RENDERED: JUNE 29, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002178-MR

CHARLES BROWDER — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 10-CI-02747

LASHONDA FENTRESS, AS NEXT FRIEND AND
LEGAL GUARDIAN OF ELIJAH JAMES FENTRESS;
LASHONDA FENTRESS, ADMINISTRATRIX OF
THE ESTATE OF JAMES E. FENTRESS;
LASHONDA FENTRESS, AS NEXT FRIEND AND
LEGAL GUARDIAN OF ANDREIS IVAN FENTRESS;
AND LASHONDA FENTRESS, AS NEXT FRIEND AND
LEGAL GUARDIAN OF
AALIYAH ELIZABETH FENTRESS — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, JONES, AND THOMPSON, JUDGES.

JONES, JUDGE: Charles Browder brings this interlocutory appeal from an order of the Hardin Circuit Court that found he was not entitled to the protection of qualified immunity.[1] Finding no error, we AFFIRM.

I. BACKGROUND

On the morning of June 6, 2010, Browder, who was on-duty as a Hardin County Sheriff's deputy, was traveling on I-65. A Mitsubishi Outlander, later determined to have been driven by Brandon Lee Jessie, passed Browder at a high rate of speed. Browder activated the emergency lights on his marked police cruiser in an attempt to pull Jessie over. When Jessie did not comply, Browder initiated a high-speed pursuit. Browder continued to pursue Jessie as he exited I-65 onto KY Highway 313. The chase continued down KY Highway 313 for approximately nine and a half miles, during which time both vehicles reached speeds in excess of 100 miles per hour. The chase ultimately ended when Jessie

[1] On December 27, 2013, Browder filed a joint notice of appeal with then-defendant/appellant Samuel Taylor. Subsequently, Taylor settled with the Estate and, on October 3, 2014, filed a joint motion with the Estate to dismiss his portion of this appeal. A panel of this Court granted Taylor's motion on November 5, 2014; however, due to an administrative clerical error, the entire appeal was deemed final and removed from this Court's active docket. On January 9, 2015, Browder and the Estate filed a joint motion to restore the case to this Court's active docket, noting that only Taylor's appeal was dismissed. Due to an administrative oversight in the Clerk's Office, no action was taken on that motion for some time. On January 26, 2018, the Estate filed a motion for a ruling. A three-judge motion panel granted both the motion for a ruling and the motion to reinstate Browder's portion of the appeal. Following receipt of the certified record from Hardin Circuit Court, the appeal was immediately assigned to this panel for August 2018.

entered an intersection against a red light and crashed into a vehicle driven by James Fentress. Fentress was pronounced dead at the scene of the accident.

On December 20, 2010, LaShonda Fentress, acting as administratrix of James Fentress's estate and as next friend and legal guardian of her and Fentress's children (collectively referred to as the "Estate"), filed the underlying action.[2] The complaint alleged that Browder had been negligent in initiating, conducting, and continuing the pursuit of Jessie and in failing to instruct officers to stop traffic at the intersection, despite his knowledge that Jessie was heading into an intersection at a high rate of speed. Following discovery, Browder filed a motion for summary judgment in which he contended that he had no duty to protect Fentress from the harm inflicted by Jessie, that his actions were not the proximate or actual cause of Fentress's death, that claims against him in his individual capacity were barred by the doctrine of qualified official immunity, and that claims against him in his official capacity were barred by the doctrine of sovereign immunity.[3] Browder argued that the initiation and continuation of the chase were discretionary acts that fell within the scope of his authority as a sheriff's deputy.

[2] In addition to Browder, the complaint named numerous other individuals and entities that had been involved or were connected to the accident. All other defendants have either settled or have been dismissed from the suit. Accordingly, our summary of this case's procedural history concerns only the Estate's claim against Browder.

[3] The complaint did not indicate whether Browder was being sued in his individual capacity, official capacity, or both.

In its response, the Estate contended that Browder was not entitled to the protection of qualified immunity, as his acts were ministerial. The Estate noted that the Hardin County Sheriff's Office has specific policies and procedures for high-speed pursuits. The Estate maintained Browder's failure to comply with those mandatory policies and procedures proximately caused Fentress's death. In pertinent part, the policies and procedures state:

> POLICY
>
> It is the policy of the Hardin County Sheriff's Office that the apprehension of one or more occupants of a moving motor vehicle is to be considered secondary in importance to public safety. Pursuit, especially prolonged high-speed pursuit should be used only as a last resort; whenever safer alternative actions are possible, they should be taken.
>
> . . .
>
> 1. A vehicle pursuit must consist of four conditions:
>
>   a. The violator knows that the deputy wants him/her to stop;
>
>   b. The violator intentionally takes action in an attempt to evade the deputy;
>
>   c. The deputy attempts to overtake and stop the violator; and
>
>   d. The deputy must have reasonable suspicion to believe that the violator being pursued is a felon or a suspected felon.
>
> . . .

PROCEDURE

> The responsibility for initiating the pursuit rests with the individual deputy; however the deputy and/or the supervising deputy may at any time call off the pursuit. Just because a pursuit can be justified does not eliminate the individual deputy, supervisor or agency from civil and/or criminal penalties. Pursuits shall be for a violent felony offense[,] use of force likely to cause death or serious physical injury, or threatened use of such force. A charge of Wanton Endangerment arising from the pursuit shall not be cause for continuing pursuit.
>
> . . .
>
> c. Deputies Will Terminate a Pursuit When:
>
> 1) The circumstances of the pursuit present an extreme safety hazard to the public, the deputy, or the suspect.
>
> 2) No Field Supervisor or higher authority can be contacted to approve the pursuit's continuation.

The Estate cited to a portion of Browder's deposition testimony in which he acknowledged that no one had been supervising him on the date of the incident. Browder also testified that he believed that the fact that Jessie had been driving at a speed in excess of 120 miles per hour created an extreme safety hazard to the public; however, he stated that he did not terminate the pursuit because he thought that he and the officers assisting him would be able to apprehend Jessie before reaching the intersection where the accident occurred.

On December 6, 2013, the trial court entered an order on Browder's motion for summary judgment. The trial court cited to *Jones v. Lathram*, 150 S.W.3d 50 (Ky. 2004), *as amended* (Jan. 31, 2005), to support its conclusion that "[t]he predominant nature of a chase and the steps taken by officers to stop it are seen as ministerial." R. 409.

In light of that conclusion, the trial court determined that Browder was unable to claim the protection of qualified immunity.

This appeal followed.

II. STANDARD OF REVIEW

The sole issue in this appeal is whether the trial court erred in concluding that Browder is not entitled to the protection of qualified immunity. While denials of summary judgment are typically not appealable, an order denying a claim of immunity is subject to immediate appeal. *Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 886-87 (Ky. 2009). Whether a defendant is entitled to qualified immunity is a question of law. *Rowan Cty. v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006) (citing *Jefferson Cty. Fiscal Court v. Peerce*, 132 S.W.3d 824, 825 (Ky. 2004)). Accordingly, our review is *de novo*. *Id.* (citing *Estate of Clark ex rel. Mitchell v. Daviess Cty.*, 105 S.W.3d 841, 844 (Ky. App. 2003)).

III. ANALYSIS

"[W]hen sued in their individual capacities, public officers and employees enjoy . . . qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment." *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001) (citing 63C Am. Jur. 2d, *Public Officers and Employees* § 309 (1997)). Qualified immunity applies only to a public officer or employee's negligent performance of a discretionary act or function. *Id.* A discretionary act is one that "involve[s] the exercise of discretion and judgment, or personal deliberation, decision, and judgment . . . ." *Id.* However, "[a]n act is not necessarily 'discretionary' just because the officer performing it has some discretion with respect to the means or method to be employed." *Id.* (citing *Franklin Cty. v. Malone*, 957 S.W.2d 195, 201 (Ky. 1997)). In contrast, qualified immunity does not shield a defendant from liability when he or she has negligently performed a ministerial act. *Id.* An act is deemed ministerial when it "requires only obedience to the orders of others, or when the officer's duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts." *Id.* (citing *Malone*, 957 S.W.2d at 201). "*Whether* the employee's act is discretionary, and not ministerial, is the qualifier that must be determined before qualified immunity is granted to the governmental employee." *Marson v. Thomason*, 438 S.W.3d 292, 296 (Ky. 2014).

Browder contends that the trial court erred in concluding that his act of initiating and continuing the high-speed pursuit of Jessie was a ministerial act. He argues that the trial court erred in relying on *Jones* to conclude that a high-speed pursuit is ministerial, as he contends that the facts in *Jones* are highly distinguishable from the facts of the instant case. While we agree with Browder that *Jones* is distinguishable, we find no error in the trial court's conclusion that execution of this high-speed pursuit was ministerial.

The facts of this case are substantially similar to those found in *Mattingly v. Mitchell*, 425 S.W.3d 85 (Ky. App. 2013). Mattingly, a police officer with the Louisville Metro Police Department, initiated a pursuit of a vehicle that he had observed speeding. Shortly after Mattingly terminated the pursuit, the vehicle he had been pursuing crashed into another vehicle and killed one of the occupants. The administrator of the victim's estate brought suit against Mattingly, alleging negligence, and Mattingly asserted that he was protected by qualified official immunity as he believed that his decision to pursue the vehicle was discretionary. The lower court found that the officer's acts were ministerial. On appeal, we affirmed.

In concluding that Mattingly's acts were properly classified as ministerial, we observed that the "Louisville Metro Police Department's Standard Operating Procedures contain specific directives when an officer initiates or

continues a suspect's pursuit." *Id.* at 90. Accordingly, whatever discretion Mattingly may have had in initiating and continuing a pursuit was constrained by those procedures. Additionally, we found that compliance with the Standard Operating Procedures involved "merely execution [or nonperformance] of a specific act arising from fixed and designated facts." *Id.* (quoting *Yanero*, 65 S.W.3d at 522).

The same is true in the instant case. The Hardin County Sheriff's Department has specific and comprehensive procedures that deputies are required to follow when initiating, continuing, and terminating vehicular pursuits of suspects. The language of the policy itself notes that "[d]espite the risks [associated with a high-speed pursuit] . . . **well-regulated** deputy pursuits are sometimes necessary." (Emphasis added). We, of course, recognize that Browder did have to exercise some discretion in initiating and continuing the pursuit of Jessie. However, any discretion he had was limited to the confines of the Hardin County Sheriff's Department's policy on vehicular pursuits. "He either violated the procedures or he did not." *Mattingly*, 425 S.W.3d at 90. Accordingly, the act was ministerial, not discretionary. Browder has testified that, at the very least, he did not follow the procedure requiring him to terminate pursuit if he was unable to contact a supervisor. Browder Dep. 86:8-9; 109:5-23, May 31, 2012. Therefore,

we agree with the trial court that Browder is unable to claim the protections of qualified immunity.

The dissent contends that *Mattingly* is inapposite. According to the dissent, the Hardin County Sheriff's Office's Policies and Procedures are somehow less mandatory than those of the Louisville Metro Police Department's Standard Operating Procedures. The dissent further asserts that Browder engaged in a discretionary act when he pursued Jessie "consistent with the policy, because he estimated Jessie's speed was so extreme it was 'likely to cause death or serious physical injury' which, sadly, it did." In concluding that Browder's pursuit of Jessie was consistent with the policy, the dissent asserts that all four conditions for initiating a pursuit had been met, including the condition that the officer believed the perpetrator to be a felon or be a suspected felon. The dissent posits that it is unquestionable that "traveling at two and three times the speed limit[4] constitutes a felony[.]"

Browder may well have had a reasonable belief that, at the time he first encountered Jessie, Jessie was committing Wanton Endangerment First, which is a Class D felony. Kentucky Revised Statutes (KRS) 508.060. Nonetheless,

[4] While we do not disagree that Jessie appeared to be travelling well over the posted speed limit at the time that Browder initiated the pursuit, nothing in the record supports the assertion that Jessie was operating the vehicle at two and three times the speed limit. The highest speed that Jessie achieved during the pursuit was estimated to be approximately 120 miles per hour. At the time that Browder first observed Jessie, Browder estimated that Jessie was travelling "in excess of 100 miles per hour," but Browder was unable to get a radar read on Jessie. Jessie was traveling on I-65 at that time.

under the mandates of the policy, that belief was insufficient to justify pursuit of the Jessie's vehicle. The policy plainly states that "pursuits shall be for [1] violent felony offense [2] use of force likely to cause death or serious physical injury, [or] threatened use of such force." Wanton Endangerment First does not rise to the level of a *violent* felony offense. *See* KRS 439.3401. Browder did not witness any use of force or threatened use of force likely to cause death or serious physical injury. And, Browder's concern that Jessie could have injured someone with his driving as Browder continued to pursue him was not a permissible reason for Browder to continue the pursuit. The policy itself removed this consideration from the realm of Browder's deliberative duties: "A charge of Wanton Endangerment arising from the pursuit shall not be cause for continuing the pursuit."

While Browder had the discretion to activate his lights in an attempt to pull Jessie over for speeding down the interstate, the policy at issue is clear that he did not have the authority to continue a pursuit. Once it became reasonably clear to Browder that Jessie intended to flee, which surely was at the point he turned off the interstate and continued down Highway 313 for almost *ten miles*, he was not authorized to continue the pursuit. Hardin County's policies and procedures are clear on this point.

Browder had not observed and was not otherwise aware that Jessie had committed a "violent felony offense" nor is there any indication that Jessie

engaged in "use of force likely to cause death or serious physical injury, [or] threatened use of such force." To be certain, he was speeding. Likely, his driving was reckless. However, other than Jessie's excessive speed, there is nothing to indicate that Browder was aware of Jessie "using force" or threatening the use of such force. Under these circumstances, the policy mandated that Browder cease his initial stop once it was reasonably clear that Jessie intended to abscond. This was a mandatory duty making qualified immunity unavailable.[5]

[5] To this end, we note that Minnesota employs an immunity standard that is similar to Kentucky's standard. In *Mumm v. Mornson*, 708 N.W.2d 475 (Minn. 2006), the Supreme Court of Minnesota considered whether a police officer was entitled to immunity when he continued a high-speed pursuit in violation of the policy (the officer knew the suspect had not engaged in any of the predicate felonies and was able to ascertain her identity). Even though the policy afforded some discretion to the officer in deciding whether to terminate pursuit, it was clear that an officer was only authorized to continue a pursuit under certain circumstance. Ultimately, the *Mumm* Court determined that the officer had a ministerial duty to cease his pursuit. It held:

> The policy at issue in this case imposed a ministerial duty, which the officers failed to perform. The officers do not dispute that they knew Mornson's identity at the time the pursuit was initiated and that they knew that Mornson had not committed any of the felonies listed in section 7–405 of the Pursuit Policy. Under these circumstances, section 7–405 imposes a mandatory duty to refrain from initiating or to discontinue pursuit. When police know the identity of a fleeing individual, the policy instructs that police shall discontinue the pursuit. The plain language of this portion of the policy gives officers no discretion to exercise independent judgment. Section 7–405 imposes a narrow and definite duty on an officer facing a particular set of circumstances, rendering that officer's duty ministerial.

Id. at 491-92 (footnote omitted); *see also Brown v. Ener*, 987 S.W.2d 66, 69 (Tex. App. 1998) ("Deputy Ener acted against department mandates and performed an act, a high speed chase, in which he had no discretion. Accordingly, Deputy Ener has not proved he was performing a discretionary function as a matter of law.").

Additionally, as noted *supra*, the policy mandates that a pursuing officer discontinue pursuit of a vehicle if "[n]o Field Supervisor or higher authority can be contacted to approve the pursuit's continuation." The dissent takes issue with this directive, asserting that a pursuing officer cannot know how long it will take to contact a supervisor and whether such contact will be fruitless. While this policy may indeed be imperfect, it is the policy as stated. Further, the facts of this case do not represent a situation where the pursuing officer attempted to contact a supervisor and was unable to do so. Likewise, this is not a situation where the pursuing officer believed he had insufficient time in which to safely contact a supervisor. Deputy Browder testified to the fact that, *at the time he initiated the pursuit*, he was aware that there was no supervising authority for him to contact. As there was no supervising authority to contact, policy mandated that Deputy Browder cease pursuit of the vehicle.

Finally, the dissent cites to several compelling policy reasons to apply immunity in this case. We cannot disagree that there are some compelling public policies arguments in favor of immunity.[6] However, we must be cognizant that our opinion is not rendered in a vacuum. Presumably, the Hardin County Sheriff's

[6] Of course, as numerous courts and legal scholars have recognized, there are equally persuasive public policy rationales to support the converse position. Anna M. Krstulic, *America's Most Shocking Standard: When Innocent Parties Are Injured or Killed in High-Speed Pursuits, What Police Conduct Sufficiently "Shocks the Conscience" to Allow Recovery?*, 47 Washburn L.J. 785 (2008).

Office weighed the various policy concerns before adopting its own policies and procedures.[7] Those policy concerns led it to believe that it was necessary to restrict its officers from continuing pursuits in certain circumstances. An officer who fails to adhere to those mandatory policies is not entitled to qualified immunity. *Mattingly* is controlling on this point. It is a published opinion that is binding on this Court. And, ultimately, this Court is bound by precedent not policy. If the law in this area is to be changed, it must be accomplished by the Kentucky Supreme Court. As such, we must affirm the circuit court's conclusion that Browder was not entitled to qualified immunity under these facts.

[7] The *Mumm* Court also made this observation:

> We believe that the city and the officers ask too much in urging us to conclude that all police conduct in emergency situations is discretionary. We do not read our previous cases as establishing the broad proposition that all police conduct in emergencies is discretionary, even in the face of binding police department policies. Indeed, while often necessary, police pursuits by definition are emergency situations, jeopardizing the safety and lives of those involved, as well as innocent bystanders. We recognize that governmental entities have the authority to eliminate by policy the discretion of their employees, as was done by the Minneapolis Police Department in its Pursuit Policy. ***By adopting policies specifically intended to apply to pursuits, the Minneapolis Police Department implicitly recognizes that officers should not have unfettered discretion in emergency situations. Moreover, the existence of such policies reveals a belief that certain situations do not justify the creation of the risk attendant to police chases.***

Mumm, 708 N.W.2d at 493 (emphasis added).

In Browder's brief to this Court, he additionally argues that the trial court erred in failing to hold that any claims the Estate asserted against him in his official capacity are barred by sovereign immunity. We note that the trial court's order on Browder's motion for summary judgment does not specifically address whether claims asserted against Browder in his official capacity are barred by sovereign immunity. After concluding that Browder is not entitled to qualified immunity, the trial court's order simply states that the Estate's claims against Browder can proceed. Thus, it is unclear whether the trial court actually denied Browder's claim of sovereign immunity and, accordingly, whether we have jurisdiction to consider the issue. *See Chen v. Lowe*, 521 S.W.3d 587, 590 (Ky. App. 2017) ("Therefore, the issue of [Appellant's] immunity remains unresolved, and the order denying his motion to dismiss is not immediately appealable.").

Nonetheless, Browder's amended prehearing statement, filed with this Court on April 7, 2014, specifically states that "[t]he only issue that may be addressed within this interlocutory appeal is the issue of qualified official immunity and the remaining issues addressed within the above-referenced Summary Judgement are not appropriate for appeal at this time." As Browder did not raise the issue of sovereign immunity in his prehearing statement, it is not properly before this Court and we decline to review it. Kentucky Rules of Civil

Procedure (CR) 76.03(8); *Short v. City of Olive Hill*, 414 S.W.3d 433, 441 (Ky. App. 2013).

IV. CONCLUSION

Based on the foregoing, we AFFIRM the order of the Hardin Circuit Court.

THOMPSON, JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent. I would reverse the circuit court order and find Officer Browder immune from suit. These circumstances convince me that Browder was not under a ministerial duty to terminate a pursuit he lawfully initiated.

The very existence of Brandon Lee Jessie was unknown to Browder until the officer witnessed Jessie's crime of Wanton Endangerment – passing a marked police vehicle on a public roadway at approximately 120 miles per hour. The Estate's assertion that Browder "should not have engaged in pursuit in the first place" is patently wrong. Officer Browder was duty bound to pursue. *Chambers v. Ideal Pure Milk Co*., 245 S.W.2d 589, 590 (Ky. 1952) ("Charged as they were with the obligation to enforce the law, the traffic laws included, [the law

enforcement officers] would have been derelict in their duty had they not pursued him."). But whether he satisfied his first duty is not in doubt – he did satisfy it.

The question is this: was Browder duty bound to terminate the pursuit prior to the accident? And more importantly for purposes of the immunity question, was the duty ministerial in that he had no discretion in making the decision when or under what circumstances to stop pursuing Jessie. I cannot agree with the majority that terminating the pursuit was a ministerial duty. I begin by noting the errors in the circuit court's analysis.

In its order denying immunity, the circuit court unnecessarily allows comparative fault concerns to bleed into the immunity analysis, and sums up by saying, "it is not practically impossible for the Plaintiff to establish some causation and fault to be assigned to [Browder] in the actions actually taken or not taken during the chase." This is irrelevant to the immunity question.

Additionally, and as the majority suggests, the circuit court's citation to *Jones v. Lathram*, 150 S.W.3d 50 (Ky. 2004), *as amended* (Jan. 31, 2005) is also irrelevant. *Jones* held that "[t]he act of safely controlling a police cruiser is not a discretionary act, but rather a ministerial function." *Pile v. City of Brandenburg*, 215 S.W.3d 36, 40 (Ky. 2006). The Estate does not and cannot allege Browder failed to maintain control of his own vehicle. Rather, the Estate claims Browder was under a non-discretionary duty to refrain from pursuing or a non-discretionary

duty to terminate the pursuit in time to avoid Jessie's collision with Fentress. In my opinion, neither is so.

The authority the majority cites is also inapposite. In *Mattingly v. Mitchell*, 425 S.W.3d 85 (Ky. App. 2013), "the Louisville Metro Police Department's Standard Operating Procedures . . . provide[d] specific directives to its officers when initiating or engaging in a pursuit [and] . . . . Mattingly's pursuit . . . constituted an identifiable deviation from an absolute, certain, and imperative order." *Id.* at 90 (citation and internal quotation marks omitted). The Hardin County Sheriff's Office, like the Metro Police Department and most other modern law enforcement offices, has a policy for initiating and continuing pursuits. But I do not read in that policy any "absolute, certain, and imperative order" that Browder violated.

Law enforcement pursuit policies "must . . . leave room for the exercise of an officer's discretion because the circumstances and timing of each potential or real pursuit will vary." Patrick T. O'Connor & William L. Norse, Jr. *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law*, 57 Mercer L. Rev. 511, 514 (2006). Although these policies will vary from jurisdiction to jurisdiction, "most policies fit into one of three basic models: (1) judgmental -- allowing officers to make all major decisions relating to initiation, tactics, and termination; (2) restrictive -- placing certain restrictions on

officers' judgments and decisions, for example, the *supervisor makes the final call*; and (3) discouragement -- cautioning or discouraging any pursuit, except under the most severe of circumstances." *Id.* (emphasis added). The policy before us follows the second model. However, "[e]ach model, as appropriate, provides for the individual officer's discretion in deciding when and in what manner to pursue." *Id.* at 514-15.

Getting to the core of the issue, a ministerial act is "one that requires only obedience to the orders of others or whether[8] the officer's duty is absolute, certain and imperative, involving merely execution of specific acts arising from a fixed and designated fact." *Pile*, 215 S.W.3d at 41. As we consider what fixed and designated fact is supposed to have compelled the obedience of Officer Browder, we must keep in mind that "whether a particular act or function is discretionary or ministerial in nature is and, indeed, should be, inherently fact-sensitive." *Haney v. Monsky*, 311 S.W.3d 235, 246 (Ky. 2010).

Unlike *Mattingly*, this case does not present a clear violation of an absolute, certain and imperative order or policy. If Browder's pursuit was not, as the policy calls for, a "last resort" to end the danger that Jessie presented and *that*

[8] The sentence is an awkward read and it is possible the author meant to use the word "where" instead of the word "whether."

existed before Browder first saw him,[9] what "safer alternative actions [were] possible"? I can envision none. And how can we say the decision to pursue and continue pursuing, or to cease pursuing, requires no discretion on the part of the officer on site? We must remember that Jessie was not simply exceeding the speed limit; he was wantonly endangering everyone near him. It is illogical to conclude that if Browder did not pursue him or had terminated his pursuit, Jessie then would have decided to comply with traffic laws. The Supreme Court of the United States appears to agree and, if presented with this case, likely would have asked and answered this question:

> Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best. Whereas [Browder's pursuit and the coordinated efforts of the other officers was calculated] to eliminate the risk that [Jessie] posed to the public, ceasing pursuit was not. First of all, there would have been no way to convey convincingly to [Jessie] that the chase was off, and that he was free to go. Had [Jessie] looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. . . . Given such uncertainty, respondent might have been just as likely to

[9] The Estate's argument that Jessie's "Wanton Endangerment ar[ose] from the pursuit" itself is simply wrong.

> respond by continuing to drive recklessly as by slowing down and wiping his brow.

Scott v. Harris, 550 U.S. 372, 385, 127 S. Ct. 1769, 1778-79, 167 L. Ed. 2d 686 (2007) (citation omitted).

There were four conditions to pursuit established by the Hardin County Sheriff's Office policy. Which of the four were lacking here? Do we doubt Jessie knew Browder wanted him to stop; or that Jessie took action to evade Browder; or that Browder sought to stop him; or that traveling at two and three times the speed limit constitutes a felony? All four conditions were met.

Browder pursued Jessie, consistent with the policy, because he estimated Jessie's speed was so extreme it was "likely to cause death or serious physical injury" which, sadly, it did.

How can we conclude that the separate policy for terminating pursuit requires no discretion on the part of the officer at the scene? The first part of the policy says the officer "[w]ill [t]erminate a [p]ursuit [w]hen . . . the circumstances of the pursuit [which are obviously unique and variable in every case] present an extreme safety hazard to the public . . . ." Every pursuit will create some hazard to the public. Who has the discretion to determine whether the safety hazard has risen from ordinary to extreme? Surely, that is a judgment call of the officer in pursuit.

The second part of the policy indicates that pursuit should cease when "[n]o [f]ield [s]upervisor or higher authority can be contacted to approve the pursuit's *continuation*." (Emphasis added.) Officers are not psychic; what do we expect of them? They cannot instantaneously know whether a supervisor can be contacted or how long that will take. Obviously, once the pursuit is initiated, time elapses before even the effort to contact higher authority can begin. More time elapses while the supervisor is sought, and more time still until he responds or fails to do so. Who has the discretion to decide when the effort to contact a supervisor is fruitless? In the final analysis, the decision to terminate a pursuit must be left to the discretion of the pursuing officer. The officer's immunity for discretionary acts can still be lost if this discretion is exercised in bad faith, *Yanero v. Davis*, 65 S.W.3d 510, 522 (Ky. 2001), as we might have alternatively held in *Mattingly*. *Mattingly*, 425 S.W.3d at 87 ("Mattingly was found guilty of misconduct for violating the Department's Standard Operating Procedures . . . .").

Finally, I am persuaded by Browder's most compelling argument – taking away the cloak of immunity by declining to recognize that police pursuits are inherently fact-specific, discretionary acts will be detrimental to all of society. As expressed by the Supreme Court of the United States:

> [W]e are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would

> create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights.

Scott, 550 U.S. at 385, 127 S. Ct. at 1779 (emphasis in original). Affirming the circuit court's ruling will lead to that perverse incentive of the speeder to simply speed more.

Stripped of immunity, officers will also be incentivized. "[T]o avoid potential liability, officers will simply [allow excessive speeders to] drive past . . . [notwithstanding that s]uch a result is not in the public interest and . . . is difficult to reconcile with any concept of public reliance on police . . . ." *City of Florence, Kentucky v. Chipman*, 38 S.W.3d 387, 393 (Ky. 2001).

For the foregoing reasons, I respectfully dissent. I would reverse the circuit court's order and hold the duty Browder owed was discretionary, thereby entitling him to qualified immunity in the absence of bad faith.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEES:
R. Keith Bond Elizabethtown, Kentucky	Garry R. Adams, Jr. Louisville, Kentucky