

Reversed and Rendered and Opinion filed November 16, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-01076-CV

CHARLES RINEHART, JAMES HOLT, AND THOMAS DAVIS, Appellants

V.

**WALLACE R. BRITTON, SR., AND NANCY MURPHY AS NEXT OF FRIEND OF
NORMAN BRITTON, Appellees**

**On Appeal from the 240th District Court
Fort Bend County, Texas
Trial Court Cause No. 93,947**

OPINION

Charles Rinehart, James Holt, and Thomas Davis (collectively referred to as the "Officers"), appeal the granting of the no-evidence motion for summary judgment in favor of Wallace Britton, Sr., and Nancy Murphy as next of friend of Norman Britton ("Britton"), appellees. The Officers also appeal the denial of their counter-motion for summary judgment in favor of Britton. We reverse the granting of the no-evidence motion because we find that the Officers raised a fact issue on each element of official immunity. We also reverse the denial of the Officers' counter-motion for summary judgment, because we find that the Officers

are entitled to official immunity under state law, and, therefore, we reverse and render judgment in favor of the Officers.

Factual and Procedural History

Wallace Britton (“ the deceased”) and forty-five other psychiatric inmates were being transported by bus to a different prison unit located across the state. The bus was not air-conditioned, and, during the transport, broke-down in 100-degree heat. Rinehart, one of the correctional officers, placed the wrong type of fuel in the bus, causing it to break-down. Rinehart and the other officers, Holt and Davis, immediately notified their out-of-town supervisors, called for local law enforcement assistance, called a local mechanic, and made ice and water available to the inmates. However, for almost two hours, the bus - with its prisoners on board - sat in the heat. During this time, neither the deceased nor any of the other inmates were allowed off the bus. The deceased suffered a heat stroke and died two days later; he was taking medication prescribed to him by the Texas Department of Criminal Justice (“TDCJ”) that predisposed him to heat stroke.

Britton’s family sued the TDCJ, Wayne Scott, the director of the TDCJ, and the three correctional officers. The Brittons’ claims were split into two appeals between this court and the First Court of Appeals. *See Scott v. Britton*, 16 S.W.3d 173 (Tex. App.—Houston [1st Dist.] 2000, no pet.). In this appeal, we address the Brittons’ claims against the Officers, in which they alleged state claims of negligence under the Texas Tort Claims Act, wrongful death and survival actions, and due process and Eighth Amendment claims under sections 1983 and 1988. The Officers answered these claims, asserting the affirmative defenses of official and qualified immunity.

The Brittons filed a no-evidence motion for summary judgment on the Officers’ affirmative defenses of official immunity, claiming that the Officers had not brought forth any evidence of the following elements of official immunity: (1) that they were performing discretionary duties; (2) in good faith; (3) while acting within the scope of their authority. In response to this motion, the Officers filed a counter-motion for summary judgment based on official immunity and qualified immunity. The trial court granted the Brittons’ no-evidence motion and denied the Officers’ counter-motion, and this appeal followed.

Standard of Review

As we stated, the Brittons filed a no-evidence motion for summary judgment based on the Officers' affirmative defense of official immunity. The order granting the Brittons' no-evidence motion does not specify the reason the trial court granted it, and thus, we will affirm the motion if any of the theories advanced in it are meritorious. *See Kyle v. West Gulf Maritime, Ass'n*, 792 S.W.2d 805, 807 (Tex. App.—Houston [14th Dist.] 1990, no writ); *see also Basse Truck Line, Inc. v. First State Bank*, 949 S.W.2d 17,19 (Tex. App.—San Antonio 1997, pet. denied).

In a no-evidence motion for summary judgment, the non-movant carries the burden to present enough evidence to entitle him to a trial. *See* TEX. R. CIV. P. 166a(i); *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The motion must state the elements as to which no evidence exists, and the burden shifts to the respondent to produce summary judgment evidence raising a genuine issue of material fact. *See Lampasas*, 988 S.W.2d at 433. We must review the evidence in the light most favorable to the respondent against whom the no-evidence summary judgment was rendered, disregarding all contrary evidence and inferences. *See Graves v. Komet*, 982 S.W.2d 551, 553 (Tex. App. San Antonio 1998, no pet.); *Lampasas*, 988 S.W.2d at 432.

Unlike the Brittons, the Officers filed a traditional motion for summary judgment, where the movant has the burden of showing, with competent proof, that no genuine issue of material fact exists, and that he is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a; *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). When a defendant is the movant for summary judgment, he has the burden to conclusively negate at least one essential element of the plaintiff's cause of action, or conclusively establish each element of an affirmative defense. *See Doe v. Boys Clubs*, 907 S.W.2d 472, 476-77 (Tex. 1995). If the movant's motion and summary judgment proof facially establish its right to judgment as a matter of law, the burden shifts to the non-movant to raise a material fact issue sufficient to defeat summary judgment. *See HBO, A Div. of Time Warner Entertainment Co., L.P. v. Harrison*, 983 S.W.2d 31, 35 (Tex. App.—Houston [14th Dist.] 1998, no pet.). In deciding whether a disputed material fact issue exists precluding summary judgment, we resolve every reasonable inference in favor of the non-movant and take all evidence favorable to it as true. *See Nixon*, 690 S.W.2d at 548-49; *Karl v. Oaks Minor Emergency Clinic*, 826 S.W.2d 791, 794 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

Because both the Officers and the Brittons moved for summary judgment, and the trial court granted one motion and denied the other, we will review both sides' summary judgment evidence and determine all questions presented. *See Commissioners Court v. Agan*, 940 S.W.2d 77, 81 (Tex. 1977); *Scott v. Britton*, 16 S.W.3d 173, 177. In doing so, we will render the judgment that the trial court should have rendered. *See Commissioners Court*, 940 S.W.2d at 81; *Scott*, 16 S.W.3d at 177.

The Brittons' No-evidence Motion for Summary Judgment based on the Officers' Affirmative Defense of Official Immunity

In their first point of error, the Officers argue that the trial court erred in granting the Brittons' no-evidence motion for summary judgment because the Officers raised a fact issue on each element of their defense of official immunity. In their fourth point of error, the Officers discuss the evidence they presented to substantiate that they acted in good faith. Because good faith is an element of official immunity, we will address these points of error together.

Official immunity is an affirmative defense that protects government employees or officials from personal liability. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Government employees or officials are entitled to official immunity from suit if they perform (1) discretionary duties (2) in good faith (3) while acting within the scope of their authority. *See id.* As we explain below, we agree that the Officers raised a fact issue on, and proved as a matter of law, each of these elements.

Discretionary Duty

First, the Brittons alleged that the Officers' conduct was ministerial. A government official is not entitled to immunity when he performs a ministerial duty. *See Kassen v. Hatley*, 887 S.W.2d 4, 9 (Tex. 1994). Conduct is ministerial if the law prescribes the duties to be performed with such precision that nothing is left to the actor's discretion. *See City of Houston v. Kilburn*, 849 S.W.2d 810, 811 (Tex. 1993). However, if an act involves personal deliberation, decision, and judgment, it is discretionary, and the official may be entitled to official immunity. *See City of Lancaster*, 883 S.W.2d at 654.

The Brittons contend that the Officers had no discretion on which type of fuel to place in the bus's engine, and that when Rinehart placed unleaded fuel in the bus's diesel engine, he performed a ministerial act. The Brittons also argue that the Officers performed a ministerial act when they merely followed orders

from their supervisors to leave the inmates on the bus when it broke-down. The Brittons contend that a TDCJ transportation policy dictates the policies and procedures correctional officers should follow when the bus breaks-down or an inmate becomes ill on the bus. This policy states that an inmate should not be evacuated from the prison bus during an emergency situation until assistance arrives, proper security is provided, and it is determined that the vehicle cannot be repaired at its location. Consequently, the Officers should not be entitled to immunity for merely following orders from supervisors and following the TDCJ policies in leaving the deceased on the prison bus.

The Officers argue, on the other hand, that their actions were discretionary because the decision to leave the inmates on the prison bus during the break-down required personal deliberation, decision, and judgment. As summary judgment evidence, they presented the deposition testimony of Wayne Scott, the executive director of the TDCJ, and the TDCJ's transportation policies and procedures. In his deposition testimony, Scott stated that each individual officer has the discretion on whether to remove an inmate from the prison bus when that inmate appears ill. In making the decision, the officer must take into account several factors, including the seriousness of the inmate's illness, the need for immediate assistance, and the possibility that the other offenders on the bus could attack that officer. The TDCJ transportation policy states that it is designed to prescribe policies and procedures for emergency situations that arise during the transfer of inmates. Because of the variety of the circumstances that may arise, the policy states that officers are expected to use common sense and sound judgment in their response to an emergency situation.

We find that Scott's deposition testimony and the TDCJ's transportation policies and procedures proved that the Officers' decision to leave the deceased on the bus required personal deliberation, decision and judgment, and thus, was discretionary.

Good Faith

Second, we find that the Officers presented evidence that they acted in good faith. Texas uses an objective standard to test good faith in official immunity cases. The official has the burden to prove that a reasonably prudent official, under the same or similar circumstances, might have believed that the action taken was justified. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 656-57 (Tex. 1994). The official need not prove that it would have been unreasonable to take a different action; neither must he

prove that all reasonable prudent officials would have made the same decision as he would have. *See id.* at 657. An official can act negligently and still meet the test for good faith. Moreover, an expert's opinion testimony may establish good faith, even if the expert is an interested witness, as long as the statements are more than mere conclusory statements. *See Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999).

In response to the Brittons' no-evidence motion for summary judgment, the Officers presented Scott's deposition testimony. Scott discussed the seriousness of the situation as a whole: forty-six inmates were on the bus, and once the bus broke-down, the Officers immediately called for local law enforcement assistance, put ice and water on the bus, maintained security on the bus, and called a local mechanic. Additionally, Scott discussed the availability of the Officers' alternatives. Scott stated that the Officers had the option to remove an offender from the prison bus if they felt confident that a particular inmate was seriously ill and needed immediate assistance. The TDCJ policy, which the Officers also included as summary judgment evidence, explained the Officers' option of removing an inmate from the bus when it becomes inoperable.

Scott concluded that the Officers acted in good faith at all times, and discussed the particular security dangers associated with removing inmates from the bus in an area such as a filling station, the area where Britton's bus broke-down. Scott stated that the number of inmates on the bus greatly outnumbered the Officers - forty-six to three. Of these inmates, some were identified as "assaultive inmates," who had a history of assaulting other inmates or staff members. Removing Britton from the bus might have given these inmates the opportunity to act in concert with one another, attack the Officers, take their weapons away, and secure the bus for themselves. Moreover, the filling station would not be a secure area, and any offenders removed from the bus would have a free arm at all times. Scott states that the Officers acted reasonably at all times in deciding to keep Britton on the bus and followed any regulations or policy and manual provisions that prescribed their actions.

We conclude that the Officers produced sufficient evidence to prove that their conduct in leaving Britton on the prison bus during its break-down was in good faith. Scott's deposition testimony and the TDCJ transportation policy discuss the needs and risks of Britton's situation, and present some evidence

that a reasonable officer, under the same or similar circumstances, could have balanced the needs and risks as the Officers did.

Scope of Authority

Lastly, to defeat the Brittons' no-evidence motion for summary judgment, the Officers must have presented some evidence that they were acting within the scope of their authority. Britton stipulated in his petition that, at all times, the Officers were acting within the scope of their employment and discharging their assigned duties. Thus, we need not examine the Officers' evidence on this element, and resolve it in favor of them.

In sum, reviewing the evidence in the light most favorable to the Officers, we find that they produced sufficient evidence on each element of official immunity to defeat the Brittons' no-evidence motion for summary judgment. Accordingly, we sustain the Officers' first and fourth points of error.

The Officers' Counter-Motion for Summary Judgment Based on the Affirmative Defense of Official Immunity

For the reasons stated in the discussion above, we find that the Officers established their affirmative defense of qualified immunity as a matter of law. Having held that the Officers are entitled to official immunity under state law, we need not address their claim to qualified immunity under federal law.

Conclusion

We reverse the judgment of the trial court, which granted the no-evidence summary judgment in favor of Britton and denied the Officers' counter-motion for summary judgment, and we grant the Officers' motion for summary judgment and render judgment in favor of the Officers on the Brittons' lawsuit.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Opinion filed November 16, 2000.

Panel consists of Justices Yates, Fowler and Frost.

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