

D-1-GN-22-001902

No. _____

**REBECA GARCIA,
PLAINTIFF,**

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**IN THE DISTRICT COURT
345TH, DISTRICT COURT**

v.

_____ **JUDICIAL DISTRICT**

**THE CITY OF AUSTIN
DEFENDANT.**

TRAVIS COUNTY, TEXAS

PLAINTIFF’S ORIGINAL PETITION

To the Honorable Court:

NOW COMES Rebeca Garcia, Plaintiff, complaining of the City of Austin, Defendant,
and for cause of action shows this Court the following:

I. Introduction

This is a lawsuit about City of Austin police officer Christopher Taylor, who shot and killed Mike Ramos, an unarmed Black man, in front of his girlfriend, Plaintiff Rebeca Garcia, on April 24, 2020.

On April 24, 2020, Mike and Rebeca were sitting in a vehicle in the parking lot of an apartment complex. Austin police officers surrounded the vehicle and held the occupants at gun point. The officers yelled commands and one officer fired a so-called “less-lethal” round, hitting Mike. Mike got into the vehicle and began to slowly drive away from the police. That is when Officer Taylor shot and killed Mike Ramos while his girlfriend, Rebeca Garcia, was forced to stand by and watch.

II. Parties

I. Rebeca Garcia is a citizen of Texas, and a resident of Austin, Texas at the time of the complained-of incident.

2. Defendant City of Austin is a Texas municipal corporation in the Western District of Texas which funds and operates the Austin Police Department (“APD”).

III. Jurisdiction

3. The subject matter in controversy is within the jurisdictional limits of this Court.

a. The City of Austin is subject to jurisdiction because it is a Texas municipality and because this case is about its employee’s conduct that occurred here in Austin, Texas.

IV. Venue

4. Travis County is the correct venue for this lawsuit because the events described above and below occurred in Travis County.

V. Service

5. Defendant may be served, by and through its attorney of record pursuant to Texas Rules of Civil Procedure.

VI. Discovery Level

6. Pursuant to Texas Rules of Civil Procedure 47, discovery is intended to be conducted under Level 2 because it involves a claim for damages of monetary relief over \$1,000,000.

VII. Facts

A. Officer Taylor shot and killed Mike Ramos in front of Rebeca Garcia

8. On April 24, 2020, Austin Police responded to a 911 report about a man with a gun and a woman using drugs in a gold and black Prius in the front parking area of a South Austin apartment complex. The man was Mike Ramos and he did not, in fact, have a gun:

Operator: Austin 911, do you need police, fire, or EMS?

Caller: Police.

Operator: Okay. To what address or location?

Caller: 2601 South Pleasant Valley.

Operator: I’m sorry you said 2601 South Pleasant Valley?

Caller: Yeah.

Operator: Okay, hold on just one moment, please. Okay. At the Rosemont at Oak Valley Apartments?

Caller: Yeah. I'm in the Rosemont Apartments, it's a – it's a – it's a gold and black Prius outside. (unintelligible).

Operator: I'm sorry. The phone is real muffled. I couldn't hear what you were saying.

Caller: I can barely hear you.

Operator: Okay. I need you to start over. I couldn't understand anything you were saying. What's going on?

Caller: They're in the car smokin' crack and cookin' meth.

Operator: Okay. What color and type of vehicle is it?

Caller: Uh, it's a gold Prius. It's a gold Prius with a Hispanic man and Hispanic woman. They got toilet paper in the front – toilet paper in the front dash window. And I seen him with a gun, he had a gun, too.

Operator: You said a gold and black Prius?

Caller: Yes. And he has a gun. He has a gun to this lady.

Operator: You see him holding one to her?

Caller: Yes, I seen him holding a gun, maam.

Operator: Is he doing that right now?

Caller: Yes.

Operator: Just one moment. Is he pointing it at her?

Caller: He's – he's – he's holding it up.

Operator: He's holding it up? Or is he pointing it at her?

Caller: He – he was pointing it at her. But he got – he got – maam, I don't know what's goin' on¹ but I need yall to come quick.

Operator: Okay. But I need to know the difference. Is he pointing it at her or just holding in, it up?

Caller: He's holding it. He's holding it.

Operator: Okay. Is he – is he – but you said Hispanic male. Could you see what color clothing he has on?

Caller: Uh, it's like a white shirt. (Unintelligible) it's a gold and black Prius. He has ...

Operator: Okay. Are they- okay.

Caller: I'm (unintelligible).

Operator: I need you to – (redacted), I understand. I already have officers en route. I'm trying to get this information to them. Where at in the parking lot? Is he by a particular building number? Or – okay. I can't understand anything you're saying. You're pulling the phone away or something.

Caller: The first – the first left – it's gonna be the first left.

¹ As it turned out, the caller truly did not know what was going on. The police found a man and a woman in a gold and black Prius, but the man was not, in fact wearing a white shirt (Mike's shirt was red) and he was not, in fact, in possession of a gun. Upon information and belief, the caller deliberately swatted Mike. "Swatting" is defined in the Cambridge Dictionary as: the action of making a false report of a serious emergency so that a SWAT team (a group of officers trained to deal with dangerous situations) will go to a person's home, by someone who wants to frighten, upset, or cause problems for that person. *Swatting*. DICTIONARY.COM, <https://dictionary.cambridge.org/dictionary/english/swatting>.

Operator: When you enter the apartments?

Caller: Yes. It's gonna be the first left. It's gonna be the first left (unintelligible).

Operator: Okay. I do – like I said, I have officers already en route right now.²

9. Austin Police Chief Brian Manley summarized what happened next in his report about the shooting to the Texas Attorney General:

Before arriving at the scene, officers stopped briefly to discuss their response to the area and create a plan before attempting to approach the subjects in the vehicle. **After formulating a course of action, officers approached the area in marked patrol units. Officers strategically parked their patrol vehicles, effectively blocking the exit and mitigating the risk of flight.**³ Officers observed the Toyota Prius backed into a parking spot in the apartment complex parking lot near the one-way entrance/exit. Officers immediately commanded both subjects to show their hands as police communications identified the nature of the call as “gun urgent.” Officers continued to give verbal commands as both the male and female exited the vehicle. Officers commanded the male subject to lift his shirt and turn around in a circle. The male subject initially complied with commands but eventually became non-compliant and verbally confrontational. **The male subject began asking why officers had guns pointed at him and asked officers to put their weapons away.** The male subject walked back toward the driver’s door of the Toyota Prius and remained non-compliant and verbally confrontational. The male refused verbal commands from officers to step forward and away from the driver's door. Due to the nature of the call and the 911 caller’s information, officers had reason to believe the Toyota Prius could contain a gun. Due to the male subject’s noncompliance and ability to possibly access a gun inside the vehicle or on his person, officers decided to deploy a less-lethal munition to gain compliance. The less-lethal munition struck the front of the male subject on the left side of his body but did not prove to be effective as the male subject quickly entered the driver's door of the Toyota Prius. The male subject closed the driver door and started the vehicle. Officers commanded the driver to turn off the vehicle but he did not comply. Approximately nine seconds later, the male subject drove forward out of the parking spot. [emphasis added].

10. While Chief Manley’s report to the Attorney General essentially reflects the sequence of events, it fails to capture the chaotic, conflicting shouts by the officers and Mike’s

² *Officer-Involved Shooting April 24, 2020*, AUSTINTEXAS.GOV, <https://www.austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020>.

³ This binding evidentiary admission by the City belies Officer Taylor’s irrational fear that Mike would use the Prius as a deadly weapon. Officer Taylor claims that he killed Mike because he feared that “the male subject intended to use the Toyota Prius as a deadly weapon.” Brian Manley reported to the Texas Attorney General that the strategic decision about where to place the police vehicles was effective.

incredulity over why police were threatening to shoot him. Compare Manley's statement to the Texas Attorney General that, "the male subject began asking why officers had guns pointed at him and asked officers to put their weapons away," to the audio recordings:

Officer: Keep going! Keep going! Keep going! Stop! Stop! Walk toward me!

Mike: Man, what the fuck?! Why (unintelligible)?

Officer: Come toward us!

Officer: Michael Ramos, you are gonna get impacted if you don't listen! Walk toward me!

Mike: Man, yall scaring the fuck out of me, dog.

Officer (not to Mike): Impact him.

Officer: Michael Ramos! Michael Ramos!

Mike: Don't shoot, yall!

Officer: Michael Ramos!

Mike: Don't shoot!

Officer: Hey listen to me, man. Hey, relax! Relax, Michael! I need you to turn around for me. Michael! Michael, listen to me, man! Michael, listen to me, man. Just listen. I want you to turn around for me, man. Turn around for me, Michael! I'll explain it in a second.

Officer: Don't go back!

Mike: What is going on?!

Officer: I cant explain it right now, Michael, but you need to turn around.

Officer: Leave your hands up!

Officer: Do not go toward that door!

Mike: Man, what the fuck, man?!

Officer: Michael Ramos, come toward me!

Officer: Impact him.

Mike: Man what the, MAN WHAT THE FUCK did I fucking do, man?! The fuck are yall trippin' on, dog?!

Officer: Hey, hey, Michael, get on your knees! Get on your knees!

Mike: Man, why the fuck you fuckin' shoot, man?!

Officer: Michael, get on your knees! Do it now!

Mike: Man, what the fuck yall trippin on dog?!

Officer: Come out of the vehicle!

Officer: Michael, do it now!

Mike: Why all yall got guns, dog?! Man, what the fuck, man?!

Officer (screaming): IMPACT HIM!

Mike: What the fuck?!

Officer (not to Mike): Hit him with the impact whenever you get an angle.

Mike: I ain't GOT no fucking gun, dog! What the fuck?! (Unintelligible).

Officer (not to Mike): Hit him whenever you feel justified. He's not following commands and he has a weapon.⁴

Mike: Put the fucking gun down, dog! Man, what the fuck, dog?

Officer (not to Mike): Impact him.

Officer Pieper: Walk towards us! I'm going to impact you!

Officer: Keep your hands up, Passenger!

Mike: Impact me?! For what?!

Officer Pieper: Walk towards us! Comply with us!

Mike: Fuck! Put the fucking guns down, dog!

Officer Pieper: Comply with us!

Officer (not to Mike): Whenever you get a shot, go for the hit.

Mike: Man, what the fuck, dog?!

Officer Pieper: IMPACTING!

Gunshot.

11. As Chief Manley reported to the Attorney General, Mike got back in his car after Officer Pieper shot him with the “less lethal” shotgun shell. Mike never threatened the officers or bystanders. He simply got back in his car. Nine seconds later, as Mike slowly drove forward and away from police and bystanders toward the dumpsters at the dead-end of the parking area, Officer Taylor shot Mike in the head and killed him. Rebeca Garcia jumped out of the car just before Mike drove away. There was no gun on Mike, in the car, or in the vicinity. Officers never saw a gun or anything they mistook for a gun.

12. Pursuant to Texas Civil Practice and Remedies Code Section Sec. 101.101(c), formal notice of this claim was not required as the “governmental unit [had] actual notice that. . . the claimant has received some injury.” Specifically, The City of Austin has known about the incident giving rise to this claim and Rebeca’s involvement in the incident since the day it occurred—April 24, 2020. This is evidenced by then-Chief Brian Manley’s briefings to the public of incident’s details on April 24, 2020, April 27, 2020, and May 11, 2020.⁵

⁴ This order from a senior officer to a trainee officer is confounding given that videos show that Mike—who *had* complied with police commands to lift his shirt and turn in a circle—did not, in fact, have a weapon. There was no weapon or anything that could be mistaken for a weapon throughout this incident.

⁵ *Officer-Involved Shooting April 24, 2020*, AUSTINTEXAS.GOV, <https://www.austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020>.

B. Mike Ramos was Rebeca's best friend and boyfriend.

13. Rebeca and Mike met in October of 2019. From the day they met they spent every day together. They compared their life stories and found that they had nearly ran into each other on several occasions. They considered this kismet. Rebeca said it seemed like they were always in each other's lives, even though they kept missing each other. Their love story came to a sudden and violent end on April 24, 2020.
14. When officers drew their firearms at Mike, they also drew them at Rebeca. Officer Taylor fired the rounds into the vehicle that Rebeca had just exited. In their handling of the situation, Austin police officers and Officer Taylor recklessly and outrageously endangered the lives of two Austin citizens of color, simply sitting in a parking lot. It was reasonably foreseeable to Austin police officers and Officer Taylor that the woman a few feet distant from Mike was his loved one.
15. As a result of the officers' actions, Rebeca has suffered severe emotional distress that continues to impact her everyday life.

VIII. Claims

A. Officer Taylor negligently inflicted emotional distress upon Rebeca

16. Rebecca Garcia incorporates sections I through VII above into her negligent infliction of emotional distress claim.
17. Rebeca Garcia was a bystander to the murder of Mike Ramos. Despite receiving no physical injury, Rebeca was a foreseeable plaintiff in the shooting that resulted in Mike's death.
18. Rebeca was in the same vehicle as Mike during the incident until seconds before the fatal shot. She was located in the scene of the incident the entire time. Rebeca's sensory and

contemporaneous observation of the incident resulted in sever shock, direct emotional impact, and extreme emotional distress.

19. Rebeca was Mike's girlfriend and best friend. They were inseparable since the day they met. Their relationship was more than simply that of a close friend; they were as close as family.

20. It was reasonably foreseeable to Officer Taylor that the woman in the passenger seat of the vehicle was Mike's loved one who would suffer extreme emotional distress upon witnessing Mike's murder and thus would be a plaintiff in the incident that caused Mike's death. Rebeca's mental anguish was foreseeable to Officer Taylor. As such, Officer Taylor owed Rebeca a duty of care that he breached by killing Mike, resulting in Rebeca's injuries.

B. Damages

21. Rebeca incorporates sections I through VIII.B above into this section on damages.

22. Officer Taylor's negligent infliction of emotional distress was the proximate cause of various injuries that Rebecca suffered as a result.

23. Rebeca seeks recovery for all of her damages including past and future pain, past and future mental anguish, punitive damages, miscellaneous other economic damages including out-of-pocket expenses, pre- and post-judgment interest, attorney's fees, expenses, and costs.

24. Defendant City of Austin is liable for the damages negligently caused by Officer Taylor pursuant to the Texas Tort Claims Act. *See* Tex. Civ. Pr. & Rem. Code §101.0215(a)(1).

IX. Request for jury trial

7. Plaintiff requests a jury trial.

X. Prayer

8. For all these reasons, Rebeca Garcia requests that the City of Austin be summoned to appear and answer Rebeca's allegations. After a jury trial regarding her claims, Rebeca prays

for general relief, and seeks to recover the damages listed above in an amount to be determined by the jury and any other relief to which she is entitled.

Respectfully submitted,



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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that Plaintiff's Original Complaint was filed on April 22, 2022 via the Court's efile system and will be served in compliance with the Texas Rules of Civil Procedure.



Scott M. Hendler

Automated Certificate of eService

This automated certificate of service was created by the e filing system. The filer served this document via email generated by the e filing system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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CAUSE NO. D-1-GN-22-001902

REBECA GARCIA
Plaintiff,

v.

THE CITY OF AUSTIN

Defendant.

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

345TH JUDICIAL DISTRICT

DEFENDANT'S ORIGINAL ANSWER AND AFFIRMATIVE DEFENSES

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant, City of Austin, represented by and through the undersigned Assistant City Attorney, and hereby files this Original Answer and Affirmative Defenses in response to Plaintiff's Original Petition.

I.

GENERAL DENIAL

1. The City generally denies the material allegations of Plaintiff's pleadings, demands proof thereof as required by the Texas Rules of Civil Procedure, and reserves the right to plead further and in greater particularity.

II.

AFFIRMATIVE AND OTHER DEFENSES

The City asserts the following affirmative and other defenses:

2. The City is a home-rule municipality and political subdivision of the State of Texas. To the extent that it was acting in the performance of its governmental functions during the occurrence made the basis of this lawsuit, the City has governmental immunity from suit and from liability, and the City affirmatively pleads and asserts the affirmative defense of sovereign immunity.

3. The City reserves their right to assert additional affirmative defenses as they become apparent.

PRAYER FOR RELIEF

The City prays that Plaintiff take nothing by this suit and that it recover all court costs and other and further relief, both at law and in equity, to which it may show itself justly entitled.

RESPECTFULLY SUBMITTED,

ANNE MORGAN, CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION

/s/ H. Gray Laird III
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ATTORNEYS FOR DEFENDANT

This is to certify that I have served a copy of the foregoing on all parties, or their attorneys of record, in compliance with the Texas Rules of Civil Procedure, this 23rd day of May, 2022.

Via e-Service and/or facsimile:

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/s/ H. Gray Laird III
H. GRAY LAIRD III

Automated Certificate of eService

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CAUSE NO. D-1-GN-22-001902

REBECA GARCIA
Plaintiff,

v.

THE CITY OF AUSTIN

Defendant

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

345TH JUDICIAL DISTRICT

DEFENDANT'S PLEA TO THE JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, City of Austin, represented by and through the undersigned counsel, files this Plea to the Jurisdiction as follows:

I. RELEVANT PLEADINGS AND FACTS

This lawsuit arises out of an officer-involved shooting which occurred on April 24, 2020 in Austin, Texas. Plaintiff Rebeca Garcia alleges that her boyfriend, Mike Ramos, was shot and killed by Austin Police Officer Christopher Taylor after Taylor and other police officers responded to a 911 call about a man with a gun and a woman using drugs in a vehicle while the vehicle was parked in the parking lot of an apartment complex. (Plaintiff's Original Petition, ¶¶ 8, 11) Plaintiff alleges that she jumped out of the car just before Taylor shot Ramos, and that she witnessed the shooting of Ramos. (Plaintiff's Original Petition ¶¶ 11; 17; 20)

Plaintiff brought this lawsuit against the City of Austin, alleging that the City is liable for the actions of its employee, Officer Taylor, under the Texas Tort Claims Act. Tex. Civ. Pr. & Rem. Code § 101.0215(a)(1). (Plaintiff's Original Petition ¶ 24) Plaintiff couches this lawsuit as a claim against the City for Officer Taylor's "negligent infliction of emotional distress" on the Plaintiff. (Plaintiff's Original Petition ¶ 22)

II. ARGUMENT AND AUTHORITIES

A. Plaintiff must allege and prove a waiver of the City's governmental immunity.

Governmental immunity shields Texas cities from suit for common law and statutory claims arising out of their governmental functions, unless there is a clear legislative waiver. *Wasson Interests, Ltd. v. City of Jacksonville* (“*Wasson I*”), 489 S.W.3d 427, 429-30 (Tex. 2016). Government immunity from suit deprives the trial court of subject matter jurisdiction and, thus, is properly asserted in a plea to the jurisdiction. *Texas Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 225-226 (Tex. 2004).

The State's consent to jurisdiction may be alleged either by reference to a statute or by pleading express legislative permission. *General Services Comm'n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001). Texas does not recognize the doctrine of waiver of governmental immunity by conduct. *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 414 (Tex. 2011); *see also Hughes v. Tom Green County*, 553 S.W.3d 1, 7 (Tex. App.—Austin 2017, pet. granted) (“the Supreme Court and this Court have repeatedly declined to apply a waiver-by-conduct theory”). Rather, legislative consent to sue must be made in “clear and unambiguous language.” *University of Tex. Med. Branch v. York*, 871 S.W.2d 175, 177 (Tex. 1994). Absent this consent, the trial court lacks a jurisdictional basis to hear the claim. *Texas Dept. of Transportation v. Jones*, 8 S.W.3d 636, 638-39 (Tex. 1999).

When subject matter jurisdiction is contested, “[t]he trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed.” *Id.* at 226. Whether the trial court has subject matter jurisdiction is a question of law. *Id.*

A plaintiff bears the burden to allege facts that affirmatively demonstrate the trial court's

jurisdiction to hear a case. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). If the pleadings affirmatively negate the existence of jurisdiction, the plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Miranda*, 113 S.W.3d at 226-27.

Here, Plaintiff does not allege that a specific waiver of the City's governmental immunity applies. The Original Petition makes no mention of any waiver of the City's governmental immunity and, as a result, her claim fails as a matter of law.

B. The Texas Tort Claims Act's limited waivers of immunity do not apply.

The Texas Tort Claims Act provides in pertinent part:

"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 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; and

(2) personal injury and 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."

Tex. Civ. Prac. & Rem. Code Ann. §101.021.

As stated above, Plaintiff does not identify a specific waiver of immunity and thus her claim should be dismissed on that ground alone. Even if one assumes that Plaintiff intends to proceed under the limited waiver found in *Tex. Civ. Prac. & Rem. Code Ann.* §101.021(2) for personal injury and death caused by the use of tangible personal property, Plaintiff's claim is futile

since the Texas Tort Claims Act clearly establishes that the state has not waived immunity for intentional torts. The Texas Tort Claims Act does not waive a governmental unit's immunity for a claim arising from assault, battery or any other intentional tort. *Tex. Civ. Prac. & Rem. Code* §101.057(2).

Here, the gravamen of Plaintiff's Complaint is that Officer Taylor wrongfully shot Ramos, while Plaintiff was in the near vicinity of Ramos, which is clearly an intentional tort, and thus Plaintiff's claim against the City is barred by governmental immunity. *See Harris Cty., Tex. v. Cabazos*, 177 S.W.3d 105, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.)(immunity not waived for claim arising out of deliberate shooting by deputy sheriff). Although Plaintiff couches her claim as a negligence claim, the facts as alleged in Plaintiff's Complaint all describe intentional torts. Plaintiff alleges that Officer Taylor and other APD officers drew their firearms at Ramos and the Plaintiff, and Taylor ultimately shot his firearm at Ramos, which is an intentional tort.

As the Court of Appeals in *Harris County, Tex. v. Cabazos* explained: “[i]f a plaintiff pleads facts which amount to an intentional tort, no matter if the claim is framed as negligence, the claim generally is for an intentional tort and is barred by the TTCA.” *Harris County*, 177 S.W.3d at 111; *citing Texas Department of Public Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001); *City of Laredo v. Nuno*, 94 S.W.3d 786, 789 (Tex. App.-San Antonio 2002, no pet.); *Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434, 450 (Tex.App.-Fort Worth 2001, no pet.); *Medrano v. City of Pearsall*, 989 S.W.2d 141, 144 (Tex.App.-San Antonio 1999, no pet.). A plaintiff cannot circumvent the intentional tort exception by couching her claims in terms of negligence. *See Huong v. City of Port Arthur*, 961 F.Supp.1003, 1008–09 (E.D.Tex.1997) (plaintiffs cannot circumvent intentional tort exception to waiver of liability by simply

pleading negligence when shooting event upon which they base their claims is actually intentional tort). This is exactly what the Plaintiff in this case is attempting to do. As a result, the City is immune from Plaintiff's state law personal injury claim and this claim should be dismissed.

C. Plaintiff failed to provide timely notice of her claim against the City.

The Texas Tort Claims Act states:

“(a) A governmental unit is entitled to receive notice of a claim against it under this chapter not later than six months after the day that the incident giving rise to the claim occurred. The notice must reasonably describe:

(1) the damage or injury claimed;

(2) the time and place of the incident; and

(3) the incident.

(b) A city's charter and ordinance provisions requiring notice within a charter period permitted by law are ratified and approved.

(c) The notice requirements provided or ratified and approved by Subsections (a) and (b) do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged.”

Tex. Civ. Prac. & Rem. Code Ann. § 101.101.

Actual notice, under subsection (c), is subjective notice. Knowledge that an incident occurred is insufficient. Rather, the governmental unit is entitled to enough information to identify that its alleged fault produced or contributed to the claimant's injuries. *City of San Antonio v. Tenorio*, 543 S.W.3d 772, 776 (Tex. 2018). “Actual notice means the governmental unit is subjectively aware that it may be responsible for death, injury, or property damage in the

manner ultimately alleged by the claimant.” *Worsdale v. City of Killeen*, 578 S.W.3d 57, 77 (Tex. 2019).

Plaintiff alleges the City had actual notice under § 101.101(c) of her claim for negligent infliction of emotional distress since the date of the incident because Austin Police Department then Police Chief Brian Manley conducted three public briefings shortly thereafter. (Plaintiff’s Original Petition ¶ 12). She further alleges she was a foreseeable plaintiff and it was reasonably foreseeable “that the woman in the passenger seat of the vehicle was Mike’s loved one who would suffer extreme emotional distress upon witnessing Mike’s murder and thus would be a plaintiff...” (Plaintiff’s Original Petition ¶¶ 17, 20).

Plaintiff does not raise sufficient facts to demonstrate the City had actual notice of her alleged emotional distress injury. While the City has knowledge of the incident giving rise to her claim, it did not have actual notice that the incident would bring about a claim for an emotional injury as plaintiff alleges. “Consistent with the plain meaning of the statutory language, the Tort Claims Act’s notice provision requires knowledge that rises to the level of notice, which has the effect—if not the purpose—of ‘enable[ing] governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial.’” *Worsdale v. City of Killeen*, 578 S.W.3d 57, 73 (Tex. 2019) citing *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).

Additionally, Plaintiff failed to provide notice of her claim under § 101.101(a) within six months of her alleged injury. And, under § 101.101(b), the City of Austin requires notice of claims within 45 days of the alleged injury¹. The City of Austin did not have actual notice of

¹ Austin’s City Charter Article XII Section 3 Notice of Claims: “...the person injured, if living, or his or her representatives, if dead, or the owner of the property damaged or destroyed, shall give the city council or city manager notice in writing of such death, injury, damage or destruction, duly verified by affidavit, within 45 days after same has been sustained...”

Plaintiff's injury, nor did Plaintiff bring her claim within 45 days of her injury. Having met none of the required elements for notice under § 101.101, Plaintiff's claim should be dismissed for lack of jurisdiction.

RESPECTFULLY SUBMITTED,

ANNE MORGAN, CITY ATTORNEY
MEGHAN RILEY, CHIEF, LITIGATION

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties, or their attorneys of record, in compliance with the Texas Rules of Civil Procedure, this 17th day of November, 2022.

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H. GRAY LAIRD III

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CAUSE NO. D-1-GN-22-001902

REBECA GARCIA,	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
v.	§	
	§	OF TRAVIS COUNTY, TEXAS
THE CITY OF AUSTIN,	§	
Defendant	§	
	§	345TH JUDICIAL DISTRICT

NOTICE OF HEARING

Please take notice that the hearing on Defendant City of Austin’s Plea to the Jurisdiction is set for **Thursday, January 26, 2023, at 9:00 a.m.** on the Central Docket in the Travis County Civil District Courts. The hearing is set for one hour.

Pursuant to the existing Emergency Orders resulting from the COVID-19 pandemic, this hearing will take place remotely, using Zoom videoconferencing, which is free to download at <https://zoom.us>, and is available as an app for smart phones and tablets. Since several cases may be scheduled at the same time, your case may be called later in the day, and you must be available when your case is called.

Prior to the hearing, the assigned court will email all counsel and self-represented parties *for whom it has current email addresses* the court’s instructions and procedures, with information on how to access the hearing on Zoom.

If your current email address is not on file, you do not receive the instructions and procedures from the court at least two days prior to the hearing, or you do not have access to the internet over a smart phone, tablet, or computer, please contact the Court Administrator’s office at 512-854-2484 for information on how to participate in the hearing.

RESPECTFULLY SUBMITTED,

ANNE L. MORGAN, CITY ATTORNEY
MEGHAN L. RILEY, CHIEF, LITIGATION

/s/ H. Gray Laird III

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CERTIFICATION UNDER LOCAL RULE 2.2

Counsel has conferred with all parties about the date and time of the setting.

/s/ H. Gray Laird III

H. GRAY LAIRD III

CERTIFICATE OF SERVICE

This is to certify that I have served a copy on all parties, or their attorneys of record, in compliance with the Texas Rules of Civil Procedure, on December 5, 2022

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CAUSE NO. D-1-GN-22-001902

REBECA GARCIA	§	IN THE DISTRICT COURT
v.	§	345th JUDICIAL DISTRICT
THE CITY OF AUSTIN	§	TRAVIS COUNTY, TEXAS
Plaintiff,	§	
Defendant.	§	

PROPOSED ORDER

BEFORE THE COURT is Plaintiff's Motion to Withdraw Donald Puckett as Counsel of Record. The Court having read and considered the Motion finds that the Motion should be and is hereby **GRANTED**.

IT IS ORDERED that Donald Puckett be withdrawn as counsel of record for Plaintiff.

IT IS FURTHER ORDERED that the Clerk of Court remove Mr. Puckett's name from the list of persons authorized to receive electronic notices in this case.

SIGNED AND ENTERED this ____ day of _____ 20__.

PRESIDING JUDGE

CAUSE NO. D-1-GN-22-001902

REBECA GARCIA	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
THE CITY OF AUSTIN	§	
	§	
Defendant.	§	345th JUDICIAL DISTRICT

**PLAINTIFF’S RESPONSE IN OPPOSITION
TO DEFENDANT’S PLEA TO THE JURISDICTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW REBECA GARCIA, Plaintiff herein, and files this Response in Opposition to Defendant’s Plea to the Jurisdiction and respectfully states as follows:

**I.
SUMMARY OF THE ARGUMENT**

Defendant mischaracterizes Plaintiff’s lawsuit. Instead of accepting Plaintiff’s pleadings as true, Defendant misconstrues Plaintiff’s claim to assert a claim that is not in Plaintiff’s pleadings to avoid damages under Texas Civil Practice and Remedies Code Section 101.0215(a)(1) (Liability of Municipality for Police and Fire Protection and Control). Defendant’s mischaracterization requires Plaintiff to prove “intent.” Proving intent is not an element of Plaintiff’s claim of negligent infliction of emotional distress.

Plaintiff, a bystander who contemporaneously observed the deadly shooting of her boyfriend and best friend—Mike Ramos, an unarmed Black man—sued Defendant for negligent infliction of emotional distress. Officer Christopher Taylor, an employee of Defendant, negligently caused Plaintiff’s emotional distress by inflicting deadly injury on Mike Ramos in her

presence on April 24, 2020. Officer Taylor foresaw the injury he would cause to Plaintiff. Defendant is liable to Plaintiff for Officer Taylor's negligent conduct under the bystander theory of recovery Texas courts have recognized.

Plaintiff plead a claim for negligent infliction of emotional distress as a bystander. *See* Plaintiff's Original Petition, Section VII, §§ 16–20. Significantly, “intent” is not an element that Plaintiff must prove. In fact, Plaintiff never used the words “wrongfully shot” in her pleadings. *See* Defendant's Plea to the Jurisdiction, p. 8, ¶ 1. Finally, Defendant's argument that it did not have “actual notice” lacks merit. Defendant knew that Plaintiff was present near Mike Ramos and witnessed the negligent shooting by Officer Christopher Taylor. *See* Plaintiff's Original Petition, Section VII, § 12.

Defendant's plea to the jurisdiction should be denied.

II. **STANDARD OF REVIEW**

“A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit.” *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). “The claims may form the context in which a dilatory plea is raised, but the plea should be decided without delving into the merits of the case.” *Id.* “The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached.” *Id.*

In determining jurisdiction, a trial court must “construe the pleadings liberally in the pleader's favor and look to their intent.” *Houston Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016). “*Only* if the pleadings affirmatively negate jurisdiction should the plea to the jurisdiction be granted without affording the plaintiffs an opportunity to replead.” *Id.* (emphasis added); *see also Office of Attorney Gen. v. Crawford*, 322 S.W.3d 858, 861, n. 8 (Tex.

App.—Houston [1st Dist.] 2010, pet. denied) (relying on dictionary definition of “‘only’ to mean, among other things, no more than; nothing other than; . . . nothing more besides; solely, merely, exclusively or [b]y itself, alone, without anything else.”) (internal quotations omitted).

“If the challenged jurisdictional fact[s] overlap[] with the merits of the plaintiff's claim[], the party asserting the plea to the jurisdiction must overcome a traditional-summary-judgment-like burden and conclusively negate th[e] fact[s].” *Bacon v. Texas Hist. Comm’n*, 411 S.W.3d 161, 171 (Tex. App.—Austin 2013, no pet.). “Our ultimate inquiry is whether the particular facts presented, as determined by the foregoing review of the pleadings and any evidence, affirmatively demonstrate a claim within the trial court's subject-matter jurisdiction.” *Id.*

“If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder.” *Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–28 (Tex. 2004).

III. **ARGUMENT AND AUTHORITIES**

A. The Court Has Jurisdiction to Hear a Claim of Negligent Infliction of Emotional Distress by a Bystander.

Plaintiff pled a negligent infliction of emotional distress claim as a bystander. *See* Plaintiff’s Original Petition, Section VII, §§ 16–20. Defendant’s mischaracterization of Plaintiff’s claim cannot be a basis to defeat subject matter jurisdiction. Adding an element of proof to Plaintiff’s negligent infliction claim has no basis in law. Defendant cites no authority that allows it to add an element of proof.

Officer Taylor does not claim that his decision to use deadly force was intentional. In a motion to dismiss based on qualified immunity filed in federal court in the Western District in Austin, he told the Court that Mike Ramos’s vehicle could travel a short distance “in a split second”

and that “he had even less time to make the incalculably difficult decision to utilize deadly force.” *See* Cause No. 1:20-cv-01256-RP, Dkt, 49, “Defendant Christopher Taylor’s Motion to Dismiss Plaintiff’s Second Amended Complaint and Supporting Brief,” p. 12, (Filed April 12, 2022) (Exhibit A). Because of Officer Taylor’s representations in federal court, Plaintiff plead a negligence claim. Negligent infliction of emotional distress of a bystander is a cause of action recognized in Texas courts. Defendant cannot circumvent Officer Taylor’s representations in federal court regarding his decision to use deadly force in “even less time” than a split second against Mike Ramos.

B. Defendant Has Not Presented Any Evidence to Meet Its Burden.

Defendant challenges the jurisdictional facts, but it does not attach any evidence to its plea as required in a traditional motion for summary judgment. *Bacon v. Texas Hist. Comm’n*, 411 S.W.3d 161, 171 (Tex. App.—Austin 2013, no pet.). Conclusory allegations are insufficient. Defendant has the initial burden to provide evidence. *Miranda*, 133 S.W.3d at 228. Without evidence, Defendant has not carried its burden.

C. Defendant Had Actual Notice of Plaintiff’s Injury.

Plaintiff was not required to provide written notice under the Texas Tort Claims Act and the City of Austin’s Charter because Defendant had actual notice of the injury to Plaintiff. TEX. CIV. PRAC. & REM. CODE. § 101.101(c) (notice requirements do not apply if the “governmental unit . . . has actual notice . . . that the claimant received some injury.”). Defendant had actual notice as noted in Chief Manley’s report to the Texas Attorney General. *See* Plaintiff’s Original Petition, Section VII, § 12. Thus, Defendant’s argument lacks merit.

D. Defendants Improperly Challenge the Merits of Plaintiff’s Claims.

The merits of Plaintiff’s claim have no bearing in determining a trial court’s jurisdiction. Because Defendant mischaracterizes Plaintiff’s claim and improperly challenges the merits of the negligent infliction of emotional distress claim in its dilatory plea, it should be denied. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 554 (Tex. 2000) (“The claims may form the context in which a dilatory plea is raised, but the plea should be decided without delving into the merits of the case.”).

**IV.
PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that this Court deny Defendant’s Plea to the Jurisdiction and grant Plaintiff any such other and further relief, at law or in equity, to which Plaintiff may show himself to be justly entitled.

Dated: January 19, 2023

Respectfully submitted,

/s/ Ramiro Canales

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Texas e-filing system on January 19, 2023.

/s/ Ramiro Canales
Ramiro Canales

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

BRENDA RAMOS, ON BEHALF OF	§	
HERSELF AND THE ESTATE OF	§	
MIKE RAMOS	§	
<i>Plaintiff,</i>	§	
	§	CIVIL ACTION NO. 1:20-cv-01256-RP
v.	§	
	§	
THE CITY OF AUSTIN and	§	
CHRISTOPHER TAYLOR,	§	
<i>Defendants.</i>	§	

**DEFENDANT CHRISTOPHER TAYLOR’S MOTION TO DISMISS PLAINTIFF’S
SECOND AMENDED COMPLAINT AND SUPPORTING BRIEF**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

NOW COMES Defendant, Christopher Taylor (hereinafter “Officer Taylor”), the individual defendant in the above-entitled and numbered cause, and moves that this Court dismiss Plaintiff’s Second Amended Complaint, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted, and in support would respectfully show the Court as follows:

EXHIBIT A

I. SUMMARY OF THE ARGUMENT

1. The incident videos incorporated into Plaintiff's Second Amended Complaint reflect that Officer Christopher Taylor's conduct did not constitute a violation of the Fourth Amendment as a matter of law—and no amount of blatant textual contradictions of those videos can change that reality. The Fifth Circuit mandates the use of its two-prong *Hathaway* test for analyzing cases where pedestrian officers shoot into moving vehicles potentially being used as weapons. The *Hathaway* test thus must—as a matter of law—be applied to this case's facts to determine if no reasonable police officer could have believed that Ramos posed a possible threat to the officers standing near his car.

2. The test's prongs deal with (1) time, and (2) perceived proximity, respectively. Applied here, Officer Taylor had (1) a split second—the amount of time it takes for a car to travel approximately one-to-two car lengths—to decide whether to use deadly force to stop a car that (2) ***his fellow police officers were actively scrambling away from to escape the car's path***, thus putting in any officer's mind observing such scene a perceived close proximity to the suddenly-moving vehicle. Pursuant to such test, reasonable officers witnessing those circumstances could have considered Ramos's car a potentially deadly threat to the officers scrambling away from it, and that using deadly force to stop that deadly threat would not be unreasonable.

3. Even if this Court disagrees regarding the reasonableness of his actions, Officer Christopher Taylor would still be entitled to Qualified Immunity. ***The Supreme Court strictly enforces the requirement to identify an analogous case and explain the analogy for the purposes of satisfying the “clearly established law” prong of Qualified Immunity.*** *Irwin* is a controlling Fifth Circuit case on largely similar facts: after commands to stop were refused, police officers fired at the driver of a car moving toward ***the general direction*** of nearby police officers. Just as

the District Court had done previously, the Fifth Circuit researched all pre-existing controlling case law, found no factually similar analogous cases, and consequently affirmed the granting of Qualified Immunity as a result.

4. Just as in *Irwin*—which was decided *after* the incident that forms the basis of this lawsuit—Officer Taylor likewise lacked any pre-existing “clearly established” legal precedents in April of 2020 that would have provided him the requisite legal notice. Dismissal is appropriate as a result.

II. ARGUMENTS & AUTHORITIES

A. Standard for Dismissal under Rule 12(b)(6).

5. A motion to dismiss pursuant to Rule 12(b)(6) challenges a plaintiff’s complaint on the basis that it fails to state a claim upon which relief may be granted.¹ “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”² “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”³ “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.”⁴ “To withstand a Rule 12(b)(6) motion, [a] complaint must allege ‘more than labels and conclusions,’” and “a formulaic recitation of the elements of a cause of action will not do.”⁵

6. For the purposes of Rule 12(b)(6), a complaint does not “suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’”⁶ A “complaint ‘does not need detailed

¹ See FED. R. CIV. P. 12(b)(6).

² *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

³ *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

⁴ *Id.* (quoting *Twombly* at 556).

⁵ *Norris v. Hearst Tr.*, 500 F.3d 454, 464 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

⁶ *Iqbal*, 556 U.S. at 678.

factual allegations,’ but must provide the plaintiff’s grounds for entitlement to relief – including factual allegations that when assumed to be true ‘raise a right to relief above the speculative level.’”⁷ “Conversely, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.”⁸ A court need not “strain to find inferences favorable to the plaintiffs.”⁹

B. Standard for Qualified Immunity.

7. Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss an action barred by Qualified Immunity.¹⁰ It is Plaintiff’s burden to plead and prove specific facts overcoming Qualified Immunity for each applicable claim.¹¹ Courts use a two-prong analysis to determine whether an officer is entitled to Qualified Immunity.¹² A plaintiff must show (1) the official violated a constitutional right; and (2) the constitutional right was “clearly established” at the time of the defendant’s alleged misconduct.¹³ If Plaintiff fails to satisfy either prong here, Officer Taylor is immune from suit as a matter of law.¹⁴

⁷ *Cuvillier v. Sullivan*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

⁸ *Id.* (quotation and alteration omitted).

⁹ *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (quoting *Westfall v. Miller*, 77 F.3d 868, 870 (5th Cir. 1996)).

¹⁰ *See Bustillos v. El Paso Cnty. Hosp. Dist.*, 226 F. Supp. 3d 778, 793 (W.D. Tex. 2016) (Martinez, J.) (dismissing a plaintiff’s claim based on qualified immunity).

¹¹ *See Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009); *see also Elliot v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985).

¹² *Cole v. Carson*, No. 14-10228, 2019 WL 3928715, at *5 (5th Cir. Aug. 20, 2019), as revised (Aug. 21, 2019).

¹³ *Reed v. Taylor*, 923 F.3d 411, 414 (5th Cir. 2019).

¹⁴ *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007).

8. A right is clearly established when “the contours of the right [are] sufficiently clear [such] that a reasonable official would understand that what he is doing violated that right.”¹⁵ Because Qualified Immunity shields “all but the plainly incompetent or those who knowingly violate the law,” *the Fifth Circuit considers Qualified Immunity the norm, and admonishes courts to deny a defendant immunity only in rare circumstances.*¹⁶ Officer Taylor raises the defense of Qualified Immunity here in response to all of Plaintiff’s claims alleged against him.¹⁷ It is thus Plaintiff’s burden to plead and prove that Officer Taylor is not entitled to such protections. Plaintiff’s Second Amended Complaint and the incident videos it incorporates fail to meet that burden.

C. Videos of the subject incident have been incorporated by reference for this Court’s consideration—and take precedence over the Complaint itself.

9. Pursuant to controlling Fifth Circuit and Supreme Court precedents, “court[s] may take into account documents incorporated into the complaint by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned” when analyzing a 12(b)(6) motion to dismiss.¹⁸ In addition to documents, videos may also be incorporated by reference, including but not limited to body cam and dash cam videos as part of motions to dismiss

¹⁵ *Werneck v. Garcia*, 591 F.2d 386, 392 (5th Cir. 2009) (citations omitted); *see also Freeman v. Gore*, 483 F.3d 404, 411 (5th Cir. 2007) (the court applies an objective standard “based on the viewpoint of a reasonable official in light of the information available to the defendant and the law that was clearly established at the time of defendant’s actions.”); *see also Kinney v. Weaver*, 367 F.3d 337, 349-50 (5th Cir. 2004), quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

¹⁶ *Romero v. City of Grapevine*, 888 F.3d 170, 176 (5th Cir. 2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (internal quotation marks omitted) (emphasis added).

¹⁷ *See generally* Pl.’s Second Am. Compl., Dkt. # 45.

¹⁸ *Meyers v. Textron, Inc.*, 540 F. App’x 408, 409 (5th Cir. 2013) (per curiam) (*citing Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (also citing § 1357 Motion to Dismiss Practice Under Rule 12(b)(6)); *see also* FED. R. CIV. P. 10(c) (acknowledging incorporation by reference in federal pleadings).

§1983 claims.¹⁹ As this Court has reiterated itself, “[i]n deciding a motion to dismiss, a court may consider video evidence attached as an exhibit to the complaint; when doing so, ‘the court is not required to favor plaintiff’s allegations over the video evidence.’”²⁰

10. Plaintiff’s Second Amended Complaint references “Austin police dashcam and body-worn camera videos” of the subject incident, and provides hyperlinks for the Court to retrieve and view all such videos.²¹ One of the hyperlinks directs to a City of Austin website that contains the cited videos in a manner obviously intended for public consumption, making the videos inherently “matters of public record” that this Court may consider for the purposes of this motion even if Plaintiff had not incorporated them explicitly—which she did.²² If an allegation in a complaint is contradicted by the contents of an exhibit incorporated by reference into the complaint, then “indeed the exhibit and not the allegation controls.”²³ “[T]he Court is not required to accept any [plaintiffs’] characterization of [incorporated or attached exhibits] because the exhibit controls over contradictory assertions.”²⁴ As the Fifth Circuit has held, “[a]lthough courts must construe evidence in light most favorable to the nonmoving party, *we will not adopt a plaintiff’s characterization of the facts where unaltered video evidence contradicts that account.*”²⁵ Accordingly, this Court can *and should* consider the subject incident videos to be both relevant

¹⁹ *Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093, * 1 (W.D. Tex. April 30, 2018).

²⁰ *Id.* at *1 (emphasis added) (citing *Hartman v. Walker*, 685 F. App’x 366, 368 (5th Cir. 2017)).

²¹ Pl.’s Second Am. Compl., pg. 17, fn. 9, Dkt. # 45.

²² *Id.*

²³ See *U.S. ex rel. Riley v. St. Luke’s Episcopal Hosp.*, 355 F.3d 370, 377 (5th Cir. 2004) (emphasis added) (citing *Simmons v. Peavy–Welsh Lumber Co.*, 113 F.2d 812, 813 (5th Cir.), cert. denied, 311 U.S. 685 (1940)).

²⁴ *Roberto Garza v. Allstate Vehicle and Prop. Ins. Co.*, No. 7:22-CV-00067, 2022 WL 1046156, at *3 (S.D. Tex. Apr. 6, 2022).

²⁵ *Thompson v. Mercer*, 762 F.3d 433, 435 (5th Cir. 2014) (citing *Scott v. Harris*, 550 U.S. 372, 381 (2007)).

and controlling when determining whether or not Plaintiff's Second Amended Complaint contains a claim against Officer Taylor for which relief may be granted.

D. An application of this case's facts to the mandatory two-prong *Hathaway* test precludes the existence of a Fourth Amendment violation, and thus Plaintiff has no claim against Officer Taylor for which relief may be granted.

11. The video footage incorporated by reference reveals no actionable Fourth Amendment violation as a matter of law pursuant to *Hathaway* and its progeny. To state an excessive force claim, a plaintiff must show “(1) an injury, (2) which resulted directly and only from a use of force that was clearly excessive, and (3) the excessiveness was *clearly unreasonable*.”²⁶ District Courts—including this one—across the Fifth Circuit have recognized that the two-prong *Hathaway* test is binding in “cases that involve [pedestrian officers] shooting at vehicles” *for the purposes of the reasonableness inquiry*.²⁷

12. The Fifth Circuit has reliably upheld and applied this two-prong legal test since its inception in *Hathaway*.²⁸ In *Hathaway*, the Fifth Circuit “surveyed the relevant case law and identified two ‘central’ factors in the reasonableness inquiry in these kinds of cases: (1) the limited

²⁶ *Ontiveros v. City of Rosenberg*, 565 F.3d 379, 382 (5th Cir. 2009) (emphasis added).

²⁷ *Dudley v. Bexar Cnty.*, No. 5:12-CV-357-DAE, 2014 WL 6979542, at *5 (W.D. Tex. Dec. 9, 2014) (noting “[i]n cases that involve shooting at vehicles, there are two ‘central’ factors in the reasonableness inquiry: (1) the limited time [the] officer[] ha[s] to respond to the threat from the vehicle; and (2) the closeness of the officers to the projected path of the vehicle.”) (internal quotes removed); *see also Irwin*, 2021 WL 75452, at *5 (noting “[f]or cases involving deadly force by a pedestrian-officer against an individual fleeing by vehicle, the Fifth Circuit has identified two more specific considerations: (1) the limited time an officer has to respond to the threat from the vehicle; and (2) the closeness of [an] officer to the projected path of the vehicle.”) (internal quotes removed); *see also Malbrough v. City of Rayne*, 2019 WL 1120064, at *11 (W.D. La. Mar. 11, 2019), *aff'd sub nom. Malbrough v. Stelly*, 814 F. App'x 798 (5th Cir. 2020).

²⁸ *See Hathaway v. Bazany*, 507 F.3d 312, 321 (5th Cir. 2007) (adopting the temporal and proximity test) (adopting in part *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005)); *see also e.g. Sanchez v. Edwards*, 433 F. App'x 272, 275 (5th Cir. 2011).

time an officer has to respond to the threat from the vehicle; and (2) the closeness of the officer to the projected path of the vehicle.”²⁹

13. The two-prong test was recently applied by the Fifth Circuit in *Malbrough*.³⁰ The Fifth Circuit reiterated that there are “two factors in determining that the officer’s use of deadly force was reasonable [in cases involving shooting at vehicles]: (1) the limited time the officer had to respond, and (2) the officer’s proximity to the path of the vehicle.”³¹ Even more recently, the Fifth Circuit decided *Irwin*—discussed in more detail *infra*—along those same two *Hathaway* factors as required for any Fifth Circuit case where police officers fire into a moving vehicle.³²

i. The proximity prong of the *Hathaway* test bears out that a reasonable officer from Officer Taylor’s vantage point would have considered his fellow officers to be in the possible path of Ramos’s vehicle.

14. It is easier to conceptualize the *Hathaway* test here by considering the two factors inversely. The second proximity prong considers how close the endangered officers or bystanders were positioned relative to the *possible* path of the vehicle. The word “*possible*” must be emphasized, because the Fifth Circuit mandates that, for the purposes of the *Hathaway* test, the “[potentially endangered person’s] location matters, but *it’s not relevant whether, in hindsight, he was ever in real danger. We must ask whether it would have appeared to a reasonable officer on the scene that [the Defendant-Officer,] other officers, or bystanders were in danger.*”³³ The incorporated video footage in this case clearly reflects that “it would have *appeared* to a reasonable officer”—from the perspective of Officer Taylor—the “other officers...were in danger.”

²⁹ *Sanchez*, 433 F. App’x at 275.

³⁰ *Malbrough v. Stelly*, 814 F. App’x 798, 803-04 (5th Cir. 2020).

³¹ *Id.* at 804.

³² *Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988, at *2 (5th Cir. Oct. 21, 2021).

³³ *Malbrough*, 814 F. App’x at 804 – 05 (emphasis added).

15. The dash camera footage of APD Officer Valerie Taveres is particularly instructive regarding what a reasonable officer would have perceived from Officer Taylor's vantage point.³⁴ Taveres' dash cam footage depicts a rear view of four nearby pedestrian police officers standing to the left of Officer Taylor when he utilized deadly force in their defense. These four officers would have been in—or at least in close proximity to—the direct path of Ramos's vehicle if he had continued driving straight forward rather than turning. It is the proximity of those four officers who must be legally considered for evaluating the *Hathaway* proximity prong.

16. After standing relatively motionless for several minutes, the four police officers at 7:02 begin scrambling backwards away from Ramos's vehicle as soon as it begins to move.³⁵ Their body language and instinctual reactions seen on video make it undeniable that they believe they might possibly be in the path of Ramos's vehicle—and thus in danger of being run over by it. More importantly here, it is undeniable that another officer witnessing such instinctual reactions would perceive that the threat to those officers was real.

17. The officers are discussed from left to right herein. As soon as Ramos's car takes off, the first officer jumps inside the leftmost police vehicle through the front driver side door to get out of the way of Ramos's car. The second officer quickly scrambles backwards to get behind the same leftmost police vehicle, ostensibly using it as a protective barrier to put the vehicle between him and Ramos's car. The third and fourth officers likewise scramble backwards to get out of the way of Ramos's car, one of whom shelters behind a different police vehicle for protection from Ramos's oncoming vehicle.³⁶ A reasonable police officer who perceives his fellow officers

³⁴ See **Exhibit No. 2**, Supplemental Video No. 2, "Dash Camera of Officer Benjamin Hart", 03:46 – 7:23. Available at <http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020>.

³⁵ See **Exhibit No. 2**, "Dash Camera of Officer Benjamin Hart", 07:02 – 7:08.

³⁶ *Id.*

reacting to a suspect’s vehicle lurching forward by jumping into—and sheltering behind—nearby vehicles would very plausibly believe those officers were in the path of the vehicle. People do not frantically scramble to get out of the way of cars headed *away* from them.

18. The Court also has for its consideration a top-down helicopter view of the scene soon after the shooting.³⁷ As the view rotates, the short, 9-second helicopter video immediately depicts the four police vehicles that arrived and were positioned specifically to block the only motor vehicle exit out of the apartment parking lot.³⁸ A reasonable officer would operate under the belief that—because the only motor vehicle exit was blocked by police vehicles and the officers standing next to them—Ramos’s options were necessarily limited to submitting to arrest, resisting, fleeing on foot, *or driving through and over* the nearby police officers with his car to escape. The helicopter video also depicts a minivan parked directly in front of the strategically positioned police vehicles—perhaps one-to-two car lengths in front of them—which is clearly the same minivan parked directly to the right of Ramos’s Prius when he put his car in gear and drove forward.³⁹ The cell phone video Plaintiff incorporated by reference likewise shows that Ramos’s car was pointed directly at—or at the very least *in the general vicinity* of—nearby police officers when it initially moved forward and Officer Taylor made his split second decision.⁴⁰ Ramos’s vehicle can be seen where it eventually came to a stop after Ramos was incapacitated.⁴¹ In conjunction, the videos

³⁷ See **Exhibit No. 1**, Supplemental Video No. 1, “APD Helicopter Footage”, 00:01 – 00:09. Available at <http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020>.

³⁸ *Id.*; see also See Pl.’s First Am. Compl, pg. 4-5, Dkt. # 5 (“Officers strategically parked their patrol vehicles, effectively blocking the exit and mitigating the risk of flight.”).

³⁹ Compare **Exhibit No. 1**, “APD Helicopter Footage”, 00:01 – 00:09 with **Exhibit No. 3**, “Critical Incident Video Briefing Video”, 10:48 - 11:05 (depicting minivan next to Ramos’s Prius, providing reference of proximity of path of vehicle).

⁴⁰ Pl.’s Second Am. Compl., pg. 17, fn. 8, Dkt. # 45, 00:40 – 00:45 (video available at <https://www.youtube.com/watch?v=7dQMDiUpLHU>).

⁴¹ **Exhibit No. 1**, “APD Helicopter Footage”, 00:05 – 00:09.

show that Ramos’s car was *very* close in proximity to where the pedestrian officers were scrambling behind the police vehicles to get out of the way, and that Plaintiff’s burden of proving that no reasonable officer would perceive the scrambling officers to be potentially in the path of the vehicle will be insurmountable.

19. Plaintiff will no doubt attempt to argue that Ramos’s car’s right turn meant that the subject pedestrian officers positioned in front of his car were—when viewed from the comfort and hindsight of an office chair⁴²—not in real danger. Pursuant to the controlling legal test, actual but-for danger is not relevant to the analysis, just as it would make no difference if a court later determined that a suspect’s gun was actually loaded with blanks. The only thing that legally matters is whether a reasonable officer would *perceive* danger in the circumstances faced. As the Fifth Circuit put it when applying the *Hathaway* test last year, Plaintiff would “[need] to show that [the other officers] were far enough away from [Ramos’s Prius] and its path, as it moved forward, that no reasonable officer could have *thought* anyone was in danger.”⁴³ Such a finding would be arguably impossible here in light of the collective video evidence. Plaintiff’s claim must consequently fail pursuant to an application of the binding *Hathaway* test.

ii. Officer Taylor had only a split second to make the decision to use deadly force to potentially save the lives of the nearby police officers scrambling out of the car’s path—satisfying the temporal prong of the *Hathaway* test.

20. The temporal prong of the *Hathaway* test likewise obviates the existence of any actionable Fourth Amendment claim here, because the video footage reflects the split-second nature of the

⁴² See *Stroik v. Ponseti*, 35 F.3d 155, 158–59 (5th Cir. 1994) (“[w]hat constitutes reasonable action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.”).

⁴³ *Malbrough*, 814 F. App’x at 805. (emphasis added).

potential danger of Ramos’s vehicle. The dash cam footage of Officer Cantu-Harkless,⁴⁴ as well as the helicopter video discussed *supra*, shows just how close Ramos’s vehicle was to the police officers who scrambled to get out of the car’s path. Based on the footage, Ramos’s vehicle was perhaps one—*maybe* two—car lengths away from the front of Officer Cantu-Harkless’ police vehicle, and thus one-to-two car lengths away from the officers standing beside it.⁴⁵ No evidence is needed to understand how long it would take a modern motor vehicle to travel that short of a distance.⁴⁶ ***Because Ramos’s vehicle could bridge that gap in a split second, Officer Taylor had even less time to make the incalculably difficult decision of whether to utilize deadly force to protect the nearby officers scrambling backwards away from the suddenly-moving car.*** Ramos’s vehicle started moving at 11:01, and Officer Taylor’s gunshot can be heard at 11:02.⁴⁷ The temporal prong, measured in the time the officer has to decide whether to use deadly force, applied here reflects the quintessential “split-second decision” that federal law gives police officers breathing room to decide under the protections of Qualified Immunity.⁴⁸ Plaintiff’s incorporated video evidence thus nullifies any claim for which relief may be granted against Officer Taylor pursuant to the binding *Hathaway* test under both the proximity and temporal prongs.

E. No law existed that was so clearly established that—“in the blink of an eye”—every reasonable officer would have known it immediately.

⁴⁴ See **Exhibit No. 3**, “Critical Incident Video Briefing Video”, 07:38 – 11:14. Available at <http://austintexas.gov/apd-critical-incidents/officer-involved-shooting-april-24-2020>.

⁴⁵ See e.g. **Exhibit No. 3**, “Critical Incident Briefing Video”, 11:01.

⁴⁶ See e.g. *id.* at 11:01 – 11:02 (depicting Ramos’s vehicle easily travelling the distance of one car length in less than one second).

⁴⁷ *Id.*

⁴⁸ See *Graham v. Connor*, 490 U.S. 386, 387 (1989) (“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and *its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary* in a particular situation.”)(emphasis added).

21. To overcome Qualified Immunity, Plaintiff here must show that Officer Taylor’s actions were unreasonable in light of clearly established law.⁴⁹ As noted by the Fifth Circuit in 2019, “excessive-force claims often turn on ‘split-second decisions’ to use lethal force. That means *the law must be so clearly established that—in the blink of an eye, in the middle of a high-speed chase—every reasonable officer would know it immediately.*”⁵⁰

22. Courts “cannot deny Qualified Immunity without identifying a case in which an officer acting under similar circumstances was held to have violated the Fourth Amendment, and without explaining why the case clearly proscribed the conduct of that individual officer.”⁵¹ As the Fifth Circuit reiterated in a 2020 decision, “[t]he Supreme Court strictly enforces the requirement to identify an analogous case and explain the analogy.”⁵² No such clearly established case precedent existed in April of 2020 that would have sprung into every reasonable officers’ mind in the split second between when Officer Taylor’s fellow officers began scrambling to escape the path of the vehicle at 11:01, and when he fired his weapon at 11:02 in the hopes of preventing them from being injured or killed.

23. The absence of the requisite clearly established law applicable to this case is reflected in *Irwin*, a January 2021 decision from the Northern District of Texas’ Honorable Jane J. Boyle.⁵³ *Irwin* is factually proximate to this case. The *Irwin* Defendant-Officers saw the plaintiff drive into a fence, and exited their own vehicle with their firearms drawn to approach the car on foot. “When

⁴⁹ *Wyatt v. Fletcher*, 718 F.3d 496, 502 (5th Cir. 2013) (citing *Michalik v. Hermann*, 422 F.3d 252, 258 (5th Cir. 2005)).

⁵⁰ *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) (emphasis added) (citing *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 582 (5th Cir. 2009)).

⁵¹ *Joseph on behalf of Est. of Joseph v. Bartlett*, 981 F.3d 319, 345 (5th Cir. 2020); see also *Irwin v. Santiago*, No. 3:19-CV-2926-B, 2021 WL 75452, at *7 (N.D. Tex. Jan. 8, 2021).

⁵² *Joseph*, 981 F.3d at 346.

⁵³ See generally *Irwin v. Santiago*, 2021 WL 75452, at *2.

Irwin’s vehicle continued rolling forward despite the Defendant-Officers’ commands, they collectively fired seven shots at the driver’s side of Irwin’s vehicle.”⁵⁴ The Court noted that there was a genuine material dispute about whether or not the police officer—alleged to be in danger—was standing directly in the path of the vehicle, or whether the officer was instead only standing “to the side of the front” of the vehicle, and thus not directly in the vehicle’s path.⁵⁵

24. The *Irwin* court granted the Defendant-Officers the protections of Qualified Immunity, because the court found no significantly similar controlling legal precedents that would “provide notice that it is unlawful to shoot at a vehicle that is rolling forward, failing to heed officers’ commands to stop, *as an officer stands ‘to the side of the front’ of the vehicle.*”⁵⁶ Whether or not the police officers in this case were in hindsight standing *directly* in the path of Ramos’s vehicle, or merely instead “to the side of the front” of it, is thus irrelevant.

25. The *Irwin* court first considered the plaintiff’s offering of *Lytle*, a Fifth Circuit decision holding that a jury could find a constitutional violation in Plaintiff’s offered summary judgment narrative—the *Lytle* officer opened fire on a fleeing vehicle, with no bystanders anywhere near the path of the vehicle, and where the officer did not start shooting until the suspect’s car “had made it three or four houses down the block.”⁵⁷ In contrast, a reasonable officer in the place of Officer Taylor would absolutely perceive that his fellow officers were in the path of Ramos’s vehicle based on their instinctual physical reactions to escape from the car seen on video. Moreover, Ramos’s vehicle had also certainly not travelled three to four houses away before Officer Taylor discharged his weapon.

⁵⁴ *Irwin v. Santiago*, 2021 WL 75452, at *2.

⁵⁵ *Id.* at *5, 7.

⁵⁶ *Id.* at *7 (emphasis added).

⁵⁷ *Id.* at *6 (citing *Lytle v. Bexar Cty., Tex.*, 560 F.3d 404, 418 (5th Cir. 2009) (holding the cited facts as true because it was required to do so for the purposes of summary judgment)).

26. The *Irwin* court next considered the plaintiff’s offering of *Garner*, for the general overall notion of when deadly force is reasonable. The court rejected outright the practice of relying on *Garner* alone, rather than a factually analogous decision:

[A]s reiterated in *Mullenix*, the Supreme Court has rejected the “use of *Garner*’s ‘general’ test for excessive force” as clearly established law. Rather, courts must determine “whether it was clearly established that the Fourth Amendment prohibited the officer’s conduct in the situation [he] confronted[.]”⁵⁸

The *Irwin* court also struck out on its own to find an analogous prior precedent, but ultimately determined that no such controlling precedent existed. The *Irwin* court’s review of the controlling cases it did find only “further bolster[ed] the Court’s conclusion that the Defendant–Officers did not have ‘fair warning’ that their conduct violated the Fourth Amendment.”⁵⁹

27. Finally, the *Irwin* court took note of a handful of out-of-circuit cases, but found them to be legally insufficient to put a police officer working within the confines of the Fifth Circuit’s jurisdiction on notice of the right at issue. “[T]he Fifth Circuit sets a high bar for out-of-circuit authority to clearly establish the law—there must be a ‘robust’ consensus among the other circuits. And the analogous cases from other circuits do not meet this bar.”⁶⁰ In the time period between the 2018 conduct—analyzed in *Irwin*—and the early 2020 events of this case, no “‘robust’ consensus” has suddenly developed that would have provided sufficient legal notice to Officer Taylor that shooting at a driver who is driving toward officers scrambling to get out of the way

⁵⁸ *Irwin v. Santiago*, 2021 WL 75452, at *7 (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)).

⁵⁹ *Id.* at *7 (citing *e.g. Sanchez*, 433 F. App’x at 273-75 (5th Cir. 2011) (per curiam) (concluding the defendant–officers acted reasonably when they shot at the plaintiff’s car as it accelerated in the direction of **one of the officers, who was “positioned near the front of the car”**); *see also e.g. Est. of Shaw v. Sierra*, 366 F. App’x 522, 524 (5th Cir. 2010) (holding no constitutional violation occurred where the defendant–officers fired after the vehicle “accelerated toward [an officer] who was approaching the vehicle on foot” and standing “directly in front of [the] vehicle”).

⁶⁰ *Irwin v. Santiago*, 2021 WL 75452, at *7 (citing *Morrow v. Meachum*, 917 F.3d 870, 879–80 (5th Cir. 2019)).

would be unconstitutional—and especially not to the extent that every officer would know it “in the blink of an eye.” Officer Taylor is consequently entitled to the protections of Qualified Immunity as a matter of law.

F. The Fifth Circuit’s recent decision to affirm *Irwin* due to a complete lack of any analogous prior case law should leave no doubt—Plaintiff’s claim fails to overcome Qualified Immunity must be dismissed.

28. In October of 2021, the Fifth Circuit affirmed the above-referenced *Irwin* decision, which should leave no doubt that Plaintiff’s eventual dismissal is inescapable based on the video evidence.⁶¹ The granting of Qualified Immunity in *Irwin* despite the finding of a factual dispute about whether any officer was in the vehicle’s direct path—and thus in hindsight whether the officers were even in true danger—is *incredibly* instructive. Both courts assumed as true the *Irwin* plaintiff’s contention that “[n]either officer ‘was positioned directly in front or in the pathway of Irwin’s vehicle.’”⁶² The District Court and Fifth Circuit also both held that a jury could accordingly find a “material dispute about the objective reasonableness of the Officers’ conduct,” or in other words a jury could look at the *Irwin* videos and conclude that the force was unreasonable or excessive—and thus potentially unconstitutional.⁶³ Plaintiff will no doubt argue the same in her Response. Even if this Court is persuaded by such an argument, the end result must necessarily be the same as it was in *Irwin* due to the lack of any directly analogous clearly established law at the time of the subject incident:

Turning to the Qualified Immunity inquiry, we conclude that the district court did not err in deciding that there is no clearly established law demonstrating that the officers’ conduct constituted an excessive use of force. The particular facts that are material here—Irwin’s failure to heed officers’ commands to stop, Officer Santiago’s position, and the brief period of time it took for the Officers to perceive and react to the direction of Irwin’s vehicle—are *not sufficiently analogous to the*

⁶¹ *Irwin v. Santiago*, No. 21-10020, 2021 WL 4932988, at *2 (5th Cir. Oct. 21, 2021).

⁶² *Id.* at *1.

⁶³ *Id.* at *3.

facts of our cases finding excessive force such that officers Santiago and Roberts would have been “on notice” that their conduct was unconstitutional... we think that *it was not a matter of clearly established law* that Officers Santiago and Roberts were unreasonable in firing on Irwin's vehicle. We therefore AFFIRM the district court's grant of summary judgment for the defendants on the basis of Qualified Immunity.⁶⁴

The same is true here. The facts of *Irwin* and this case are remarkably similar in terms of vehicle proximity—i.e. that the officers were standing *at the very least* to the side of the vehicles—and the short time available to respond to the threat.⁶⁵ The subject incident also predated the 2021 *Irwin* decision, which is crucially important because the *Irwin* decision is the first Fifth Circuit decision that would henceforth put future officers on notice of the potential unconstitutional nature of such actions.

29. As the Fifth Circuit concluded, the dispositive hinge in *Irwin* was that the “the projected path of Irwin’s vehicle was in the officer’s direction, *at least generally*, whereas [in the prior case law] the vehicle was moving *away* from the officer.”⁶⁶ No reasonable person could watch the incorporated videos and determine that Ramos’s car was moving in the *diametrically opposite* direction of the pedestrian officers, or that Ramos’s car was not facing the officer’s direction, “*at least generally*.” Any contention to the contrary is blatantly contradicted by the incorporated video evidence.⁶⁷

30. Accordingly, no clearly established law existed on April 24, 2020 that an officer could not use deadly force against the driver of a vehicle moving in the *general* direction of other officers.

⁶⁴ *Irwin v. Santiago*, 2021 WL 4932988, at *3 (emphasis added).

⁶⁵ *Id.* at fn. 1, providing links to two videos of the incident at issue in *Irwin*.

⁶⁶ *Id.*

⁶⁷ *See e.g.* Pl.’s Second Am. Compl., pg. 175, Dkt. # 45 (Plaintiff’s new pleadings make an obvious but ill-fated end-around attempt to avoid *Irwin*, including by having the temerity to represent that “[n]either Taylor nor any other officer was in front of the Prius or to its side when Taylor fired his fatal shots” despite video evidence directly to the contrary.).

Exhibit 1

Video: helifootage 4-24-20.mp4

**To be produced to the Court on a USB Flash Drive
and to Counsel via Dropbox Link**

Exhibit 2

Video: DashCam 4-24-20 (Hart).mp4

**To be produced to the Court on a USB Flash Drive
and to Counsel via Dropbox Link**

Exhibit 3

Video: Critical Incident Briefing 4-24-20.mp4

**To be produced to the Court on a USB Flash Drive
and to Counsel via Dropbox Link**

CAUSE NO. D-1-GN-22-001902

REBECA GARCIA

Plaintiff,

v.

THE CITY OF AUSTIN

Defendant.

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§
§
§
§

IN THE DISTRICT COURT

345th JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

PROPOSED ORDER

BEFORE THE COURT is Defendant's Plea to the Jurisdiction and Plaintiff's Response in Opposition to Defendant's Plea to the Jurisdiction. The Court having read and considered the Motion and Response, the Court finds that the Motion should be and is hereby **DENIED**.

IT IS SO ORDERED.

SIGNED AND ENTERED this ____ day of _____ 2023.

PRESIDING JUDGE

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CAUSE NO. D-1-GN-22-001902

REBECA GARCIA
Plaintiff,

v.

THE CITY OF AUSTIN

Defendant

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IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

345TH JUDICIAL DISTRICT

DEFENDANT'S REPLY IN SUPPORT OF PLEA TO THE JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, City of Austin, represented by and through the undersigned counsel, files this Reply in Support of its Plea to the Jurisdiction as follows:

A. Plaintiff pleaded jurisdictional facts which amount to an intentional tort.

In her response, Plaintiff contends that Defendant mischaracterizes Plaintiff's lawsuit as alleging an intentional tort, and she claims that the facts set forth in her Petition only assert that Officer Taylor acted negligently. Plaintiff's response is without merit.

A review of the facts alleged in Plaintiff's Petition reveals that Plaintiff clearly pleaded an intentional tort. Plaintiff's Petition alleges that Defendant's employees, Officer Taylor and other officers, "drew their firearms at Mike [Ramos][and] they also drew them at Rebeca." (Plaintiff's Original Petition, ¶ 14) Plaintiff further alleges that "Taylor shot Mike in the head and killed him" while the Plaintiff was just "a few feet distant from Mike." (Plaintiff's Original Petition, ¶¶ 11; 14) Plaintiff also pleaded that the Plaintiff witnessed "Mike's murder." (Plaintiff's Original Petition, ¶ 20)¹ These are not facts "mischaracterized" by the Defendant.

¹ "Murder" under Texas law requires an intentional or knowing mental state. Texas Penal Code §19.02.

These are the facts alleged by the Plaintiff in her own Petition. These facts, if taken as true, clearly allege and constitute intentional torts.

Plaintiff fails to address in any manner the cases cited by Defendant in the Plea to the Jurisdiction and is easy to understand why Plaintiff ignores them. The long line of cases clearly supports dismissal of this claim. All of the cases emphasize that the focus of the Court's analysis should be on the acts of the alleged tortfeasor and whether those acts amount to an intentional tort, no matter how Plaintiff frames the cause of action in the Petition.

For example, the Court in *Harris Cty., Tex. v. Cabazos*, 177 S.W.3d 105, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.) rejected the plaintiff's argument that he only alleged that a sheriff was negligent in discharging his firearm and thus did not assert an intentional tort. The Court in *Harris County* held that despite the plaintiff's efforts to phrase his claims in terms of negligence, the facts as alleged in the petition focused on the sheriff's intentional shooting of the firearm. *Id.* at 112. As a result, plaintiff's claims were barred by the Texas Tort Claims Act's intentional tort exclusion to waiver of immunity. *Id.* at 113. See *Huong v. City of Port Arthur*, 961 F.Supp.1003, 1008–09 (E.D.Tex.1997) (plaintiffs cannot circumvent intentional tort exception to waiver of immunity by simply pleading negligence when shooting event upon which they base their claims is actually intentional tort).

The Plaintiff in this case is attempting to do exactly what the courts in *Harris County*, *Huong* and the other cases cited in the Plea to the Jurisdiction specifically rejected. Plaintiff attempts to bypass the intentional tort exclusion by labeling her claim as a negligence claim even though she pleads facts which constitute an intentional tort. Allegations that officers drew firearms at Ramos and the Plaintiff, shot Ramos in the head and killed him, and allegations that

refer to “Mike’s murder” do not assert a negligence claim. These factual allegations allege an intentional tort and, as a result, Plaintiff’s claim is barred by the Texas Tort Claims Act.

Plaintiff also attempts to navigate around the intentional tort exception by citing to a portion of Officer Taylor’s motion to dismiss in a federal court case in which Taylor asserted that he was entitled to qualified immunity for Ramos’s excessive force claim since he had less than a split second to “make the incalculably difficult decision to utilize deadly force.” (Plaintiff’s Ex. A) Yet, this argument by Taylor in another pleading does not contain any factual allegation as to his mental state at the time of his actions. It simply describes the limited time in which he had to decide how to act under the circumstances. Plaintiff’s effort to sidestep her own factual allegations in her Petition are simply not supported by the relevant caselaw cited above or Taylor’s argument in federal court.

Although Plaintiff couches her claim as a negligence claim, the facts as alleged in Plaintiff’s Petition all describe intentional torts. A plaintiff cannot circumvent the intentional tort exception by couching her claims in terms of negligence. *See Huong v. City of Port Arthur*, 961 F.Supp.1003, 1008–09 (E.D.Tex.1997). Defendant is not relying on any other facts other than those asserted by the Plaintiff in her Petition. Plaintiff has the burden to allege jurisdictional facts to support subject matter jurisdiction. Plaintiff’s alleged facts regarding the conduct of Taylor all constitute intentional torts for which the City is immune under the Texas Torts Claim Act. Accordingly, Plaintiff’s claim should be dismissed.

B. Plaintiff failed to provide timely notice of her claim against the City.

The Texas Tort Claims Act requires that a governmental unit receive notice of a claim that describes, among other things, the damage or injury claimed within six months after the day of the incident. Further, the City of Austin’s charter requires “notice in writing of such death,

injury, damage or destruction, duly verified by affidavit, within 45 days after same has been sustained...” Austin’s City Charter Article XII Section 3, Notice of Claims. Plaintiff met neither requirement of notice, and thus her claim should be dismissed.

Plaintiff asserts in her response that the City had notice of the Plaintiff’s claim since Chief Manley’s report to the Texas Attorney General identifies the Plaintiff as being at the scene of the shooting. Yet, Manley’s report, as cited by Plaintiff, contains no indication that Plaintiff was injured or incurred any damages, and Plaintiff herself provided no notice to the City of her claim or alleged injuries until she filed this lawsuit.

Plaintiff does not raise sufficient facts to demonstrate the City had actual notice of her alleged emotional distress injury. While the City had knowledge of the incident giving rise to her claim, it did not have actual notice that the incident would bring about a claim for an emotional injury as plaintiff alleges. “Consistent with the plain meaning of the statutory language, the Tort Claims Act's notice provision requires knowledge that rises to the level of notice, which has the effect—if not the purpose—of ‘enable[ing] governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial.’” *Worsdale v. City of Killeen*, 578 S.W.3d 57, 73 (Tex. 2019) citing *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995).

Plaintiff failed to provide notice of her claim under § 101.101(a) within six months of her alleged injury. And, under § 101.101(b), the City of Austin requires notice of claims within 45 days of the alleged injury. The City of Austin did not have actual notice of Plaintiff’s injury, nor did Plaintiff bring her claim within 45 days of her injury.

Plaintiff instead improperly relies on § 101.101(c), the text of which states that the notice requirements in “Subsections (a) and (b) do not apply if the governmental unit has actual notice

that death has occurred, that the claimant received some injury, or that the claimant’s property has been damaged.” Tex. Civ. Prac. & Rem. Code § 101.101(c). “The actual notice provision requires that a governmental unit has subjective awareness that its fault, as ultimately alleged by the claimant, produced or contributed to the *claimed injuries*.” *City of San Antonio v. Tenorio*, 543 S.W.3d 772, 776 (Tex. 2018) (emphasis added). Additionally, actual notice requires “subjective knowledge of (1) a death, injury, or property damage; (2) the governmental unit’s fault that produced or contributed to the death, injury, or property damage; and (3) the parties involved.” *Id.*, citing *Cathey*, 900 S.W. 3d at 341. Plaintiff relies on Chief Manley’s letter to the Attorney General that describes the interactions taking place between officers and Mr. Ramos. The only mention of Ms. Garcia is in reference to “both subjects” and the “female exited the vehicle.” (Plaintiff’s Original Petition, ¶ 9). There is no reference to Plaintiff’s alleged emotional injury. The letter only discusses Mr. Ramos, who is not a party in this case. While the City may have had actual notice of Mr. Ramos’ death, Plaintiff provided no evidence that the City had actual notice of her injury.

Having met none of the required elements for notice under § 101.101 or the City of Austin’s Charter, Plaintiff’s claim should be dismissed for lack of jurisdiction.

RESPECTFULLY SUBMITTED,

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CAUSE NO. D-1-GN-22-001902

REBECA GARCIA
Plaintiff,

v.

THE CITY OF AUSTIN

Defendant

§
§
§
§
§
§
§
§

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

345TH JUDICIAL DISTRICT

**DEFENDANT'S SUPPLEMENTAL REPLY IN SUPPORT OF
PLEA TO THE JURISDICTION**

TO THE HONORABLE CATHERINE A. MAUZY:

Defendant, City of Austin, represented by and through the undersigned counsel, files this Supplemental Reply in Support of its Plea to the Jurisdiction as follows:

A. Plaintiff pleaded jurisdictional facts which amount to an intentional tort.

At the January 26, 2023 hearing on Defendant's Plea to the Jurisdiction, Plaintiff discussed two cases which were not included in Plaintiff's Response to the Plea to the Jurisdiction: *City of Austin v. Davis*, 693 S.W.2d 31 (Tex. App.—Austin 1985) and *Hermann Hosp. v. Martinez*, 990 S.W.2d 476 (Tex. App.—Houston (1999)). Neither of these cases is analogous to this case since the underlying actions of the tortfeasors in those cases did not involve intentional torts. Instead, the tortfeasors' actions as pleaded and as demonstrated by the evidence only involved pure negligence.

In *City of Austin v. Davis*, 693 S.W.2d 31 (Tex. App.—Austin 1985), a father brought a negligence claim against a city hospital alleging that he was entitled to recover for his own mental distress which he suffered as a bystander when he helped find his son's body after his son fell down an airshaft at the hospital. The father alleged that hospital staff negligently failed to

properly medicate and restrain his son during his son's hospitalization which led to his son leaving his room and falling down the airshaft. *Id.* at 33.

City of Austin v. Davis did not involve any intentional actions of the tortfeasors, and the Court did not address the Texas Tort Claims Act's intentional tort exception to the waiver of immunity. The only liability issue addressed by the Court was whether the father was close enough in proximity to his son's body when it was discovered to support a claim for bystander recovery. *Id.* at 33-34.

Similarly, *Hermann Hosp. v. Martinez*, 990 S.W.2d 476 (Tex. App.—Houston (1999)) did not involve any intentional actions of the tortfeasor. In *Hermann*, a family's vehicle was struck by another vehicle driven a city employee. *Id.* at 478. The mother and sister of a child who was seriously injured in the accident brought bystander claims against the city. *Id.* The city stipulated that its employee's negligence in operating the city vehicle was the proximate cause of the family's injuries, and the Court permitted a bystander claim under the Texas Tort Claims Act. *Id.* at 479-80. *Hermann* did not involve any intentional actions of the tortfeasor, and the Court did not address the Texas Tort Claims Act's intentional tort exception to the waiver of immunity.

Unlike the *Davis* and *Hermann* cases, the instant case clearly involves alleged intentional actions of the tortfeasor, and the jurisdictional facts pleaded by the Plaintiff constitute intentional torts. Plaintiff's alleged facts regarding the conduct of Taylor all constitute intentional torts for which the City is immune under the Texas Torts Claim Act. Accordingly, Plaintiff's claim should be dismissed.

RESPECTFULLY SUBMITTED,

ANNE MORGAN, CITY ATTORNEY
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CAUSE NO. D-1-GN-22-001902

REBECA GARCIA
Plaintiff,

v.
THE CITY OF AUSTIN,
Defendant.

§ IN THE DISTRICT COURT
§
§
§ 345TH JUDICIAL DISTRICT
§
§ TRAVIS COUNTY, TEXAS

ORDER GRANTING DEFENDANTS' PLEA TO THE JURISDICTION

On January 26, 2023, the Court heard the City of Austin's ("Defendant") *Plea to the Jurisdiction*. The matter was taken under advisement by the Court.

Attorney Ramiro Canales appeared for Plaintiff, Rebeca Garcia, and announced ready. Attorneys H. Gray Laird and Sara Rice appeared for Defendant and announced ready.

After considering the Motion, Response, Reply, supplemental briefing, and argument of counsel, the Court finds that Defendant's Plea to the Jurisdiction should be GRANTED and it is so ORDERED.

Signed this 21st day of February, 2023.


HON. CATHERINE A. MAUZY

CAUSE NO. D-1-GN-22-001902

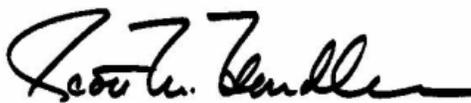
REBECA GARCIA	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
THE CITY OF AUSTIN	§	
	§	
Defendant.	§	345 th JUDICIAL DISTRICT

NOTICE OF ACCELERATED APPEAL

Pursuant to Texas Rules of Appellate Procedure 25.1(a), 26.1(b), 28.1(a), and Texas Civil Practice and Remedies Code § 51.014(a)(8), Plaintiff Rebeca Garcia appeals to the Third Court of Appeals in Austin, Texas from the interlocutory order filed in this action on February 21, 2023 granting Defendant's Plea to the Jurisdiction hereto attached as Attachment A.

Dated: March 10, 2023

**Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that the foregoing was filed on March 10, 2023 via the Court's e-file system and will be served in compliance with the Texas Rules of Civil Procedure.

A handwritten signature in black ink, appearing to read "Scott M. Hendler", written over a horizontal line.

Scott M. Hendler

CAUSE NO. D-1-GN-22-001902

REBECA GARCIA
Plaintiff,

v.
THE CITY OF AUSTIN,
Defendant.

§ IN THE DISTRICT COURT
§
§
§ 345TH JUDICIAL DISTRICT
§
§ TRAVIS COUNTY, TEXAS

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On January 26, 2023, the Court heard the City of Austin's ("Defendant") *Plea to the Jurisdiction*. The matter was taken under advisement by the Court.

Attorney Ramiro Canales appeared for Plaintiff, Rebeca Garcia, and announced ready. Attorneys H. Gray Laird and Sara Rice appeared for Defendant and announced ready.

After considering the Motion, Response, Reply, supplemental briefing, and argument of counsel, the Court finds that Defendant's Plea to the Jurisdiction should be GRANTED and it is so ORDERED.

Signed this 21st day of February, 2023.


HON. CATHERINE A. MAUZY

ATTACHMENT A

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No. 14-23-00241-CV
In the Court of Appeals
For the Fourteenth District of Texas

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
6/12/2023 3:17:13 PM
DEBORAH M. YOUNG
Clerk of The Court

REBECA GARCIA

APPELLANT,

v.

THE CITY OF AUSTIN

APPELLEE.

On Appeal from the 345th District Court of Travis County, Texas
Cause No. D-1-GN-22-001902, Honorable Catherine Mauzy, Judge Presiding

APPELLANT REBECA GARCIA'S BRIEF

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ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

Identity of Parties and Counsel.....	i
Table of Contents.....	iii
Index of Authorities.....	v
Record References.....	vi
Statement of the Case.....	vii
Statement Regarding Oral Argument.....	viii
Standard of Review.....	ix
Issues Presented.....	xi
I. Whether the trial court erred in granting Appellee’s plea to the jurisdiction.	
II. Whether the City of Austin met the traditional-summary- judgment-like burden to establish governmental immunity.	
Introduction.....	xii
Statement of Facts.....	1
Summary of the Argument.....	3
Argument.....	4
I. The Trial Court Has Jurisdiction to Hear a Claim of Negligent Infliction of Emotional Distress.....	4
II. Appellee Did Not Present Any Evidence to Meet Its Burden.....	5
III. Appellee Had Actual Notice of Appellant’s Injury.....	5

IV. Appellee Improperly Challenged the Merits of Appellant’s Claim.....5

Conclusion and Prayer.....6

Certificate of Compliance.....7

Certificate of Service.....7

APPENDIX

TAB A.....Trial Court’s Order

INDEX OF AUTHORITIES

Cases

<i>Bacon v. Texas Hist. Comm'n</i> , 411 S.W.3d 161, 171 (Tex. App. – Austin 2013, no pet.).....	x,5
<i>Bland Indep. Sch. Dist. v. Blue</i> , 34 S.W.3d 547, 554 (Tex. 2000).....	ix,5
<i>Houston Belt & Terminal Ry. v. City of Houston</i> , 487 S.W.3d 154, 160 (Tex. 2016).....	ix
<i>Office of Attorney Gen. v. Crawford</i> , 322 S.W.3d 858, 861, n. 8 (Tex.App. – Houston [1 st Dist.] 2010, pet. denied).....	ix
<i>Texas Dep't of Parks & Wildlife v. Miranda</i> , 133 S.W.3d 217, 228 (Tex. 2004).....	ix,x,5

Statutes

TEX. CIV. PRAC. & REM. CODE	
§ 101.101(c).....	5

Rules

TEX. R. APP. P. 9.4(i)(1).....	7
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RECORD REFERENCES

Appellant Rebeca Garcia will be cited as “Appellant.”

Appellee the City of Austin will be cited as “Appellee.”

The appellate record consists of one volume of the Clerk’s Record and one volume of the Reporter’s Record. Appellant will cite the record as follows:

Clerk’s Record

(Volume) CR [page no.]

Reporter’s Record

(Volume) RR [page no.]

Appendix

Appendix - TAB [letter]

STATEMENT OF THE CASE

*Nature of the Case
and Parties:*

Appellant filed an original petition making a claim of negligent infliction of emotional distress under the bystander theory of recovery. (1 CR 4-13). Appellee filed an answer, affirmative defenses, and a plea to the jurisdiction. (1 CR 17-28). Appellant filed a response to the plea to the Jurisdiction. (1 CR 35-63). Appellee filed a reply and a supplemental reply. (1 CR 64-72).

Trial Court:

Honorable Catherine Mauzy, 345th Judicial District Court, Travis County, Texas.

*Trial Court's
Disposition:*

A hearing on Appellee's plea to the jurisdiction was held on January 26, 2023. (1 CR 29-30, 1 RR 1-12). The trial court granted Appellee's plea to the jurisdiction. (1 CR 78-78) (Appendix-TAB A).

STATEMENT REGARDING ORAL ARGUMENT

Because this appeal involves an analysis of case law regarding governmental immunity, Appellant does not believe that oral argument is necessary.

STANDARD OF REVIEW

“Appellate courts reviewing a challenge to a trial court's subject matter jurisdiction review the trial court's ruling *de novo*.” *Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). “A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit.” *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). “The claims may form the context in which a dilatory plea is raised, but the plea should be decided without delving into the merits of the case.” *Id.* “The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs’ claims should never be reached.” *Id.*

In determining jurisdiction, a trial court must “construe the pleadings liberally in the pleader’s favor and look to their intent.” *Houston Belt & Terminal Ry. v. City of Houston*, 487 S.W.3d 154, 160 (Tex. 2016). “*Only* if the pleadings affirmatively negate jurisdiction should the plea to the jurisdiction be granted without affording the plaintiffs an opportunity to replead.” *Id.* (emphasis added); *see also Office of Attorney Gen. v. Crawford*, 322 S.W.3d 858, 861, n. 8 (Tex.App. – Houston [1st Dist.] 2010, pet. denied) (relying on dictionary definition of “‘only’ to mean, among other things, ‘no more than; nothing other than...nothing more besides; solely, merely, exclusively or ‘By itself, alone, without anything else.’”).

“If the challenged jurisdictional fact[s] overlap[] with the merits of the plaintiff’s claim[], the party asserting the plea to the jurisdiction must overcome a traditional-summary-judgment-like burden and conclusively negate th[e] fact[s].” *Bacon v. Texas Hist. Comm’n*, 411 S.W.3d 161, 171 (Tex. App. – Austin 2013, no pet.). “Our ultimate inquiry is whether the particular facts presented, as determined by the foregoing review of the pleadings and any evidence, affirmatively demonstrate a claim within the trial court’s subject-matter jurisdiction.” *Id.* “If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder.” *Miranda*, 133 S.W.3d at 227-228.

ISSUES PRESENTED

- I. Whether the trial court erred in granting Appellee's plea to the jurisdiction.
- II. Whether the City of Austin met the traditional-summary-judgment-like burden to establish governmental immunity.

TO THE HONORABLE FOURTEENTHCOURT OF APPEALS:

Appellant appeals the trial court's order, which, without any analysis or citation to legal authority, erroneously granted Appellee's plea to the jurisdiction. The trial court's order is bad precedent that affects the rights of claimants who plead a claim of negligent infliction of emotional distress.

A trial court must liberally construe pleadings and accept them as true. A court cannot determine its jurisdiction based on a claim that was not pled. Allowing adversaries to mischaracterize a cause of action sets a bad precedent and creates confusion for claimants in future proceedings. Furthermore, fact questions regarding jurisdiction must be decided by the fact finder. A trial court cannot usurp the role of jury in determining its jurisdiction.

The trial court's order granting Appellee's plea to the jurisdiction must be reversed.

STATEMENT OF FACTS

On April 24, 2020, City of Austin Police officer Chris Taylor, shot and killed Mike Ramos, an unarmed Black man, in front of his girlfriend, Appellant Rebeca Garcia. (1 CR 4).

On April 12, 2022, City of Austin Police Officer Chris Taylor, filed “Defendant Christopher Taylor’s Motion to Dismiss Plaintiff’s Second Amended Complaint and Supporting Brief” in Cause No. 1:20-cv-01256-RP in the U.S. District Court in the Western District of Texas, Austin Division. (1 CR 41-63).

On April 22, 2022, Appellant filed her Original Petition in Travis County, Texas. (1 CR 4-13). As a bystander who witnessed the traumatic killing of Mike Ramos, Appellant filed a claim of negligent infliction of emotional distress against the City of Austin. (1 CR 10-11).

On May 23, 2022, Appellee filed an Original Answer and Affirmative Defenses. (1 CR 17-20).

On November 17, 2022, Appellee filed a Plea to the Jurisdiction. (1 CR 21-28).

On January 19, 2023, Appellant filed a Response in Opposition to Appellee’s Plea to the Jurisdiction. (1 CR 35-63).

On January 24, 2023, Appellee filed a Reply in Support of Plea to the Jurisdiction. (1 CR 64-69).

On January 26, 2023, a hearing was held on Appellee's Plea to the Jurisdiction. (1 CR 29-30, 1 RR 1-12).

On January 30, 2023, Appellee filed a Supplemental Reply. (1 CR 70-72).

On February 21, 2023, the trial court granted Appellee's Plea to the Jurisdiction. (1 CR 78). The trial court order does not state the reason(s) for granting the Plea to the Jurisdiction.

On March 10, 2023, Appellant filed a Notice of Accelerated Appeal. (1 CR 82-84).

SUMMARY OF THE ARGUMENT

A trial court must accept Plaintiff's pleadings as true and cannot create a cause of action that was not pled. In this case, the trial court did the opposite of what Texas Supreme Court precedents require. Without explanation, the trial court granted Appellee's plea to the jurisdiction. (1 CR 78). Contrary to what Plaintiff pled, Appellee argued that the trial court should grant its plea because Plaintiff's bystander claim of "negligent infliction of emotional distress" was actually an "intentional tort[]". (1 CR 24). As Plaintiff's Original Petition indicates, that is not the case. (1 CR 10-11). On this point, the trial court erred.

Additionally, the trial court erred by not requiring Appellee to meet the traditional-summary-judgment-like burden to negate jurisdictional facts that overlapped with Plaintiff's claim of negligent infliction of emotional distress. In fact, Appellee did not submit any evidence. Without evidence, the trial court had no basis to grant Appellee's plea to the jurisdiction. Plaintiff submitted evidence from a federal proceeding that created a fact question regarding the court's jurisdiction. (1 CR 35-63). Only a fact finder can answer the fact question and determine whether the court has jurisdiction.

ARGUMENT

I. The Trial Court Has Jurisdiction to Hear a Claim of Negligent Infliction of Emotional Distress.

Appellant, a bystander, pled a negligent infliction of emotional distress claim. (1 CR 10-11). In its Plea to the Jurisdiction, Appellee mischaracterized Appellant's negligence claim as an intentional claim to defeat subject matter jurisdiction. Adding an element of proof to Appellant's negligent infliction of emotional distress claim has no basis in law, and Appellee did not cite any Texas Supreme Court precedent that requires it.

Officer Taylor does not claim that his decision to use deadly force was intentional. In a motion to dismiss based on qualified immunity filed in federal court in the Western District in Austin, he told the Court that Mike Ramos's vehicle could travel a short distance "in a split second" and that "he had even less time to make the incalculably difficult decision to utilize deadly force." (1 CR 52). Because of Officer Taylor's representations in federal court, Appellant plead a negligence claim. Negligent infliction of emotional distress of a bystander is a cause of action recognized in Texas courts. Appellee cannot circumvent Officer Taylor's representations in federal court regarding his decision to use deadly force in "even less time" than a split second against Mike Ramos. (1 CR 52).

II. Appellee Did Not Present Any Evidence to Meet Its Burden.

Appellee challenges the jurisdictional facts, but it does not attach any evidence to its plea as required in a traditional motion for summary judgment. *Bacon*, 411 S.W.3d at 171. Conclusory allegations are insufficient. Appellee has the initial burden to provide evidence. *Miranda*, 133 S.W.3d at 228. Without evidence, Appellee did not carry its burden.

III. Appellee Had Actual Notice of Appellant's Injury.

Appellant was not required to provide written notice under the Texas Tort Claims Act and the City of Austin's Charter because Appellee had actual notice of the injury to Appellant. TEX. CIV. PRAC. & REM. CODE. § 101.101(c) (notice requirements do not apply if the "governmental unit . . . has actual notice . . . that the claimant received some injury."). Appellee had actual notice as noted in Chief Manley's report to the Texas Attorney General. (1 CR 9).

IV. Appellee Improperly Challenged the Merits of Appellant's Claim.

The merits of Appellant's claim have no bearing in determining a trial court's jurisdiction. Because Appellee mischaracterized Appellant's claim and improperly challenged the merits of the negligent infliction of emotional distress claim in its dilatory plea, it should have been denied. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 554 ("The claims may form the context in which a dilatory plea is raised, but the plea should be decided without delving into the merits of the case.").

CONCLUSION AND PRAYER

WHEREFORE, Appellant respectfully prays that the Fourteenth Court of Appeals reverse the trial court's order granting Appellee's plea to the jurisdiction. She further prays for such other and further relief at law and equity to which Appellant may be entitled.

Dated: June 12, 2023

Respectfully submitted,

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/s/ Ramiro Canales

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I hereby certify that Appellant Rebecca’s Brief contains 2,323 words, excluding the specific sections identified in TEX. R. APP. P. 9.4(i)(1). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes that are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare this document.

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No. 14-23-00241-CV

In the Court of Appeals
For the Fourteenth District of Texas

REBECA GARCIA

APPELLANT,

v.

THE CITY OF AUSTIN

APPELLEE.

APPENDIX

TAB A.....Trial Court's Order

TAB A

Trial Court's Order

CAUSE NO. D-1-GN-22-001902

REBECA GARCIA
Plaintiff,

v.
THE CITY OF AUSTIN,
Defendant.

§ IN THE DISTRICT COURT
§
§
§ 345TH JUDICIAL DISTRICT
§
§ TRAVIS COUNTY, TEXAS

ORDER GRANTING DEFENDANTS' PLEA TO THE JURISDICTION

On January 26, 2023, the Court heard the City of Austin's ("Defendant") *Plea to the Jurisdiction*. The matter was taken under advisement by the Court.

Attorney Ramiro Canales appeared for Plaintiff, Rebeca Garcia, and announced ready. Attorneys H. Gray Laird and Sara Rice appeared for Defendant and announced ready.

After considering the Motion, Response, Reply, supplemental briefing, and argument of counsel, the Court finds that Defendant's Plea to the Jurisdiction should be GRANTED and it is so ORDERED.

Signed this 21st day of February, 2023.


HON. CATHERINE A. MAUZY

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No. 14-23-00241-CV

**IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS**

REBECA GARCIA
Appellant

v.

THE CITY OF AUSTIN,
Appellee

On Appeal from the 345th District Court of Travis County, Texas
Cause No. D-1-GN-22-001902, Honorable Catherine Mauzy, Judge Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS i

INDEX OF AUTHORITIES..... ii

RECORD REFERENCES1

STATEMENT OF THE CASE.....1

ISSUE PRESENTED2

STATEMENT OF FACTS.....2

SUMMARY OF THE ARGUMENT3

ARGUMENT.....4

I. The trial court did not err in granting the City’s Plea to the Jurisdiction.4

A. Appellant must allege and prove a waiver of the City’s governmental immunity.....4

B. The Texas Tort Claims Act’s limited waivers of immunity do not apply.....6

C. Appellant pleaded jurisdictional facts which amount to an intentional tort, and thus her claim is barred by governmental immunity.....7

II. The City Concedes Actual Notice Under Tex. Civ. Prac. & Rem. Code Sec. 101.10111

CONCLUSION.....11

CERTIFICATE OF COMPLIANCE12

CERTIFICATE OF SERVICE12

INDEX OF AUTHORITIES

Cases

<i>Cathey v. Booth</i> , 900 S.W.2d 339, 341 (Tex. 1995).....	11
<i>City of Laredo v. Nuno</i> , 94 S.W.3d 786, 789 (Tex. App.-San Antonio 2002.);	8
<i>General Services Comm’n v. Little-Tex Insulation Co., Inc.</i> , 39 S.W.3d 591, 594 (Tex. 2001)....	4
<i>Harris County, Tex. v. Cabazos</i> , 177 S.W.3d 105, 111 (Tex. App.—Houston [1 st Dist.] 2005)....	8
<i>Hughes v. Tom Green County</i> , 553 S.W.3d 1, 7 (Tex. App.—Austin 2017)	4
<i>Huong v. City of Port Arthur</i> , 961 F.Supp.1003, 1008–09 (E.D.Tex.1997).....	8, 10
<i>Medrano v. City of Pearsall</i> , 989 S.W.2d 141, 144 (Tex.App.-San Antonio 1999).....	8
<i>Sharyland Water Supply Corp. v. City of Alton</i> , 354 S.W.3d 407, 414 (Tex. 2011)	4
<i>Tarrant County Hosp. Dist. v. Henry</i> , 52 S.W.3d 434, 450 (Tex.App.-Fort Worth 2001);.....	8
<i>Texas Ass’n of Bus. v. Texas Air Control Bd.</i> , 852 S.W.2d 440, 443 (Tex. 1993).	5
<i>Texas Dept of Parks and Wildlife v. Miranda</i> , 133 S.W.3d 217, 225-226 (Tex. 2004).	4,5
<i>Texas Dept of Public Safety v. Petta</i> , 44 S.W.3d 575, 580 (Tex. 2001);.....	8
<i>Texas Dept. of Transportation v. Jones</i> , 8 S.W.3d 636, 638-39 (Tex. 1999).....	5
<i>University of Tex. Med. Branch v. York</i> , 871 S.W.2d 175, 177 (Tex. 1994).....	5
<i>Wasson Interests, Ltd. v. City of Jacksonville</i> (“Wasson I”), 489 S.W.3d 427, 429-30 (Tex. 2016).	4

Statutes

<i>Tex. Civ. Prac. & Rem. Code</i> §101.057(2).....	3, 7
<i>Tex. Civ. Prac. & Rem. Code Ann.</i> §101.021.	6
Texas Tort Claims Act Sec. 101.101 (a) and (b).	2, 11
<i>Tex. Civ. Pr. & Rem. Code</i> § 101.0215(a)(1).....	2

Rules

Rule 9.4 of the Texas Rules of Appellate Procedure 12

RECORD REFERENCES

Clerk's Record. Citations to the Clerk's Record will be to "CR" with the page number following, e.g., "CR 1."

Reporter's Record. Citations to the Reporter's Record will be to "RR" with the page number following, e.g., "RR 2."

STATEMENT OF THE CASE

Nature of the Case: Plaintiff-Appellant Rebeca Garcia filed suit against the City of Austin asserting a claim for negligent infliction of emotional distress arising out of an officer-involved shooting on April 24, 2020.

Trial Court: Cause No. D-1-GN-22-001902, Rebeca Garcia, Plaintiff, v. City of Austin, Defendant, in the 345th District Court of Travis County, Texas

Trial Court's Disposition: The trial court granted the City of Austin's Plea to the Jurisdiction. (1 CR 78)

ISSUE PRESENTED

- I. Whether the trial court erred in granting the City's Plea to the Jurisdiction when the Appellant's facts, as pleaded in her Petition, amount to an intentional tort for which there is no waiver of immunity under the Texas Tort Claims Act.
- II. The City Concedes Actual Notice Under Tex. Civ. Prac. & Rem. Code Sec. 101.101.

STATEMENT OF FACTS

This lawsuit arises out of an officer-involved shooting which occurred on April 24, 2020 in Austin, Texas. Appellant Rebeca Garcia alleges that her boyfriend, Mike Ramos, was shot and killed by Austin Police Officer Christopher Taylor after Taylor and other police officers responded to a 911 call about a man with a gun and a woman using drugs in a vehicle while the vehicle was parked in the parking lot of an apartment complex. (1 CR 4-11) Appellant alleges that the City's employees, Officer Taylor and other officers, "drew their firearms at Mike [Ramos][and] they also drew them at Rebeca." (1 CR 10) Appellant further alleges that "Taylor shot Mike in the head and killed him" while the Appellant was just "a few feet distant from Mike." (1 CR 9-10) Appellant also pleaded that she witnessed "Mike's murder." (1 CR 11)

Appellant brought this lawsuit against the City of Austin, alleging that the City is liable for the actions of its employee, Officer Taylor, under the Texas Tort Claims Act. Tex. Civ. Pr. & Rem. Code § 101.0215(a)(1). (I CR 11) Appellant

couches this lawsuit as a claim against the City for Officer Taylor’s “negligent infliction of emotional distress” on Appellant. (1 CR 11)

SUMMARY OF THE ARGUMENT

The Texas Tort Claims Act does not waive a governmental unit’s immunity for a claim arising from assault, battery or any other intentional tort. *Tex. Civ. Prac. & Rem. Code* §101.057(2). Although Appellant couches her claim as a negligence claim, the facts as alleged in Appellant’s Petition all describe intentional torts. Appellant alleges that Officer Taylor and other APD officers drew their firearms at Ramos and the Appellant, and Taylor ultimately shot his firearm at Ramos, which is an intentional tort.

A plaintiff cannot circumvent the intentional tort exception by couching her claims in terms of negligence. That is exactly what the Appellant in this case attempted to do. As a result, the City is immune from Appellant’s state law personal injury claim, and the trial court did not err in granting the City’s Plea to the Jurisdiction.

ARGUMENT

I. The trial court did not err in granting the City’s Plea to the Jurisdiction.

A. Appellant must allege and prove a waiver of the City’s governmental immunity.

Governmental immunity shields Texas cities from suit for common law and statutory claims arising out of their governmental functions unless there is a clear legislative waiver. *Wasson Interests, Ltd. v. City of Jacksonville* (“*Wasson I*”), 489 S.W.3d 427, 429-30 (Tex. 2016). Government immunity from suit deprives the trial court of subject matter jurisdiction and, thus, is properly asserted in a plea to the jurisdiction. *Texas Dep’t of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 225-226 (Tex. 2004).

The State’s consent to jurisdiction may be alleged either by reference to a statute or by pleading express legislative permission. *General Services Comm’n v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex. 2001). Texas does not recognize the doctrine of waiver of governmental immunity by conduct. *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 414 (Tex. 2011); *see also Hughes v. Tom Green County*, 553 S.W.3d 1, 7 (Tex. App.—Austin 2017, pet. granted) (“the Supreme Court and this Court have repeatedly declined to apply a waiver-by-conduct theory”). Rather, legislative consent to sue must be made in “clear and unambiguous language.” *University of Tex. Med. Branch v. York*, 871

S.W.2d 175, 177 (Tex. 1994). Absent this consent, the trial court lacks a jurisdictional basis to hear the claim. *Texas Dept. of Transportation v. Jones*, 8 S.W.3d 636, 638-39 (Tex. 1999).

When subject matter jurisdiction is contested, “[t]he trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the litigation to proceed.” *Id.* at 226. Whether the trial court has subject matter jurisdiction is a question of law. *Id.*

A plaintiff bears the burden to allege facts that affirmatively demonstrate the trial court’s jurisdiction to hear a case. *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). If the pleadings affirmatively negate the existence of jurisdiction, the plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. *Miranda*, 113 S.W.3d at 226-27.

Here, Appellant does not allege that a specific waiver of the City’s governmental immunity applies. The Original Petition makes no mention of any waiver of the City’s governmental immunity and Appellant again does not identify a specific waiver in her brief to this Court. As a result, her claim fails as a matter of law. (1 CR 4-12)

B. The Texas Tort Claims Act's limited waivers of immunity do not apply.

The Texas Tort Claims Act provides in pertinent part:

“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 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; and

(2) personal injury and 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.”

Tex. Civ. Prac. & Rem. Code Ann. §101.021.

As stated above, Appellant does not identify a specific waiver of immunity, and thus her claim fails on that ground alone. Even if one assumes that Appellant intended to proceed under the limited waiver found in *Tex. Civ. Prac. & Rem. Code Ann.* §101.021(2) for personal injury and death caused by the use of tangible personal property, Appellant's claim is futile since the Texas Tort Claims Act clearly establishes that the state has not waived immunity for intentional torts. The Texas

Tort Claims Act does not waive a governmental unit's immunity for a claim arising from assault, battery or any other intentional tort. *Tex. Civ. Prac. & Rem. Code* §101.057(2).

C. Appellant pleaded jurisdictional facts which amount to an intentional tort, and thus her claim is barred by governmental immunity.

No matter how Appellant now attempts to couch her factual allegations, the facts as alleged in her Petition clearly describe an intentional tort. Appellant alleges in her Petition that her boyfriend, Mike Ramos, was shot and killed by Austin Police Officer Christopher Taylor after Taylor and other police officers responded to a 911 call about a man with a gun and a woman using drugs in a vehicle while the vehicle was parked in the parking lot of an apartment complex. (1 CR 4-11) Appellant alleges that the City's employees, Officer Taylor and other officers, "drew their firearms at Mike [Ramos][and] they also drew them at Rebeca." (1 CR 10) Appellant further alleges that "Taylor shot Mike in the head and killed him" while the Appellant was just "a few feet distant from Mike." (1 CR 9-10) Appellant also pleaded that she witnessed "Mike's murder." (1 CR 11)¹ Appellant alleges that she jumped out of the car just before Taylor shot Ramos, and that she witnessed the shooting of Ramos. (1 CR 9)

¹ "Murder" under Texas law requires an intentional or knowing mental state. Texas Penal Code §19.02.

The above facts are not facts “mischaracterized” by the City as Appellant argues. These are the facts alleged by the Appellant in her own Petition. These facts, if taken as true, clearly allege and constitute intentional torts.

Here, the gravamen of Appellant’s Petition is that Officer Taylor wrongfully shot Ramos, while Appellant was in the near vicinity of Ramos, which is clearly an intentional tort, and thus Appellant’s claim against the City is barred by governmental immunity. *See Harris County, Tex. v. Cabazos*, 177 S.W.3d 105, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.)(immunity not waived for claim arising out of deliberate shooting by deputy sheriff). As the Court of Appeals in *Harris County, Tex. v. Cabazos* explained: “[i]f a plaintiff pleads facts which amount to an intentional tort, no matter if the claim is framed as negligence, the claim generally is for an intentional tort and is barred by the TTCA.” *Harris County*, 177 S.W.3d at 111; *citing Texas Department of Public Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001); *City of Laredo v. Nuno*, 94 S.W.3d 786, 789 (Tex. App.-San Antonio 2002, no pet.); *Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434, 450 (Tex.App.-Fort Worth 2001, no pet.); *Medrano v. City of Pearsall*, 989 S.W.2d 141, 144 (Tex.App.-San Antonio 1999, no pet.). A plaintiff cannot circumvent the intentional tort exception by couching her claims in terms of negligence. *See Huong v. City of Port Arthur*, 961 F.Supp.1003, 1008–09 (E.D.Tex.1997) (plaintiffs cannot circumvent intentional tort exception to waiver

of liability by simply pleading negligence when the shooting event upon which they base their claims is actually an intentional tort).

Appellant fails to address in any manner this well-known, long line of cases, and it is easy to understand why she ignores them. This established authority clearly supports dismissal of this claim. All of the cases emphasize that the focus of the Court's analysis should be on the acts of the alleged tortfeasor, and whether those acts amount to an intentional tort, no matter how a plaintiff frames the cause of action in the petition.

Appellant in this case is attempting to do exactly what the courts in the above cases have prohibited. She argues that the City has "mischaracterized" her negligence claim as an intentional tort claim and has added an element of proof to her purported negligent infliction of emotional distress claim. Appellant also contends that the City has improperly challenged the merits of Appellant's claim. The City has done no such things. Instead, the City has relied solely on the Appellant's own facts as alleged in her Petition to demonstrate that Appellant's factual allegations allege an intentional tort. Allegations that officers drew firearms at Ramos and the Plaintiff, shot Ramos in the head and killed him, and allegations that refer to "Mike's murder" do not assert a negligence claim. (1 CR 4-11) These factual allegations allege an intentional tort and, as a result, Plaintiff's claim is barred by the Texas Tort Claims Act.

Appellant also attempts to navigate around the intentional tort exception by citing to a portion of Officer Taylor's motion to dismiss in a federal court case in which Taylor asserted that he was entitled to qualified immunity for Ramos's excessive force claim since he had less than a split second to "make the incalculably difficult decision to utilize deadly force." (Appellant's Brief at 4) Yet, this argument by Taylor in another pleading does not contain any factual allegation as to his mental state at the time of his actions. It simply describes the limited time in which he had to decide how to act under the circumstances. Appellant's effort to sidestep her own factual allegations in her Petition are simply not supported by the relevant caselaw cited above or Taylor's argument in federal court.

Although Appellant couches her claim as a negligence claim, the facts as alleged in her Petition all describe intentional torts. A plaintiff cannot circumvent the intentional tort exception by couching her claims in terms of negligence. *See Huong v. City of Port Arthur*, 961 F.Supp.1003, 1008–09 (E.D.Tex.1997). The City is not relying on any other facts other than those asserted by Appellant in her Petition. Appellant had the burden to allege jurisdictional facts to support subject matter jurisdiction. Appellant's alleged facts regarding the conduct of Taylor all constitute intentional torts for which the City is immune under the Texas Torts Claim Act. Accordingly, the trial court did not err in granting the City's Plea to the Jurisdiction and dismissing the Appellant's claims against the City.

II. The City Concedes Actual Notice Under Tex. Civ. Prac. & Rem. Code Sec. 101.101

The City of Austin acknowledges that it received sufficient notice of Appellant's claim under Texas Tort Claims Act Sec. 101.101 (a) and (b). Compliance with the notice provisions of the Texas Tort Claims Act is a prerequisite to a waiver of governmental immunity. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). The City concedes that Appellant met such prerequisite.

CONCLUSION

For the above reasons, Appellee City of Austin respectfully requests that the Court of Appeals affirm the trial court's grant of the City's Plea to the Jurisdiction.

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No. 14-23-00241-CV

In the Court of Appeals
For the Fourteenth District of Texas

REBECA GARCIA

APPELLANT,

v.

THE CITY OF AUSTIN

APPELLEE.

On Appeal from the 345th District Court of Travis County, Texas
Cause No. D-1-GN-22-001902, Honorable Catherine Mauzy, Judge Presiding

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<i>Antu v. Eddy</i> , 914 S.W.2d 166, 174-75 (Tex. App.—San Antonio 1995, no pet.) ...	8
<i>Bacon v. Texas Hist. Comm'n</i> , 411 S.W.3d 161, 171 (Tex. App.—Austin 2013, no pet.)	9
<i>Benavides v. Cnty. of Wilson</i> , 955 F.2d 968, 975 (5th Cir. 1992)	5, 9
<i>Boyles v. Kerr</i> , 855 S.W.2d 593, 597 (Tex. 1993).....	4
<i>City of Austin v. Davis</i> , 693 S.W.2d 31, 34 (Tex. App. 1985, writ refused n.r.e.)....	9
<i>City of Laredo v. Nuno</i> , 94 S.W.3d 786, 788 (Tex. App.—San Antonio 2002, no pet.)	6
<i>City of Tyler v. Likes</i> , 962 S.W.2d 489, 494 (Tex.1997)	2, 4, 5
<i>Freeman v. City of Pasadena</i> , 744 S.W.2d 923, 924 (Tex. 1988).....	3
<i>Harris Cnty., TX v. Cabazos</i> , 177 S.W.3d 105, 108 (Tex. App.—Houston [1 st Dist. 2005, no pet.)	6, 8
<i>Heckman v. Williamson County</i> , 369 S.W.3d 137, 150 (Tex. 2012).....	3
<i>Martinez v. Mikel</i> , 960 S.W.2d 158, 159, 161 (Tex. App.—San Antonio 1997, no pet.)	8
<i>Medrano v. City of Pearsall</i> , 989 S.W.2d 141, 143 (Tex. App.—San Antonio 1999, no pet.)	6
<i>Reagan v. Vaughn</i> , 804 S.W.2d 463, 467 (Tex. 1990).....	9
<i>Tarrant Cnty. Hosp. Dist. v. Henry</i> , 52 S.W.3d 434, 439 (Tex. App.—Fort Worth 2001, no pet.)	6
<i>Texas Dep't of Parks & Wildlife v. Miranda</i> , 133 S.W.3d 217, 228 (Tex. 2004)	9
<i>Thornton v. Home Depot U.S.A., Inc.</i> , No. A-04-CA-1039 AWA, 2006 WL 2022920, at *2 (W.D. Tex. July 17, 2006).....	4
<i>White v. United States</i> , 471 F. Supp. 3d 780, 786 (W.D. Tex. 2020).....	4
<i>Young v. City of Dimmitt</i> , 787 S.W.2d 50, 51 (Tex. 1990).....	8

Statutes

Tex. Civ. Prac. & Rem. Code § 101.021	7
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Rules

Tex. R. of App. P. 38.6(c).....	2
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TO THE HONORABLE FOURTEENTH COURT OF APPEALS:

Appellant Rebeca Garcia (“Appellant”) hereby files her Reply to Appellee’s Brief, which, without analysis or citation to legal authority, erroneously granted Appellee’s plea to the jurisdiction. Rule 38.6(c) of the Texas Rules of Appellate Procedure provides that reply briefs are due within 20 days of the date Appellee’s Brief was filed. Appellee’s Brief was filed on July 12, 2023, and 20 days after that date is Tuesday, August 1, 2023. Accordingly, this Reply is timely filed.

I. INTRODUCTION

As described in more detail in Appellant’s Brief (hereinafter App’ant Br.), the trial court’s decision to grant Appellee’s Plea to the Jurisdiction was in error. First, the trial court had jurisdiction to hear Ms. Garcia’s claim of negligent infliction of emotional distress. *See, e.g., City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex.1997) (holding that mental anguish damages may be compensable when they are a foreseeable result of a breach of duty arising out of certain “special relationships”). Second, the trial court granted the City’s plea to the jurisdiction without providing any supporting legal authority or reasoning. *See Order Granting Defendant’s Plea to the Jurisdiction (1 CR 78)* (holding, without explanation, that “Defendant’s Plea to the Jurisdiction should be GRANTED[.]” The City’s brief (hereinafter App’ee Br.) does not provide legal authority to justify the trial court’s

decision, which was in error. Accordingly, the trial court's decision should be reversed.

II. ARGUMENT AND AUTHORITIES

The trial court's order granting Appellee's plea to the jurisdiction was made in error. Appellant made out a claim below over which the trial court had jurisdiction, and the trial court should have construed the pleadings liberally in favor of jurisdiction and accepted the allegations in the pleadings as true. *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012). Appellee, as the moving party, then should have been required to "present *conclusive proof* that the trial court lacks subject-matter jurisdiction." *Id.* (emphasis added). The trial court failed to recognize that Appellant made out a valid claim under Texas law, which—as described in the next section, she did—and then further failed to hold Appellee to its burden of proof.

A. Texas recognizes a Claim for Negligent Infliction of Emotional Distress.

The trial court's order is in error because the Texas Supreme Court does recognize a claim of negligent infliction of emotional distress, in cases involving injuries of "such a shocking and disturbing nature that mental anguish is a highly foreseeable result[,]" including "actions by bystanders for a close family member's serious injury." *Likes*, 962 S.W.2d at 496 (citing *Freeman v. City of Pasadena*, 744 S.W.2d 923, 924 (Tex. 1988)); *see also White v. United States*, 471 F. Supp. 3d

780, 786 (W.D. Tex. 2020) (discussing “bystander” theory of recovery); *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993) (same). The Texas Supreme Court also recognizes the claim in certain situations involving “special relationships.” *Likes*, 962 S.W.2d at 494. These “special relationships” include, but are not limited to, those involving “intensely emotional” subjects, which may be implicated in this case.

Here, Officer Taylor shot and killed Mike Ramos in front of his girlfriend, Appellant Rebeca Garcia. Seeing the shooting death of her boyfriend constitutes, in Appellant’s view, was an injury of “such a shocking and disturbing nature that mental anguish is a highly foreseeable result.” *Likes*, 962 S.W.2d at 496. Accordingly, the trial court should have construed Appellant’s petition as presenting a valid claim of negligent infliction of emotional distress through the “bystander” theory and should have taken into account Texas cases examining that theory. Texas courts have recognized in bystander cases the “elements are flexible and should be applied on a case-by-case basis.” *Thornton v. Home Depot U.S.A., Inc.*, No. A-04-CA-1039 AWA, 2006 WL 2022920, at *2 (W.D. Tex. July 17, 2006).

Next, the trial court should have required Appellee to “present *conclusive proof* that the trial court lacks subject-matter jurisdiction.” *Heckman*, 369 S.W.3d

at 150. Only then should the trial court have granted a plea to the jurisdiction. The trial court's error resulted in it rendering an incorrect judgment.

B. Officer Taylor's Intentional Shooting of Mike Ramos Does Not Preclude Appellant's Claim for Negligent Infliction of Emotional Distress.

Appellee argues that Appellant's invocation of negligent infliction of emotional distress is erroneous or disingenuous because "[t]he facts as alleged in Appellant's Petition all describe intentional torts." App'ee Br. at 3. But it is not Appellee's right to twist Appellant's claims. Though Officer Taylor may have "shot his firearm at [Mike] Ramos, which is an intentional tort," *id.* at 3, he was *negligent* in his infliction of emotional distress on Rebeca Garcia, who was a bystander to the intentional tort. Bystander liability is recognized in Texas. *Benavides v. Cnty. of Wilson*, 955 F.2d 968, 975 (5th Cir. 1992) (stating that "Texas courts recognize such a cause of action" where plaintiff shows that "her emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the incident, as contrasted with learning of the accident from others after the occurrence."); *Likes*, 962 S.W.2d at 496.

Appellee has provided no proof that Officer Taylor *intentionally* chose to cause or intended to cause *Ms. Garcia* emotional distress, and does not even try to make that argument. Appellee glosses over the negligent infliction of emotional "bystander" distress suffered by *Ms. Garcia* by arguing that Officer Taylor

intentionally shot Ramos—the trial court should have disregarded this argument as incorrect under the law and should have required Appellee to conclusive proof that the trial court lacked jurisdiction over Appellant’s claim.

Appellee claims that Appellant is “circumventing” that the tort committed in this case was intentional. But the “long line of cases” Appellee cites to “prove” that Appellant is impermissibly mislabeling her claim, *see* App’ee Br. at 8, are not on point. None of the cases cited involve a claim for negligent infliction of emotional distress, which is what is at issue here. *See Harris Cnty., TX v. Cabazos*, 177 S.W.3d 105, 108 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (claiming that “Harris County negligently implemented policies and procedures for the arrest of a suspect, and that Haynes negligently discharged his pistol to assault appellee and negligently effectuated appellee’s arrest while acting in bad faith”); *City of Laredo v. Nuno*, 94 S.W.3d 786, 788 (Tex. App.—San Antonio 2002, no pet.) (asserting negligence and gross negligence claims against City that did not include emotional distress); *Tarrant Cnty. Hosp. Dist. v. Henry*, 52 S.W.3d 434, 439 (Tex. App.—Fort Worth 2001, no pet.) (noting that plaintiff sued a hospital district for “assault and battery, intentional infliction of emotional distress, negligence, violations of the Texas Commission on Human Rights Act (TCHRA), breach of contract, and exemplary damages.”); *Medrano v. City of Pearsall*, 989 S.W.2d 141, 143 (Tex. App.—San Antonio 1999, no pet.) (alleging that three individuals were assaulted

by police while handcuffed, that City-issued property was used to effectuate the injuries, and that the City was negligent in hiring and training the officers).

None of these cases involve a City's immunity for its officer negligently inflicting emotional distress; accordingly, they should be disregarded.

C. Appellee's Governmental Immunity Is Not Triggered by the Negligent Action of an Employee.

Appellee argues that Appellant does not "identify a specific waiver" to the City's governmental immunity for intentional tort. App'ee. Br. at 5. But, again, Appellant does not need to identify a waiver to the City's immunity from suit, as the tort Appellant alleged stemmed from *negligence*. Appellee cites the Texas Tort Claims Act ("TTCA"), which provides in part: "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 employment if . . . (B) the employee would be personally liable to the claimant according to Texas law" and the claim would make a private person liable to claimant under Texas law.

App'ee. Br. at 6 (quoting Tex. Civ. Prac. & Rem. Code § 101.021 (emphasis added)).

The TTCA provides that a governmental unity, in this case the City, may be liable for personal injury or damage caused by the negligent act of an employee acting in the scope of employment—that is what Appellant has claimed occurred in

this case. Such a claim is well-supported in Texas law. *See, e.g., Young v. City of Dimmitt*, 787 S.W.2d 50, 51 (Tex. 1990) (“Although a governmental unit is immune from claims arising out of intentional torts, petitioners’ negligent employment and entrustment claims arise out of the alleged negligence of the city employees supervising the officer, not out of the officer’s intentional tort.”); *Harris Cnty.*, 177 S.W.3d at 109 (“Although a governmental unit is immune from claims arising out of intentional torts, an injured party may still pursue a separate negligence claim arising out of the same facts.”).

Texas courts have held officers and political subdivisions, such as counties and cities, liable for negligent infliction of emotional distress and have held that immunity does not protect them from liability for that claim. *See, e.g., Antu v. Eddy*, 914 S.W.2d 166, 174–75 (Tex. App.—San Antonio 1995, no pet.) (holding that police officer and Bexar county were “not entitled to official immunity” regarding claim for “negligent infliction of emotional distress.”); *Martinez v. Mikel*, 960 S.W.2d 158, 159, 161 (Tex. App.—San Antonio 1997, no pet.) (affirming trial court’s denial of summary judgment for officer on official immunity for claims including negligent infliction of emotional distress). The officer’s infliction of emotional distress was negligent, as it was not intended, though it was also reasonably foreseeable, and the City is not entitled to immunity under the TTCA.

III. CONCLUSION

As stated in Appellant's Brief, the trial court's order is bad precedent that affects the rights of claimants who plead a claim of negligent infliction of emotional distress, and cuts against good precedent from the United States Court of Appeals for the Fifth Circuit and Texas courts that uphold the cause of action. *See, e.g., Benavides*, 955 F.2d at 975 (stating that "Texas courts recognize such a cause of action" where plaintiff shows that "her emotional distress resulted from a direct emotional impact from the sensory and contemporaneous observance of the incident, as contrasted with learning of the accident from others after the occurrence.") (quoting *Reagan v. Vaughn*, 804 S.W.2d 463, 467 (Tex. 1990)) (internal quotation marks and ellipses omitted); *see also City of Austin v. Davis*, 693 S.W.2d 31, 34 (Tex. App. 1985, writ refused n.r.e.) (upholding "bystander" cause of action for negligent infliction of emotional distress).

A trial court must liberally construe pleadings and accept them as true. As stated in Appellant's Brief, Appellee challenges the jurisdictional facts, but does not attach any evidence to its plea as required in a traditional motion for summary judgment. *Bacon v. Texas Hist. Comm'n*, 411 S.W.3d 161, 171 (Tex. App.—Austin 2013, no pet.). Conclusory allegations are insufficient. Appellee has the initial burden to provide evidence. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004). Without evidence, Appellee did not carry its

burden. Further, any fact questions regarding jurisdiction must be decided by the fact finder.

For the reasons provided herein, the arguments presented in Appellee's Brief should be disregarded, and the trial court's order granting Appellee's plea to the jurisdiction should be reversed.

IV. PRAYER

WHEREFORE, Appellant respectfully prays that the Fourteenth Court of Appeals reverse the trial court's order granting Appellee's plea to the jurisdiction. She further prays for such other and further relief at law and equity to which Appellant may be entitled.

Dated: August 1, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant Rebeca's Garcia's Reply Brief contains 1,943 words, except for the words included in the sections described in Tex. R. App. Pro. 9.4(i)(1). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for footnotes that are in 12-point typeface. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare this document.

/s/ Laura A. Goettsche

Laura A. Goettsche

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Appellant Rebeca Garcia' Reply Brief was e-served on H. Gray Laird, Appellee's counsel, via the Texas e-filing system on August 1, 2023 at the following e-mail address:

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Affirmed and Memorandum Opinion filed March 28, 2024.



In The

Fourteenth Court of Appeals

NO. 14-23-00241-CV

REBECA GARCIA, Appellant

V.

THE CITY OF AUSTIN, Appellee

**On Appeal from the 345th District Court
Travis County, Texas
Trial Court Cause No. D-1-GN-22-001902**

MEMORANDUM OPINION

An individual was shot and killed by an Austin police officer while the police officer was exercising his official duties. The individual's girlfriend, appellant Rebeca Garcia, sued the City of Austin, alleging negligent infliction of emotional distress. The City responded by filing a plea to the jurisdiction, asserting immunity from suit. The trial court granted the plea and dismissed Garcia's suit. In two issues on appeal, Garcia asserts the trial court erred in granting the plea. Reviewing the jurisdictional allegations, taking them as true, and construing them in favor of

Garcia, we conclude that Garcia's petition does not present a claim for which immunity is waived and affirm the trial court's order granting the City's plea to the jurisdiction.

BACKGROUND

According to Garcia's pleadings, Garcia and Mike Ramos were sitting in a car in the parking lot of an apartment complex. A citizen called 911 and reported that a man and woman were sitting in a gold and black Toyota Prius using drugs. The citizen reported that the man had a gun. City of Austin police officers responded, saw the Toyota Prius backed into a parking spot, and commanded both people to show their hands and get out of the car. When Ramos was out of the car officers instructed him to lift his shirt and turn in a circle. Ramos initially complied but became non-compliant and verbally confrontational. Ramos walked back toward the car, refusing verbal commands to step away from the driver's door of the car. Believing there was a gun in the car, officers shot a "less-lethal munition," which struck Ramos on the left side, but did not stop him from getting back in the car. When Ramos began to drive away, an Austin police officer shot and killed him. Garcia, who was in the car, jumped out of the car as Ramos drove away.

Garcia received no physical injuries but subsequently sued the City for negligent infliction of emotional distress. Garcia alleged that her "sensory and contemporaneous observation of the incident resulted in sever[e] shock, direct emotional impact, and extreme emotional distress."

The City filed a plea to the jurisdiction in which it alleged that Garcia failed to plead a waiver of the City's governmental immunity. The City asserted that the gravamen of Garcia's complaint was that the police officer wrongfully shot Ramos while she was in the vicinity. Because Garcia's claim of negligent infliction of emotional distress was based on the commission of an intentional tort, the City

asserted that Garcia’s claim was barred by governmental immunity.¹ Garcia responded, alleging that her claim sounded in negligence and because she was not required to prove intent, immunity did not bar her claim. After a non-evidentiary hearing, the trial court granted the City’s plea. This appeal followed.

ANALYSIS²

In two issues Garcia asserts (1) the trial court erred in granting the City’s plea to the jurisdiction; and (2) the City did not meet its burden to establish governmental immunity.

I. Standard of review and applicable law

Whether a trial court has subject matter jurisdiction is a question of law we review de novo. *City of Houston v. Williams*, 353 S.W.3d 128, 133–34 (Tex. 2011). When considering a plea to the jurisdiction, our analysis begins with the live pleadings. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). We first determine if the pleader has alleged facts that affirmatively demonstrate the court’s jurisdiction to hear the case. *Tex. Dep’t. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). In doing so, we construe the pleadings liberally in favor of the plaintiff, and unless challenged with evidence, we accept all allegations as true. *Id.* at 226–27. The plea must be granted if the plaintiff’s pleadings affirmatively negate the existence of jurisdiction or if the defendant presents undisputed evidence that

¹ The City also asserted that Garcia failed to give notice under section 101.101 of the Tort Claims Act, but on appeal has conceded actual notice.

² The Texas Supreme Court ordered the Third Court of Appeals to transfer this case to our court. *See* Tex. Gov’t Code § 73.001. Under the Rules of Appellate Procedure, “the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the transferor court under principles of stare decisis if the transferee court’s decision otherwise would have been inconsistent with the precedent of the transferor court.” Tex. R. App. P. 41.3. We are unaware of any conflict between the Third Court of Appeals precedent and that of this court on any relevant issue.

negates the existence of the court's jurisdiction. *Heckman*, 369 S.W.3d at 150.

II. The trial court did not err in granting the City's plea to the jurisdiction.

In Garcia's first issue she asserts the trial court erred in granting the City's plea to the jurisdiction. The City asserted the trial court lacked jurisdiction based on application of the doctrine of governmental immunity. Governmental immunity from suit defeats a trial court's subject matter jurisdiction and is therefore properly asserted in a plea to the jurisdiction. *See Miranda*, 133 S.W.3d at 225–26. Absent a waiver of governmental immunity, a political subdivision of the state, such as the City, may not be sued. *See Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 638 (Tex. 1999).

Tort claims against a governmental entity are governed by the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code § 101.106; *see also Miranda*, 133 S.W.3d at 224–25 (holding that the governmental entity was immune from suit for a tort unless it was expressly waived by the Texas Tort Claims Act). As pertinent to this case, the Texas Tort Claims Act waives governmental immunity from suits arising from injuries caused by a condition or use of tangible personal property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law. Tex. Civ. Prac. & Rem. Code § 101.021; *Tex. Dep't of Pub. Safety v. Petta*, 44 S.W.3d 575, 580 (Tex. 2001). The Texas Tort Claims Act waives governmental immunity for certain negligent conduct, but it does not waive immunity for claims arising out of intentional torts. Tex. Civ. Prac. & Rem. Code § 101.057; *see also City of Watauga v. Gordon*, 434 S.W.3d 586, 594 (Tex. 2014). Intentional conduct, no matter how it is pleaded, falls under the Texas Tort Claims Act's governmental immunity waiver exception. *Petta*, 44 S.W.3d at 580.

The City asserted that while Garcia's pleading alleged a claim for negligent infliction of emotional distress, the facts alleged in her pleading alleged intentional

conduct of the police officer. The specific conduct—shooting Ramos—was clearly intentional. In the trial court and in Garcia’s opening brief on appeal, she asserts that the police officer did not assert that his decision to use deadly force was intentional. Garcia relies on a motion to dismiss filed by the officer in federal court in response to a suit filed in the United States District Court for the Western District of Texas. The police officer averred in his motion that he had less than a “split second” to “make the incalculably difficult decision to utilize deadly force.” The document to which Garcia referred was a motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6). It does not contain factual allegations about the officer’s mental state at the time he shot Ramos. The speed at which the officer made the decision to use deadly force is not evidence that the officer’s act of shooting was not intentional. The officer’s affidavit in federal court is not evidence that the shooting constituted negligence.

In Garcia’s reply brief she asserts that Texas courts have held police officers and cities liable for negligent infliction of emotional distress and have held that immunity does not protect them from liability. The cases Garcia cites are distinguishable from this case in that in those cases the issue was whether an officer had official immunity, not whether a city had governmental immunity. *See Martinez v. Mikel*, 960 S.W.2d 158, 160 (Tex. App.—San Antonio 1997, no pet.) (reviewing whether officer acted in good faith in using force); *Antu v. Eddy*, 914 S.W.2d 166, 170 (Tex. App.—San Antonio 1995, no writ) (same).

Governmental immunity and official immunity are different. Official immunity protects individual officials; governmental immunity protects governmental entities. *DeWitt v. Harris Cnty.*, 904 S.W.2d 650, 653 (Tex. 1995). Whether the Texas Tort Claims Act waives governmental immunity in a given case does not affect whether the governmental employee may assert official immunity as

a defense. *Id.*

We conclude the allegations in this case fit squarely within the Texas Tort Claims Act's exclusion of claims arising out of assault, battery, or any other intentional tort. *See* Tex. Civ. Prac. & Rem. Code § 101.057. We therefore overrule Garcia's first issue.

II. The City was not required to present evidence of jurisdictional facts.

In Garcia's second issue she asserts the City was required to produce evidence to challenge the jurisdictional facts. Garcia preserved this issue by asserting her claim in response to the City's plea to the jurisdiction. When a plea to the jurisdiction challenges the pleadings, we determine if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Miranda*, 133 S.W.3d at 226. However, if a plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised, as the trial court is required to do. *Id.*

In this case, Garcia's pleadings negate jurisdiction because her allegations fit squarely within the Texas Tort Claims Act's exclusion of claims resulting from intentional torts. The City did not challenge the existence of jurisdictional facts because it alleged Garcia's pleadings affirmatively negated jurisdiction. We therefore overrule Garcia's second issue.

CONCLUSION

Having overruled Garcia's issues on appeal we affirm the trial court's final judgment dismissing the case for lack of subject-matter jurisdiction.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Bourliot, Zimmerer, and Spain.