



Telthorster moved for summary judgment on Tennell's claims, asserting that he was entitled to official immunity. A governmental employee is entitled to official immunity for (1) the performance of discretionary duties, (2) that are within the scope of the employee's authority, (3) provided that the employee acts in good faith.<sup>1</sup> Tennell does not dispute that, at the time of the incident, Telthorster was exercising a discretionary duty within the scope of his authority. Tennell contends only that Telthorster failed to establish as a matter of law that he acted in good faith in effecting the arrest.

Today, the Court holds that the need/risk assessment set forth in *Wadewitz v. Montgomery*<sup>2</sup> is not required for determining whether an officer acted in good faith in arresting a fleeing suspect.<sup>3</sup> I fully agree with that part of the Court's opinion. The Court, however, goes on to articulate a test for determining an officer's good faith based on *City of Lancaster v. Chambers*,<sup>4</sup> a case in which we sought to protect bystanders and other innocent parties from injuries sustained during an officer's high-speed pursuit of a suspect.<sup>5</sup> Based on *Chambers*, the Court holds that, to establish good faith in the arrest context, an officer must show that a reasonably prudent officer, under the same or similar circumstances, could have believed

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<sup>1</sup> *Univ. of Houston v. Clark*, 38 S.W.3d 578, 580 (Tex. 2000); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

<sup>2</sup> 951 S.W.2d 464, 466-67 (Tex. 1997).

<sup>3</sup> \_\_\_ S.W.3d \_\_\_.

<sup>4</sup> 883 S.W.2d at 656.

<sup>5</sup> *Id.*

that the disputed conduct was justified based on the information the officer possessed when the conduct occurred.<sup>6</sup>

The Court's articulation of its test demonstrates the flaw in its reasoning. The Court fails to distinguish between when an arresting officer acts with negligence and when an arresting officer acts with intent. I don't think that the Court's test applies where the officer acts negligently. The Court relies on *Chambers* for its test. But *Chambers* based its good-faith test on federal cases discussing an officer's qualified immunity to claims brought under 42 U.S.C. § 1983.<sup>7</sup> And negligent conduct alone, absent any intentional government conduct, cannot form the basis of a section 1983 claim.<sup>8</sup> Accordingly, the cases *Chambers* relied on involved more than merely negligent conduct by the officer, thereby implicating qualified immunity.

I recognize that the *Chambers* case involved negligence claims, and the Court applied the official immunity doctrine there. But the suspect was not the one asserting those claims. As mentioned, the *Chambers* Court was concerned about protecting bystanders and other innocent parties during high-speed police pursuits.<sup>9</sup> As the Court today correctly recognizes, those concerns are not implicated here.<sup>10</sup>

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<sup>6</sup> \_\_ S.W.3d \_\_.

<sup>7</sup> *Chambers*, 883 S.W.2d at 656.

<sup>8</sup> See *Daniels v. Williams*, 474 U.S. 327, 331-34 (1986); *Brooks v. Ctr. for Healthcare Servs.*, 981 S.W.2d 279, 284 (Tex. App. — San Antonio 1998, no writ); *Emerson v. Borland*, 927 S.W.2d 709, 718 (Tex. App. — Austin 1996, writ denied).

<sup>9</sup> *Chambers*, 883 S.W.2d at 656.

<sup>10</sup> \_\_ S.W.3d \_\_.

I would hold that when a suspect contends only that an officer's conduct in effecting an arrest is negligent, the officer's good faith is established as a matter of law. This is consistent with the position taken by the Restatement (Second) of Torts. Section 118 of the Restatement (Second) of Torts provides: "The use of force against another for the purpose of effecting his arrest and the arrest thereby effected are privileged if all the conditions stated in §§ 119-132, in so far as they are applicable, exist."<sup>11</sup> Of those sections, only section 132 is relevant here, because it considers the amount of force an officer uses. Section 132 provides:

The use of force against another for the purpose of effecting the arrest or recapture of the other, or for maintaining the actor's custody of him, is not privileged if the means employed are in excess of those which the actor reasonably believes to be necessary.<sup>12</sup>

While this section suggests a subjective standard for determining whether an arresting officer used excessive force. I think it more consistent to require the *Chambers* standard that the officer's good faith be established by objectively reasonable behavior. But, regardless of the standard applied, sections 118 and 132, read together, demonstrate that when the suspect fails to allege that the officer used excessive force in effecting the suspect's arrest, the officer's use of force is privileged. It follows from that premise that, unless the suspect contends that the officer used excessive force in effecting the arrest, the officer's good faith in arresting the suspect is established as a matter of law.

Here, Tennell does not contend that Telthorster used excessive force, but only that he acted negligently, which resulted in his firearm accidentally discharging. Although Tennell alleges that Telthorster

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<sup>11</sup> RESTATEMENT (SECOND) OF TORTS § 118 (1965).

<sup>12</sup> *Id.* § 132.

acted with malice, malice generally requires specific intent.<sup>13</sup> Tennell included his malice allegation within his petition's single negligence count. Tennell did not allege that Telthorster engaged in intentional misconduct during the arrest and, in fact, concedes that Telthorster accidentally discharged his firearm. Because an intentional tort requires that the actor have a specific intent to inflict injury,<sup>14</sup> and Tennell concedes that the shooting was accidental, I conclude that Tennell's claims against Telthorster are limited to negligence claims. Tennell does not contend otherwise.

I would hold, under these circumstances, that Telthorster's good faith is established as a matter of law. Therefore, the Court's discussion about whether a reasonably prudent officer, under the same or similar circumstances, could have believed that the disputed conduct was justified based on the information the officer possessed when the conduct occurred is unnecessary. While that may be the test that applies when the suspect contends that the officer used excessive force or committed another intentional tort, we are not presented with such claims here.

For these reasons, I concur in the Court's judgment.

Opinion delivered: June 27, 2002

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Craig T. Enoch  
Justice

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<sup>13</sup> See, e.g., TEX. CIV. PRAC. & REM. CODE § 41.001(7).

<sup>14</sup> See, e.g., *Reed Tool Co. v. Copelin*, 689 S.W.2d 404, 406 (Tex. 1985).