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

MAJORITY OPINION

The City of Houston appeals from an order denying summary judgment based on governmental immunity from suit. The order stems from a personal injury action brought by Isabel and Rosa Mejia to recover damages based on injuries sustained in an automobile accident. In a single issue the City argues the trial court erred in denying its motion for summary judgment, asserting there was no genuine issue of material fact as to whether Sergeant Gallagher, the police officer who hit the Mejias, was in the scope of her employment at the time of the accident. We overrule the City's sole issue because the City did not meet its burden to conclusively prove that

Sergeant Gallagher was not in the scope of her employment when the accident occurred. We therefore affirm the trial court's order denying the City's motion for summary judgment.

BACKGROUND

This lawsuit is governed by the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.001, et. seq. Isabel Mejia was driving, and her daughter Rosa was a passenger when Sergeant Michelle Gallagher (Gallagher) of the Houston Police Department failed to yield the right of way at an intersection and hit the Mejias' car. The Mejias sued Gallagher and the City for personal injuries. The Mejias' claims against Gallagher were dismissed pursuant to the City's exercise of the Tort Claims Act election of remedies provision. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.106(e).

The City responded to Mejia's request for admissions, initially admitting that Gallagher was in the course and scope of her employment at the time of the accident. The City subsequently amended its responses to deny Gallagher was in the course and scope of her employment.

The City filed a motion for summary judgment on immunity grounds, alleging Gallagher was not in the course and scope of her employment at the time of the accident. The City attached Gallagher's affidavit to its motion. In the affidavit Gallagher testified that her husband worked as a lieutenant for the Houston Police Department and drove a "take-home" City vehicle that had been in the police garage for repairs. Gallagher's husband asked Gallagher to pick up his City vehicle from the police garage and drive it home. Gallagher testified in her affidavit that she did not request permission from her supervisor to pick up the City car because there was no requirement to check out a car when picking it up from the garage. "Per Lieutenant Gallagher's instructions," Gallagher drove the City vehicle to him. The

accident happened when Sergeant Gallagher was on her way home in Lieutenant Gallagher's City-issued vehicle.

Gallagher testified that at the time of the accident she was driving home from work as part of her regular commute, had no official duties, and other than still being on call, was not being paid for her time. She further averred that she was not responding to a call for service, criminal activity, or an emergency situation.

The Mejias responded to the City's motion for summary judgment, arguing that there were genuine issues of material fact, primarily in regard to whether Gallagher was acting within the course and scope of her employment at the time of the accident. Attached to the response were copies of the accident report, the City's first responses to requests for admissions in which it admitted Gallagher was within the course and scope of her employment, the City's amended responses in which it denied Gallagher was within the course and scope of her employment, Gallagher's affidavit, and Gallagher's deposition.

The City objected to evidence of the police report on the grounds that it was not authenticated. The City further objected to evidence of its first response to requests for admissions because the City obtained leave from the trial court to amend its responses. The trial court sustained the City's objections to the police report and the first response to the requests for admissions, and denied the City's motion for summary judgment.

ANALYSIS

In a single issue the City argues the trial court erroneously denied its motion for summary judgment on the issue of immunity because there was no genuine issue of material fact that, at the time of the accident, Gallagher was not in the scope of her employment.

I. Standard of Review and Applicable Law

When a governmental unit raises the affirmative defense of governmental immunity in a traditional summary judgment motion, it must establish the affirmative defense as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Oakbend Med. Ctr. v. Martinez*, 515 S.W.3d 536, 542 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

If the movant conclusively establishes its entitlement to an affirmative defense of immunity, the burden of production shifts to the nonmovant to present evidence sufficient to create a fact issue on at least one element of either the movant's affirmative defense or an exception to that affirmative defense. *See Oakbend Med. Ctr.*, 515 S.W.3d at 542 (citing *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936 (Tex. 1972)). Summary judgment is proper when a suit is barred as a matter of law because of a governmental unit's immunity. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–28 (Tex. 2004) (standard of review for a jurisdictional plea based on evidence generally mirrors the traditional summary judgment standard).

Governmental units are not subject to suit for the torts of their agents or officers unless a constitutional or statutory waiver of immunity applies. *City of Houston v. Daniels*, 66 S.W.3d 420, 424 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (citing *Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989)). The parties' dispute here centers on the applicability of the Texas Tort Claims Act's statutory waiver of immunity from suit in certain circumstances.

The Tort Claims Act waives a governmental unit's immunity from suit for personal injuries arising from the negligent use of a motor vehicle by an employee acting within the scope of her employment when the employee would be personally

liable to the claimant under Texas law. Tex. Civ. Prac. & Rem. Code § 101.021(1). The City of Houston is a governmental unit for purposes of the Act. *Id*. § 101.001(3)(B); *City of Houston v. Nicolai*, 539 S.W.3d 378, 385 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). Under the Act, "scope of employment" means the performance 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." Tex. Civ. Prac. & Rem. Code § 101.001(5).

Whether a peace officer was on duty or off is not dispositive as to whether she was acting within her employment's scope. *Garza v. Harrison*, 574 S.W.3d 389, 405 (Tex. 2019). Nor is the officer's use of a police vehicle dispositive. *Id*. Instead, we must examine the capacity in which the officer was acting at the time she committed the allegedly tortious act. *Harris Cty. v. Gibbons*, 150 S.W.3d 877, 882 (Tex. App.—Houston [14th Dist.] 2004, no pet.). In other words, we consider what the officer was doing and why she was doing it. *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.).

In general, a police officer acts within the scope of her employment when her act furthers her employer's business and is undertaken to accomplish an objective for which she is employed. *Id*. at *3. Thus, the mere fact that an off-duty officer was on call does not render her act within the scope of employment. *City of Balch Springs v. Austin*, 315 S.W.3d 219, 225 (Tex. App.—Dallas 2010, no pet.). On the other hand, mixed motives do not prevent an officer's act from being within her employment's scope if her act served a purpose of her employer in addition to any other purpose the act served. *City of Houston v. Lal*, No. 01-19-00625-CV, 2020 WL 937026, at *2 (Tex. App.—Houston [1st Dist.] Feb. 27, 2020, no pet.). Accordingly, 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. *Garza*, 574 S.W.3d at 400–01. The key

question in a case such as this is whether, when viewed objectively, there was a connection between the officer's job duties and her allegedly tortious act. *Id*. at 401.

II. The City did not conclusively establish its entitlement to the affirmative defense of immunity.

The basic facts are undisputed. Sergeant Gallagher finished her shift at 4:00 p.m. on the day of the accident. Gallagher's husband, a lieutenant with the Houston Police Department, asked Gallagher to pick up his City-issued vehicle from the City garage and drive it to their home so Lieutenant Gallagher would have his City-issued vehicle available for the start of his shift.

The dispute arises as a result of the different lenses the parties use to view the undisputed facts. The City argues that Gallagher was "not acting in her capacity as a peace officer; rather she was just another commuter on a Friday evening heading home to enjoy time off on the weekend." The Mejias argue that Gallagher "was driving a vehicle owned by the City, was carrying out instructions issued by a superior HPD officer, and HPD would derive benefit from her actions." We agree with the Mejias.

The summary judgment proof does not support the City's argument that Gallagher was merely a commuter on her way home from work. Gallagher's affidavit reflects that her husband (a superior officer employed by Gallagher's employer) asked her to pick up his City-issued vehicle from the City garage so her superior officer would have the vehicle available at the beginning of his shift (a benefit to Gallagher's employer, HPD).

The City therefore failed to meet its burden to conclusively prove that Gallagher was not acting within the scope of her employment at the time of the accident. Because the City failed to carry its burden of proof, the trial court did not err in denying the City's motion for summary judgment. *See Nicolai*, 539 S.W.3d at 386.

The City argues that like the peace officers in *City of Fort Worth v. Hart, as next friend of K.H.*, No. 10-17-00258-CV, 2019 WL 91676 (Tex. App.—Waco Jan. 2, 2019, pet. filed) (mem. op.) and *Lara*, 2016 WL 3964794, at *4–5 Gallagher was merely commuting to work at the time of the accident and was not within the scope of her employment. Both of those cases are distinguishable from the present case. In *Hart*, the police officer was driving a city-owned vehicle but was only commuting to work at the time he had an automobile accident. 2019 WL 91676 at *4. The Waco Court of Appeals held that the officer's use of a city-owned vehicle and the fact that the accident happened during his on-duty hours was not sufficient to rebut the evidence that he was not acting in the scope of his employment. *Id.* at *4–5.

Similarly, in *Lara*, a police officer driving a city-issued vehicle was commuting to work when he collided with another driver. 2016 WL 3964794 at *1. The police officer, like the officer in *Hart*, was not engaged in any business that would benefit his employer other than commuting to work. *Id.* The First Court of Appeals held that at the time of the accident the officer was not acting within the scope of his duties because the activity of commuting to work did not have a connection with, or was being undertaken in furtherance of, the employer's business. *Id.* at *3-5.

Here, Gallagher was not merely commuting to work. Gallagher picked up her husband's City-issued vehicle after being asked to do so by Lieutenant Gallagher, a superior officer, and was in the process of delivering it to him so he could have the vehicle at the beginning of his shift. By doing so Gallagher was "in or about the performance of a task lawfully assigned" by a competent authority. *See* Tex. Civ. Prac. & Rem. Code § 101.001(5). Gallagher furthered her employer's business because Lieutenant Gallagher was saved a trip to the City garage before the beginning of his shift. At the very least a fact issue was raised as to whether Gallagher was acting within the scope of her employment at the time of the accident.

Finally, the City argues that the trial court erred in denying its motion for summary judgment based on the mere fact that Gallagher was driving a City-owned vehicle. At the hearing on the City's motion for summary judgment the trial court stated:

> City of Houston vehicle, I think that's probably — we're probably in an area now that, you know, we need to let a jury determine, you know, that sort of thing. I'm not going to take it out of their hands.
>
> I'm going to deny the motion for summary judgment at this time.

The City argues that in making this statement the trial court improperly denied the motion for summary judgment. While the City is correct that the use of a City-owned vehicle is not dispositive, we do not read the trial court's comment on the record to be the sole reason for its ruling. Even if that were the reason for the ruling, the record reflects that the City did not carry its burden to conclusively prove that Gallagher was not acting within the scope of her employment. The trial court therefore did not err in denying the City's motion for summary judgment.

CONCLUSION

We overrule the City's issue on appeal and affirm the trial court's order denying the City's motion for summary judgment.

/s/ Jerry Zimmerer
Justice

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