

NOT DESIGNATED FOR PUBLICATION

CHIWANA J. JONES, ET AL

COURT OF APPEAL,
FIFTH CIRCUIT

NO. 01-C-1345

VERSUS

FIFTH CIRCUIT

NICK CONGEMI, ET AL

FILED OCT 16 2002

COURT OF APPEAL

STATE OF LOUISIANA

CONSOLIDATED WITH

CHIWANA J. JONES, ET AL

NO. 02-CA-148

VERSUS

FIFTH CIRCUIT

NICK CONGEMI, ET AL

COURT OF APPEAL

STATE OF LOUISIANA

CONSOLIDATED WITH

WILMAREEN JAMES WIFE OF/AND
WILSON JAMES

NO. 02-CA-149

VERSUS

FIFTH CIRCUIT

NICK CONGEMI, ET AL

COURT OF APPEAL

STATE OF LOUISIANA

ON REMAND FROM LOUISIANA SUPREME COURT

ON SUPERVISORY WRITS AND APPEAL FROM
THE 24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 539-176 C/W 543-220, DIVISION "O"
HONORABLE ROSS P. LADART, JUDGE

OCTOBER 16, 2002

**THOMAS F. DALEY
JUDGE**

Panel composed of Judges Thomas F. Daley,
Sol Gothard, and Walter J. Rothschild

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Officer Michael Archuleta, Officer Russell Moran,

Officer Bennie Bazley

**WRIT GRANTED; SUMMARY JUDGMENT GRANTED DISMISSING
PLAINTIFFS CLAIM AGAINST CITY OF KENNER, THE CHIEF OF
POLICE, NICK CONGEMI, THE KENNER POLICE OFFICERS,
SCOTTSDALE INSURANCE CO., AND FIREMAN'S FUND INSURANCE
COMPANY OF OHIO;**

SUMMARY JUDGMENT ON ISSUE OF DUTY TO DEFEND REVERSED

T.D.
WJR

This matter arises from an automobile accident that occurred on August 30, 1998, at the intersection of Airline Highway and North Atlanta Street in Kenner, Louisiana between a vehicle driven by Wilmareen James and a Dodge Neon driven by Terrence King. The accident occurred when the vehicle driven by Terrence King disregarded a red light and struck a vehicle occupied by plaintiffs. At the time of the accident, the King vehicle was being followed by three Kenner police units. Plaintiffs filed suit against the City of Kenner, the Chief of Police Nick Congemi, the three officers involved (hereinafter referred to as the Kenner defendants), and their respective insurers, Scottsdale Insurance Company (Scottsdale) and Fireman's Fund Insurance Company of Ohio (Fireman's Fund). The Kenner defendants filed a Motion for Summary Judgment on the issue of liability asserting that Mr. King's negligence was the sole cause of the accident. The Summary Judgment was denied by the trial court. The Kenner defendants filed a Writ Application, No. 02-C-1345, with this

Court requesting that this Court review the trial court's denial of the Summary Judgment Motion. On December 13, 2001 this Court denied the Kenner defendants' Writ Application. Judge Rothschild dissented and would have granted the writ. The Kenner defendants then filed a Writ Application with the Louisiana Supreme Court, Writ No. 2002-CC-0105. On April 12, 2002, the Supreme Court granted the Kenner defendants' Writ Application and remanded the matter to this court for full briefing, argument, and opinion.

Independent of the Summary Judgment on causation, Scottsdale filed a Motion for Summary Judgment on the issues of coverage and duty to defend. On the 6th of November, 2001, the Summary Judgment on insurance coverage was granted by the trial court. The Kenner defendants' have appealed the grant of this Summary Judgment denying insurance coverage. The appeal was docketed in this Court as 02-CA-148 and 02-CA-149. By order dated May 7, 2002, this Court consolidated the writ remand and appeal because they arise from the same operative facts.

FACTS:

This incident began when Kenner Police Officer Michael Archuleta (Archuleta) spotted a green Dodge Neon traveling east on Airline Drive, on the western side of the railroad overpass, near the New Orleans Airport. Archuleta observed that the Dodge Neon was speeding, so he pulled onto eastbound Airline Drive to follow the Neon. He remained 1½ to 2 car lengths behind the Neon, and noted the vehicle was traveling at 55 miles per hour while the posted speed limit was 45 miles per hour. He activated his overhead lights as the two cars reached the overpass. The Neon slowed to 40 miles per hour, which was the speed limit on the east side of the overpass. When the Neon reached the intersection just in front of the airport, the Neon stopped for the red

light. Archuleta activated his siren in short pops in an attempt to get the attention of the driver of the Neon. When the light turned green, the Neon proceeded eastbound on Airline at 40 miles per hour. Both vehicles stopped for the next red light at the intersection of Airline and Hollandey. At that point, Archuleta informed the Kenner Police Department's radio dispatcher of his location and of the fact that he was following a vehicle that was stopping for all signals, but not pulling over. He asked the dispatcher to perform a registration check on the Neon.

When the light at Hollandey turned green, the Neon continued east on Airline, moved to the left lane of travel, and continued to drive at the speed limit. The light at the next intersection, Williams Boulevard and Airline Drive, was red. Hearing the information over the radio that Archuleta was following a car that would not pull over, two more Kenner police officers came to the area. Officer Bennie Bazley (Bazley) positioned his vehicle southbound on Williams, without blocking any lanes of travel on Airline. Officer Russell Moran (Moran) was westbound on Airline and got into the turning lane to turn south at Williams. When the Neon stopped at the red light at Williams, Moran positioned his vehicle in front of the Neon, blocking the left lane of travel and a portion of the right lane of travel. Archuleta exited his vehicle and walked toward the Neon. As Archuleta reached the left rear bumper of the Neon, the Neon proceeded around Moran's vehicle and drove off. Bazley, then Moran, then Archuleta followed the Neon. Each of these police units had their overhead lights on.

The next intersection controlled by a traffic signal was the intersection at Clay Street. The Neon proceeded through this intersection without any incident since the light was green. The next signal was Roosevelt. Although the light was red, the Neon drove through the intersection. Just after the intersection at Roosevelt, the officers

testified that the speed of the Neon increased. Bazley and Moran also drove through the red light, slowing and activating their sirens as they did so. Archuleta followed.

The next traffic signal was at the intersection of Airline and North Atlanta/Wilkerneal. That light turned red as the Neon approached. A car driven by Wilmareen James was crossing Airline at that intersection. The Neon struck the James car, killing four of its occupants and severely injuring the other four occupants. When the Neon came to rest, the driver, Terrence King, jumped from the car and fled on foot. Bazley and Archuleta apprehended the driver, Terrence King, nearby.

The Kenner defendants moved for Summary Judgment claiming the sole cause of the accident was Terrence King's actions and that there were no genuine issues of fact as to liability. The Kenner defendants argue that the policemen involved in this incident were doing exactly what the public expects of police officers, they were following a vehicle that was acting suspiciously. The City of Kenner contends that the actions of the officers were not the cause of this accident, nor was the accident caused by a lack of training or failure to adhere to departmental policy.

The plaintiffs argue that in order to determine whether the Kenner defendants are liable for this accident, the court must perform a duty risk analysis. The plaintiffs point out that R.S. 32:24(D) imposes a duty on a police officer to drive with due regard for the safety of all persons. Plaintiffs assert that the actions of the three Kenner police officers were in violation of their own departmental policies regarding vehicle pursuits. They argue that if Archuleta had discontinued the pursuit of King, the accident would not have occurred. The Kenner defendants reply by asserting they were not in pursuit of King, that this was not a high speed chase, and that they were merely following King because he had failed to pull over for a routine traffic stop. They contend that King was driving the speed limit until just prior to the accident, and

that their actions in trailing King were reasonable under the circumstances and not a violation of departmental policy.

The trial court denied the Motion for Summary Judgment stating that the facts suggest there was a pursuit of King by the Kenner police, but he was unable to determine if the pursuit was conducted in compliance with the department's policies. The court went on to state that it was unable to determine if the accident would have occurred but for the manner in which King was pursued.

The Kenner defendants are self-insured for automobile liability up to \$250,000.00 and Fireman's Fund provides excess coverage up to \$10,000,000.00. Scottsdale provides the Kenner defendants an insurance policy entitled "Law Enforcement Liability Policy." Independent of the Summary Judgment on causation, Scottsdale moved for Summary Judgment on the issues of coverage and liability, claiming that law enforcement activities involving the use of automobiles were excluded from coverage on its policy and, therefore, they had no obligation to defend the police department. Finding that the Scottsdale policy afforded no coverage due to the automobile exclusion, the trial court granted Scottsdale's motion and dismissed Scottsdale from the litigation.

LAW ON SUMMARY JUDGMENTS:

Appellate courts review summary judgments de novo under the same criteria that govern the district court's consideration of whether summary judgment is appropriate. Reynolds v. Select Properties Ltd., 93-1480 (La.4/11/94), 634 So.2d 1180. Summary judgment is designed to secure the just, speedy, and inexpensive determination of every action. C.C.P. art. 966(A)(2). This procedure is favored and shall be construed to accomplish these ends. Id. A Motion for Summary Judgment

will be granted if the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. C.C.P. art. 966(B). The movant bears the burden of proof. C.C.P. art. 966(C)(2). However, where the movant will not bear the burden of proof at trial, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim; rather, he must only point out that there is an absence of factual support for one or more essential elements of the adverse party's claim. Id. Thereafter, if the adverse party fails to produce factual support sufficient to show that he will be able to meet his evidentiary burden of proof at trial, no issue of material fact exists. Id.

DISCUSSION ON ISSUE OF LIABILITY:

In their Motion for Summary Judgment on the issue of liability, the Kenner defendants contend that this accident was caused by one thing and one thing only, the actions of Terrence King. They argue that the actions of the police officers were reasonable under the circumstances. They state that the officers were doing exactly what the public and society expect of its police officers; they were following a vehicle that was acting suspiciously. They contend that the King vehicle was being operated within the speed limit and was not being operated in a manner as to place the public at risk until moments before this incident when King suddenly accelerated and ran through the red light at the intersection of Airline and Atlanta/Wilkerneal, crashing into the plaintiffs' vehicle.

In support of their motion, the Kenner defendants attached portions of the depositions of Archuleta, Bazley, and Moran and the testimony of numerous witnesses taken at the criminal trial of King. The testimony of an expert taken at the criminal trial

stated that the speed of the Neon when it struck the Honda was 56 miles per hour. The speed prior to impact was 63.75 miles per hour. The testimony of Mary Jackson from the criminal trial indicates that her license plate was stolen prior to this incident, and her license plate was on the Neon at the time of this incident. The testimony of Officer Arthur Cleveland established that he received a call from the owner of the Neon, stating that this car had been stolen.

In support of their position, the Kenner defendants point to other cases in which police departments were found not to be liable for accidents occurring between a vehicle being followed by police and another car. In McElreath v. Progressive Ins. Co. 595 So.2d 693 (La. App. 5th Cir. 1992), this court affirmed a summary judgment granted in favor of the Gretna Police Department. In that case, police officers were pursuing a motorcycle that was being operated in a reckless manner. The officers chased the motorcycle for approximately 1 ½ miles at speeds up to sixty to seventy miles per hour, with the motorcycle proceeding at an estimated ninety miles per hour. The motorcycle struck another vehicle and those occupants filed suit against the officers and the department. In affirming the trial court's grant of summary judgment, this court found that the officers owed a duty to the citizens of Gretna to apprehend the driver of the motorcycle and that the accident was caused by the actions of the driver of the motorcycle and/or plaintiff. In Brown v. City of New Orleans, 464 So.2d 976 (La. App. 4 Cir. 1985), an officer chased a vehicle that drove away after stopping for a traffic violation. Seven or eight blocks later this vehicle struck another vehicle, killing its driver. The plaintiffs alleged the actions of the officer were the cause of the accident. The Fourth Circuit affirmed the trial court's finding in favor of the officer, stating that plaintiff's claim that the officer caused the accident was "absurd." Based

on these cases and the testimony of the officers involved, the Kenner defendants strongly argue that the sole cause of this accident was the actions of Terrence King.

In opposition to the Motion for Summary Judgment, the plaintiffs argue that the accident would not have occurred but for the actions of the police officers in pursuing the King vehicle. Plaintiffs assert that in pursuing King, the officers were in violation of several policies of the department relating to pursuit of vehicles. Plaintiffs argue that in pursuing King, the officers owed a duty to the plaintiffs of not escalating an attempted routine traffic stop into a fatal high-speed chase. Plaintiffs contend that in order to determine whether the officers' conduct was negligent, the Court must perform a duty risk analysis.

In their Memorandum in Opposition, the plaintiffs cite extensively from the department's Operations Manual. Portions of this manual are also attached to the memorandum. Plaintiffs point out that FSOP 7-15 of the manual states:

A routine vehicle stop will be performed when an officer in an authorized emergency vehicle or a pursuit vehicle, as defined in Part 4 of this procedure, attempts to stop a vehicle after articulable facts indicate that said vehicle or suspect requires investigation and the officer has concluded that the stop does not present danger to the officer, the general public or to the suspect(s). If the driver of the suspect vehicle responds to the emergency equipment (emergency lights and/or siren) and stops within approximately 400 yards (or a cumulative distance of approximately 4 city blocks) of the initiation of the attempt to stop the vehicle, then the officer has performed a routine vehicle stop. No attempt to flee from the officer's emergency equipped vehicle occurred. In the event an attempt to conduct a routine traffic stop for minor traffic or misdemeanor offense or suspicious activity does not result in compliance within the designated 'stop zone', the officer should disengage the attempt to stop the vehicle and may begin trailing the vehicle.

This policy goes on to state that the pursuit, "beyond a low-risk attempt to initially stop a vehicle, is justified only as when there is the commission of a serious felony by the occupant(s), or when the occupants, by their actions, present an immediate threat to the public."

Attached to plaintiff's opposition is an affidavit from Ken Katsaris, an expert in law enforcement policy and procedures involving traffic stops and vehicle pursuits. Mr. Katsaris states that the Kenner officers failed to comply with their own departmental policies and with the applicable national standards relative to pursuits and traffic stops. He concludes "It is reasonable to believe from pursuit experience that if the pursuit had terminated as directed by the City policy, this accident would not have occurred."

When this Court first reviewed the denial of the Summary Judgment we declined to reverse the denial of the Summary Judgment and deferred to the trial court's finding that there were material issues of facts as to the circumstances surrounding this accident. Whether the Kenner police were pursuing the Neon at a high rate of speed in violation of departmental policy or trailing the vehicle in compliance with departmental policy, seems to this author to be a disputed issue of material fact. Resolution of that fact this author believed could affect the trial court's causation determination. The Supreme Court, without stating any reasons, has rejected that position. Given this directive from the Supreme Court and recognizing the superior authority of that court, we now adopt the position set forth by Judge Rothschild in his original dissent, wherein he wrote,

I do not believe that the failure of the police to follow department policies, if such failure occurred, creates a material issue of the fact to preclude a summary judgment in favor of the Kenner defendants. The scope of the duty owed by law enforcement officers during dangerous traffic situations is to choose a course of action which is reasonable under the circumstances. Syrie v. Schilhab, 693 So.2d 1173, 1177 (La. 1997). The facts of this case reveal that the police acted reasonably under the circumstances, and there has been no showing otherwise.

For the foregoing reasons, the judgment of the trial court denying the Kenner defendants' Motion for Summary Judgment is reversed.

DISCUSSION ON THE ISSUE OF COVERAGE AND DEFENSE:

Scottsdale provided the Kenner defendants with a policy of insurance entitled "Law Enforcement Liability Policy." The policy contains an exclusion for bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading, or unloading of any automobile owned by or operated by the City of Kenner. Scottsdale contends that under the allegations made by plaintiffs and the facts of this case, there is no coverage under this policy. While acknowledging that the duty to defend is broader than liability for claims, Scottsdale argues that it is obligated to defend only if the allegations of plaintiffs' petitions, if taken as true, establish that there is coverage under the policy.

In support of this motion, Scottsdale attached the plaintiffs' petitions, the Scottsdale insurance policy, and the Fireman's Fund insurance policy. The Scottsdale policy states that:

The Company will pay on behalf of the insured all loss resulting from wrongful act(s) which arise out of and are committed during the course and scope of law enforcement activities or which arise out of the ownership, maintenance or use of premises by the name insured for the purpose of conducting law enforcement activities.

The Scottsdale policy does indeed contain an exclusion for injury and damages arising from the use of an automobile.

In opposition, the Kenner defendants argue that the policy is inconsistent and ambiguous. They conclude that this ambiguity should be resolved in favor of coverage. The issue of Scottsdale's coverage is mooted by this Court's granting of Summary Judgment on the issue of causation and so we need not address the coverage issue. However, we must still determine the issue of whether Scottsdale had a duty to defend its insured.

It is well-settled that an insurer's duty to defend suits brought against its insured is broader than its liability for damage claims. Vaughn v. Franklin 2000-0291, (La. App. 1 Cir. 3/28/01), 785 So.2d 79. Under the so-called "eight corners rule", an insurer must look at the four corners of the petition and the four corners of the policy to determine whether it has a duty to defend. Id. The allegations in the petition must be liberally interpreted in determining whether they fall into the insurer's duty to defend. Id.

The Kenner defendants and Fireman's Fund argue that there are allegations in plaintiffs' pleading that are alleged breaches of law enforcement duties completely independent from the use of an automobile. They contend that the duty allegedly breached by the officers or the Chief was not in the use of a police vehicle. In their petitions, plaintiffs allege, among other things, that the City of Kenner and its Police Chief were negligent in failing to properly instruct and/or train employees in the performance of their duty recognizing the need for or enforcement of a policy on pursuit and in failing to have procedures in place to recognize and avoid this type of incident. These are allegations related to duties that do not involve the use of automobiles. We find Scottsdale had a duty to defend its insured based on these allegations in plaintiff's petition. Accordingly, the trial court erred in granting Summary Judgment in favor of Scottsdale on the issue of duty to defend.

The judgment granting Summary Judgment in favor of Scottsdale is reversed in part. We conclude that Scottsdale had a duty to defend.

WRIT GRANTED; SUMMARY JUDGMENT GRANTED DISMISSING PLAINTIFFS CLAIM AGAINST CITY OF KENNER, THE CHIEF OF POLICE, NICK CONGEMI, THE KENNER POLICE OFFICERS, SCOTTSDALE INSURANCE CO., AND FIREMAN'S FUND INSURANCE COMPANY OF OHIO;

SUMMARY JUDGMENT ON ISSUE OF DUTY TO DEFEND REVERSED



EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

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JAMES L. CANNELLA
THOMAS F. DALEY
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CERTIFICATE

ICERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY OCTOBER 16, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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EDWARD A. DUFRESNE, JR.
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