Supreme Court has construed the "arises from" requirement to mean that the vehicle's use "must have actually caused the injury." *Dallas Area Rapid Transit v. Whitley*, 104 S.W.3d 540, 543 (Tex.2003) (internal quotations omitted). The causal nexus is not satisfied by the mere involvement of a vehicle, nor by an operation or use that "does no more than furnish the condition that makes the injury possible." *Id.* (internal quotations omitted);

When an alleged cause is geographically, temporally, or causally attenuated from the alleged effect, that attenuation will tend to show that the alleged cause did no more than furnish the condition that made the effect possible. See *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex.1998) (escaped mental patient's death on a freeway was "distant geographically, temporally, and causally" from the unlocked doors through which he escaped). The Texas Supreme Court has noted that this nexus requirement is consistent with the clear intent of the TTCA that the waiver of sovereign immunity be limited. *LeLeaux*, 835 S.W.2d at 51.

Texas law is clear that immunity is very much intact in cases where there is no causation. The chain of causation is broken when the injury most directly results from *another person's own decisions*. *City of Sugarland v. Ballard*, 174 S.W.3d 259

(Tex.App.-Houston [1st Dist.] 2005, no pet.) (Plaintiff's deliberate decision to flee from police undercuts the claim that resulting injuries are "caused" by the police when the Plaintiff is struck by another vehicle); *Texas Department of Public Safety v. Grisham*, 232 S.W.3d 822 (Tex.App.-Houston [14th Dist.] 2007, no pet.) (Use of police car merely furnished the condition that made injury possible and did not actually cause the injury and driver's decision to change lanes and collide with another vehicle actually caused his injuries.).

Similar cases have also held, in similar circumstances, that there was no nexus to establish a waiver of immunity. An example includes Dallas Court of Appeals case, *City of Dallas v. Hillis*, 308 S.W.3d 526, 534 (Tex.App.-Dallas, 2010 review denied).

Hillis involved a factual situation in which a police officer pursued a motorcyclist who ultimately crashed and died as a result of his own actions. The Court held that immunity was intact because the plaintiffs could not satisfy the causation standard applicable in Texas. In *Hillis*, the City of Dallas had a no pursuit policy in place, and the plaintiff's in the case asserted that the City was liable for initiating and continuing a high speed chase. *Hillis*, 308 S.W.3d at 532. The officer in *Hillis* was pursuing Hillis at speeds of over 100mph on a portion of Interstate 635 that has posted speed limit of 45mph. *Hillis*, 308 S.W.3d at 533. As the court describes, "as Hillis entered the left curve of the eastbound fork, he lost control of the motorcycle. Although [the officer's] speed was about 105 miles per hour at the moment of the accident, it still took [the officer] 10 seconds to reach the approximate area where Hillis lost control of his motorcycle." *Hillis*, 308 S.W.3d at 533. The officer did not hit the deceased's motorcycle with his patrol car and did not physically force the deceased off the road or into another vehicle or object. *Hillis*. 308 S.W. 3rd at 534. The Court held that at the time of the accident, the officer's operation of his vehicle was so physically and temporally separated from the deceased's motorcycle that, as a matter of law, his operation of his vehicle did not actually cause the deceased's accident. *Id.* *Hillis* highlights the obvious nature of immunity in this case.

Teague v. City of Dallas, involves another similar situation. *Teague v. City of Dallas*, 344 S.W.3d 434 (Tex.App - Dallas 2011, review denied). In *Teague* Defendant City of Dallas' police officers pursued a fleeing vehicle driven by the plaintiff's boyfriend. *Teague*, at 437. During the pursuit, the driver cut across three lanes of traffic to

exit the freeway in an attempt to evade the pursuing police. *Id*, at 436. As he did, he lost control of his vehicle and collided with another police officer's vehicle. *Id.*, at 436. The Court held that immunity was not waived as there was no causal connection between the governmental employees' actions and the plaintiff's injuries. *Id.*, at 437. Specifically, the court stated that it was the driver's decision to cut across three lanes of traffic that caused the plaintiff's injuries and not the defendants'. *Id*., at 439. None of the officers directed the driver to exit, attempted to create a roadblock, or bump the vehicle, or attempted to force the driver off the road. *Teague*, 344 S.W.3d at 436. The court further noted that the pursuing vehicles were about seventy (70) yards away at the time of the collision and that the defendant's operation of their vehicles "was too physically and temporally separated from [the driver's] conduct to constitute a cause of Teague's injuries." 344 S.W.3d at 439 citing to *Hillis*. As such, the court held that immunity was not waived and that the trial court did not have subject matter jurisdiction over the case.

In pursuit cases, plaintiffs typically rely on Texas Supreme Court case, *Travis v. City of Mesquite* in which two off-duty police officers pursued a suspect vehicle going down the wrong way of a one-way street. *Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992). The fleeing driver then crashed head-on into another motorist's car, killing one person and injuring another. *Id.* The Supreme Court held that the summary judgment evidence "raised the inference that [the fleeing motorist] drove down the access road at excessive speed because of the police's decision to give chase. There was summary judgment evidence that the conduct of the police officer was a cause in fact of the accident in question, and of the injuries for which the plaintiffs seek recovery." *Travis*, 830 S.W.2d at 98. Additionally, the Officers testified in their depositions that they knew they were going down the wrong way of a one-way and knew that it could possibly lead to a head-on collision. *Id.*

Additionally, Texas Supreme Court case *Ryder v. Fayette County*, 453 S.W. 3d 922, 928 (2015) states that the "arises from" requirement means that the vehicle's use "must have actually caused the injury." In *Ryder*, the Supreme Court states:

> "[The] tortious act alleged must relate to the defendant's operation of the vehicle rather than to some aspect of the defendant's conduct. In other words, even where the plaintiff has alleged a tort on the part of a government driver, there is no immunity waiver absent the negligent or

> otherwise improper use of a motor-driven vehicle. For example, a driver's failure to supervise children at a bus stop may rise to the level of negligence, but that shortcoming cannot accurately be characterized as negligent operation of the bus. *See generally Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208 (Tex. 1989). Where the vehicle itself "is only the setting" for defendant's wrongful conduct, any resulting harm will not give rise to a claim for which immunity is waived under Section 101.021. *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W. 2d 49, 51 (Tex. 1992).

Ryder, 453 S.W.3d at 928. Lesson here, keep in mind whether the facts in your case can reasonably be argued that the City's vehicle vehicle "actually" caused the injury.

While the facts in *Ryder* found against the City, the Supreme Court in *Ryder* quotes the Dallas Court of Appeals *Hillis* case with approval: "When an alleged cause is geographically, temporally, or causally attenuated from the alleged effect, that attenuation will tend to show that the alleged cause did not more than furnish the condition that made the effect possible." *Ryder*, at 930, quoting *City of Dallas v. Hillis*, 308 S.W.3d 526, 532 (Tex. App - Dallas).

Further, the *Hillis* court relies on Texas Supreme Court case *Dallas County Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 343 (Tex.1998) in which an escaped mental patient's death on a freeway was "distant geographically, temporally, and causally" from the unlocked doors through which he escaped. *Bossley*, 968 S.W.2d at 343. The Texas Supreme Court has noted that this nexus requirement is consistent with the clear intent of the TTCA that the waiver of sovereign immunity be limited. *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992).

In *Dallas Area Rapid Transit v. Whitley*, the Texas Supreme Court considered whether a plaintiff could sue a local transit authority for injuries that he sustained during an altercation with a fellow passenger. 104 S.W.3d at 541. In that case, the bus driver required the plaintiff to exit the bus in the vicinity of the passenger who had assaulted the plaintiff. *Id.* The Texas Supreme Court concluded that immunity was not waived under the TTCA because the bus passenger's injuries did not arise from the government driver's operation of the bus. *Id.* at 542-43. *Hillis* relied on *Whitley* in rejecting the notion that immunity is waived simply because a collision took place in the context of a police chase. *Hillis*, 308 S.W.3d at 532.

The San Antonio Court of Appeals in *Lopez v. Escobar*, No. 04-13-00151-CV, 2013 WL 4679062, at *5 (Tex. App.-San Antonio Aug 28, 2013, no pet.) also followed the reasoning from the *Hillis* court. *Lopez* involved an incident in which police officers signaled a truck to stop in a highway median, but the truck driver instead attempted to flee and went into oncoming traffic where he collided with Escobar, the plaintiff. *Id.* at *2. The San Antonio Court of Appeals held that "pursuing" the truck driver into the median did not proximately cause Escobar's injuries, but rather, the suspect driver caused them. *Id.* at *4, *6.

In *Williams v. City of Baytown*, No. 01-14-000269-CV 2015 WL 209488 (May 5, 2015), the Houston Court of Appeals held that immunity had not been waived in a police chase in which the suspect vehicle rammed through a police barricade and police pursued and ultimately rear-ended plaintiff's vehicle. The police officers in *Williams* were only 10 seconds behind the suspect when the accident occurred. The plaintiff's alleged that the City was negligent in using their vehicle in the foiled attempt to box-in the suspect vehicle. *Hillis* is also relied on by *Williams* court, but further cites to the holding in Texas Supreme Court case *Ryder* in stating that the plaintiffs had "failed to show a waiver of immunity through the operation of a police vehicle – no police car was directly involved in the collision – no officer blinded oncoming traffic or entered a freeway access road the wrong way during the chase." *Williams*, at *7. Specifically, the court held that "the decision to try to box-in the fleeing suspects was too attenuated from [the suspect's] decision to evade the officer and continue his reckless flight. As a result, the officer's failed strategy was not a proximate cause of the accident." *Williams*, at *8.

Similarly, in *Townsend v. City of Alvin*, No. 14-05-000915-CV, 2006 WL 2354922, at *1 (Tex. App-Houston 2006), the Houston Court of Appeals also rejected the plaintiff's contention that a police officer exercised control over a speeding individual's vehicle when the officer instructed the individual to driver straight homer after a traffic stop, even though the driver did not possess a driver's license. *Id.* at *1. The suspect driver in that case ran a red light and killed another driver on the road a few minutes after the police encounter. *Id.* The court held that the facts alleged did not establish waiver of immunity because the police officer did not control the suspect's car at the time of the accident. *Id.* at *3-4.

See also *City of Sugarland v. Ballard*, 174 S.W.3d 259 (Tex. App. - Houston [1st

Dist.] 2005, no pet.) (Plaintiff's deliberate decision to flee from police undercuts the claim that resulting injuries are "caused" by the police when the Plaintiff is struck by another vehicle); *Texas Department of Public Safety v. Grisham*, 232 S.W.3d 822 (Tex. App .- Houston [14th Dist.] 2007, no pet.) (Use of police car merely furnished the condition that made injury possible and did not actually cause the injury and driver's decision to change lanes and collide with another vehicle actually caused his injuries.).

In a recent Court of Appeals case out of Waco, the court again held that the City's immunity was not waived as the accident did not "arise from" the city's use of the motor-driven vehicle. *Northcutt v. City of Hearne*, No. 10-14-00012-CV, 2015 WL 4727197 (July 30, 2015). In *Northcutt*, the plaintiff alleged that Officer Sullivan was stationed in a private drive with his lights off setting up a speed trap. As the plaintiff approached the speed trap, the officer flipped on his lights and pulled out of the private drive onto the shoulder causing the plaintiff to swerve to avoid contact. As a result, the plaintiff lost control of the motorcycle, flipped on its side, in which the plaintiff died as a result of the accident. The court held specifically, that the accident in question was not proximately caused by the officer's police unit. The Court stated that "without a number of unreasonable assumptions and stacked inferences" there was no evidence to create a fact issue as to whether or not the officer's action caused the plaintiff's injuries. *Northcutt*, at *4. As it was Northcutt's burden to provide evidence demonstrating a causal nexus, she failed in meeting the burden. *Northcutt*, at *4, *citing to Ron v. Airtrain Airways*, 397 S.W.3d 785, 800 (Tex. App. - Houston 2013)(no pet.)("This court should not find genuine facts issue precluding summary judgment by unreasonable inferences from the summary –judgment evidence or by piling on one inference upon another" (citing *Shlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.,* 435 S.W.2d 854, 858 (Tex. 1968). *Northcutt*, citing to *Hillis* and *Ryder*, found that Northcutt's complaints about the officer's actions "seem to be more properly classified as a condition that made the accident possible, rather than the actual cause of the accident itself." *Northcutt*, at *5

Review the facts of your case to determine whether the plaintiff is attempting to connect a third party's decision to an act by the city. Following this train of "unreasonable assumption and stacked inferences" which goes against the basic purpose of section 101.021 in which

immunity is waived "only to a limited degree." *Bossley*¸968 S.W.2d 339, 343 (Tex. 1998).

C. The Standard of Care In An Emergency Situation

As addressed above, the Texas Tort Claims Act waives immunity from liability and suit in a number of circumstances. TTCA §101.021-§101.025. But the TTCA also includes a subchapter entitled "Exceptions and Exclusions" listing circumstances in which its waiver provisions do not apply. TTCA §101.051-§101.066. Among these, is Section 101.055(2) governing an emergency situation:

> 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.

TTCA §101.055(2), Tex. Civ. Prac. & Rem. Code.

Defendant cities will retain immunity from such claims, as the Texas Tort Claims Act does not waive sovereign immunity for claims arising from an employee responding to an emergency call or reacting to an emergency situation. §101.055(2), TCP&RC. Under the Texas Gov't Code, regarding the intention of enacting statutes, there is a presumption that the entire statute is intended to be effective, that a just and reasonable result is intended, and that public interest is favored over any private interest. Tex. Govt. Code Ann. §311.021.

Since the Texas Tort Claims Act does not define "emergency," courts looks to the plain meaning of the term. An "emergency" is an unexpected and usually dangerous situation that calls for immediate action. *See City of San Antonio v. Hartman*, 201 S.W.3d 667, 672–73 (Tex. 2006) (holding emergency situation existed as matter of law under section 101.055(2) when unprecedented flooding was present and city had officially declared a disaster); *Quested v. City of Houston*, 440 S.W.3d 275, 285 (Tex. App.–Houston [14th Dist.] 2014, no pet.) (SWAT officer was responding to emergency call when he drove to hostage situation and was involved in an accident); *Tex. Dep't of Pub. Safety v. Little*, 259 S.W.3d 236, 239 (Tex. App.–Houston [14th Dist.] 2008, no pet.) (dispatch call requesting assistance with wanted person was an emergency call when officer testified without contradiction that

law enforcement officers consider such a request to be an emergency); *see also City of Houston v. Davis*, No. 01–13–00600–CV, 2014 WL 1678907, at *5 (Tex. App.–Houston [1st Dist.] Apr. 24, 2014, no. pet.) (mem. op.) (officer was responding to emergency situation when he pulled over car in response to a report that driver of the car had tried to run another vehicle off the road).

The emergency exception by its language completely removes emergency action and reaction from the statutory waiver of sovereign immunity. *City of Arlington v. Whitaker*, 977 S.W.2d 742, 745 (Tex. App.-Fort Worth 1998, pet. denied); *Green v. City of Friendswood*, 22 S.W.3d 588, 593 (Tex. App. – Houston [14th Dist.] 2000, pet. denied). The leading case in how a Plaintiff establishes recklessness in cases involving emergency vehicles is *City of Amarillo v. Martin*, 971 S.W.2d 426 (Tex.1998).

The underlying policy of the emergency response exception is to balance the safety of the public with the need for prompt response from emergency personnel. *Martin*, 971 S.W.2d 426, 429 (Tex. 1998). Imposing liability for a mere failure in judgment could deter emergency personnel from acting decisively and from taking calculated risks. *Id.*, at 430. *This would allow for the judicial second guessing of the split-second and time-pressured decisions emergency personnel are forced to make. See Id.*

The Texas Supreme Court explains that the legislature has placed a higher burden upon civilian drivers than upon emergency vehicle drivers; this burden is justified because emergency-vehicle operators face more exigent circumstances than civilian drivers. *Martin*, 971 S.W.2d at 431.

Under emergency conditions, an emergency vehicle operator is entitled to various privileges. *Martin*, at 428 (referring to Tex. Trans. Code §546.001-005 which allow emergency vehicle to proceed past a red light or stop sign, exceed the maximum speed limit, or disregard regulation governing the direction of movement in traffic). However, these privileges "do not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons…" *Martin*, at 428. While the operator has a duty to drive with due regard for others by avoiding negligent behavior, liability is only imposed for reckless conduct. *Martin*, at 431. Specifically, section 546.005 of the Transportation Code provides that the driver of an emergency vehicle must drive "with appropriate regard for the safety of all persons," and he is not relieved of "the

consequences of reckless disregard for the safety of others." *Martin*, 971 S.W.2d at 431; Tex. Transp. Code. § 546.005; see *Smith v. Janda*, 126 S.W.3d 543, 545 (Tex.App.-San Antonio 2003, no pet.). "Interpreting the un-codified predecessor of section 546.005, the Supreme Court of Texas held that this provision 'imposes a duty to drive with due regard for others by avoiding negligent behavior, but it only imposes liability for reckless conduct.'" *Smith*, 126 S.W.3d at 545. "Thus, a governmental entity is immune from suits to recover damages resulting from the emergency operation of an emergency vehicle unless the operator acted recklessly; that is, 'committed an act that the operator knew or should have known posed a high degree of risk of serious injury.'" *Id.*

Further, in defining "recklessness", *Martin* cited *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex.1993), which re-affirmed that a gross negligence or recklessness finding requires a showing that the Defendant's conduct *created an extreme risk of harm*, and that the Defendant was subjectively aware of the extreme risk created by that conduct, but acted in conscious disregard of that danger. See *Alexander*, 868 S.W.2d at 326. (emphasis added). The *Alexander* Court in turn quoted an earlier opinion explaining gross negligence: "[T]he plaintiff must show that the defendant *knew about the peril, but his acts or omissions demonstrated that he didn't care*." *Id.* (quoting *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex.1981))(emphasis added).

As such, under Texas law, reckless disregard for the safety of others includes essential characteristics of gross negligence indicating an entire want of care sufficient to raise the belief or presumption that the act or omission complained of was the result of conscious indifference to the rights and welfare of the persons affected. *City of San Antonio v. Schneider*, 787 S.W.2d 459, 465 (Tex. App.- San Antonio, 1990 rehg denied). According to the Texas Supreme Court, what lifts ordinary negligence into gross negligence is the mental state of the defendant. To prove gross negligence, the Plaintiffs must show that the Defendant was consciously (i.e. knowingly) indifferent to the deceased's rights, welfare and safety. *Transportation Ins. Co. v. Moriel*, 879 S.W.10, 20 (Tex.1994).

As *Martin* and the above cases indicate, the plaintiffs in a lawsuit must plead and produce evidence that the officer *knew* that he was engaging in conduct which created an extreme risk of harm, but just didn't care. *Moriel*, 879 S.W. at 21.

(emphasis added). The Texas Supreme Court has recently stated that the terms "conscious indifference" and "reckless disregard" require proof that a party knew the relevant facts but did not care about the result and that a showing of such conscious indifference is required under Section 101.055(2) of the Tort Claims Act. *City of San Antonio v. Hartman*, 201 S.W.3d 667 (Tex. 2006). *See also Pasadena v. Kuhn*, 260 S.W.3d 93, 99 (Tex.App.- Houston [1st Dist.] 2008, no pet.)(applying Hartman's conscious indifference standard to an emergency driving situation). *See also Fidelity v. Guar. Ins. Co. v. Drewery Const. Co.*, 186 S.W.3d 571, 576 (Tex. 2006); *Dillard Department Stores, Inc., v. Silva*, 148 S.W.3d 370, 373-74 (Tex. 2004); *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.778, 785 (Tex. 2001); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981)(All of which have held that "conscious indifference" and "reckless disregard" require proof that a party knew of the relevant facts but did not care about the result.)

Likewise, other courts have determined that evidentiary records involving even more direct factual evidence through actual collisions with emergency vehicles are insufficient to show reckless disregard and cannot defeat immunity. See *City of Pasadena v. Kuhn*, 260 S.W.3d 93, 99-100 (holding officer's actions *not* taken with conscious indifference or reckless disregard for safety of citizen when officer collided with citizen after slowing down to enter intersection); *Pakdimounivong v. City of Arlington*, 219 S.W. 3d 401, 411-12 (Tex.App.- Fort Worth 2006, pet. denied)(holding that officers' actions were *not* taken with conscious indifference or reckless disregard for safety of deceased when no evidence showed that officers did not care what happened to deceased); *Smith v. Janda*, 126 S.W.3d 543, 545-46 (Tex. App.-San Antonio 2003, no pet) (holding that evidence was insufficient to establish recklessness when ambulance driven to emergency with lights and sirens activated as it approached intersection, other drivers at intersection could hear and see sirens and lights, ambulance driver slowed down and looked around and then proceeded into intersection without coming to complete stop); *City of San Angelo Fire Dept. v. Hudson*, 179 S.W.3d 695, 701-02 (Tex.App.- Austin 2005, no pet.) (holding no evidence of reckless disregard for safety of others when officer entered intersection without stopping and witness did not hear brakes being applied).

D. Official Immunity Doctrine

City can also remain immune from claims based on the individual immunity of the City employee.

Official immunity is an affirmative defense that protects government employees from liability. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994). Under Texas law, a suit against governmental employees in their official capacities is, in all respects, a suit against the state; thus employees sued in their official capacities are shielded by sovereign immunity. *Univ. of Texas Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767,777 (Tex.App.---Houston 1999, pet. dism'd w.o.j.). Specifically, "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Alcala v. Texas Webb County*, 620 F.Supp.2d 795 (S.D. Tex. 2009) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *see also Bennett v. Pippin*, 74 F.3d 578, 584 (5th Cir. 1996).

E. If Employee Is Entitled to Immunity, So Is The City.

Whether the individual employee has been sued individually or not, had he been sued individually, he would be entitled to official immunity under Texas law. Under Texas law, if the employee is immune from suit, he is not "personally liable to the claimant according to Texas law" **and the City retains its immunity**. *City of San Antonio v. Trevino*, 217 S.W.3d 591, 593, 596 (Tex.App.-San Antonio 2006, no pet.). In other words, "[w]hen official immunity shields a governmental employee from liability, sovereign immunity shields the governmental employer from vicarious liability." *University of Houston v. Clark*, 38 S.W.3d 578, 579 (Tex. 2000); *DeWitt v. Harris County*, 904 S.W.2d 650, 653 (Tex. 1995).

Plaintiffs also cite to Corpus Christi Court of Appeals case *Cameron County v. Alvarado* in support of their argument. *Alvarado* cites to Texas Supreme Court Case *City of Lancaster v. Chambers*, 883, S.W.2d 650, 653 (Tex.1994). In *Chambers*, the Supreme Court of Texas held that an officer establishes good faith in a police-pursuit case by showing that a reasonably prudent officer *could have* believed it necessary to continue the pursuit, balancing the need for immediate police intervention against the risk of harm to the public. *Id.*

Alvarado quotes *Chambers* when holding that the "could have believed" aspect of the good faith test means that, in order to be entitled to summary judgment, a police officer must prove that a reasonably prudent

officer might have believed that the pursuit should have been continued. *Alvarado*, at 880. (citing to *Chambers*, at 656-57). The test is one of "objective legal reasonableness" and the immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Chambers* at 656.

Can the plaintiffs show that *no* reasonable officer in same position could have ever believed the facts justified his response. This is important, because to create a genuine issue of material fact, Plaintiffs must do more than show that the officer was negligent, or that a reasonably prudent officer could have reached a different decision. They must show that *absolutely no reasonable police officer* would ever engage in and continue with this pursuit. "[T]o controvert a police officer's summary judgment proof on good faith, the [respondent] must do more than show that a reasonable prudent officer could have decided to stop the pursuit. The respondent must show that *no* reasonable person in the officer's position could have thought that the facts justified the officer's acts." *Wadewitz*, at 467.

As such, if the employee is entitled to official immunity, the City is, by extension, consequently entitled to its government immunity. *University of Houston v. Clark*, 38 S.W.3d 578, 579 (Tex. 2000); *DeWitt v. Harris County*, 904 S.W.2d 650, 653 (Tex. 1995).

F. Did the Individual Employee Act In Reasonable Good Faith?

A governmental employee has official immunity for the performance of (1) discretionary duties within (2) the scope of the employee's authority, provided the employee (3) acts in good faith. *Clark*, 38 S.W.3d at 580*; see also Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997).

Was the employee performing discretionary duties within the scope of his employment?

In *City of Lancaster v. Chambers*, 883, S.W.2d 650, 653 (Tex.1994), the Supreme Court of Texas held that an officer establishes good faith in a police-pursuit case by showing that a reasonably prudent officer could have believed it necessary to continue the pursuit, balancing the need for immediate police intervention against the risk of harm to the public. The Texas Supreme Court later extended this test to high-speed emergency responses and elaborated on the need and risk elements. *Wadewitz v. Montgomery*, 951 S.W.2d at 467. The court explained that the need element is determined by the seriousness of the emergency, the necessity

of the officer's immediate response, and the alternate courses of action available, if any. *Id.* The test is one of "objective legal reasonableness" and the immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Chambers* at 656.

The attached evidence shows that the *Wadewitz* particularized need/risk assessment has been met and establishes official immunity in this case. You'll want to have and attach evidence that shows that your City employee would be entitled to official immunity and that each of the *Wadewitz* and *Chambers* elements are met.

The Supreme Court has held in reviewing an officer's affidavit, that "assessing such facts as time of day and traffic, weather and road conditions, [the officer] was assessing the specific circumstances present that affected this risk." *Clark*, at 586. "An officer should not be required in his affidavit to affirmatively negate the existence of all circumstances or risk that did not actually exist." *Clark*, at 586.

This is important, because to create a genuine issue of material fact, Plaintiffs must do more than show that the employee was negligent, or that a reasonably prudent officer could have reached a different decision. They must show that *absolutely no reasonable police officer* would ever engage in and continue with the employee's action. "[T]o controvert a police officer's summary judgment proof on good faith, the [respondent] must do more than show that a reasonable prudent officer could have decided to stop the pursuit. The respondent must show that *no* reasonable person in the officer's position could have thought that the facts justified the officer's acts." *Wadewitz*, at 467.

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