

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL BESTE and KATHRYN SUCCARDE,

Plaintiffs-Appellants,

V

CITY OF DETROIT,

Defendant-Appellee,

and

TERENCE ANTONIO NEWELL, TAHA
CLIFF WHELLER, and DETROIT POLICE
DEPARTMENT,

Defendants.

UNPUBLISHED

July 16, 2002

No. 230657

Wayne Circuit Court

LC No. 00-005409-NI

Before: Kelly, P.J., and Murphy and Murray, JJ.

MURPHY, J. (*concurring*).

I concur with the majority opinion in all respects except I find it unnecessary to determine whether *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000), applies retroactively because defendant city is entitled to summary disposition even under the overruled precedent set forth in *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998), and *Fiser v Ann Arbor*, 417 Mich 461; 339 NW2d 413 (1983) (both cases overruled in *Robinson*, *supra* at 445).

Under prior precedent, factors considered in determining the reasonableness of police pursuits included: (1) whether there was an emergency, (2) the speed of the pursuit, (3) the area of the pursuit, (4) the weather and road conditions, (5) the presence of pedestrians and other traffic, (6) the presence or absence of audible and visible warnings, and (7) the reason the officers were pursuing the fleeing vehicle. *Rogers*, *supra* at 144, citing *Fiser*, *supra* at 472.

Here, as noted by the majority, Succarde stated in an affidavit that she saw a police vehicle next to the fleeing vehicle, and she opined that the police vehicle physically forced the fleeing vehicle into Beste and her. However, Succarde's opinion appears to be mere speculation that the police vehicle forced the fleeing vehicle into her car and Beste, and additionally, there are no facts contained in the affidavit indicating that the police vehicle, or any police vehicle, was in hot pursuit of the fleeing vehicle, or proceeding in any improper manner.

MRE 701¹. Plaintiffs presented no documentary evidence that would create an issue of fact negating the reasonableness of the police officers' actions in the incident under the factors enunciated in *Rogers* and *Fiser*. There was no evidence presented that the officers were driving at excessive speeds or proceeding through stop signs and signals.

According to officer White, officer Biggers turned their vehicle around and followed the fleeing vehicle at a speed just slightly over the twenty-five to thirty-five mile per hour speed limit, and that they lost sight of the fleeing vehicle, at which point officer Biggers proceeded at the posted speed limit. Officer White believed that Wheeler was not really fleeing the police because they never had time to take any action, including turning on the lights and siren while in view, and officer White checked "none" under the special circumstances section of the crash report, which listed "police chase" as a special circumstance. There is a complete lack of evidence proving causation. Officer White further testified in her deposition that another police vehicle in the vicinity also lost sight of the fleeing vehicle.

There is simply no evidence of an improper police pursuit and summary disposition in defendant city's favor was proper without regard to *Robinson*.²

/s/ William B. Murphy

¹ MRE 701 requires that a lay witness' opinion be "rationally based on the perception of the witness"

² Regarding Succarde's claim concerning the police helicopter, it was also mere speculation, and moreover, a helicopter is not a "motor vehicle." MCL 691.1405; MCL 257.33; MCL 257.79 (A vehicle "means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway").