

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
December 14, 2005 Session

**DONALD SHEA SMITH v. TEDDY W. CHERRY, ET AL.**

**Appeal from the Circuit Court for Montgomery County  
No. 50000298 Ross H. Hicks, Judge**

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**No. M2005-01168-COA-R3-CV - Filed on June 22, 2006**

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Plaintiff was awarded damages of \$300,000 for injuries sustained in a vehicular accident. His vehicle was struck by a motorist pursued by a City of Clarksville police officer. The trial court apportioned 30% of the damages against the City upon a finding the officer's decision to commence or continue his pursuit of the suspect was negligent. The City appeals contending the officer was not negligent and his conduct was not a cause in fact of the accident or plaintiff's injuries. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

W. Timothy Harvey, Clarksville, Tennessee, for the appellant, Teddy W. Cherry and City of Clarksville, Tennessee.

Robert T. Bateman, Clarksville, Tennessee, for the appellee, Donald Shea Smith.

**OPINION**

Plaintiff Donald Smith was seriously injured in a vehicular accident when the motorcycle he was operating was struck by a vehicle operated by defendant Teddy W. Cherry. The accident occurred while Cherry was evading a Clarksville Police Officer.

Officer Robert Eley of the Clarksville Police Department was on patrol on the afternoon of July 16, 1999, when he heard a radio transmission dispatching two officers to a residential neighborhood where there were reports of gunshot. The transmission indicated officers should be on the lookout for a black pickup truck that left the same neighborhood area traveling at a high rate of speed. Moments later, as Officer Eley was traveling on Warfield Boulevard, he noticed a black pickup truck headed in the opposite direction. Officer Eley immediately activated his emergency lights and siren and made a U-turn to pursue and obtain the license plate number of the truck.

Prior to catching up to the pickup truck, Officer Eley received another radio transmission directing him to disregard the transmission concerning the black pickup truck. Notwithstanding the new directive, Officer Eley continued his pursuit. As he pursued the truck, he was able to read the first three digits of the license plate and transmitted the partial information to the dispatcher. Officer Eley also attempted to direct the driver of the pickup truck to pull over and stop. The driver of the pickup truck, however, accelerated and made a right turn off of Warfield Boulevard onto Memorial Drive, and then a quick turn off of Memorial Drive into an apartment complex.

While pursuing the vehicle, Officer Eley was able to identify the entire license plate number. Officer Eley advised the dispatcher of the complete number, that the vehicle was running from him, that it had entered an apartment complex, and he was discontinuing the pursuit. Officer Eley turned off his emergency lights and siren and reduced his speed; however, he continued to follow the pickup truck through the apartment complex. Cherry traveled through the apartment complex and exited onto Richview Road at a high rate of speed. Officer Eley was now some distance behind Cherry and temporarily lost sight of the vehicle once Cherry left the apartment complex.

Smith was riding his motorcycle on Richview Road traveling in the direction of the apartment complex. As Smith arrived at the red traffic light on Richview Road that intersects with the apartment complex, he heard tires squealing and then saw a pickup truck enter the intersection from the apartment complex. As the pickup truck exited the apartment complex it swerved onto Richview Road and crashed into Smith's motorcycle, knocking Smith to the pavement. The pickup truck did not stop, but continued on Richview Road at a high rate of speed.

When Officer Eley reached the Richview Road intersection, the pickup truck was out of sight, but he noticed a motorcycle and the cyclist were down on the pavement.<sup>1</sup> Officer Eley went over to see if the cyclist was injured. The cyclist, Smith, advised Officer Eley his leg was broken. Officer Eley radioed the dispatcher to notify of the hit and run and to request medical assistance for Smith. Officer Eley then proceeded to pursue Cherry. Within a minute he saw other police officers apprehending Cherry, so he returned to assist Smith.

Smith was transported to the hospital where he was treated for multiple injuries. His medical expenses totaled \$78,272.58, and his physician anticipated future medical treatment, including a knee replacement, with an estimated cost of \$25,000 to \$50,000. Smith was unable to work for three months following the accident, and his lost wages totaled \$7,300.

Smith filed this action against Cherry, Officer Eley and the City of Clarksville. He alleged Officer Eley was negligent in his pursuit of Cherry, that his negligence contributed to Smith's injuries, and the City was liable for Officer Eley's negligence. Cherry did not defend the suit, and a default judgment was entered against Cherry. The City defended contending Officer Eley was not

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<sup>1</sup>Entrance to the complex is by a private drive which runs through the complex with an entry at one side of the complex onto Memorial Boulevard, where Cherry and Officer Eley entered the complex, and on the other side of the complex to Richview Road, where the accident occurred.

negligent and the accident was the sole and proximate result of Cherry's acts and omissions. The trial court found both defendants negligent and their negligence a legal cause of Smith's injuries and damages. The trial court judge assessed 30% of the fault to the City and 70% of the fault to Cherry. It awarded compensatory damages of \$300,000, of which the City was held liable for \$90,000. The City appeals, claiming the trial court erred in finding the City liable for Smith's damages.

### STANDARD OF REVIEW

The standard of review of a trial court's findings of fact is *de novo* and we presume that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Where the trial court does not make findings of fact, there is no presumption of correctness and we "must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). We also give great weight to a trial court's determinations of credibility of witnesses. *Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn. 1997); *B & G Constr., Inc. v. Polk*, 37 S.W.3d 462, 465 (Tenn. Ct. App. 2000). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

### ANALYSIS

The City contends it is not liable to Smith in any amount because the evidence preponderates against the trial court's finding that Officer Eley was negligent in his pursuit of Cherry, particularly since Eley ceased pursuit of Cherry prior to the wreck. We respectfully disagree.

We start our analysis with the recognition that a governmental entity, such as the City of Clarksville, is generally immune from suit for personal injuries and property damage. *Hawks v. City of Westmoreland*, 960 S.W.2d 10 (Tenn. 1997). This immunity, however, is removed by statute in limited circumstances. *See* Tenn. Code Ann. § 29-20-202. One such circumstance permits a tort action against a governmental entity for the negligence of its employee while operating a motor vehicle within the scope of employment. Tenn. Code Ann. § 29-20-202(a). There are, however, exceptions to the exception. The governmental entity, in this case the City of Clarksville, nevertheless remains immune from liability arising from its employees' negligent conduct to the extent authorized by Tenn. Code Ann. § 55-8-108.<sup>2</sup> That statute permits law enforcement personnel

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<sup>2</sup> The statute reads in part:

(a) The driver of an authorized emergency vehicle, when responding to an emergency call, or when in the pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b)(1) A driver of an authorized emergency vehicle operating such vehicle in accordance with the provisions of subsection (a) may:

to disregard certain rules of the road in limited circumstances, such as a police chase. Tenn. Code Ann. § 55-8-108(a)-(b). Nevertheless, a governmental entity may be held liable for injuries to a third party occurring during a police chase. Tenn. Code Ann. § 55-8-108(e).<sup>3</sup>

Such a circumstance was discussed by the Tennessee Supreme Court in another case involving a police officer's decision to commence or continue a pursuit of a suspect wherein a third party was injured by the fleeing suspect. *Haynes v. Hamilton County*, 883 S.W.2d 606 (Tenn. 1994). The Court stated:

[A]n officer's decision to commence or continue a high-speed chase is encompassed within the statutory term "conduct" and may form the basis of liability in an action brought by a third party who is injured by the fleeing suspect, if the officer's decision was unreasonable. In determining whether the decision to initiate or continue pursuit is reasonable, the risk of injury to innocent third parties should be weighed against the interest in apprehending suspects. Factors relevant to that determination include the speed and area of the pursuit, weather and road conditions, the presence or absence of pedestrians and other traffic, alternative methods of apprehension, applicable police regulations, and the danger posed to the public by the suspect being pursued.

*Id.* at 611. Thus, a police officer's decision to commence or continue pursuit may constitute negligent "conduct."

In order for there to be a viable cause of action for negligence, the following elements must be established: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause." *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn.1991). "Causation, or cause in fact, means that the injury or harm would not have occurred 'but for' the defendant's negligent conduct." *Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn.1993).

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- (B) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation
- (C) Exceed the speed limits so long as life or property is not thereby endangered; and
- (D) Disregard regulations governing direction of movement or turning in specified directions.

<sup>3</sup>(e) Notwithstanding the requirement of this section that drivers of authorized emergency vehicles exercise due regard for the safety of all persons, no municipality . . . , or their officers or employees, shall be liable for any injury proximately or indirectly caused to an actual or suspected violator of a law or ordinance who is fleeing pursuit by law enforcement personnel. The fact that law enforcement personnel pursue an actual or suspected violator of a law or ordinance who flees from such pursuit shall not render the law enforcement personnel, or the employers of such personnel, liable for injuries to a third party proximately caused by the fleeing party unless the conduct of the law enforcement personnel was negligent and such negligence was a proximate cause of the injuries to the third party. Tenn. Code Ann. § 55-8-108(e).

Causation and proximate cause are distinct elements of negligence, and both must be proven by the plaintiff by a preponderance of the evidence. *Bradshaw [v. Daniel]*, 854 S.W.2d [865] at 869 [(Tenn.1993)]; *McClenahan v. Cooley*, 806 S.W.2d 767, 774 (Tenn.1991); *Smith v. Gore*, 728 S.W.2d 738, 749 (Tenn.1987). “Causation (or cause in fact) is a very different concept from that of proximate cause. Causation refers to the cause and effect relationship between the tortious conduct and the injury. The doctrine of proximate cause encompasses the whole panoply of rules that may deny liability for otherwise actionable causes of harm.” *King, Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Injuries and Future Consequences*, 90 Yale L.J. 1353, 1355 n. 7 (1981). Thus, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed where cause in fact has been established. *McKellips v. Saint Francis Hosp.*, 741 P.2d 467 (Okla.1987). “Cause in fact, on the other hand, deals with the ‘but for’ consequences of an act. ‘The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct.’” *Id.* at 470 (quoting PROSSER AND KEETON, THE LAW OF TORTS 266 (5th ed.1984)).

*Kilpatrick*, 868 S.W.2d at 598.

The trial court, sitting without a jury, heard testimony from Smith and Officer Eley. It also heard testimony from the City’s Chief of Police, Mark Smith, and two residents of the apartment complex, Brenda Davis and Jerry Gray. Cherry did not appear at trial and thus did not testify.

Ms. Davis and Mr. Gray observed Officer Eley and Cherry drive through the apartment complex. Ms. Davis testified that she first heard “speeding” automobiles, then looked up and saw the black truck with a police car right behind it. She said the siren and emergency lights were not activated. Mr. Gray testified he saw the blue light activated, but the siren was not. Nevertheless, they both said it appeared the police car was in “pursuit” of the pickup truck. Ms. Davis estimated the speed of Cherry’s vehicle within the apartment complex to be at least forty miles per hour and that the officer was keeping up with him. Mr. Gray estimated the speed of the police car to be only ten to fifteen miles per hour. Officer Eley testified he was traveling twenty to twenty-five miles per hour.

Smith introduced additional evidence to establish the approximate speed of Officer Eley’s vehicle. This evidence was based on the amount of time it took Officer Eley to drive through the apartment complex, which was determined by the time of transmissions from Officer Eley to the radio dispatcher as he entered and exited the apartment complex. The mathematical calculations, based on expiration of time and distance traveled, established an estimated average speed between 26.3 and 29.1 miles per hour. The trial judge made a finding that Officer Eley’s average speed through the complex was between 26 and 29 miles per hour.<sup>4</sup>

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<sup>4</sup>The court noted this to be the average speed and Officer Eley “would obviously have been going faster at some points and slower in others . . . .”

The speed limit posted within the apartment complex was ten miles per hour; however, it had not been adopted by the City of Clarksville. Thus, it was not an official speed limit, but the Clarksville Police Chief testified that the official speed limit in residential areas around the apartment complex was twenty miles per hour. The Police Chief, nevertheless, acknowledged that ten miles per hour within an apartment complex would be reasonable based on the population density.

The trial court concluded the officer was negligent and, consequently, the City was liable for damages proximately resulting from his conduct. As the trial court explained:

[T]he evidence indicates that although Officer Eley may have officially discontinued pursuit by reducing his speed and turning off his lights and siren, that he in fact continued the pursuit by traveling at a rate of speed in excess of the speed limit through the congested area and in close enough proximity to the Cherry vehicle that Cherry would reasonably have thought that officer Eley was still pursuing him.

The record clearly establishes three of the five elements necessary to present a viable negligence claim against Officer Eley; that Officer Eley owed Smith a duty of care, that his conduct fell below the applicable standard of care amounting to a breach of that duty, and that Smith sustained an injury or loss. The facts, however, present a much closer question regarding cause in fact, which directly impacts proximate cause. As the Supreme Court explained in *Kilpatrick*, “[c]ause in fact . . . deals with the ‘but for’ consequences of an act. ‘The defendant’s conduct is a cause of the event if the event would not have occurred but for that conduct.’” *Kilpatrick*, 868 S.W.2d at 598 (citing *McKellips v. Saint Francis Hosp.*, 741 P.2d 467, 470 (Okla. 1987) (quoting PROSSER AND KEETON, THE LAW OF TORTS 266 (5th ed.1984)).

The two witnesses who observed the police car and Cherry’s vehicle travel through the apartment complex described the incident as a police “pursuit.” One of the witnesses testified the police car had its blue lights on and the officer “punched it” as he passed the witness in the apartment complex. The other witness testified that the police car was “right behind” Cherry as the two vehicles went through the apartment complex. She also testified that Cherry did not stop as he exited the complex onto Richview Road, that he went into the opposite lane of traffic and struck the motorcycle as he exited the apartment complex. As the trial court characterized it:

On his approach to Richview Road, Cherry attempted to turn right onto Richview but was traveling at such a rate of speed that he lost control of his vehicle and crossed over Richview onto the opposite shoulder before ultimately being able to turn back to the right. Cherry entered the plaintiff’s lane of travel and hit the plaintiff who was riding on a motorcycle. . . .

We have concluded the evidence preponderates in favor of a finding that the officer’s conduct was both a cause in fact and a proximate cause of the accident and Smith’s injuries. The record also establishes that Officer Eley owed Smith a duty of care, that his conduct fell below the applicable

standard of care amounting to a breach of that duty, and that Smith sustained injuries as a consequence. Therefore, the trial court correctly held in Smith's favor in his negligence claim against Officer Eley. Moreover, because the officer was an employee acting within the course of his employment, the trial court correctly held the City liable for a portion of Smith's damages.<sup>5</sup>

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against appellant, City of Clarksville, Tennessee.

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FRANK G. CLEMENT, JR., JUDGE

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<sup>5</sup>The trial court found that although Officer Eley was negligent, Cherry was "overwhelmingly" responsible for the accident.