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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000879-MR
AND
NO. 2015-CA-000921-MR

MELONIE DEANA PURSIFULL, INDIVIDUALLY AND
AS ADMINISTRATRIX OF THE ESTATE OF
ANTHONY SEAN PURSIFULL, DECEASED, AND AS
STATUTORY GUARDIAN OF V.A.P., A MINOR,
AND F.S.P, A MINOR, AND STEPHANIE BOWLES,
AS STATUTORY GUARDIAN OF S.B.P., A MINOR

APPELLANTS

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE ROBERT COSTANZO, JUDGE
ACTION NO. 08-CI-00567

KENNY ABNER AND ROBERT FARLEY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: A sheriff's deputy and his canine unit were killed when a person in a vehicle being pursued by two Kentucky State Police troopers veered his car off the road at almost 80 miles per hour and crashed his vehicle into the deputy's cruiser. The victim's family sued the troopers individually, claiming the troopers negligently pursued the criminal, resulting in the deputy's death. The trial court granted summary judgment in favor of the troopers. Both cases were appealed and have been consolidated to the same panel. We issue this jointly-styled opinion to address the nearly-identical issues raised in both cases.

FACTS

Two Kentucky State Police troopers, Kenny Abner and Robert Farley, each in separate police cruisers, initiated pursuit of a vehicle driven by David Poppiti. Poppiti was suspected of having recently stolen gasoline from a service station. The hour was late, and the sun had already set. Poppiti led the troopers on a high-speed chase on U.S. Highway 119 between Harlan and Pineville, Kentucky. The chase lasted approximately 20 miles and slightly more than 10 minutes. At that point, Poppiti, while traveling about 80 miles per hour, drove his car off the roadway and straight into the side of Deputy Sheriff Anthony Pursifull's cruiser. Deputy Pursifull and his canine unit were stationed off the highway where U.S. 119 terminated in a "T" intersection.

The impact killed Deputy Pursifull and his canine unit. Poppiti and his passenger both survived. Poppiti subsequently pled guilty to one count of

murder and one count of first-degree fleeing or evading police. He received a 20-year imprisonment sentence.

Melonie Pursifull then filed a suit individually, as administratrix of Pursifull's estate, and as statutory guardian of V.A.P. and F.S.P., minors, against Troopers Abner and Farley. Stephanie Bowles, as statutory guardian of S.B.P., a minor, also filed suit against Troopers Abner and Farley.

Following discovery, on May 23, 2013, the trial court granted partial summary judgment in favor of Trooper Abner. In that Order, the trial court found and held that Trooper Abner was entitled to qualified official immunity on the causes of action raised by Melonie Pursifull.

On September 23, 2014, the trial court then granted summary judgment in favor of Trooper Abner relating to Melonie Pursifull and Stephanie Bowles' cause of action. In that Order, the trial court found and held that the case of *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky. 1952) controlled the issue of causation. In that case, a horse-drawn milk wagon was cut in two when an automobile being pursued by police crashed through the wagon. *Id.* at 589-90. In the ensuing lawsuit seeking damages as a result of the officers' alleged negligence, Kentucky's then-highest court rejected that the officers' pursuit was the legal or proximate cause of the accident. *Id.* at 591. "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.*

Based on the holding in *Chambers*, the trial court granted summary judgment in favor of Trooper Abner, noting the negligence claim was precluded because causation could not be proven. The trial court declined to address Trooper Abner's additional summary judgment claim that the "Firefighter's Rule" operates as a defense to the negligence cause of action. Because the plaintiffs could not prove causation, the trial court reasoned, Trooper Abner did not require a defense to the negligence claim.

Finally, on May 13, 2015, the trial court entered summary judgment in favor of Trooper Farley. Its order does not state the reasons for its ruling. The parties have timely appealed, and the two cases have been consolidated to the same panel for an appellate decision.

STANDARD OF REVIEW

A trial court considering the summary judgment motion must view "[t]he record . . . in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991) (citing *Dossett v. New York Mining and Manufacturing Co.*, 451 S.W.2d 843 (Ky. 1970)). "Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists." *Shelton v. Kentucky Easter Seals Society, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). "So we operate under a de novo standard of review with no need to defer to the trial court's decision." *Id.*

Under that review, summary judgment should only be granted “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*, 807 S.W.2d at 483 (quoting *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)). “The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (quoting *Steelvest*, 807 S.W.2d at 482). “[I]mpossible’ is used in a practical sense, not in an absolute sense.” *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992).

ANALYSIS

The parties present multiple, alternative issues for our review. First, Stephanie Bowles argues the trial court erred by granting summary judgment on the issue of causation. She argues that a genuine issue of material fact exists regarding whether the troopers’ actions were the legal cause of Deputy Pursifull’s death. Second, she argues that the troopers are not entitled to qualified official immunity from suit.

Melonie Pursifull likewise argues that a genuine issue of material fact exists regarding whether the troopers’ actions were the legal cause of Deputy Pursifull’s death and that the troopers are not entitled to qualified official immunity from suit. She also claims the Firefighter’s Rule does not bar her cause of action.

In response, Trooper Abner argues that his actions were not the legal or substantial factor in the death of Deputy Pursifull. He alternatively claims the Firefighter's Rule bars suits between fellow law enforcement officers in these circumstances. He also alternatively claims he is entitled to qualified official immunity from suit. Trooper Farley adopts Trooper Abner's arguments.

We hold that the trial court properly granted summary judgment on the causation issue. Accordingly, all other issues are moot. Our analysis is as follows.

CAUSATION

The trial court properly held that the troopers' actions were not the legal or substantial factor in the death of Deputy Pursifull. A negligence claim requires a party to prove three elements: (1) duty; (2) breach of that duty; and (3) consequent injury. *Keaton v. G.C. Williams Funeral Home, Inc.*, 436 S.W.3d 538, 542 (Ky. App. 2013) (citing *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 247 (Ky. 1992)). Consequent injury consists of two distinct elements: (1) "actual injury or harm to the plaintiff"; and (2) "legal causation between the defendant's breach and the plaintiff's injury." *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 89 (Ky. 2003). The "duty" element is a question of law, while breach and injury are questions of fact. *Id.* Legal causation, which is the issue before us, is a mixed question of law and fact. *Id.* (citing *Deutsch v. Shein*, 597 S.W.2d 141, 145 (Ky. 1980)).

In Kentucky, legal cause is defined as conduct that “is a substantial factor in bringing about the harm” for which “there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.” *Deutsch v. Shein*, 597 S.W.2d 141, 144 (Ky. 1980) (abrogated on other grounds by *Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012)) (citing Restatement (Second) of Torts § 431). “Substantial” does not simply mean that the harm would not have occurred without the actor’s negligence, instead:

[t]he negligence must also be a substantial factor in bringing about the plaintiff’s harm. The word “substantial” is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called “philosophic sense,” which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called “philosophic sense,” yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Restatement (Second) of Torts § 431, comment (a).

Because causation is a mixed question of law and fact, it may sometimes be an issue for the court to determine and sometimes an issue for the jury. “The court has the duty to determine ‘whether the evidence as to the facts makes an issue upon which the jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff.’” *Pathways, Inc. v. Hammons*, 113 S.W.3d 85, 92 (Ky. 2003) (quoting Restatement (Second) of Torts § 431(1)(a)). This determination must occur in the

context of the summary judgment standard. *Pathways, Inc.*, 113 S.W.3d at 92. All facts must be viewed in a light most favorable to the non-moving party, and all doubts must be resolved in the non-moving party's favor. *Id.*

Here, the only issue on the negligence claim is whether the troopers were the legal cause of Poppiti murdering Deputy Pursifull. On this issue, the trial court properly found *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky. 1952) controlled. There, a horse-drawn milk wagon was cut in two by a speeding automobile that was being chased by two officers in a police cruiser. It appears the cruiser did not hit the milk wagon; only the fleeing suspect's vehicle hit the milk wagon, which then caused the milk wagon to hit the back end of the police cruiser. *Id.* at 590. The officers observed a known suspicious character with a past criminal history behaving oddly inside a parked car. The officers attempted to investigate, and the suspicious character sped off. The suspect led the police on a 75-plus mile-per-hour chase over 13 city blocks before crashing into the milk wagon. Officers pursued with their lights flashing and siren screaming, and they fired shots in the air to halt the fleeing suspect. *Id.*

The milk wagon driver sued the police officers individually, claiming their negligence caused the suspect to crash into the milk wagon. The Commonwealth's then-highest court rejected that the officers were either the legal or proximate cause of the accident. While the officer's pursuit did cause the suspect to speed, the officers were not liable for the suspect's negligent speed. "Police cannot be made insurers of the conduct of the culprits they chase." Thus,

instituting and continuing the chase “was not the legal or proximate cause of the accident,” and the officers were not liable for the suspect’s negligent acts. *Id.* at 591.

Utilizing this holding, a panel of this Court recently held in a factually-similar appeal to the instant case:

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.

Plummer v. Lake, 2014 WL 1513294 at *10 (Ky. App. 2014) (unreported) (disc. rev. denied Dec. 10, 2014).

Chambers is dispositive in the instant case. While the troopers may have factually caused Poppiti to speed, they are not “made insurers of the conduct of” Poppiti. The *Chambers* holding is even stronger here as it appears to not be the negligent actions of the suspect, but the intentional or wanton actions of the suspect that caused Deputy Pursifull to lose his life. We have reviewed the record and the video of the collision. All evidence supports that Poppiti veered off the road, made no attempt to stop or otherwise slow his vehicle as his stop lights never engaged, and struck squarely into Deputy Pursifull’s vehicle at speeds exceeding 70 miles per hour.

Notably, Poppiti later pled guilty to the murder of Deputy Pursifull under Kentucky Revised Statutes (KRS) 507.020. That statute permits two *mens rea*: intentional or wanton with extreme indifference to human life. Both mental states are substantially more severe than mere negligent conduct. *Compare* KRS 501.020(1) and (3) with *Commonwealth v. Tackett*, 299 Ky. 731, 187 S.W.2d 297, 299 (1945) (“In order to hold one criminally negligent there must be a higher degree of negligence proven than is required to establish negligence in a civil action.”). Poppiti also pled guilty to first-degree fleeing or evading police, which requires one to knowingly or wantonly disobey a direction to stop a motor vehicle, and in so doing flee or elude in such a way that the person “is the cause . . . of . . . death to any person” KRS 520.095(1)(a)(4). Even under this offense, Poppiti acted more egregiously than the level of civil negligence, and he admitted he was “the cause” of Deputy Pursifull’s death.

Given that the suspect acted intentionally or wantonly with extreme indifference to human life, we cannot say that any of the troopers’ actions, even if they were negligent in causing or continuing the pursuit, were the legal or proximate cause of Deputy Pursifull’s murder. “When the original negligence is remote and only furnishes the occasion of the injury, it is not the proximate cause thereof.” *Peak v. Barlow Homes, Inc.*, 765 S.W.2d 577, 579 (Ky. App. 1988).

Having reached the conclusion that the trial court did not err by granting summary judgment on the causation element, we briefly address the remaining arguments raised by appellants on the causation issue. First, we reject

Bowles's argument that *Mattingly v. Mitchell*, 425 S.W.3d 85 (Ky. App. 2013) in any way addresses the causation issue. There, a trial court had denied an officer's motion for summary judgment regarding causation, and a panel of this Court specifically concluded that it did not have jurisdiction to consider the denial of a summary judgment motion "on the basis that his actions were not the proximate cause of the accident[.]" *Id.* at 91.

We likewise reject Melonie Pursifull's argument that the adoption of comparative fault implicitly overruled *Chambers*. Melonie Pursifull relies on *Pile v. City of Brandenburg*, 215 S.W.3d 36 (Ky. 2006). There, a police officer arrested a person who was suspected of drunk driving. *Id.* at 38-39. The officer then left the suspect handcuffed in the back of the police cruiser, which was separated from the front by a plexiglass partition, while the officer went to direct traffic. The keys were left in the ignition. The suspect managed to maneuver to the front seat, start the car, and drive away at a high rate of speed, eventually crashing into a vehicle driven by Theresa Ann Foltz. Both Foltz and the suspect were killed. Foltz's estate sued the police officer, among others.

On appeal the Kentucky Supreme Court addressed whether the suspect's tortious conduct was the superseding cause of the death. *Id.* at 41-42. It initially noted that "the rationale for the doctrine of superseding cause has been *substantially diminished* by the adoption of comparative negligence[.]" *Id.* at 42 (emphasis added). The doctrine has not been extinguished entirely, though. The Court further noted "that a superseding cause is an act of a third person or other

force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a factor in bringing about.” *Id.*

Under *Pile*’s facts, the suspect’s actions were not a superseding cause. “It is clear that leaving the key in the vehicle was a negligent act which created the opportunity for the prisoner to escape with the vehicle and operate it in the fashion which caused the ultimate fatality.” *Id.*

The instant case is not like *Pile*. Here, the officers did not negligently leave keys in a vehicle so a suspect could steal the automobile. Instead, the officers initiated a traffic stop. The officers did not create the opportunity for Poppiti to murder Deputy Pursifull by initiating a lawful stop. Poppiti chose to flee the lawful stop, Poppiti chose to lead the police on a high-speed chase, and Poppiti finally chose to drive his vehicle (either intentionally or wantonly with extreme indifference to human life) into Deputy Pursifull’s parked cruiser. These events collectively could create a superseding cause, “a factor of such extraordinary, unforeseeable nature as to relieve the original wrongdoer of liability to the ultimate victim.” *McDonald’s Corp. v. Ogborn*, 309 S.W.3d 274, 292 (Ky. App. 2009) (quoting *Briscoe v. Amazing Products, Inc.*, 23 S.W.3d 228, 229 (Ky. App. 2000)).

More importantly, though, the troopers herein have not argued that Poppiti’s actions were a superseding cause. Instead, their argument has focused on whether the troopers’ actions were the proximate or legal cause of Deputy Pursifull’s death. To that end, *Hammons* is on point in its discussion of the “substantial factor” test for legal causation. *Pathways, Inc. v. Hammons*, 113

S.W.3d 85, 92 (Ky. 2003). Though the appellants argue the troopers were negligent during the high-speed chase by crossing the center line, driving too close to the suspect vehicle, and shining a spotlight into the suspect vehicle, none of these acts, even if any or all of them were negligent acts, was the proximate or direct cause of Poppiti's murderous act. All of the troopers' allegedly negligent acts were completed long before Poppiti chose to murder Deputy Pursifull.

To that end, this case is best contrasted with *Gaither v. Justice & Public Safety Cabinet*, 447 S.W.3d 628 (Ky. 2014). There, Kentucky State Police officers acted negligently by permitting their confidential informant's identity to become public knowledge, even though the officers were aware that known drug traffickers on the street would discover the confidential informant's identity. One of the drug traffickers then kidnapped the confidential informant and had him tortured and killed. The officers argued that the drug trafficker's actions were a superseding cause that "broke the chain of proximate causation connecting the police negligence and Gaither's death." *Id.* at 639. The Court rejected this argument, noting that drug traffickers are quick to retaliate against confidential informants; thus it was a "known risk and a foreseeable consequence of using Gaither in a buy/bust operation against Noel after Gaither's anonymity had been compromised. It is therefore not a superseding cause that relieves the KSP of its share of the apportioned fault." *Id.* at 640.

In *Gaither* the legal and proximate cause of Gaither's murder was the failure to maintain a confidential identity. In *Pile* the legal and proximate cause of

Foltz's death was leaving the keys in the cruiser with the suspect. In contrast here, the legal and proximate cause of Deputy Pursifull's death was the intentional or wanton act of Poppiti. Any of the allegedly negligent acts by the troopers did not result in the murder of Deputy Pursifull. Had the troopers caused a collision due to their negligence, then the instant case might have a different outcome. *See, e.g., Jones v. Lathram*, 150 S.W.3d 50 (Ky. 2004).

It is apparent from the facts, though, that Poppiti either intentionally or wantonly with extreme indifference to human life veered his car off the road and directly into Deputy Pursifull's cruiser. Poppiti's actions directly caused the deaths of Deputy Pursifull and his canine unit. *Chambers v. Ideal Pure Milk Co.*, 245 S.W.2d 589 (Ky. 1952) is dispositive on the causation issue and controls this case.

CONCLUSION

The trial court properly granted summary judgment to the troopers on the issue of causation. As the trial court correctly held that the troopers were entitled to summary judgment on the negligence claims, we need not address the qualified official immunity and Firefighter's Rule issues. Accordingly, we affirm the order.

ALL CONCUR.

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