

RENDERED: June 12, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-003259-MR

KAY BURTON, ADMINISTRATRIX
OF THE ESTATE OF DOUGLAS
V. BURTON

APPELLANT

v. APPEAL FROM ADAIR CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
ACTION NO. 94-CI-000100

MARK D. HARRIS, INDIVIDUALLY,
AND OFFICIALLY AS POLICE OFFICER
FOR THE CITY OF COLUMBIA; AND
CITY OF COLUMBIA

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, EMBERTON, and JOHNSON, Judges.

JOHNSON, JUDGE: Kay Burton (Burton), the administratrix of the estate of her son, Douglas Burton (Doug), has appealed from the judgment of the Adair Circuit Court entered on August 12, 1996, which summarily dismissed her complaint. Burton had alleged that the negligence of Officer Mark D. Harris (Officer Harris) and his employer, the City of Columbia (the City) caused the death of her son. Finding no error, we affirm.

The parties to this appeal do not agree on the factual events leading to Doug's death and disagree as to the appropriate inferences to be drawn from the facts which are not in dispute. Officer Harris and the City strenuously object to many of Burton's alleged facts in support of her complaint and are particularly aggrieved by those allegations which impugn the officer's character. Nevertheless, considering the procedural posture of this case, it is our function, in reviewing the legal efficacy of the summary judgment, to consider "the facts alleged by the plaintiff[] and the evidence of record supporting [her] claim at the time of dismissal, together with all reasonable inferences therefrom. . . ." Capital Holding Corporation v. Bailey, Ky., 873 S.W.2d 187, 189 (1994). To that end, we are required to recite the facts as alleged by Burton, although the appellees find them offensive.

Burton alleged as follows: At approximately 3:30 a.m. on April 24, 1994, Doug was fatally injured when the motorcycle he was operating left the highway, flipped over and crashed in a ditch. A few minutes before the accident, Officer Harris, who was accompanied in his police car by a friend, Kevin Magsam (Magsam), had seen Burton pass two vehicles in a no-passing zone on Highway 206. Officer Harris began to pursue Doug with his lights on. At the time of the accident, Officer Harris was still chasing Doug in his patrol car. Doug was familiar with the highway on which the accident occurred. He was an experienced motorcycle operator, although this was the first day the

motorcycle he was riding was operational. Tests performed during an autopsy indicated that Doug had a blood alcohol level of 0.12. There was also a presumptive presence of marijuana in his system.

Doug had spent most of the evening before the crash with a friend, William Polson (Polson), at Predators, a local pool hall in Columbia. The two men had purchased beer "at the local bootlegger at the drive through window." At 8:30 or 9:00 p.m., Doug was talking with friends, including Carol Schrantz (Schrantz), outside of the pool hall when, according to Schrantz's affidavit, Officer Harris drove by in his police vehicle and gave Doug a vulgar hand gesture, a "greeting" which, she stated, Doug returned. A few minutes later, Officer Harris returned, stopped and talked to Doug. Schrantz stated that she heard Officer Harris tell Doug before driving away, "I'll get you before this night's over." Schrantz asked Doug about the meaning of the officer's statement to which Doug replied, "Nothing."

By 1:00 a.m., Doug and Polson decided to go home, but Polson's motorcycle would not start. The two men rolled the motorcycle down the street from Predators to Burton's Service Station which is located next to a convenient store. After working on Polson's bike for two hours without success, they decided to call it quits. Polson obtained a ride home with Dawn Scott. When Doug got on his motorcycle to leave, it fell over.

Burton alleged that Officer Harris had been parked behind the convenient store "for quite some time," watching and "stalking" her son. She alleged that Officer Harris witnessed

Doug's bike fall over. Doug apparently got his motorcycle upright and once on Highway 206, committed the traffic violation which caused Officer Harris to turn on his lights and pursue him. Additional allegations essential to Burton's arguments on appeal include (1) that Doug's speedometer was stuck at 25 m.p.h. after the accident, (2) that Officer Harris had been professionally recognized for his large number of DUI arrests, and (3) that Officer Harris told a witness¹ after the accident that he did not get along with "Harleys and drunks."

In her complaint, Burton alleged that Officer Harris "wrongfully, negligently and maliciously pursued [Doug] at a high rate of a [sic] speed causing [Doug] to have an accident and causing [his] death." She also alleged that the City was responsible for her son's death because of its "negligence and carelessness" in its "training and instruction of proper procedures for police officers."

As exhibits to their motion for summary judgment, Officer Harris and the City filed the coroner's report and the affidavit of Sheriff John S. Shipp, who stated that on the date of the accident he was a police officer with the Kentucky State Police and was responsible for the investigation of the accident which resulted in Doug's death. He stated that he inspected Officer Harris' vehicle on the night of the incident and that "there were no signs or indications on the front of th[e] cruiser which would demonstrate that contact occurred between the police

¹The identity of this witness is not contained anywhere in the record or briefs.

cruiser and [Doug's] motorcycle. . . ." He made a similar finding after inspecting the motorcycle. The appellees also offered the affidavit of Officer Harris, who denied seeing the motorcycle wreck, and that of Magsam, who stated that the police cruiser never made physical contact with Doug's motorcycle. Burton's response to the motion for summary judgment included the affidavit of Robert Davis (Davis), a private investigator and former Kentucky State Police officer, employed by Burton to investigate the accident. Most of the facts recited earlier herein are contained in Davis' affidavit.

On August 12, 1996, the trial court entered a summary judgment ruling that Officer Harris' conduct was not the proximate cause of Doug's accident and that the facts of the instant case "fall[] squarely within the circumstances envisioned by the Chambers [v. Ideal Pure Milk Co., Ky., 245 S.W.2d 589 (1952)] decision." Burton filed a timely motion to set aside and vacate the judgment pursuant to Kentucky Rules of Civil Procedure 59.05, accompanied by the affidavit of Schrantz, which as noted earlier, contained allegations of personal animosity toward Doug on the part of Officer Harris. Nevertheless, the trial court found nothing in Schrantz's affidavit to cause it to vacate its earlier ruling and, accordingly, on October 31, 1996, denied Burton's motion. This appeal followed.

It is well settled in this jurisdiction that summary judgment is to be cautiously granted and is appropriate only "'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 Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991), quoting Paintsville Hospital Company v. Rose, Ky., 683 S.W.2d 255, 256 (1985). See also Old Mason's Home of Kentucky, Inc. v. Mitchell, Ky. App., 892 S.W.2d 304, 307 (1995). On the other hand, "a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." 807 S.W.2d at 482. The evidence of negligence in this case falls far short of meeting the standard articulated in Steelvest, and our review of the record reveals that it would be impossible for Burton to prove that any conduct committed by Officer Harris, or his employer, the City, caused Doug's death.

In Chambers, supra, our highest Court addressed a similar factual situation. In that case, a person attempting to flee from the police collided with a milk wagon, injuring the driver. The driver brought suit against the police alleging that it was their conduct which caused his injuries. In rejecting the plaintiff's claim, the Court 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 (emphasis added).

Burton insists that Chambers does not reflect the current law in this jurisdiction. Specifically, she relies on Speck v. Bowling, Ky. App., 892 S.W.2d 309 (1995), in which this Court held that a police officer "is [not] free to operate his vehicle negligently or to put others on the roadways in danger in carrying out [their] duties." Id. at 311. Burton argues that Speck "implicitly overruled Chambers." Burton is incorrect.

Opinions of this Court, emanating from an intermediate appellate body, cannot alter the precedential value or legal viability of opinions of our state's highest Court. In any event, Speck is significantly distinguishable from Chambers. In Speck it was alleged that the police officer was negligent in operating his vehicle which collided with and caused injury to a third party. In Chambers it was the fleeing suspect who collided with a third party. The Chambers holding is specifically limited to injuries resulting from the negligent conduct of a person attempting to elude the police. The Court refused to impose liability on a police officer as a matter of law for the injuries or damages caused by a vehicle being operated by a pursued violator or suspected criminal.

Chambers does not purport to address issues of proximate cause in situations like those in Speck and Prater v.

Arnett, Ky. App., 648 S.W.2d 82 (1983) (proximate cause of fatal injuries sustained by passenger in police vehicle during high speed chase determined to present a jury question), which involve a collision with the vehicle being operated by the officer. In the instant case, there is no evidence from which a jury could possibly infer that Officer Harris' vehicle came into contact with Doug's motorcycle. Thus, as a matter of law, the proximate cause of Doug's injuries was not a legally cognizable breach of any duty owed to Doug by Officer Harris. Chambers, supra.

Since Burton is aware that there is no evidence that Officer Harris' vehicle collided with Doug's motorcycle, she also argues that Officer Harris was negligent in deciding to pursue Doug in the first instance and/or in failing to terminate the chase. Her argument from her brief is, in part, as follows:

Officer Harris decided to engage in a high speed pursuit for some distance despite the fact that the violation in question was a minor passing violation. The high speed chase occurred on a winding curving road. Officer Harris knew Doug was on a motorcycle which is difficult to control in curves, yet he continued this chase knowing that if Doug wrecked the motorcycle he would likely receive serious injuries or death. Also, other drivers on the road could have been injured as the vehicles took wide curves into other lanes. Officer Harris also believed Doug to be intoxicated magnifying the above dangers.

In the present action, Officer Harris' duty in effecting an arrest was measured by the danger involved under the circumstances in relation to the offense in question. The violation in question was clearly outweighed by the

danger involved. As such, Officer Harris had a duty to terminate the chase, yet he failed to do so.

Clearly, the law in this area is evolving. The get-the-suspect-at-any-cost attitude, memorialized in countless Hollywood chase scenes, is giving way to the recognition that a police officer's "paramount duty is to protect the public." Haynes v. Hamilton County, 883 S.W.2d 606, 610 (Tenn. 1994). In the majority of states, the question of whether an officer's decision to pursue or to continue to pursue a suspect at high speeds is the proximate cause of injury to innocent third parties, is one for a jury's determination. Id. at 612. The majority of jurisdictions allow liability to be imposed on an officer in an action by the third party injured by a fleeing suspect. Id. Considering this trend, and the evolution of tort law in this jurisdiction, see e.g. Waldon v. Housing Authority of Paducah, Ky. App., 854 S.W.2d 777 (1993), and Grayson Fraternal Order of Eagles v. Claywell, Ky., 735 S.W.2d 328 (1987), we believe that the continued application of Chambers in the context of injuries to third parties is susceptible to change. In any event, we are not aware of any recent authority in this jurisdiction that would cause us to question the application of Chambers vis-a-vis injuries sustained by a fleeing suspect.

Finally, Burton argues that the accident would not have occurred but for Officer Harris' negligent failure to arrest Doug for public intoxication earlier in the evening. Burton insists that a jury could infer from the evidence of Officer Harris'

hostility toward Doug and those who ride motorcycles and from his professional awards for arresting drunk drivers, that Officer Harris was stalking Burton, knowing he was drunk, in order to obtain another DUI arrest and thereby bolster his career.

While Doug was legally intoxicated at the time of the accident, there is no evidence in the record from which the jury could infer that Officer Harris had probable cause to arrest Doug for public intoxication at any time on the day of the accident. There is no evidence that Officer Harris saw Doug buy alcohol from the "local bootlegger." There is no evidence that Doug was drinking outside of Predators or ever drank or smoked marijuana in view of Officer Harris. There is no evidence that Doug acted in a manner consistent with being in a state of intoxication. Indeed, had Officer Harris been watching Doug for the entire evening prior to the accident, there is no evidence that he would have seen Doug ever behaving as though he were impaired. The evidence of record simply does not support Burton's allegations in this regard.

Accordingly, the judgment of the Adair Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Theodore H. Lavit
Hon. Stephen B. Humphress
Lebanon, KY

BRIEF FOR APPELLEE:

Hon. James D. Desmond
Louisville, KY