

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
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MICHAEL MARSH, Admr.

Plaintiff

v.

HEARTLAND BEHAVIORAL HEALTH CENTER, et al.

Defendants

Case No. 2007-06705

Judge Joseph T. Clark

DECISION

{¶ 1} Plaintiff brought this action alleging that Heartland Behavioral Health Center (HBHC) police officers, Thomas Frankland and Jeffrey Newkirk, operated their HBHC patrol car in such a manner so as to cause the death of Ronald Marsh (Marsh). More specifically, plaintiff alleges that Officers Frankland and Newkirk acted “negligently and/or recklessly and/or willfully and wantonly and in conscious disregard of the safety of the public and his/their employer’s policies and the laws of the State of Ohio.” The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶ 2} Based upon those facts adduced at trial, the events that led to the fatal accident are as follows.

{¶ 3} At approximately 2:33 a.m. on August 11, 2005, Massillon Police Officer Brian Muntean observed a bright green Kawasaki sport motorcycle speed past his cruiser in the opposite direction. According to Officer Muntean, the driver “came left of center and was clearly in my lane.” (Muntean Deposition, Defendant’s Exhibit N.)

Officer Muntean turned around, activated his cruiser's lights and siren, and began to pursue the motorcycle through the streets in Massillon. Shortly thereafter, other officers joined in the pursuit. The officers involved in the chase testified that the driver ran red lights, exceeded the speed limit, and evaded Officer Muntean's attempt to block the driver's path by parking his cruiser in the street as the driver came directly at him.

{¶ 4} At approximately 2:40 a.m., the pursuit was called off when the driver of the motorcycle sped out of sight. The dispatcher broadcasted Officer Muntean's description of the driver as a white male, 5'9", blond hair, crew cut, and not wearing a shirt. (Muntean Deposition, Defendant's Exhibit N.) A later broadcast at 2:46 a.m. stated that there was a female passenger on the bike but no description of her was given.

{¶ 5} Officer Frankland was working the 11:00 p.m. to 7:00 a.m. shift on August 10 and 11, 2005. Although Officer Newkirk was on the 3-11 shift, he was working overtime and listening to the police scanner when he heard the reports of the Massillon police motorcycle pursuit. Officers Frankland and Newkirk then left HBHC property, without notifying their dispatcher, for the ostensible purpose of refueling their patrol vehicle. Both Officers Newkirk and Frankland have admitted that their true intent was to "assist" with the chase if the opportunity presented itself.

{¶ 6} The two officers proceeded to the intersection of State Route 21 and Navarre Road to refuel at a Citgo gas station. While at the Citgo station, Officer Newkirk observed a green Kawasaki motorcycle across the street at a Speedway gas station. Officer Frankland stated that his intention at the time was to head over to the Speedway, pull behind the motorcycle, and try to positively identify it or get a license plate number. However, as Officer Frankland's cruiser neared the green motorcycle, the driver who was later determined to be Marsh spotted them. Marsh motioned for his female passenger to climb back on the motorcycle and then he accelerated onto Navarre Road. The passenger was later determined to be Devon Cairns.

{¶ 7} The motorcycle proceeded down Navarre Road while Officers Frankland and Newkirk followed in their patrol car with lights and siren activated. Newkirk quickly realized that the motorcycle was out of range and he told Officer Frankland to "shut it down." Officer Frankland also recognized that he was unable to keep up with the

motorcycle, but he continued to drive down Navarre Road thinking that the motorcycle would possibly stop or crash. Marsh's motorcycle did crash into a fence and a parked vehicle after Marsh failed to negotiate a curve on Navarre Road, resulting in the death of both riders.

{¶ 8} Officers Frankland's and Newkirk's patrol car passed the accident scene, traveling at approximately 60 mph in a 45 mph speed zone, without either of them realizing what had just occurred. At approximately 2:53 a.m., Officer Frankland called the Massillon police dispatcher to notify her that he believed he had spotted the driver of the motorcycle involved in an earlier pursuit with Massillon police. Officer Frankland testified that he told the dispatcher "I just lost your green Kawasaki on Navarre Road."

{¶ 9} Defendants argue that no duty was owed to Marsh because Marsh had assumed the risk of harm to himself by engaging in an activity that created an obvious and extremely high likelihood of injury. Marsh was later determined to have been intoxicated at the time of the crash. Furthermore, defendants argue that Marsh's egregious actions were the sole proximate cause of his death and the death of his passenger.

{¶ 10} Plaintiff argues that the defense of primary assumption of the risk is not available to defendants under the facts of this case inasmuch as defendants' agents owed Marsh a duty of care to refrain from initiating an unnecessary pursuit, notwithstanding Marsh's intoxication. Plaintiff also argues that inasmuch as the conduct of Officers Newkirk and Frankland was either willful, wanton, or reckless, Marsh's contributory negligence does not bar plaintiff's recovery. Plaintiff does not dispute that Marsh was negligent.

{¶ 11} Plaintiff points to several facts which, in plaintiff's view, give rise to an elevated level of culpability on the part of Officers Frankland and Newkirk. For example, plaintiff asserts that Officers Frankland and Newkirk had no authority to approach Marsh outside HBHC grounds, that they did not have probable cause to initiate a pursuit, and that they violated numerous HBHC policies in connection with such pursuit. Additionally, plaintiff notes that Officer Frankland was aware that his conduct created a risk of serious harm both to Marsh and his passenger, as is evidenced by Officer Frankland's trial testimony.

{¶ 12} Willful or wanton misconduct “connotes behavior demonstrating a deliberate or reckless disregard for the safety of others.” *Reynolds v. Oakwood* (1987), 38 Ohio App.3d 125, 127. Wanton misconduct is the failure to exercise any care whatsoever toward one to whom a duty of care is owed under circumstances in which there is a great probability of resulting harm. *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 117-118. In *Thompson v. McNeill* (1990), 53 Ohio St.3d 102, the court employed the definition of “recklessness” found in the Restatement of Torts 2d which states:

{¶ 13} “The actor’s conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.” 2 Restatement of the Law 2d, Torts (1965), at 587, Section 500. Comment f to Section 500 contrasts recklessness and intentional misconduct: “While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it.” *Id.* at 590. Comment a to Section 500 adds, in part, that: “the risk must itself be an unreasonable one under the circumstances.” *Id.* at 588.

{¶ 14} In this case, both Officers Newkirk and Frankland admitted that they were outside of their jurisdiction when they first initiated contact with the green Kawasaki motorcycle. Although Officer Frankland did not believe he was prohibited from driving over to the Speedway in order to obtain a plate number for the motorcycle, he knew that his supervisor did not want him to become involved in matters that were within the purview of the Massillon police department.¹

{¶ 15} Officers Frankland and Newkirk testified that they intended only to get a license plate number in order to determine that the motorcycle was the same one involved in the earlier police chase. However, on cross-examination, Officer Frankland admitted that neither he nor Officer Newkirk had knowledge of the plate number of the motorcycle involved in the earlier chase.

¹Officer Frankland was subsequently disciplined by HBHC for numerous violations of internal HBHC policies and in connection with this incident. (See Plaintiff’s Exhibit 13.)

{¶ 16} Officer Frankland had received some training in high speed pursuits in connection with his work with the Minerva Police Department and he knew that such pursuits entailed a risk of harm both to the participants and to the public. Officer Frankland testified that when the motorcycle sped onto Navarre Road, he followed with lights and sirens activated. According to Officer Frankland, he accelerated to a top speed of approximately 60 mph as he watched the motorcycle speed out of sight within 20 to 30 seconds. Officers Frankland and Newkirk agree that the motorcycle was approximately one-half mile ahead of their patrol car when they saw it crest a small hill and go out of sight.

{¶ 17} Henry Lipian is an expert in the field of accident reconstruction and a former Ohio State Highway Patrolman and pursuit instructor. Lipian opined that Officers Newkirk and Frankland were merely following the motorcycle prior to the fatal crash. In his opinion, Officers Frankland and Newkirk did not engage in a pursuit, as he understands the term. According to Lipian, the acceleration capability of the Kawasaki motorcycle operated by Marsh was roughly three times greater than that of the vehicle operated by Officers Frankland and Newkirk and, in Lipian's opinion, the patrol car was never close enough to the motorcycle to stimulate Marsh's "flight response."

{¶ 18} Plaintiff relies heavily upon the testimony of Michael Germano who caught sight of the HBHC patrol car as it sped past the front window of his home on Navarre Road. Germano was lying on his sofa watching television at approximately 2:45 a.m. when he heard a motorcycle engine in the distance. Germano knew from the sound of the engine that the motorcycle was traveling at a high rate of speed. Shortly thereafter, he heard what he described as a "thump." He later realized that what he had heard was the sound of the motorcycle colliding with a parked vehicle in his driveway.

{¶ 19} Germano recalled that he got to his front window within eight to ten seconds of hearing the thump and that he saw the lights of the patrol car about five seconds later. Although Germano reportedly told an investigator that it was possible that the patrol car was traveling at 65 mph when it passed his home, in his trial deposition he estimated the speed at 45 to 60 mph. He acknowledged that it was "very difficult" for him to estimate the speed of the patrol car.

{¶ 20} Plaintiff argues that Germano's recollection of the elapsed time between his hearing of the thud and his visualization of the lights of the patrol car establishes that the patrol car was much closer to the motorcycle than either Officers Frankland or Newkirk were willing to admit. However, based upon his view of the scene and certain measurements he had taken at the scene, it was Lipian's opinion that Germano's estimate of the elapsed time was at odds with the physical evidence. Lipian estimated that the motorcycle was at least 3,000 feet and more than 90 seconds ahead of the patrol car when it left the roadway. Given the circumstances under which Germano observed the patrol car, the court finds that Lipian's estimates of speed and distance are more reliable than Germano's.

{¶ 21} Plaintiff points out that Officer Frankland knew both that the Massillon police had terminated the earlier pursuit due to the excessive speeds, and that they had successfully identified Marsh as the operator of the motorcycle and were waiting for him at his home. Plaintiff believes this evidence establishes an elevated level of culpability on the part of the officers.

{¶ 22} In determining whether a particular act or omission is negligent, the court must weigh the utility of the conduct against the foreseeable risk of harm. *Benlehr v. Shell Oil Co.* (1978), 62 Ohio App.2d 1, 9; citing, Prosser, Law of Torts 149, Section 31 (4th ed. 1971). See also 2 Restatement of Torts 2d 54, Section 291 (1965). In this case, given the fact that Marsh had been previously identified by Massillon police, the utility of the officers' conduct was, at best, minimal. Neither Officers Frankland nor Newkirk had any cause to believe, at that time, that Marsh was intoxicated. Additionally, given the fact that the Massillon police had ended the earlier pursuit due to the dangerous speeds, there was a foreseeable risk of flight and, consequently, an unreasonable risk of harm. Given such facts, it is the determination of the court that the utility of conduct was outweighed by the foreseeable risks. In short, Officers Frankland and Newkirk were negligent.

{¶ 23} However, the question whether conduct is reckless or merely negligent is a matter to be determined by the trier of fact. See *Fabrey v. McDonald Village Police Dept.* 70 Ohio St.3d 351,356, 1994-Ohio-368. Based upon the totality of the evidence, the court finds that the conduct of Officers Frankland and Newkirk was not so egregious

as to be considered either reckless, wanton or willful. Even if one were to characterize the incident as a pursuit, the evidence supports the conclusion that the HBHC patrol car never reached a speed of more than 60 mph and that the pursuit was abandoned shortly after it began. Moreover, when Officer Frankland made first contact with Marsh, the motorcycle was in a stationary position and neither Marsh nor his passenger was seated. Thus, there was somewhat less expectation of flight. In short, while the court believes that Officer Frankland's decision to make contact with Marsh and to follow his motorcycle for a short distance was not reasonable under the circumstances, the evidence does not establish a greater level of culpability than negligence.

{¶ 24} Moreover, the testimony of Officers Frankland and Newkirk combined with the expert opinion of defendants' accident reconstruction expert, convinces the court that the conduct of Officers Frankland and Newkirk was not a substantial factor in bringing about the death of Marsh and Cairns. The evidence establishes that very shortly after Marsh turned his vehicle onto Navarre Road and accelerated, the HBHC patrol car was out of sight with no chance of overtaking his motorcycle. According to Lipian, the HBHC patrol car was too far behind Marsh's motorcycle to generate a flight response. The court agrees with Lipian.

{¶ 25} The evidence also establishes that Marsh continued to operate the motorcycle at a dangerous speed over a hill and then downward toward a curve in the road. Although Lipian found evidence of braking, he estimated that the motorcycle was traveling at 82-92 mph when Marsh attempted to negotiate the curve. Officer Newkirk testified that, in order to negotiate that same curve in the road, Officer Frankland was required to slow the HBHC patrol car "dramatically." As stated above, the patrol car was traveling at approximately 60 mph when it crested the hill on Navarre Road.

{¶ 26} Lipian opined that excessive speed and poor lean angle, exacerbated by the presence of a passenger on board the motorcycle, caused the fatal crash. Under such circumstances, the court finds that Marsh was reckless and that such recklessness broke the chain of legal causation. Indeed, while the approaching HBHC patrol car may have initially caused Marsh to take flight, it was Marsh's decision to continue to operate his motorcycle in a dangerous manner while under the influence of alcohol, which conditions proximately caused his death.

{¶ 27} Moreover, even if the court were to believe that the negligence of Officers Frankland and Newkirk was a proximate cause of Marsh's death, and that Marsh's conduct was merely negligent, Marsh's contributory negligence was clearly greater than that of the officers. Consequently, plaintiff's recovery would be barred under Ohio's comparative negligence statute. See R.C. 2307.22.

{¶ 28} For the foregoing reasons, plaintiff has failed to prove his claims by a preponderance of the evidence and judgment shall be rendered in favor of defendants.

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Judge Joseph T. Clark

JUDGMENT ENTRY

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendants. Court costs are assessed

against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

JOSEPH T. CLARK
Judge

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Filed May 26, 2009
To S.C. reporter June 15, 2009