IN THE COURT OF APPEALS OF IOWA

No. 0-940 / 09-1926
Filed March 30, 2011

SHAWN DOOLEY, JAMES W. DOOLEY JR., SYLVESTER POSTLEY, TIMOTHY POSTLEY and ULSEN ANDERSON,
Plaintiffs-Appellants,

vs.

CITY OF CEDAR RAPIDS, A Government Subdivision of the State of Iowa and SHAWN HALL,
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Denver D. Dillard, Judge.

Plaintiffs injured in a motor vehicle accident appeal the dismissal of their case. **AFFIRMED.**

Milo W. Lundblad and Kenneth R. Nix of Brustin & Lundblad, LTD, Chicago, Illinois, and Linda Hassem Robbins, Cedar Rapids, for appellants.

Mohamed Sheronick and Elizabeth Jacobi, Cedar Rapids, for appellees.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

EISENHAUER, J.

Shawn Dooley, James Dooley, Jr., Sylvester Postley, Timothy Postley, and Ulsen Anderson (plaintiffs) appeal following the court's grant of summary judgment to defendants City of Cedar Rapids and Officer Shawn Hall (City). We affirm.

I. Background Facts and Proceedings.

On April 5, 2003, at 2:15 a.m., Officer Hall was on routine patrol and observed Nicholas Derring's car turning a corner. Derring appeared to turn without stopping at a red light. Derring was now travelling in the same direction as Officer Hall. Officer Hall knew "area drinking establishments had closed approximately 15 minutes prior . . . and considered the possibility that [Derring] was intoxicated." Officer Hall continued in the same direction to observe Derring's car and saw him "turn left onto the on-ramp for Interstate 380 Southbound. As [Derring's car] made its way up the on ramp, [Officer Hall] lost sight of [Derring's car] due to the roadway's topography." Officer Hall also entered Interstate 380 southbound and again observed Derring's vehicle. By then Derring's vehicle was farther away than Officer Hall thought it should be if Derring had been driving at the posted speed limit. Officer Hall estimated Derring was going 100 miles per hour. Officer Hall accelerated "to catch up to [Derring's vehicle]" in order to "pace" Derring's vehicle. Officer Hall testified he did not activate his top lights or siren as he accelerated. Officer Hall saw Derring's car lose control, drive through the median, and drive into northbound

traffic where it collided with Plaintiff's van. Officer Hall testified he turned on his flashing lights after observing the collision.

In contrast, plaintiff Ulsen Anderson testified he woke up and saw Derring's car crossing the median with Officer Hall's car behind it with flashing lights. Plaintiff Shawn Dooley testified he noticed Derring's car before it lost control because "I saw the police lights flashing coming down the highway in a high-speed chase chasing a car." Derring was killed in the collision and subsequent blood alcohol tests revealed an alcohol concentration of .225mg/dL.

In March 2005, plaintiffs filed a petition against City seeking damages. In November 2007, the court denied City's first motion for summary judgment ruling plaintiffs "have established that genuine issues of material fact exist with respect to whether Officer Hall's conduct was reckless." In November 2008, the court denied City's second motion for summary judgment. City argued plaintiffs could not establish a duty of care. However, the court ruled a statutory duty between City and plaintiffs was created by Iowa Code section 321.231 (2005).

Before trial was scheduled to start in December 2008, the court filed "Court's Notice of Reconsideration of Plaintiff's Duty." The court stated it disagreed with the prior court analysis of duty and indicated its preliminary opinion that plaintiffs "have not identified a basis upon which a duty is owed." The court set forth its duty analysis so plaintiffs could respond before a final ruling.

The court stated section 321.231 does not create an express or implied statutory duty, but rather assumes "a tort which also assumes an existing duty and [is] not the basis for creating the duty." *See* Iowa Code § 321.231.

The court also discussed common law duty, stating:

> This court is not aware of allegations or proposed evidence which would show that Hall directly caused the collision in this case nor that his actions prompted the collision nor that he had the ability to stop Derring and failed to do so. . . . Hall owed no duty to the Plaintiffs unless the evidence shows that he was directly involved in the collision or failed to perform an act which would have kept the collision from occurring. This court is only aware of Plaintiff's evidence that Officer Hall should have reacted in a different manner or earlier in the sequence of events than he did. This is a duty owed to the general public and not to these individual Plaintiffs. There was no "special relation." While these acts may have been negligent, a special relation to the Plaintiffs is not established by proof of that allegation.

Plaintiff filed a resistance, stating:

> One of Plaintiffs' theories in the case, as supported by their expert, John Stread, is that Officer Hall recklessly chased Derring at speeds greater than 100 miles per hour through traffic on a highway. Officer Hall decided to initiate the chase even though the reason for doing so was his suspicion that Derring had committed a minor traffic infraction. In Mr. Stread's opinion, the offense of going through a red light on a deserted side street does not justify endangering the lives and well-being of other persons on the roadway. . . .

On November 25, 2009, the court granted summary judgment to City, finding no statutory duty. The court also ruled "Officer Hall and the City of Cedar Rapids owed no common law duty to the plaintiffs to control the conduct of Nicholas Derring 'as to prevent him from causing physical harm to another' including Plaintiffs." This appeal followed.

II. Scope of Review.

Whether City owed plaintiffs a duty of care is a threshold question of law for the court to decide on a motion for summary judgment. *See Kolbe v. State*, 625 N.W.2d 721, 725 (Iowa 2001). We review rulings on motions for summary judgment for errors at law. *Id.* The record before the district court is reviewed to determine whether the district court correctly applied the law. *Id.* We review the evidence in the light most favorable to the nonmoving party. *Id.*

III. Duty.

"The threshold question in any tort case is whether the defendant owed the plaintiff a duty of care." *Mastbergen v. City of Sheldon*, 515 N.W.2d 3, 4 (Iowa 1994) (holding no duty where no special relationship existed between jewelry store owner and law enforcement responding to store's silent alarm). In determining the existence of a duty, we look to our statutes, prior judicial rulings, and general legal principles. *Kolbe*, 625 N.W.2d at 725.

Plaintiffs assert City has a common law duty to them under Restatement (Second) of Torts, section 315, at 122 (1965). We follow the public duty doctrine, which provides "if a duty is owed to the public generally, there is no liability to an individual member of that group." *Kolbe*, 625 N.W.2d at 725 (ruling State owed no duty to plaintiff bicyclist when it issued a driver's license to third party whose vehicle struck plaintiff). We agree with plaintiffs that in determining whether a particularized duty exists in the context of third parties, we apply the Restatement. *See Thompson v. Kaczinski*, 774 N.W.2d 829, 834-36 (Iowa 2009) (ruling determination of common law duty involves consideration of the

relationship between the parties and public policy considerations). However, we recognize that "[b]y necessity, police officers exercise broad discretion in investigating a crime." *Mastbergen*, 515 N.W.2d at 5. Further, a similar claim of common law duty during police pursuit was rejected by our Iowa Supreme Court in *Morris v. Leaf*, 534 N.W.2d 388, 391 (Iowa 1995). The *Morris* court stated:

> This is an action brought to recover damages for injuries sustained when *the car operated by one of the plaintiffs was struck by a driver who was attempting to elude a police officer*. The district court granted summary judgment on the ground that the *officer had no duty to protect the injured party from the negligent act of the fleeing motorist . . . .* We affirm.
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> . . . .
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> The plaintiffs contend that summary judgment was not appropriate in this case because the high-speed chase in which the officer had engaged the fleeing driver (named Leaf) created the kind of special relationship that we have held is necessary to establish tort liability of a police officer. . . .
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> The City and its officer counter that summary judgment was appropriate because the plaintiffs failed to establish that the officer owed a duty to them, that the officer's actions were the proximate cause of their injuries, or that the officer's actions amounted to a reckless disregard for their safety. Furthermore, they maintain that policy considerations, such as the need for aggressive law enforcement, support non-liability in this case.
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> We have not previously ruled on the question of whether a police officer may be liable for injuries to third parties resulting from a high-speed chase. However, we have previously adopted the Restatement (Second) of Torts section 315 (1965) in the context of a police officer-citizen relationship and found no duty. *Sankey v. Richenberger*, 456 N.W.2d 206, 209 (Iowa 1990) [police chief owed no legal duty to protect city council members from third party's unanticipated assault]. Section 315 states:
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>> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another *unless*
>> (a) *a special relation exists* between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>> (b) *a special relation exists* between the actor and the other which gives to the other a right to protection.

> The plaintiffs maintain that there was a special relationship between them and the officer. *The officer, they argue, had a duty to protect them that he breached by pursuing the suspect at high speed, and his pursuit of Leaf created the danger* that resulted in the accident. . . .
>
> *Iowa courts have consistently held that law enforcement personnel do not owe a particularized duty to protect individuals; rather, they owe a general duty to the public*.

Morris, 534 N.W.2d at 389-90 (emphasis added) (citations omitted). The *Morris* court concluded, as a matter of law, no duty existed. *Id*. at 391.

Plaintiffs here argue the special relationship test is met because the facts, when viewed in the light most favorable to them, show that unlike in *Morris*, Officer Hall *created* the situation leading to the collision by pursuing Derring's speeding vehicle at high speed with his emergency lights flashing. *See Mastbergen*, 515 N.W.2d at 4 (recognizing a common law duty "when the police create the situation that places the citizen's life in jeopardy"). We disagree with plaintiffs' claim the facts support a special relationship and thereby create a legal duty to these plaintiffs. While the timing of Officer Hall's activation of the flashing lights is disputed, the undisputed facts show Derring was driving while significantly intoxicated at approximately 100 miles per hour *before* Officer Hall regained visual contact and then increased his speed to close the gap between vehicles. Officer Hall's affidavit states:

> 16. . . . I turned left onto the on ramp for southbound I-380 to continue following [Derring's] vehicle.
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> 17. I was accelerating to the posted limit and beginning to merge into traffic on southbound I-380 when I re-established visual contact with [Derring's] vehicle.
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> 18. When I re-established visual contact with [Derring's] vehicle, . . . the distance [it] had travelled while out of my vision was

> much further than it should have been had it been traveling at the posted speed limit for I-380.
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> 19. Based upon my observations of [Derring's] vehicle's position and my training and experience, I estimated [Derring's] vehicle's speed to be approximately 100 miles per hour.

Under these circumstances, we conclude as a matter of law plaintiffs have failed to establish the special relationship required to impose a common law duty and hold City liable for the actions of intoxicated, speeding, third-party Derring. *See id.* at 5 (stating "to recognize a special relationship under these circumstances would conflict with the discretion to which police are entitled" and ruling "no special relationship existed between" store owner and "law enforcement creating some more particularized duty"); *Sankey*, 456 N.W.2d at 210 ("To impose a duty . . . under these circumstances would contravene the public policy underlying the common-law rule: to assure vigorous police protection free from the chilling effect of liability for split-second decisions.").

Plaintiffs also assert City had a statutory duty under Iowa Code section 321.231.[1] Section 321.231 "is an express statute dealing with claims regarding emergency response vehicles.[2] Therefore, [City] can be held liable only to the extent liability may be imposed by section 321.231." *Hoffert v. Luze*, 578 N.W.2d 681, 683 (Iowa 1998). Iowa Code section 321.231 provides:

> 1. The driver of an authorized emergency vehicle, when responding to an emergency call or when in pursuit of an actual or

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[1] Plaintiffs also argue City had a duty under Cedar Rapids Police Department General Order 0508-03 (March 20, 2003) (emergency operation of police vehicles). Because we do not find a statutory basis for a duty, we likewise do not find a duty based on the general order implemented to carry out the statutory provisions. *See Kolbe*, 625 N.W.2d at 727.

[2] Emergency response vehicles, by definition, include police vehicles. Iowa Code § 321.1(6).

> suspected perpetrator of a felony or in response to an incident dangerous to the public . . . may exercise the privileges set forth in this section.
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> . . . . [park, direction of movement, proceed past stop sign or red light after slowing as necessary, exceed speed limit so long as driver does not endanger life or property]
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> 5. The foregoing provisions shall not relieve the driver of an authorized emergency vehicle . . . from the duty to drive . . . with due regard for the safety of all persons, nor shall such provisions protect the driver . . . from the reckless disregard for the safety of others.

Plaintiffs argue the statutory duty imposed by the language "duty to drive with due regard for the safety of all persons," precludes summary judgment. We note "although a statute may articulate a duty or standard of care applicable to the performance of a governmental function, it does not thereby create a cause of action." *Sankey*, 456 N.W.2 at 208. Rather, "[a]n actionable duty is defined by the relationship between individuals; it is a legal obligation imposed upon one individual for the benefit of another person or particularized class of persons." *Id*. at 209. Once again, the *Morris* court's rejection of a similar claim is controlling:

> The plaintiffs also rely on Iowa Code section 321.231 to support their claim that the officer owed them a duty. While section 321.231 provides that operators of emergency vehicles owe a duty to the public to drive safely, *it is not the officer's manner of driving that is at issue here; it is his decision to pursue the fleeing suspect*. Moreover, section 321.231 requires a level of culpability beyond mere negligence to support liability. The New York Court of Appeals recently interpreted a New York statute, which tracks the language of section 321.231, to require recklessness. *See Saarinen v. Kerr*, 84 N.Y.2d 494, 501, 620 N.Y.S.2d 297, 300, 644 N.E.2d 988, 991 (1994) ("[W]e hold that a police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others."). In *Saarinen*, the New York court held that "the only way to apply the statute is to read its general admonition to exercise 'due care' in light of its more specific reference to 'recklessness.'" 84 N.Y.2d at 502, 620 N.Y.S.2d at 301, 644 N.E.2d at 992.

> We interpret section 321.231 similarly. The plain language of section 321.231(5) provides that a police officer should not be civilly liable to an injured third party unless the officer acted with "reckless disregard for the safety of others."
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> We have previously recognized that assuring "police protection free from the chilling effect of liability for split-second decisions" is an important policy justification for curtailing liability. *See Sankey*, 456 N.W.2d at 210. As such, limiting personal liability for the consequences of high-speed chases to reckless rather than mere negligent conduct will provide for vigorous law enforcement without placing innocent bystanders at undue risk.
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> *In order to prove recklessness as the basis for a duty under section 321.231(3)(b), we hold that a plaintiff must show that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow*.
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> . . . .
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> Here, the uncontroverted evidence in the summary judgment record was that the officer pursued Leaf at 2:15 in the afternoon, when traffic was not heavy. The weather was clear and the streets were dry. The officer followed Leaf only fast enough to keep his fleeing vehicle in sight. *The Leaf vehicle had already been speeding when the officer decided to pursue it*, and the officer was acting on orders from the station to pursue Leaf because of his involvement in a prior hit-and-run accident. His pursuit of Leaf was designed to stop Leaf "before he hurt anyone else."
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> The district court concluded that, as a matter of law, the police officer did not owe a duty to the plaintiffs, and we agree.

Morris, 534 N.W.2d at 390-91 (emphasis added) (citations omitted).

As in *Morris*, plaintiffs here have failed to show Officer Hall acted recklessly "as the basis for a duty under section 321.231(3)(b)." Derring was already speeding and already significantly intoxicated at the time Office Hall entered the interstate. Even if we assume Officer Hall activated his lights as asserted by plaintiffs, this action combined with Officer Hall's speeding up to close the gap between vehicles does not create a statutory duty to plaintiffs

under the Iowa Supreme Court's analysis in *Morris*. *See id*. Accordingly, the district court properly granted summary judgment to City.

AFFIRMED.

Danilson, J. concurs; Vaitheswaran, P.J., dissents.

VAITHESWARAN, P.J. (dissents)

I respectfully dissent. I recognize that "[w]hether a duty arises out of a given relationship is a matter of law for the court's determination." *Thompson*, 774 N.W.2d at 834. But when the summary judgment record contains controverted facts concerning the nature of the relationship, I believe the question of whether there exists a common law or statutory duty cannot be decided as a matter of law. In my view, that is the case here.

The plaintiffs proffered deposition testimony in resistance to the defense motion for summary judgment which called into question the "uncontroverted" facts contained in Hall's affidavit. Specifically, the plaintiffs resisted the defense motion for summary judgment by pointing out that the accident took place at night, Officer Hall failed to contact his control center to obtain guidance on how to proceed, his vehicle was chasing Derring's vehicle during the period that Derring's vehicle was traveling over 100 miles per hour, his lights were flashing before the accident, and Hall's vehicle crossed the median as soon as Derring's crossed the median. These disputed facts bore directly on the nature of the relationship between Officer Hall and Derring. In contrast, the facts bearing on the duty question in *Morris* were uncontroverted and far clearer. As that court stated,

> [T]he uncontroverted evidence in the summary judgment record was that the officer pursued Leaf at 2:15 in the afternoon, when traffic was not heavy. The weather was clear and the streets were dry. The officer followed Leaf only fast enough to keep his fleeing vehicle in sight. The Leaf vehicle had already been speeding when the officer decided to pursue it, and the officer was acting on orders from the station to pursue Leaf because of his involvement in a

> prior hit-and-run accident. His pursuit of Leaf was designed to stop Leaf "before he hurt anyone else."

Morris, 534 N.W.2d at 391. For this reason, I believe *Morris* is distinguishable.

On this summary judgment record, I do not believe the question of whether the defendants owed the plaintiffs a common law or statutory duty can be decided as a matter of law, and I would allow this case to proceed to trial.