

Affirmed and Majority and Dissenting Opinions filed July 21, 2020.



In The

Fourteenth Court of Appeals

NO. 14-19-00559-CV

CITY OF HOUSTON, Appellant

V.

ISABEL MEJIA AND ROSA MEJIA, Appellees

**On Appeal from the 405th District Court
Galveston County, Texas
Trial Court Cause No. 18-CV-0756**

DISSENTING OPINION

Appellant/defendant The City of Houston conclusively proved its entitlement to governmental immunity. The summary-judgment evidence shows as a matter of law that Sergeant Michelle Gallagher of the Houston Police Department was not acting within the scope of her employment at the time of the automobile accident made the basis of this suit. So, this court should reverse the trial court's order denying summary judgment and render judgment for the City, dismissing the claims of appellees/plaintiffs Isabel Mejia and Rosa Mejia based on the City's governmental immunity from suit.

A. Applicable Legal Standard

The City has asserted its immunity from suit under the doctrine of governmental immunity. In the context of today’s case, the City cannot be sued or held liable based on the actions of its employees unless the Texas Legislature has waived the City’s governmental immunity under the Texas Tort Claims Act (the “Act”).¹ In the Act, the Texas Legislature has done so in limited circumstances.² Under section 101.021 of the Act, the City is liable for

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.³

For purposes of the Act, an “employee” is “a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.”⁴ The employee’s “‘scope of employment’ means the performance for a governmental unit of the duties of an employee’s office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.”⁵

¹ See *City of Lancaster v. Chambers*, 883 S.W.2d 650, 658 (Tex. 1994).

² See *Dallas Cty. MHMR v. Bossley*, 968 S.W.2d 339, 342–43 (Tex. 1998).

³ Tex. Civ. Prac. & Rem. Code Ann. § 101.021 (West, Westlaw through 2019 R.S.).

⁴ *Id.* § 101.001(2) (West, Westlaw through 2019 R.S.).

⁵ *Id.* § 101.001(5) (West, Westlaw through 2019 R.S.).

For the Legislature to have waived the City’s governmental immunity, Sergeant Michelle Gallagher must have been acting within the scope of her employment with the City at the time of the accident made the basis of this suit (the “Accident”).⁶ The determination as to whether Sergeant Gallagher was acting within the scope of her employment with the City “calls for an objective assessment of whether the employee was doing her job when she committed an alleged tort, not her state of mind when she was doing it.”⁷ An employee acts within the scope of her employment if she is discharging the duties generally assigned to her or acting pursuant to her job responsibilities.⁸ The Supreme Court of Texas has stated that the scope-of-employment analysis “focuses on an objective assessment of whether the employee’s acts are of the same general nature as the conduct authorized or incidental to the conduct authorized to be within the scope of employment.”⁹

Whether a peace officer was on-duty or off-duty is not dispositive as to whether she was acting within the scope of her employment.¹⁰ Likewise, a peace officer’s use of a police vehicle is not dispositive of the issue.¹¹ Courts must examine what the officer was doing at the time of the accident and why the officer was doing it.¹² It is true that “[i]n automobile collision cases [under the Tort Claims Act] a presumption arises that the driver was acting within the scope of his employment by the defendant when it is proved that the employer owned the vehicle and employed

⁶ *See id.* § 101.021(1).

⁷ *Laverie v. Wetherbe*, 517 S.W.3d 748, 753 (Tex. 2017).

⁸ *See Garza v. Harrison*, 574 S.W.3d 389, 400–01 (Tex. 2019); *Laverie*, 517 S.W.3d at 753.

⁹ *Garza*, 574 S.W.3d at 404–05.

¹⁰ *Id.* at 403.

¹¹ *Id.* at 405.

¹² *See Lara v. City of Hempstead*, No. 01-15-00987-CV, 2016 WL 3964794, at *4 (Tex. App.—Houston [1st Dist.] July 21, 2016, pet. denied) (mem. op.).

the driver.”¹³ But the presumption is only a procedural tool, and it disappears from the case once it has been rebutted by positive evidence to the contrary.¹⁴

B. Undisputed Evidence

The following undisputed evidence was the only proof before the trial court when it denied the City’s motion:

- Michelle Gallagher is a Sergeant with the Houston Police Department.
- At the time of the Accident, Sergeant Gallagher was working as a supervisor in the Child Physical Abuse Unit of the Special Victims Division.
- Sergeant Gallagher was not a patrol officer, and she did not drive a marked police car.
- Sergeant Gallagher did not respond to calls for service from dispatch, and she did not work in traffic enforcement, such as writing tickets for moving violations.
- Sergeant Gallagher’s normal shift ran from 6:00 a.m. to 4:00 p.m., Tuesday through Friday. It was not mandatory for her to drive a City vehicle to and from work every day. She was not assigned a regular vehicle for the Special Victims Division.
- During the month in which the Accident occurred, Sergeant Gallagher was on-call, and was assigned one of the Child Physical Abuse Unit’s on-call vehicles for the month.
- The day of the accident was Sergeant Gallagher’s last day to be on-call, so at the end of her shift at 4:00 p.m., she turned in her on-call vehicle.
- If Sergeant Gallagher needed a City vehicle during her regular shift when she was not assigned to be on-call, she would fill out a form to check-out one of the Special Victims Division vehicles.
- At the time of the Accident, Sergeant Gallagher’s husband also worked for the Houston Police Department as a lieutenant and was assigned a take-home vehicle.

¹³ *Lara*, 2016 WL 3964794, at *4 (internal quotations omitted).

¹⁴ *Id.*

- Sergeant Gallagher's husband's assigned vehicle had been in the garage for repairs. The repairs were completed as of the day of the Accident.
- At her husband's request, Sergeant Gallagher picked up her husband's assigned vehicle from the garage and drove it to their house so that her husband could then drive the vehicle to work when he started his shift, which began that evening.
- Sergeant Gallagher did not ask her supervisor if she was authorized to take this action because her husband was a lieutenant, and there is no requirement to check-out a vehicle when picking it up from the garage.
- At the time of the Accident, Sergeant Gallagher was driving home in her husband's assigned vehicle, returning from work as part of her regular commute. At the time of the Accident, Sergeant Gallagher had no official duties, other than still being on call, and she was not being paid for her time.
- At the time of the Accident, Sergeant Gallagher was not responding to a call for service. She was not responding to criminal activity that she had witnessed, nor was she responding to an emergency situation, such as a citizen in need of assistance. At the time of the Accident, Sergeant Gallagher was not in the process of enforcing any rules of the road, for example, clocking any other motorists for exceeding the speed limit.

C. The Scope-of-Employment Analysis

Under the undisputed evidence before the trial court, at the time of the Accident, Sergeant Gallagher was off-duty, not being paid for her time, carrying out no official duties, and merely commuting home in her husband's work vehicle. She had not performed any services for the City or been asked to do so since leaving work. The Mejias did not submit any evidence addressing the scope-of-employment issue. The undisputed evidence shows that at the time of the Accident, (1) objectively, Sergeant Gallagher was not doing her job; (2) she was not discharging the duties generally assigned to her by the Houston Police Department or acting pursuant to her job responsibilities; and (3) her acts were not of the same general nature as the conduct authorized or incidental to the conduct authorized to be within

the scope of her employment.¹⁵ Thus, the evidence before the trial court conclusively proved the City’s contention that Sergeant Gallagher was not acting within the scope of her employment with the City at the time of the Accident.¹⁶

D. The Majority’s Analysis

Citing the supreme court’s opinion in *Garza*, the majority asserts that an officer’s act falls outside the scope of her employment if, and only if, her act did not serve any purpose of her employer. The *Garza* court never said that performing an act that did not serve any purpose of the employer is the only way an employee can act outside the scope of her employment.¹⁷ Instead, the high court stated that one way an employee’s act can fall outside the scope of her employment is if the act “occurs within an independent course of conduct not intended by the employee to serve *any* purposes of the employer.”¹⁸ Thus, the majority relies on the wrong legal standard.¹⁹

The majority also claims that at the time of the Accident, Sergeant Gallagher was carrying out instructions issued by a superior officer at the Houston Police Department. Though the record reflects that Sergeant Gallagher’s husband was a lieutenant in the Houston Police Department, no evidence shows that her husband was a “superior officer” as the majority contends. No evidence shows that Sergeant Gallagher’s husband worked in the same unit as Sergeant Gallagher or had any

¹⁵ See *Garza*, 574 S.W.3d at 400–01, 404–05; *Laverie*, 517 S.W.3d at 753.

¹⁶ See *City of Fort Worth v. Hart, as next friend of K.H.*, No. 10-17-00258-CV, 2019 WL 91676, at *4–5 (Tex. App.—Waco Jan. 2, 2019, pet. denied) (mem. op.); *Lara*, 2016 WL 3964794, at *4–5.

¹⁷ See *Garza*, 574 S.W.3d at 400–01.

¹⁸ *Id.* at 400. In the same opinion, the high court stated that “the employee’s state of mind [is] irrelevant.” *Id.* at 401.

¹⁹ See *id.*

authority over her at the Houston Police Department. No evidence shows that Sergeant Gallagher's husband asked her in his official capacity to pick up his car. The evidence conclusively proves that Sergeant Gallagher was driving her husband's work vehicle home at his request and as a convenience to him. A wife's performing a task at her husband's request does not constitute following the instructions of a superior officer, though the majority appears to conclude otherwise.

Nothing in our record shows that in picking up her husband's work vehicle and driving it to their home, Sergeant Gallagher was acting on the instructions of a supervisor or other superior in her chain of command. Nothing in the record shows that she was performing that task because it had been assigned to her as part of her work responsibilities by one in authority over her in the workplace. Nothing shows the task of picking up the vehicle and driving it to the Gallagher home fell under Michelle Gallagher's work responsibilities or any other City employee's work responsibilities. Nothing in the record shows that saving a City employee "a trip to the City garage before the beginning of his shift" is part of any employee's job.

The majority also claims that by driving her husband's work vehicle home so it would be ready for the beginning of his shift, Sergeant Gallagher conferred a benefit on the Houston Police Department. The mere conferring of a benefit is not the legal test, as discussed above.²⁰ In addition, saving Sergeant Gallagher's husband a trip to the garage conferred a benefit on him in his personal capacity, rather than a benefit on the Houston Police Department. Sergeant Gallagher's picking up her husband's work vehicle was personally convenient for him because it saved him a trip to the garage before his shift started. It was not any more beneficial to the Houston Police Department for Sergeant Gallagher's husband to

²⁰ See *Garza*, 574 S.W.3d at 400–01, 404–05; *Laverie*, 517 S.W.3d at 753.

drive the vehicle in to work from his house than it was for Sergeant Gallagher's husband to appear at the garage before the start of his shift to pick up his vehicle and drive to work.

The happenstance that Sergeant Gallagher's husband also worked for the Houston Police Department does not change the analysis. If Sergeant Gallagher's husband worked for the United States Marshals Service and Sergeant Gallagher had picked up his work vehicle at his request before commuting home, Sergeant Gallagher would not be acting within the course and scope of her employment.

If Sergeant Gallagher's husband had picked up his work vehicle at the garage after the end of a shift and had an accident while commuting home when he was not being paid or performing official duties, her husband would not have been acting within the scope of his employment. No reason exists why Sergeant Gallagher should be deemed in the course and scope of her employment under the same facts.

Under *Lara* and *Hart*, Michelle Gallagher was an off-duty commuter at the time of the Accident.²¹ As a matter of law, she was not acting within the scope of her employment.²² The majority's effort to distinguish these cases is not convincing, and today's opinion creates a split of authority among the courts of appeals and a conflict between the two Houston-based courts of appeals, which have the same ten-county jurisdiction.²³

²¹ See *Hart, as next friend of K.H.*, 2019 WL 91676, at *4–5; *Lara*, 2016 WL 3964794, at *4–5.

²² See *Hart, as next friend of K.H.*, 2019 WL 91676, at *4–5; *Lara*, 2016 WL 3964794, at *4–5.

²³ The First Court of Appeals District and the Fourteenth Court of Appeals District both are composed of the counties of Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller, and Washington. See Tex. Gov't Code Ann. 22.201 (West 2013).

E. Conclusion

The record shows Sergeant Gallagher was driving her spouse's assigned vehicle to their home because he had asked her to pick up the car for him, not because any one in authority over her at work had asked her to do so, and not because the task was part of her job. The summary-judgment evidence conclusively proves that, at the time of the Accident, Sergeant Gallagher was not acting within the scope of her employment. The City conclusively proved its entitlement to governmental immunity. For the reasons stated above, the trial court erred in denying the City's summary-judgment motion. This court should sustain the City's sole issue, reverse the trial court's judgment, and render judgment granting the motion and dismissing with prejudice the Mejias' claims. Because the court does not do so, I respectfully dissent.

/s/ **Kem Thompson Frost**
 Chief Justice

Panel consists of Chief Justice Frost and Justices Zimmerer and Poissant (Zimmerer, J., majority).