THE EMERGENCY EXCEPTION TO THE TEXAS TORT CLAIMS ACT: HOW FAR DOES IT GO?

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SELECT PUBLISHED CASES

Pakdimounivong v. City of Arlington, 219 S.W.3d 401 (Tex. App.—Fort Worth 2006)
City of Arlington v. Barnes, 2008 Tex. App. LEXIS 2236 (Tex. App.—Fort Worth Mar. 27, 2008)
City of Arlington v. Moore, 2006 Tex. App. LEXIS 4725 (Tex. App.—Fort Worth June 1, 2006)

SELECT PUBLICATIONS

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Tex. Mut. Ins. Co. v. Ledbetter, 251 S.W.3d 31 (Tex. 2008) (workers compensation carrier entitled to first money recovered).
N. Cnty. Mut. Ins. Co. v. Davalos, 140 S.W.3d 685 (Tex. 2004) (insurance company had the contractual right to control the defense).
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Coburn Supply Co. v. Kohler Co., 342 F.3d 372 (5th Cir. 2003) (reversed and rendered $2.6 dollar judgment against in commercial litigation case – termination of distributor).
Willowbrook Foods, Inc. v. Grinnel Corp., 147 S.W.3d 492 (Tex. App.—San Antonio 2004, pet. denied) (summary judgment affirmed on products liability claims for fire at processing plant).
Coffey v. Johnson, 142 S.W.3d 414 (Tex. App.—Eastland 2004, no pet.) (wrongful death claim dismissed for lack of standing).
Doe v. Roman Catholic Archdiocese of St. Louis, 109 S.W.3d 928 (Tex. App.—Dallas 2003, no pet.) (grant of special appearance affirmed for lack of personal jurisdiction).
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THE EMERGENCY EXCEPTION TO THE TEXAS TORT CLAIMS ACT: HOW FAR DOES IT GO?

I. INTRODUCTION

The Texas Tort Claims Act (TTCA) provides a limited waiver of sovereign/governmental immunity.[1] However, the TTCA includes exclusions within the limited waiver, including the "emergency exception." When the emergency exception applies, immunity is retained. This paper explores the interpretation of the emergency exception under Texas law and tactical applications in litigation.

II. THE STATUTORY CONTEXT OF THE EMERGENCY EXCEPTION

The emergency exception must be considered within the context of the TTCA. While the TTCA's waiver is narrow, the emergency exception further narrows the waiver of immunity in tort litigation against the state and local governments. Courts hold that the emergency exception completely removes emergency action and reaction from the statutory waiver of sovereign immunity when the exception applies. *Durham v. Bowie Cnty.*, 135 S.W.3d 294, 298 (Tex. App.—Texarkana 2004, pet denied); *City of Arlington v. Whitaker*, 977 S.W.2d 742, 745 (Tex. App.—Fort Worth 1998, pet. denied).

A. The TTCA's Limited Waiver of Governmental Immunity

As a starting point, the TTCA does not provide a "blanket waiver" of immunity. *City of Galveston v. State*, 217 S.W.3d 466, 470 (Tex. 2007). Rather, the TTCA's limited waiver of sovereign immunity allows suits to be brought against governmental units only in certain and narrowly defined circumstances. *State Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 587 (Tex. 2001) (citing *Dallas Cnty. Mental Health & Mental Retardation v. Bossley*, 968 S.W.2d 339, 341 (Tex. 1998)). The "limited waiver" of immunity applies only if the statutory conditions are met. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). Parties and courts "must look to the terms of the Act to determine the scope of its waiver." *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 584 (Tex. 1996). Governmental entities are "immune from suit unless the Tort Claims Act expressly waives immunity." *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 224-25 (Tex. 2004). Further, "[m]ere reference to the Tort Claims Act does not establish the state's consent to be sued and thus is not enough to confer jurisdiction on the trial court." *Miller*, 51 S.W.3d at 587.

B. The Statutory Language of the Emergency Exception

The statutory language of the emergency exception is relatively short. It is stated within Section 101.055 of the Texas Civil Practice and Remedies Code, sandwiched between two other exceptions (tax assessment/collection and provision of police/fire protection). Section 101.055 provides:

> § 101.055. Certain Governmental Functions
>
> This chapter does not apply to a claim arising:
>
> (1) in connection with the assessment or collection of taxes by a governmental unit;
> (2) 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; or
> (3) from the failure to provide or the method of providing police or fire protection.
>
> TEX. CIV. PRAC. & REM. CODE ANN. § 101.055 (West 2011).

Read in context, the waiver of immunity in the TTCA is limited "only to specified claims" and "exempt[s] a variety of activities from any waiver at all." *City of Galveston*, 217 S.W.3d at 470. The exempted activities include emergency situations as provided for in Section 101.055(2). *Id.*

III. THE CONSCIOUS INDIFFERENCE, RECKLESS DISREGARD STANDARD

When no other law applies, governmental employees responding to emergencies are judged – for purposes of liability – by a reckless standard, rather

[1] Under Texas law, "sovereign immunity" defeats a trial court's subject matter jurisdiction in suits against the State; similarly, "governmental immunity" operates like sovereign immunity to afford protection to subdivisions of the State, such as counties, municipalities, and school districts. *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004). For purposes of discussion in this paper, the term "immunity" refers collectively to "sovereign immunity" and "governmental immunity."

than an ordinary negligence standard. TEX. CIV. PRAC. & REM. CODE ANN. § 101.055 (West 2011). Applying an ordinary negligence test to emergency situations would lead to "judicial 'second guessing' of many split-second decisions that are made in the field under highly pressured conditions." *City of Amarillo v. Martin*, 971 S.W.2d 426, 430 (Tex. 1998). "Further, the possibility of incurring civil liability for what amounts to a mere failure of judgment could deter emergency personnel from acting decisively and taking calculated risks in order to save life or property or to apprehend miscreants." *Id.* at 430. "Emergency vehicle operators are charged with protecting the public's health, safety, and property, and a few minutes or even seconds can make the difference between life and death." *Id*. at 431. Thus, the emergency exception recognizes that governmental employees responding to emergencies must be able to act decisively, without fear of liability in the absence of reckless conduct.

Because the terms "conscious indifference" and "reckless disregard" are not defined in the TTCA, courts give the terms their ordinary meanings. *City of San Antonio v. Hartman*, 201 S.W.3d 667, 672 n.19 (Tex. 2006) (citing TEX. GOV'T CODE ANN. § 312.002). In determining whether an employee acted with "conscious indifference" or "reckless disregard" (as opposed to mere negligence), the Texas Supreme Court "has often interpreted these terms to require proof that a party knew the relevant facts but did not care about the result." *Pakdimounivong v. City of Arlington*, 219 S.W.3d 401, 411 (Tex. App.—Fort Worth 2006, pet. denied). "The action of an emergency-vehicle operator constitutes a reckless disregard for the safety of others when the operator knows or should have known that the action in question posed a high risk of serious injuries to others." *City of San Angelo Fire Dep't v. Hudson*, 179 S.W.3d 695, 700 (Tex. App.—Austin 2005, no pet.) (citing *Smith v. Janda*, 126 S.W.3d 543, 545 (Tex. App.—San Antonio 2003, no pet.)) In other words,

> [A] governmental entity is liable for damages resulting from the emergency operation of an emergency vehicle only if the operator acted recklessly; that is, only if the operator "committed an act that the operator knew or should have known posed a high degree of risk of serious injury" but did not care about the result.

City of Arlington v. Barnes, No. 02-07-00249-CV, 2008 Tex. App. LEXIS 2236, at *8-9 (Tex. App.—Fort Worth 2008, pet. denied) (mem. op.) (quoting *Martin*, 971 S.W.2d at 430). Although the Transportation Code imposes a *duty* to drive with "due regard" for others by avoiding negligent behavior, the important distinction in the emergency exception context is that it only imposes *liability* for reckless conduct. *Martin*, 971 S.W.2d at 426; TEX. TRANSP. CODE ANN. § 546.005 (West 2011).

IV. WHAT IS "RESPONDING TO AN EMERGENCY CALL OR REACTING TO AN EMERGENCY SITUATION?"

When the emergency exception is raised, the issue of what constitutes an emergency may arise. An emergency situation need not necessarily involve a traffic accident with an emergency vehicle. *See City of Arlington v. Whitaker*, 977 S.W.2d 742, 745 (Tex. App.—Fort Worth 1998, pet. denied). Although the existence of an emergency may be a fact issue for trial, it can also be established prior to trial. *See Durham v. Bowie Cnty.*, 135 S.W.3d 294, 298 (Tex. App.—Texarkana 2004, pet. denied). Random House Dictionary defines emergency as a "state…of need for help or relief, created by some unexpected event." The Random House Dictionary of the English Language § 636 (2d ed. 1987).

The Fort Worth Court of Appeals expressly rejected the contention that "emergency," which is undefined in the statute, should be defined in accordance with the Pattern Jury Charge which indicates that an emergency does not occur if it is caused by any negligence of the person claiming the emergency. *Pakdimounivong*, 219 S.W.3d at 410 (citing 2 Comm. on Pattern Jury Charges, State Bar of Tex., Texas Pattern Jury Charges PJC 3.3 (2d ed. 2003)). The Court in *Durham* discusses in dicta the two definitions argued by the parties for determining an "emergency situation." *Durham*, 135 S.W.3d at 298 n.2. The definition the plaintiffs proposed was, "(1) a sudden and unexpected condition, (2) requiring immediate action, and (3) without time for deliberation." Bowie County's proposed definition of emergency was more expansive encompassing "an urgent need for assistance or relief." *Id.* The *Durham* Court holds whether the County's more expansive definition was appropriate is irrelevant because the time period for determining the emergency was not the time of the accident but rather at the time the County placed signs regarding flooding and low water crossings. *Id.* at 298.

Although the courts have not specifically defined "emergency situation," the *Durham* Court found that placing road signs during a flood was in response to an emergency situation. *Id.* at 299. Likewise, the Fort Worth Court of Appeals upheld a jury finding that a battalion chief's effort to block a low water crossing during flooding was an emergency situation. *Whitaker*, 977 S.W.2d at 746. The Fort Worth Court of Appeals held that the transporting officer and the two officers following in subsequent vehicles were all reacting to

an "emergency situation" when a suspect jumped from a moving vehicle during transport. *Pakdimounivong*, 219 S.W.3d at 401-14. Further, the San Antonio Court of Appeals held that a DPS officer was faced with an emergency situation when he used his patrol car to stop a car during a traffic stop from rolling backward into traffic. *Garza v. Cruz*, No. 04-04-00339-CV, 2005 Tex. App. LEXIS 1758, at *8-9 (Tex. App.—San Antonio March 9, 2005, no pet.) As the Fourteenth Court of Appeals recently held in *Tex. Dep't of Pub. Safety v. Little*, even when doubt exists as to whether the emergency has subsided, the emergency exception will still apply. 259 S.W.3d 236, 239 (Tex. App.—Houston [14th Dist] 2008, no pet.). Even though the evidence in *Little* showed that the officer had been wrongly informed of the nature of the call, the plaintiff could not meet their burden of showing a waiver of immunity, because the officer believed he was responding to an emergency. *Id.* at 239-40. Thus, the government employee's subjective belief as to the type of situation is important evidence related to whether there is an emergency situation.

V. LAWS AND ORDINANCES APPLICABLE TO EMERGENCY ACTION

The emergency exception recognizes that laws or ordinances may specifically govern response to emergencies in some scenarios. However, the emergency exception also recognizes that there may be no controlling standard for other scenarios. In the absence of a controlling standard, the "conscious indifference or reckless disregard" standard – discussed above – applies. For a statute or ordinance to come into play, it must specifically regulate conduct in response to emergencies, as opposed to being a generally applicable law. *Durham v. Bowie Cnty.*, 135 S.W.3d 294, 301 (Tex. App.—Texarkana 2004, pet. denied). "In other words, if a law or ordinance specifies how any particular emergency response is to be made, the law or ordinance must be complied with." *Id*. at 301. However, the emergency exception was not "intended to refer to a general law." *Id*.

A. Transportation Code Provisions

The Texas Transportation Code includes a series of sections governing permissible conduct of authorized emergency vehicles responding to emergencies. These provisions make frequent appearances in TTCA claims involving the emergency exception.

The Fort Worth Court of Appeals recently explained the application of the Transportation Code provisions in litigation over the application of the emergency exception, saying:

> *Section 546.005* [of the Texas Transportation Code] provides that, although the driver of an emergency vehicle must drive "with appropriate regard for the safety of all persons," he is not relieved of "the consequences of reckless disregard for the safety of others." *Id.* at § 546.005; *see Smith v. Janda*, 126 S.W.3d 543, 545 (Tex. App—San Antonio 2003, no pet.); *see also Hale v. Pena*, 991 S.W.2d 942, 948 (Tex. App.—Fort Worth 1999, no pet.). Interpreting the uncodified predecessor of *section 546.005*, the Texas Supreme Court 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." *City of Amarillo v. Martin*, 971 S.W.2d 426, 431 (Tex. 1998). Thus, a governmental entity is liable for damages resulting from the emergency operation of an emergency vehicle only if the operator acted recklessly; that is, only if the operator "committed an act that the operator knew or should have known posed a high degree of risk of serious injury" but did not care about the result. *Id.* at 430. Because under the TTCA, a governmental entity's immunity from suit is waived only to the extent the TTCA authorizes liability, a governmental entity is immune from suits resulting from the emergency operation of an emergency vehicle unless the operator acted recklessly. TEX. CIV. PRAC. & REM. CODE ANN. § 101.025 (LEXIS 2007); *Smith*, 126 S.W.3d at 545.

City of Arlington v. Barnes, No. 02-07-00249-CV, 2008 Tex. App. LEXIS 2236, at *8-9 (Tex. App.—Fort Worth 2008, pet. denied) (emphasis added).

The relevant Texas Transportation Code provisions follow:

> **§ 546.001. Permissible Conduct**
>
> In operating an authorized emergency vehicle the operator may:
>
> (1) park or stand, irrespective of another provision of this subtitle;
> (2) proceed past a red or stop signal or stop sign, after slowing as necessary for safe operation;
> (3) exceed a maximum speed limit, except as provided by an ordinance adopted under Section 545.365, as long as the operator does not endanger life or property; and

(4) disregard a regulation governing the direction of movement or turning in specified directions.

§ 546.002. When Conduct Permissible

(a) In this section, "police escort" means facilitating the movement of a funeral, oversized or hazardous load, or other traffic disruption for public safety purposes by a peace officer described by Articles 2.12(1) –(4), (8), and (22), Code of Criminal Procedure.

(b) Section 546.001 applies only when the operator is:

(1) responding to an emergency call;
(2) pursuing an actual or suspected violator of the law;
(3) responding to but not returning from a fire alarm;
(4) directing or diverting traffic for public safety purposes; or
(5) conducting a police escort.

§ 546.003. Audible or Visual Signals Required

Except as provided by Section 546.004, the operator of an authorized emergency vehicle engaging in conduct permitted by Section 546.001 shall use, at the discretion of the operator in accordance with policies of the department or the local government that employs the operator, audible or visual signals that meet the pertinent requirements of Sections 547.305 and 547.702.

§ 546.004. Exceptions to Signal Requirement

(a) A volunteer fire fighter who operates a private vehicle as an authorized emergency vehicle may engage in conduct permitted by Section 546.001 only when the fire fighter is using visual signals meeting the pertinent requirements of Sections 547.305 and 547.702.

(b) An authorized emergency vehicle that is operated as a police vehicle is not required to be equipped with or display a red light visible from the front of the vehicle.

(c) A police officer may operate an authorized emergency vehicle for a law enforcement purpose without using the audible or visual signals required by Section 546.003 if the officer is:

(1) responding to an emergency call or pursuing a suspected violator of the law with probable cause to believe that:

(A) knowledge of the presence of the officer will cause the suspect to:

(i) destroy or lose evidence of a suspected felony;
(ii) end a suspected continuing felony before the officer has obtained sufficient evidence to establish grounds for arrest; or
(iii) evade apprehension or identification of the suspect or the suspect's vehicle; or

(B) because of traffic conditions on a multilaned roadway, vehicles moving in response to the audible or visual signals may:

(i) increase the potential for a collision; or
(ii) unreasonably extend the duration of the pursuit; or

(2) complying with a written regulation relating to the use of audible or visible signals adopted by the local government that employs the officer or by the department.

§ 546.005. Duty of Care

This chapter does not relieve the operator of an authorized emergency vehicle from:

(1) the duty to operate the vehicle with appropriate regard for the safety of all persons; or
(2) the consequences of reckless disregard for the safety of others.

B. Local Ordinances

In addition to state law, municipalities may enact ordinances governing emergency action. For example, the City of Arlington adopted an ordinance establishing the standard of care of its officers, employees, and agents in emergency actions. The Arlington ordinance provides:

> **Section 6.03 Standard of Care for Emergency Action**
>
> Every officer, agent or employee of the City, and every officer, agent, or employee of an authorized provider of emergency services, including, but not limited to every unit of government or subdivision thereof, while responding to emergency calls or reacting to emergency situations, regardless of whether any declaration of emergency has been declared or proclaimed by a unit of government or subdivision thereof, is hereby authorized to act or not to act in such a manner to effectively deal with the emergency. An action or inaction is "effective" if it in any way contributes or can reasonably be thought by the provider of such emergency service to contribute to preserving any lives or property. This Section shall prevail over every other ordinance of the City and, to the extent to which the City has the authority to so authorize, over any other law establishing a standard of care in conflict with this Section. Neither the City nor the employee, agent, or officer thereof, or other unit of government or subdivision thereof or its employees, agents, or officers shall be liable for failure to use ordinary care in such emergency. It is the intent of the City Council, by passing this Ordinance, to assure effective action in emergency situations by those entrusted with the responsibility of saving lives and property by protecting such governmental units from liability, and their employees, agents, and officers from non-intentional tort liability to the fullest extent permitted by statutory and constitutional law. This Section shall be liberally construed to carry out the intent of the City Council.

ARLINGTON, TEX., CODE OF ORDINANCES, Emergency Management Chapter, § 6.03 (1987). The Fort Worth Court of Appeals has previously relied on the Arlington ordinance in a published case upholding immunity under the emergency exception. *City of Arlington v. Whitaker*, 977 S.W.2d 742, 745 (Tex. App.—Fort Worth 1998, pet. denied).

VI. CASES ADDRESSING COMMON SCENARIOS

There are several common fact patterns which have been addressed in case law. Most commonly, the emergency exception is invoked where an emergency vehicle – such as a squad car, fire truck, or ambulance – collides with a vehicle en route to an emergency call. Flooding is another area that has been addressed in several published opinions. Some of the cases addressing these more common fact patterns are discussed below.

A. Police

Cases involving police vehicles are common in TTCA litigation. In some instances, police officers are clearly responding to emergencies – such as "shots fired" or "officer down" calls. In other instances, an accident may occur while an officer is on routine patrol, when the emergency exception is not in play. However, there are also cases that fall into a grey area; these cases provide fodder for litigation, interlocutory appeals, and reported decisions of the future. In the meantime, Texas appellate courts have provided guidance in a number of factual scenarios involving police vehicles.

1. *Texas Department of Public Safety v. Little*

In *Tex. Dep't of Pub. Safety v. Little*, the Houston Fourteenth District Court of Appeals addressed a stereotypical case where the governmental entity argued the officer was responding to an emergency and the plaintiff argued the contrary. 259 S.W.3d 236 (Tex. App.—Houston [14th Dist.] 2008, no pet.). A state trooper received a "10-99" call to assist with a wanted person. *Id*. at 237. The Department offered uncontradicted evidence that officers treated 10-99 calls similar to officer down calls. *Id*. While en route, the officer questioned the urgency of the call because he was the only trooper dispatched. *Id*. He called the dispatcher on his cell phone; and, while looking at the phone, the trooper's vehicle crossed the opposing lane of traffic and ultimately on to the shoulder. *Id*. The officer lost control of the vehicle when he attempted to reenter the roadway, and he collided with an oncoming car. *Id*.

The trial court denied the Department's plea to the jurisdiction. *Id*. On interlocutory appeal, the plaintiff relied on the fact that the trooper had reduced his speed and was not running lights and sirens at the time of the collision. *Id*. at 239. However, the plaintiff did not assert that the trooper violated any laws, ordinances, or policies. *Id*. Thus, the Court held the use of lights and sirens was discretionary. *Id*.

The plaintiff also argued that the trooper was not actually responding to an emergency at the time of the accident because the trooper questioned the nature of the call. *Id*. The trooper testified that at the time of the accident he was "trying to find out to ensure that it was an emergency call to negate the need for an emergency response." *Id*. The trooper testified that multiple officers are normally dispatched to a 10-99 call. *Id*. As it turned out, the dispatcher miscoded a "10-66" call requesting officer assistance with a warrant. *Id*.

The Court held, however, that the evidence conclusively established that the trooper "was responding to an emergency call at the time of the accident." *Id*. at 239-40. Thus, the Court of Appeals reversed the trial court's denial of the Department's plea to the jurisdiction and dismissed the case for want of jurisdiction. *Id*. at 240.

2. *City of Arlington v. Barnes*

In *City of Arlington v. Barnes*, the City brought an interlocutory appeal of the trial court's denial of its plea to the jurisdiction. 2008 Tex. App. Lexis 2236, at *1 (Tex. App.—Fort Worth 2008, pet. denied) (mem. op.). In its sole issue, the City asserted that the plaintiffs failed to establish a waiver of governmental immunity. *Id*.

The facts of the case are in line with a traditional application of the emergency exception. An Arlington police officer was responding to a "shots fired" call and headed to the location with lights and sirens activated when an intersection collision occurred. *Id*. at *1-2. As the officer approached the intersection, he changed his siren pitch to alert oncoming traffic, slowed to cross the intersection, and checked traffic in both directions before crossing the intersection against a red light. *Id*. at *2. However, one of the plaintiffs did not hear or see the officer and entered the intersection at about forty miles per hour while facing a yellow light and struck the right rear of the squad car behind the passenger door. *Id*. at *1-2. As soon as the officer saw the other vehicle, he accelerated in an attempt to clear the intersection. *Id*. at *2. The officer testified there was no time for any other reaction. *Id*. The force of the collision caused the squad car to spin into a third vehicle. *Id*.

The City argued the evidence established as a matter of law that the officer was not reckless; the plaintiff contended that a fact issue existed on recklessness. *Id*. at *10. In support of its contention, the plaintiff relied on an internal Arlington disciplinary investigation that found the officer "failed to exercise due care in entering an intersection during emergency response to an emergency call." *Id*. at *12. The Court noted, however, that the documents were only evidence that the officer acted negligently, but were not evidence that the officer "committed an act that he knew or should have known posed a high degree of risk or serious injury." *Id*. Accordingly, the "Review Board's finding and reprimand" did not create a fact issue on reckless disregard. *Id*. at *13. After reviewing the facts (noting that the car that proceeded through the yellow light struck the side of the officer's squad car and that the officer accelerated in an attempt to avoid the collision), the Court held the City established as a matter of law that the officer "was not reckless and that [the City's] immunity was not waived." *Id*. at *13-14.

3. *Pakdimounivong v. City of Arlington*

In *Pakdimounivong v. City of Arlington*, the facts alleged an unusual scenario where the decedent (who had been pepper sprayed, handcuffed, and placed in leg restraints) kicked out the rear window of a patrol car and jumped on to I-20 as he was being transported to jail. 219 S.W.3d 401, 405-06 (Tex. App.—Fort Worth 2006, pet. denied). The decedent was struck by two police cars following the lead squad car. *Id*. at 406. The officer immediately behind the lead car thought he saw the decedent banging his head on the rear driver's side window and began to pick up his police radio. *Id*. However, the lead officer got on the radio first. *Id*. The officer in the second car simply thought the decedent was trying to damage the car and then "saw sparkles in the air, which was glass shattering." *Id*. Immediately afterwards, he saw a blur in front of his vehicle, but was unable to brake, swerve, or react. *Id*. The officer felt his vehicle hit the blurred object and realized it was the decedent. *Id*.

The officer driving the third squad car saw the lights on the lead car come on and heard the lead officer on the radio. *Id*. He decreased his speed and followed the other officers on to the shoulder of I-20. *Id*. He saw the decedent's body a split second before running over decedent. *Id*. The officer testified he had no opportunity to swerve and was already braking. *Id*. All of the officers involved in the transport testified as to the "sudden, unexpected, and very quick escape" of the decedent onto the highway and "that they had no time to react." *Id*. at 407.

The Fort Worth Court of Appeals began its analysis by "categorically" rejecting the plaintiff's argument that Arlington "had the burden under a plea to the jurisdiction to prove, as a matter of law, that its police officers were operating an emergency vehicle at the time of the incident." *Id*. at 410. The Court rejected the argument "for the simple reason that such language is not found in the statute." *Id*.

The Court next turned to the nature of the situation. *Id*. The Court concluded that Arlington was correct not to argue that any of its officers were responding to an emergency when the decedent was being transported to jail. *Id*. Rather, the officers were "reacting to an emergency situation" when the decedent attempted his escape. *Id*. at 410-11. The Court concluded that there was no evidence that the officers failed to comply with any laws or ordinances and that the officers did not act with conscious indifference or reckless disregard. *Id*. at 411. Thus, the City retained immunity.

B. Fire

Like police cases, the application of the emergency exception to cases involving fire vehicles is well-established. The Texas Supreme Court made it clear that the emergency exception raises the bar to establish liability. *City of Amarillo v. Martin*, 971 S.W.2d 426 (Tex. 1998).

In *Martin*, the Texas Supreme Court addressed the proper standard of liability of fire trucks responding to emergencies. 971 S.W.2d at 427. The fire truck collided with two other vehicles as it proceeded through a red light at a reduced speed while running lights and sirens. *Id*.

The plaintiff brought a simple negligence suit, alleging the driver of the fire truck failed to: maintain a proper lookout, maintain a safe stopping distance, and yield the right of way. *Id*. The trial court and court of appeals held the plaintiff could bring suit under a "simple negligence" theory, as alleged by the plaintiff. *Id*. The Texas Supreme Court disagreed. *Id*.

Rather than applying a simple negligence standard, the Texas Supreme Court held:

> To recover damages resulting from the emergency operation of an emergency vehicle, a plaintiff must show that the operator has committed an act that the operator knew or should have known posed a high degree of risk of serious injury.

Id. at 430. In rejecting a simple negligence standard, the Court said that applying a simple negligence standard to emergency responses "would lead to judicial 'second guessing' of the many split-second decisions that are made in the field under highly pressured conditions." *Id*. at 430. The Court acknowledged statistics regarding accidents with emergency vehicles. *Id*. at 432. However, the Court concluded "the Legislature has made its policy choice by enacting the statute." *Id*.

C. Ambulance

Ambulances are another type of government vehicle that is frequently used in response to emergencies. Like police and fire vehicles, courts have applied the emergency exception when ambulances are involved in collisions while responding to emergencies.

In *Smith v. Janda*, the San Antonio Court of Appeals reviewed an ambulance collision case. 126 S.W.3d 543 (Tex. App.—San Antonio 2003, no pet.) The Court applied Section 546.005 of the Texas Transportation Code as the "law[] applicable to emergency action." *Id*. at 545. Accordingly, the Court found the City of Schertz was immune from suit 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 or serious injury.'" *Id*. (quoting *Martin*, 971 S.W.2d at 431).

The undisputed evidence in the case established that the ambulance driver was responding to an emergency situation with lights and sirens activated. *Id*. at 545-46. The driver slowed the ambulance as he approached the intersection where the collision occurred. *Id*. at 546. The evidence showed other drivers heard and saw the lights and sirens and yielded to the ambulance. *Id*. Seeing that conflicting traffic had yielded, the ambulance driver entered the intersection and collided with the plaintiff, who pulled in front of the ambulance. *Id*. The San Antonio Court of Appeals held the evidence established as a matter of law that the ambulance driver was not negligent. *Id*. In its analysis, the Court noted: "Proceeding through a red light is a specifically enumerated privilege of emergency vehicles in emergency situations." *Id*. (quoting *Martin*, 971 S.W.2d at 431 (citing TEX. TRANSP. CODE ANN. § 546.001(2))).

D. Floods

The Texas Supreme Court, Fort Worth Court of Appeals, and Texarkana Court of Appeals have addressed the application of the emergency exception in the context of floods. Notably, these courts concluded that the emergency exception applied. *City of San Antonio v. Hartman*, 201 S.W.3d 667 (Tex. 2006); *Durham v. Bowie Cnty.*, 135 S.W.3d 294 (Tex. App.—Texarkana 2004, pet. denied); *City of Arlington v. Whitaker*, 977 S.W.2d 742, 745 (Tex. App.—Fort Worth 1998, pet. denied). The Texas Supreme Court case is particularly notable because it rejected a broad proposition that the emergency exception only applies to accidents involving emergency vehicles. *Hartman*, 201 S.W.3d at 672-73.

1. *City of San Antonio v. Hartman*

In *City of San Antonio v. Hartman*, the Texas Supreme Court addressed whether a 100-year flood is an "emergency situation" to which governmental immunity applies. 201 S.W.3d 667, 669 (Tex. 2006). The flood resulted from "a rainstorm of historic proportions." *Id*. The City was declared a "disaster area." *Id*. Local and state officials responded by placing barricades and flares on roads and highways throughout San Antonio. *Id*. Saledo Creek flooded at its intersection with Rigsby Avenue. *Id*. The evidence showed that at least one barricade faced oncoming motorists. *Id*. Although other cars had turned around, the Hartmans' vehicle drove straight into the floodwaters; all four occupants drowned. *Id*.

Because the plaintiffs made no contention that any law or ordinance governed the placement of barricades

or that San Antonio did not care what happened to the Hartmans, the plaintiffs had to show that San Antonio was not reacting to an emergency exception. *Id*. at 672. The Court held that the evidence conclusively established that an emergency situation existed. *Id*. The Texas Supreme Court expressly rejected the argument that the emergency exception only applied to "police and emergency vehicle accidents." *Id*. at 672-73. The Court noted that the emergency exception had been applied to at least two other flood cases. *Id*. at 673 (citing *Durham*, 135 S.W.3d 294; *Whitaker*, 977 S.W.2d 742).

2. *Whitaker v. City of Arlington*

In *Whitaker v. City of Arlington*, the Fort Worth Court of Appeals held that the emergency exception of the TTCA applied to a duty to warn of special defects based on the facts of the case. 977 S.W.2d 742, 743 (Tex. App.—Fort Worth 1998, pet. denied). The plaintiffs brought a wrongful death and survival suit after the decedent died in the early morning hours, after a fraternity party, when he drove into about four feet of rushing flood water where a swollen creek crossed the road. *Id*. A fire truck was parked on one side of the road, blocking traffic. *Id*. at 733-44. An Arlington deputy fire chief parked his Suburban on the other side of the creek, with lights flashing. *Id*. at 744. The deputy fire chief activated his siren and honked at each vehicle that approached. *Id*. The decedent made no visible response to the deputy fire chief and never slowed before driving into the flooded creek. *Id*.

The case was tried under a special defects theory, which falls within the TTCA. *Id*. The City contended that the classification of the defect was irrelevant in light of the fact that the jury found that the deputy chief was reacting to an emergency situation. *Id*. The Court agreed with the City that the emergency exception applied to claims for either special defects or premise defects in the TTCA. *Id*.

3. *Durham v. Bowie County*

In *Durham v. Bowie County*, county employees placed warning signs on a county road "promptly after" a "flood-induced chasm" was discovered. 135 S.W.3d 294, 295-96 (Tex. App.—Texarkana 2004, pet. denied). An unknown third party removed the warning signs the next day. *Id*. at 296. About one hour after the signs were removed, two people were killed when the car they were riding in crashed into the chasm. *Id*.

One of the issues in the case was whether the emergency exception applied. *Id*. at 297. The Texarkana Court of Appeals held that the severity of the storms and flooding which caused the washout conclusively established Bowie County was reacting to an emergency situation. *Id*. The plaintiffs argued the emergency was no longer ongoing when the crash occurred. *Id*. at 298 n.2. However, the Court held that it would "only consider whether Bowie County was responding to an emergency situation on February 16 when it placed the signs, as opposed to whether an emergency situation still existed at the time of the accident on February 17." *Id*.

VII. TACTICS AND HYPOTHETICALS

The ultimate question in TTCA litigation is often whether the emergency exception applies. In some cases (as discussed above), the answer is clear from guiding case law. For example, if an officer is responding to a "shots fired" case, we – as litigators – can be fairly certain the emergency exception is in play. Likewise, if a fire truck is responding to a burning residence, we know the emergency exception is going to provide the controlling liability standard.

As litigators suing and defending governmental entities, we also face fact patterns that are off the beaten path – in the wilds where different parties can fairly argue different points of view. Litigation of the less routine fact patterns helps to establish the boundaries of the emergency exception. As a tactical matter, a lawyer defending a governmental entity should assert the emergency exception if it is in play. Likewise, a lawyer suing a governmental entity should evaluate the potential application of the emergency exception when deciding whether or not to take a lawsuit. Lawyers on both sides should realistically evaluate the potential application – or lack thereof – of the emergency exception when determining the settlement value of a case.

The following examples provide food for thought on whether the emergency exception applies. The examples are based on actual cases that were defended, in part, on grounds that the emergency exception applied, barring jurisdiction. In each case, the plaintiff's attorney argued the exception did not apply. Regardless of the different viewpoints, all of the cases ultimately settled, with each side evaluating the potential application of the emergency exception. The cases provide an opportunity for the reader to be the judge: Would you apply the emergency exception in the following cases?

A. Prowling Pit Bull On the Loose

In the case of the prowling pit bull, a citizen reported a loose pit bull to the city's animal control department. A "dog catcher" was sent in an animal control vehicle to search for the pit bull. The truck was equipped with an overhead light bar, but the flashing lights were not on. The employee spotted the pit bull in a neighborhood where small children frequently play in the front yards. However, the dog initially evaded the employee. While attempting to re-locate the dog,

the employee initiated a left turn and hit an oncoming car.

The city argued the emergency exception should apply because its employee was searching for a pit bull in a neighborhood with small children. In order to bolster its position at mediation, the city filed a motion for summary judgment on the application of the emergency's exception. The plaintiff argued that these facts did not amount to an emergency within the context of the TTCA. Although the case ultimately settled and the question was not decided, how would you rule? Would it make any difference if the pit bull was loose in your neighborhood?

B. Children Fighting On the Plain

In the next example, a police officer was assigned to a local middle school as a Student Resource Officer. The students at the school fought frequently and some of the students were gang members. On the day in question, the officer monitored a large group of students (fifty or more) who were walking toward a field after school. No fight occurred initially. The officer moved his squad car to the local 7-11, where many of the students went after school. From the 7-11, the officer saw the beginnings of a fight involving four or more individuals, including at least one gang member and one unknown, older individual. The officer drove to a driveway by the field and drove on to the field along the roadway. When the students saw the officer, they yelled "cops" and began dispersing. One student, who had separated from the main group, walked or jogged backwards into the side of the police car and was struck by the side mirror. The officer was focused on the fighters – who were starting to flee – and did not see the student prior to the collision. The officer successfully stopped the fight and arrested three of the fighters, including the unknown, older individual and the gang member. The student who backed into the squad car filed suit.

The city invoked the emergency exception as a defense and filed a motion for summary judgment. The city's position was that the officer – at the time of the accident – did not know whether the fighters had guns or knives or how badly they might injure each other with bare fists. Thus, the city argued the officer was reacting to an emergency situation. The plaintiff's attorney focused heavily on an argument that this was merely a fist fight among children. The plaintiff's attorney also focused on the fact that the officer was not running lights and sirens at the time. Although this case was ultimately settled during an interlocutory appeal, it was not settled until after the visiting trial judge ruled against the city. The visiting judge agreed with the plaintiff's position, saying: "This was just children fighting out on the plain!"

If you were on the appellate court, how would you rule?

C. Overtaking Versus Pursuing a Suspect

The final example involved a police officer who was "overtaking" as opposed to "pursuing" a DWI suspect. The officer first noticed the suspect at an apartment complex driveway. The suspect's car had a prominent display of gang colors on the rearview mirror. After the officer made eye contact with the suspect, the suspect rapidly accelerated on to the street – going the opposite direction as the police officer. The suspect nearly ran over two children and an adult who were crossing the street by a local park. By the time the officer turned around, the suspect was far in the distance and turned into another apartment complex. The officer turned into the complex and saw a group of people frantically waiving and pointing in the direction of the fleeing suspect. On the other side of the complex, the officer again saw the suspect. The suspect again took off, evading the officer. The officer, after cresting a hill on a local access road, again saw the suspect in the distance. The officer turned on lights and sirens to warn motorist exiting the freeway. The suspect turned in the distance. When the officer turned he collided with two stopped cars at the intersection. Both drivers filed suit.

The city argued that the emergency exception applied in this context and filed a motion for summary judgment. However, the plaintiffs' attorneys argued that there was a technical difference between "overtaking" a suspect as compared with "pursuing" a suspect. *See* TEX. TRANSP. CODE ANN. § 546.002(b)(2) (West 2011). The officer agreed in his deposition that he was not yet "pursuing" the suspect, but was trying to get close enough to initiate contact. All parties settled the matter at mediation, while the motion for summary judgment was pending. The city's position – based on the fact that the fleeing DWI suspect nearly flattened three pedestrians – was that the officer was "reacting to an emergency situation" as envisioned by the Legislature. What's your reaction?

VIII. CONCLUSION

When suing or defending governmental entities under the TTCA, attorneys should be aware of the potential application of the emergency exception. The TTCA applies to a variety of scenarios where governmental employees act in emergencies. These scenarios are not limited to police chases or fire or ambulance crews en route to provide aid. Whether the emergency exception applies will often determine the viability of the case. The boundaries of the emergency exception should be evaluated on a case-by-case basis when the case law does not provide clear guidance.