IN THE COURT OF APPEALS OF IOWA

No. 3-773 / 13-0174
Filed September 18, 2013

IN THE INTEREST OF J.S.,
Minor Child,

STATE OF IOWA,
Appellant.

Appeal from the Iowa District Court for Clinton County, Phillip J. Tabor, District Associate Judge.

The State has appealed the denial of a restitution claim for injuries to a police officer arising out of a foot chase of a juvenile. **AFFIRMED.**

Thomas J. Miller, Attorney General, Bruce Kempkes, Assistant Attorney General, Mike Wolf, County Attorney, and Cheryl J. Newport, Assistant County Attorney, for appellant.

John J. Wolfe Jr., Clinton, for minor child,

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

MULLINS, J.

In a juvenile delinquency proceeding, J.S. admitted to an amended charge of interference with official acts after he ran away from pursuing police officers. The State sought restitution for an officer who suffered a torn hamstring injury while chasing J.S. The juvenile court denied the request. The State appealed. We affirm.

BACKGROUND FACTS AND PROCEDURE

In July 2012, a Clinton, Iowa police officer observed a vehicle with a passenger he believed to be J.S., a juvenile subject to a juvenile detention order that had been outstanding for three months. The officer followed the vehicle until it pulled off to the side of the road and J.S. exited the vehicle. J.S. then extended both of his middle fingers, told the officer to "fuck off," and ran away from the officer's location. The officer began a foot chase to apprehend J.S. Other officers arrived to assist. One of those officers, Sgt. St. Ores arrived, exited his vehicle, and while chasing J.S. heard a loud pop from his left leg and fell to the ground. St. Ores suffered significant pain in his left leg and hip area.

The officers apprehended J.S., and the State filed a delinquency petition alleging he committed a criminal violation of interference with official acts resulting in serious injury in violation of Iowa Code section 719.1(1)(2011), a class D felony. The State later amended the charge to interference with official acts, a simple misdemeanor. J.S. admitted he committed the offense by having failed to stop running away when the police ordered him to so do.

Later, the State filed a motion for restitution seeking pecuniary damages for St. Ores exceeding $26,000. J.S. resisted. In his investigative report admitted as an exhibit in the restitution hearing, St. Ores explained that when he joined the chase of J.S. he was running through an open field at approximately 3:00 p.m. on a July day. He stated: "While I was doing so, there was uneven ground, which I did not see. I lost my balance, fell, landing on my right leg, causing my left hamstring to rupture and tear from the bone." He got up, was in pain, and hobbled as he participated in the capture and arrest of J.S. Five days later, an MRI confirmed a hamstring rupture and that the hamstring muscle was significantly pulled from the bone.

The juvenile court found that the injuries to the victim did not meet the definition of pecuniary damages under Iowa Code section 910.1(3) and ordered no restitution for St. Ores. The State appealed.

STANDARD OF REVIEW

Our review of delinquency proceedings is de novo. *In re A.K.*, 825 N.W.2d 46, 49 (Iowa 2013). We review a restitution order for correction of errors at law. *State v. Watts,* 587 N.W.2d 750, 751 (Iowa 1998). "When reviewing a restitution order, 'we determine whether the court's findings lack substantial evidentiary support, or whether the court has not properly applied the law.'" *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004) (quoting *State v. Bonstetter,* 637 N.W.2d 161, 165 (Iowa 2001)).

ANALYSIS

When the juvenile court issues a dispositional order in a delinquency case, it may include an order for "[r]estitution consisting of monetary payment or a work assignment of value to the victim." Iowa Code § 232.52(2)(a)(2). Iowa Code section 910.1 provides the following definitions in relevant part, as follows:

> 3. "Pecuniary damages" means all damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action arising out of the same facts or event, except punitive damages and damages for pain, suffering, mental anguish, and loss of consortium . . . .
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> 4. "Restitution" means payment of pecuniary damages to a victim in an amount and in the manner provided by the offender's plan of restitution . . . .
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> 5. "Victim" means a person who has suffered pecuniary damages as a result of the offender's criminal activities . . . .

Id. § 910.1(3)-(5). In all criminal cases in which a judgment of conviction is entered, "the sentencing court shall order that restitution be made by each offender to the victims of the offender's criminal activities."[1] *Id*. § 910.2. Restitution includes "any damages that are causally related to the criminal activities [and] . . . not excessive if [they] bear[] a reasonable relationship to the damage caused by the offender's criminal act." *State v. Bonstetter*, 637 N.W.2d 161, 165 (Iowa 2001).

The issue of causation encompasses two concepts: factual cause and legal cause.

> Generally, causation exists in criminal law, often without much fanfare, as a doctrine justifying the imposition of criminal responsibility by requiring a "sufficient causal relationship between the defendant's conduct and the proscribed harm." *See State v.*

[1] We recognize the distinction between the "shall order" of section 910.2 and the permissive restitution order provision of section 232.52(2)(a)(2).

> *Marti,* 290 N.W.2d 570, 584 (Iowa 1980). When causation does surface as an issue in a criminal case, our law normally requires us to consider if the criminal act was a factual cause of the harm. *See id.* at 584-85; *see also Thompson v. Kaczinski,* 774 N.W.2d 829, 836-39 (Iowa 2009).
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> The conduct of a defendant is a "factual cause of harm when the harm would not have occurred absent the conduct." Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 26, at 346 (2010) [hereinafter Restatement (Third)]. We have traditionally labeled this straightforward, factual cause requirement of causation the "but for" test. *See Marti,* 290 N.W.2d at 585 (stating the test for factual cause in a criminal case can be phrased as "but for the defendant's conduct, the harm or damage would not have occurred").

State v. Tribble, 790 N.W.2d 121, 126-27 (Iowa 2010) (fn.1 omitted, stating in relevant part "this case does not require us to consider the element of causation beyond a factual-cause analysis"). Applying the "but for" or factual cause analysis to the present case is not straightforward, however. St. Ores would presumably not have suffered his hip and leg injury at the date and time of the injury but for the fact he lost his footing on uneven ground in a field while running. He would not have been running but for his decision to run after J.S. He would not have made the decision to run after J.S. but for J.S.'s decision to provoke an officer and then run away. Nonetheless, the facts establish that J.S. running away was *a* factual cause. The next question is whether J.S. running away was a legal cause of St. Ores' injury.

Historically, in criminal cases, issues of causation have been analyzed in much the same manner as causation in civil cases. *See State v. Murray*, 512 N.W.2d 547, 550 (Iowa 1994). In the case of *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009), our supreme court adopted the Restatement (Third) of Torts concept of "scope of liability" in place of legal or proximate cause in civil

cases. *Thompson*, 774 N.W.2d at 836–39. There is not yet a decision concerning whether the legal cause aspect of the term "proximate cause" is still viable in criminal cases. *State v. Adams*, 810 N.W.2d 365, 372 n.7 (Iowa 2012). Victim restitution analysis, however, must apply the statutory requirement that pecuniary damages shall be those recoverable in a civil action. *See* Iowa Code § 910.1(2)-(3); *State v. Paxton,* 674 N.W.2d 106, 108 (Iowa 2004). Thus, the "scope of liability" approach to legal cause now applicable to civil cases governs our analysis of restitution in this juvenile delinquency case.

In *Thompson*, the court also adopted the Restatement (Third) of Torts approach to foreseeability as a factual determination to be made by the fact finder when it decides whether a defendant has failed to exercise reasonable care. *Id*. at 835. "An actor's liability is limited to those physical harms that result from the risks that made the actor's conduct tortious." *Id*. at 838 (quoting Restatement (Third) § 29, at 575). This principle is known as the "risk standard." *Id*. A determination must be made as to "whether the harm at issue is a result of any of those risks" that made the actor's conduct tortious. *Id*. This standard is viewed as appealing to notions of fairness and proportionality and flexible enough to be applied to the specific facts of a case. *Id*. "[B]oth the risk standard and a foreseeability test exclude liability for harms that were sufficiently unforeseeable at the time of the actor's tortious conduct that they were not among the risks—potential harms—that made the actor negligent." Restatement (Third) § 29 cmt. j. "If the type of harm that occurs is within the scope of the risk,

the defendant is liable for all such harm caused, regardless of its extent." *Id.* cmt. p.

The State relies in large part on two cases from other jurisdictions. *People v. Cervantes*, 945 N.E.2d 1193 (Ill. App. 2011); *State v. Burton*, 370 S.W.3d 926 (Mo. Ct. App. 2012). An Illinois appellate court affirmed a criminal conviction of resisting a police officer in which the "defendant's act of running from the officers was a contributing cause of [an officer's] injuries, although it was not the only cause." *Cervantes,* 945 N.W.2d at 1197. In *Cervantes*, a patrol officer was investigating a report of a hit-and-run accident when he noticed a vehicle leaving the area. *Id.* at 1194. He activated his overhead lights, followed the vehicle, then activated his siren, and the vehicle did not stop. The vehicle eventually stopped and the driver exited the vehicle and began running through woods and backyards. *Id.* The officer chased the defendant with the help of another officer who had arrived on the scene. *Id.* Defendant was ordered to stop, but did not. "The weather was snowy, with temperatures below zero. Both [officers] fell several times while chasing defendant." *Id.* After the defendant fell he was apprehended. During the chase, on officer sustained abrasions from slipping on the icy driveway and climbing a fence. *Id.* at 1194–95.

The Illinois court found that

> [w]hen he chose to run from the pursuing police, it was reasonably foreseeable that the officers would continue the chase on foot and, in doing so, might be injured by falling on the snow or ice. It is simply not extraordinary to slip on ice in February. Moreover, Wilde testified that he suffered additional injuries by climbing a fence, which was apparently not related to the weather conditions at all. Again, defendant should reasonably have foreseen that a pursuing officer might be injured by a fall.

Id. at 1196.

The Missouri Court of Appeals, citing to *Cervantes*, reached a similar result on a similar set of facts. *Burton*, 370 S.W.3d 926. In *Burton*, a state trooper saw the defendant riding a motorcycle without a helmet. As the trooper tried to stop the defendant, the motorcycle accelerated. Eventually the defendant went off-road and proceeded on the motorcycle down a hill through the grass.

> There had been significant rain recently. The defendant hit a patch of mud, lost control of his motorcycle, and was thrown from it. The defendant got up, looked directly at the trooper, and began running as the trooper pursued him on foot. When the trooper came within an arm's length of the defendant, they encountered what the trooper described as a "patchy, muddy area." As the trooper "leaped out to grab" for the defendant, the defendant lost his footing, and slid forward, striking his head and neck on a fence. The trooper "was still kind of in the air at the time, and [he] landed face first into the bottom rung of the fence." The trooper suffered a broken nose and a cut to his upper lip. The defendant rose, and ran again. The trooper pursued him further, across two barbed wire fences and into a thicket in which the defendant became entangled, enabling the trooper to finally apprehend and arrest him.

Id. at 928.

The defendant was found guilty of third-degree assault on a law enforcement officer by recklessly causing physical injury to the trooper. *Id*. at 928–29.

> We conclude that the defendant demonstrated a conscious disregard for a substantial and unjustifiable risk that the trooper would sustain injury during the pursuit. The defendant could reasonably foresee that the trooper would pursue him through the muddy field. Flight from an officer effecting a legal stop inherently includes a substantial and unjustifiable risk of physical injury to the officer. This risk is most clearly demonstrated in cases of high-speed vehicle chases, where law-enforcement officers or innocent third parties may suffer injury or death. In fact, section 575.150.5 recognizes just such a risk when it specifies that flight in a manner creating a substantial risk of *serious* physical injury or death is a class-D felony, while otherwise, as here, flight constitutes a class-A

> misdemeanor. In any event, a substantial and unjustifiable risk of physical injury is inherent in any flight from a lawful stop by law enforcement. A reasonable person would not disregard this risk. Thus, the defendant's disregard constituted a gross deviation from the standard of care that a reasonable person would exercise.
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> As to actual causation, the trooper would not have been running in a muddy field and crossing over fences but for the defendant's flight through the field. As to legal, or proximate causation, the defendant should have reasonably foreseen that the trooper might fall and suffer injury while pursuing him. We find no variation from the result hazarded by the defendant's reckless conduct and the actual result. His flight from the trooper across a wet, muddy field and across three fences created a risk of injury to the trooper that materialized. Again, we find the reasoning of *People v. Cervantes* persuasive, wherein Cervantes's conduct of leading police officers on a chase through ice- and snow-covered yards and driveways proximately caused injury to one of the officers. 349 Ill.Dec. 41, 945 N.E.2d at 1196. Likewise here, the defendant's flight proximately caused the trooper's pursuit and injury.

Id. at 930–931.

In *Cervantes* and *Burton*, the respective courts focused on both the foreseeability that the officers would pursue a foot chase and that the conditions—snow, ice, and a fence in *Cervantes*; a wet, muddy field and crossing three fences in *Burton*—might cause the officers to fall and suffer injury.

In the present case, J.S. should have foreseen that the officers would pursue him on foot. In fact, he seemed to provoke such pursuit by raising the middle finger of each hand at the first officer and announcing an expletive. But the foreseeability that officers would give chase does not necessarily equate to foreseeability of harm. In *Cervantes* and *Burton*, the weather and surface conditions were readily apparent and those courts relied in part on the foreseeability of harm resulting from those conditions in finding liability under their respective statutes. In addition, the defendants in those cases chose paths

that brought encounters with fences into the foreseeability of harm equation. Furthermore, the officers were in hot pursuit of those defendants as a result of current criminal or traffic violations.

In the present case, the events occurred on a July afternoon with no adverse weather or surface conditions, unless one considers the uneven field surface as an adverse condition. To hold J.S. civilly liable we must find that risk of harm was foreseeable and that the harm was a result of the risk that made J.S.'s conduct tortious. That is, was the injury sufficiently foreseeable that the act of running away from officers would elevate the risk of potential harm to St. Ores to make J.S. negligent and therefore liable?

In its reply brief, the State argues that a risk of injury always exists when running. The State would apparently have us find that an individual who runs when an officer tells him to stop is strictly liable for any injury that results from the officer's decision to run, regardless of conditions or circumstance. In *Cervantes* and *Burton*, the courts emphasized the potentially hazardous conditions; and there was hot pursuit. Here, J.S.'s conduct of baiting the first officer by extending his middle fingers and yelling an expletive was wrong, was inappropriate, was a challenge, and constituted fighting words. While it is not a surprise that the first officer was provoked to run after him, the chase was not hot pursuit of a person who just committed a crime. The chase was of a juvenile who offended an officer and refused to stop when ordered to do so. This initial encounter escalated to an all-out man-hunt. The juvenile detention order that presumably gave cause for the officer to attempt to stop J.S. had been outstanding for three months;

therefore, unlike cases involving hot pursuit of someone who has just committed a crime, the urgency of the chase is not readily apparent.

CONCLUSION

Our focus must remain on the risk standard, foreseeability, and other factors required in determining the scope of liability in this case. The notions of fairness and proportionality embodied in the risk standard, together with the foreseeability of harm under the facts of this case, require a finding that St. Ores' injuries were not within the scope of liability of J.S.'s conduct of running from the officers after being told to stop. Accordingly, we affirm the decision of the juvenile court.

AFFIRMED.