

RENDERED: March 27, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2764-MR

GRACE SMITH, Executrix of
ESTATE OF IDA LOU STROUD,
and MARTHA DAVIS

APPELLANTS

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 96-CI-01999

CITY OF LOUISVILLE and
JAMES LAYTHAM

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, GUIDUGLI, and JOHNSON, Judges.

COMBS, JUDGE: This is an appeal from an order of the Jefferson Circuit Court entered on September 6, 1996, granting the appellees' motion to dismiss the appellants' complaint with prejudice. We affirm.

The appellants filed this action on April 2, 1996, alleging that the negligence of Officer Jimmie Laytham of the Louisville Division of Police caused the death of Ida Lou Stroud

and caused Stroud's daughter, Martha Davis, to suffer personal injury. The action arose out of incidents occurring on Tuesday, April 11, 1995, when Officer Laytham was following the vehicle of one Henry Perkins.

The pertinent facts are essentially uncontroverted. In the early evening hours of April 11, Officer Laytham observed the Perkins vehicle travelling westbound on I-264 at more than 80 m.p.h. Some moments later, Officer Laytham pulled in behind the Perkins vehicle and activated his cruiser's blue lights. Apparently aware of the officer's presence, the driver of the vehicle pulled into the right-hand lane, indicating to Officer Laytham that he planned to move into the emergency lane to facilitate the traffic stop. Instead, the vehicle exited the expressway at Dumesnil and Vermont Avenue in Louisville's West End.

After exiting the expressway, the driver reduced his speed to 30-40 m.p.h. and continued his progress. When the driver of the vehicle disregarded a stop sign at Dumesnil, Officer Laytham radioed the dispatcher that he was following a vehicle that would not pull over. As the Perkins vehicle continued through the West End, the driver disregarded several more stop signs. Laytham continued to follow at a speed of 30-35 m.p.h., his blue lights and siren activated.

At 40th and Greenwood Avenues, the driver again ignored a stop sign. It was at this intersection that Perkins's Lincoln Continental collided with a Toyota Corolla being driven by Martha

Davis. Both of the occupants of the smaller car were injured; Stroud later died. Perkins was not seriously injured. In fact, he exited his vehicle and ran from the scene. Officer Laytham was able to apprehend Perkins as he attempted to climb a six-foot fence.

On May 24, 1995, the Jefferson County Grand Jury indicted Perkins on six criminal counts, including murder and driving under the influence. Perkins pleaded guilty to amended charges of manslaughter, assault, criminal mischief, reckless driving, attempt to elude police, and failure to stop at a stop sign.

On April 24, 1996, Officer Laytham and the City of Louisville moved the trial court to dismiss the complaint. They argued that the damage suffered by the plaintiffs resulted solely from the collision with a drunk driver and that, as a result, the plaintiffs had not stated a cause of action against the defendants. They maintained that the uncontroverted facts indicated that Officer Laytham was not engaged in a high-speed chase or "pursuit" as that term is customarily used but was, instead, simply following the Perkins vehicle at a reasonable distance and speed. They argued that the plaintiffs had not demonstrated that Officer Laytham took any action which would have caused Perkins to drive erratically or to attempt any evasive action.

The plaintiffs filed a response to the motion, which was accompanied (among other documents) by the affidavit of Dr.

George Kirkham and the statement of Officer Laytham. The appellants argued that dismissal was not appropriate because Officer Laytham violated the City's policy and procedures with respect to a police officer's "fresh pursuit."¹

Relying in part upon Fryman v. Harrison, Ky., 896 S.W.2d 908 (1995), the court concluded that neither the officer nor the city could be held liable for the wrongful actions of the fleeing criminal.² By order entered on September 6, 1996, the trial court dismissed the action. This appeal followed.

CR 12.02 and CR 12.03 require that a motion in which matters outside the pleadings are considered is to be treated as a motion for summary judgment. Craft v. Simmons, Ky. App., 777 S.W.2d 618 (1989). Because material outside the pleadings was submitted in conjunction with the motion, we review the dismissal as if it were a summary judgment entered in favor of the movants.

¹Article 59 of the Division of Police's manual of policy and procedures provides, in part, as follows:

It is the policy of the Louisville Division of Police that the apprehension of one or more occupants of a moving motor vehicle, is to be considered secondary in importance to public safety.

* * * *

The department's fresh pursuit policy is an attempt to balance the community's demand that police officers apprehend criminals against the potential risks to third parties resulting from high-speed, vehicular pursuits.

²In Fryman, the court held that "[p]ublic officials in an individual capacity or otherwise, cannot be expected to protect every individual whether known to them or not from any possible harm by third parties." Fryman, at 909-910.

The question presented is whether the alleged negligent actions of the Officer Laytham constituted a proximate or legal cause of the appellants' injuries. We have concluded that, as a matter of law, they did not.

Summary judgment is only appropriate "when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Steelvest, Inc. v. Scansteel Serv. Center, Inc., Ky., 807 S.W.2d 476, 483 (1991), citing Paintsville Hosp. Co. v. Rose, Ky., 683 S.W.2d 255 (1985). The respondent must present some affirmative evidence showing that there exists an issue of material fact for trial in order to defeat a properly supported motion for summary judgment. Steelvest, 807 S.W.2d at 482.

Our highest court addressed a substantially similar fact situation in Chambers v. Ideal Pure Milk Co., Ky., 245 S.W.2d 589 (1952). In that case, a third party was fleeing police when he ran into a milk wagon, injuring its driver. The driver subsequently brought suit contending that the police officer's negligent conduct in chasing the third party caused his injuries. The court refused to adopt his contention. Instead, it held as follows:

The police were performing their duty when Shearer, in gross violation of his duty to obey the speed laws, crashed into the milk wagon. To argue that the officers' pursuit caused Shearer to speed may be factually true, but it does not follow that the officers are liable at law for the results of Shearer's negligent speed. Police cannot be made insurers of the conduct of the culprits they chase. It is our

conclusion that the action of the police was not the legal or proximate cause of the accident, and that the jury should have been instructed to find for the appellants.

Id. at 590-591. While the Chambers decision is expressly limited to the facts presented there, we find it instructive -- especially in light of the more recent holding of Fryman, supra.

A review of the record indicates that it is impossible for the appellants to present evidence to the trial court tending to prove that any negligent conduct on the part of Officer Laytham constituted a legal cause of the appellants' injuries. The allegations and facts presented to the trial court reveal that the actions of a drunk driver alone were the legal cause of the injuries suffered by the appellants. The order entered by the Jefferson Circuit Court in favor of the appellees must, therefore, be affirmed.

GUIDUGLI, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING: I respectfully dissent.

Fryman v. Harrison, supra, that was relied upon by the trial court, is not applicable to the case at bar since the duty requirement is met based upon the City's own policies. Chambers v. Ideal Pure Milk Company, supra, relied upon by the Majority is also distinguishable because it held that "[t]he police were performing their duty" when the damage occurred. In the case sub judice, the police officer was violating his duty as established by the City's policy and procedures when the damages occurred.

The policy and procedures are very clear concerning this type of pursuit. Pursuit is defined in pertinent part as follows: "An act or instance of pursuing or chasing." Perkins clearly took "evasive tactics" in attempting to avoid arrest. Since Officer Laytham did not "have reasonable suspicion to believe that [Perkins was] a felon or a suspected felon," the pursuit was not authorized. In fact, since the pursuit was for a misdemeanor or violation, it was specifically prohibited by the City's policy and procedures. This breach of duty established by the City's policy and procedures is actionable. Current v. Columbia Gas of Kentucky, Ky., 383 S.W.2d 139 (1964).

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