RENDERED: APRIL 6, 2018; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001911-MR

LUIS J. GONZALEZ, II, AS ADMINISTRATOR
OF THE ESTATE OF LUIS J. GONZALEZ — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 15-CI-00791

JEREMY JOHNSON, INDIVIDUALLY;
JEREMY JOHNSON, IN HIS OFFICIAL
CAPACITY AS SCOTT COUNTY DEPUTY
SHERIFF; TONY HAMPTON, INDIVIDUALLY;
AND TONY HAMPTON, IN HIS OFFICIAL
CAPACITY AS SCOTT COUNTY SHERIFF — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; COMBS AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The primary issue presented in this appeal is straightforward: Did the trial court err when it ruled that police officers could not be liable for the death of Luis Gonzalez after a fleeing suspect crashed into the

vehicle occupied by Gonzalez because the officers' actions were not the proximate cause of his death? In resolving the issue, we are urged to depart from the precedent in *Chambers v. Ideal Pure Milk Co*., 245 S.W.2d 589 (Ky. 1952), and follow the emerging trend to permit such actions to proceed for a factual determination as to the officers' liability. Because this Court is bound to follow Supreme Court precedent, we reluctantly affirm.

Luis J. Gonzales, II, as Administrator of the Estate of Luis Gonzalez (the Estate), filed this action alleging state law claims for negligence, gross negligence and wrongful death against Scott County Deputy Sheriff Jeremy Johnson and Scott County Sheriff Tony Hampton, in their individual and official capacities, as well as a claim alleging a failure to train and supervise on the part of Sheriff Hampton. The trial court ruled that the officers' actions were not the proximate cause of Gonzalez's death and granted summary judgment in favor of Deputy Johnson and Sheriff Hampton.

The events leading to this case occurred on January 14, 2014. That night, the Scott County Sheriff's Office partnered with the Kentucky State Police to conduct a sting operation seeking to arrest a suspected heroin dealer near the Scott County and Fayette County line. Although the initial location of the sting operation was a gas station in Georgetown, the suspected drug dealer changed the meeting location to the P&G Market on Lisle Road in southern Scott County. The

officers' intent was to facilitate a controlled heroin buy through the use of a confidential informant in the hope of apprehending the dealer during a traffic stop after the buy. Detective Jeremy Nettles of the Scott County Sheriff's Department was assisted by Deputy Johnson who was instructed to conceal his location by parking on a side street near the Lisle Road and Georgetown Road intersection and remain there until Detective Nettles instructed him to perform a traffic stop.

The sting operation began at 8:55 p.m. when the suspect entered the P&G Market parking lot in a dark-colored Audi. During the drug buy, Detective Nettles, Kentucky State Police Detective Morris and Deputy Johnson communicated using cell phones. Before the buy was complete, Detective Morris advised Deputy Johnson of the Audi's license plate numbers. After the drug buy, the suspect exited the parking lot in the Audi and Detective Morris followed in an unmarked unit. After the suspect pulled away, the middleman between the informant and the dealer identified the driver of the Audi as "Chief," an alias used by Kennan McLaughlin. An officer of the Lexington Police Department, who was in contact with Detective Morris during the sting operation, also identified the driver as "Chief."

Meanwhile, Deputy Johnson remained in his police cruiser while he received information from the other officers including a description of the vehicle being driven by the suspect. Deputy Johnson saw a vehicle matching that

description run the red light at the intersection of Lisle Road and U.S. 25. He then radioed dispatch to "call out pursuit," and activated the cruiser's emergency lights and pursued the Audi. However, the siren on the cruiser was not working.

About two miles into the pursuit, Deputy Johnson realized his siren was not functioning but continued his high-speed pursuit. Deputy Johnson described the roadway that night as wet and a "little slick" and recalled that the dog in the K-9 unit was also distracting him because the partition in the cruiser had not been properly secured.

When the suspect and Deputy Johnson approached an S-curve, both slowed down. Deputy Johnson then reassessed the situation because the lack of a siren, the wet road and the restless dog made the pursuit dangerous. Just as he decided to terminate the pursuit and as he came over a hillcrest, he thought he saw the Audi strike a guardrail. Upon reaching the scene, he found that the Audi had crashed head-on into a vehicle in which Gonzales was a passenger. Gonzales was pronounced dead at the scene and Geneva Spencer, the driver of the vehicle, died later because of her injuries.

McLaughlin pled guilty to two counts of second-degree manslaughter. In doing so, McLaughlin admitted to wantonly causing the death of another person pursuant to Kentucky Revised Statutes (KRS) 507.040.

Sheriff Hampton testified by deposition. He testified that when he became Scott County Sheriff in January 2011, the department did not have any written policies and procedures regarding police pursuits and did not until May 1, 2014, four months after Gonzalez's death. Until that time, officers relied on basic training and past department practices. Detective Nettles testified that it was department policy to terminate a pursuit if the cruiser's siren was not working.

The Estate argued Deputy Johnson was negligent in deciding to pursue McLaughlin and to continue the pursuit. It argued Deputy Johnson chose to pursue McLaughlin when no pursuit was needed because the officers knew the suspect's identity. As further evidence of negligence, the Estate relied on the facts that Deputy Johnson pursued McLaughlin at speeds above the legal limit, in the dark, on a wet road, and crossed lanes during the pursuit. Additionally, he did so without the use of a siren as required by KRS 189.940, which permits officers operating an emergency vehicle as such, to drive more than the speed limit but requires the vehicle's warning lights and siren to be activated.

Deputy Johnson and Sheriff Hampton moved for summary judgment on the basis that Deputy Johnson's pursuit was not the proximate or legal cause of Gonzalez's death as a matter of law. The trial court granted the motion and this appeal followed.

Kentucky Rules of Civil Procedure (CR) 56.02 provides that "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." When a trial court considers a summary judgment motion, it is required to 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 Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). "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 Soc'y, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013) (footnote omitted). We apply "a de novo standard of review with no need to defer to the trial court's decision." *Id.* The trial court ruled that summary judgment was appropriate because, regardless of the underlying facts, Deputy Johnson and Sheriff Hampton could not be liable for Gonzalez's death.

Any negligence claim has four elements: "(1) a legally-cognizable duty, (2) a breach of that duty, (3) causation linking the breach to an injury, and (4) damages." *Patton v. Bickford*, 529 S.W.3d 717, 729 (Ky. 2016). Without conceding the remaining elements, Deputy Johnson and Sheriff Hampton argue

that their actions could not be deemed the legal or proximate cause of Gonzales's death as a matter of law.

As observed in *Lewis v. B & R Corp.*, 56 S.W.3d 432, 437 (Ky.App. 2001) (footnotes omitted):

> The causal connection or proximate cause component traditionally was composed of two elements: cause-in-fact and legal or consequential causation. Cause-in-fact involves the factual chain of events leading to the injury; whereas, consequential causation concerns the concepts of foreseeability and the public policy consideration on limiting the scope of responsibility for damages. In Kentucky, the cause-in-fact component has been redefined as a "substantial factor" element as expressed in Restatement (Second) of Torts § 431.

That same Restatement section provides explanation of the term "substantial" adopted in *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) (quoting Restatement of Torts, Second § 431 Comment a):

> 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.

The second component of causation is proximate causation. The notion of proximate cause is that "although conduct in breach of an established duty may be an actual but-for cause of the plaintiff[']s damages, it is nevertheless too attenuated from the damages in time, place, or foreseeability to reasonably impose liability upon the defendant." *Patton*, 529 S.W.3d at 731. It is "bottomed on public policy as a limitation on how far society is willing to extend liability for a defendant's actions." *Id*. at 733 (quoting *Ashley County, Arkansas, v. Pfizer, Inc.*, 552 F.3d 659, 671 (8th Cir. 2009)).

The superseding intervening cause doctrine interplays with proximate causation. *Id*. at 731. "[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." *Pile v. City of Brandenburg*, 215 S.W.3d 36, 42 (Ky. 2006). "As with the determination of proximate cause generally, 'whether an undisputed act or circumstance was or was not a superseding cause is a legal issue for the court to resolve, and not a factual question for the jury.'" *Patton*, 529 S.W.3d at 731 (quoting *House v. Kellerman*, 519 S.W.2d 380, 382 (Ky. 1974)).

An officer's liability for negligence to an innocent third party struck by a vehicle operated by a fleeing suspect was addressed in *Chambers*, the only

published decision on the matter and which was decided over sixty-five years ago.[1] While pursued by two police officers in a police cruiser, a suspect's vehicle struck a horse-drawn milk wagon. The cruiser did not hit the milk wagon but the force of the suspect's automobile hitting it caused the milk wagon to hit the back end of the police cruiser. *Chambers*, 245 S.W.2d at 590. The milk wagon driver sued the police officers individually, claiming their negligence caused the suspect to crash into the milk wagon.

The Court noted that while fleeing police was "perhaps characteristic of the criminally minded" and, by statute, the officers had a duty to use due care when acting in an emergency, the officers had a duty to enforce the law and would have been derelict in that duty if they did not pursue the suspect. *Id*. The Court held as follows:

> The police were performing their duty when [the suspect], in gross violation of his duty to obey the speed laws, crashed into the milk wagon. To argue that the officers' pursuit caused [the suspect] to speed may be factually true, but it does not follow that the officers are liable at law for the results of [the suspect'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.

[1] The Estate mistakenly believes that this Court addressed the issue in *Mattingly v. Mitchell*, 425 S.W.3d 85 (Ky.App. 2013), an appeal from a denial of governmental immunity. In fact, we expressly stated that we were without jurisdiction to consider the proximate cause issue. *Id*. at 91.

Id. at 590-91.

The rule in *Chambers* has been referred to as the "per se 'no proximate cause rule[.]'" *Haynes v. Hamilton Cty*., 883 S.W.2d 606, 612 (Tenn. 1994). The premise of the rule is that it allows police pursuit of fleeing suspects as a matter of public policy and the benefit of apprehending the suspect outweighs the risks inherently involved in such pursuits. *See Thornton v. Shore*, 233 Kan. 737, 666 P.2d 655 (1983), *overruled by Robbins v. City of Wichita*, 285 Kan. 455, 172 P.3d 1187 (2007).

Although our Supreme Court has not addressed the issue since *Chambers*, on two occasions this Court has done so resulting in two unpublished opinions.[2] Those cases rejected any argument that *Chambers* had been implicitly overruled by subsequent case law.

In Plummer v. Lake, 2012-CA-001559-MR, 2014 WL 1513294 (Ky.App. Apr. 18, 2014) (unpublished), police officers were in pursuit of a vehicle traveling at a high rate of speed when the suspect's car collided head-on with another vehicle, killing its driver. In analyzing whether the officers' actions in pursing the suspect could be the proximate cause of the accident, this Court found *Chambers* dispositive of the issue and affirmed the trial court's summary judgment

[2] This Court may cite unpublished cases pursuant to CR 76.28(4)(c). While *Chambers* is dispositive authority and, therefore, citation to these cases would be improper under the rule because there is controlling authority on the proximate cause issue, we may cite these cases because they held *Chambers* remains good law in this Commonwealth.

in favor of the officers. Our Supreme Court denied discretionary review of that opinion on December 10, 2014.

Two years after *Plummer*, the issue was again before this Court and it was again resolved based on *Chambers*. In *Pursifull v. Abner*, 2015-CA-000879-MR, 2016 WL 5335515 (Ky.App. Sept. 23, 2016) (unpublished), Kentucky State Police troopers in separate vehicles pursued a vehicle driven by a suspect who allegedly stole gasoline from a service station. Traveling at high speeds, the suspect drove his vehicle off the roadway and into the side of a deputy sheriff's cruiser, killing the deputy and his canine unit. Based on *Chambers*, the trial court granted summary judgment in favor of the pursuing trooper on the basis that there was no causation as a matter of law. This Court concluded that the *Chambers* holding was even stronger in that case because the suspect acted intentionally or wantonly in causing the deputy's death. *Id*. at 4. Our Supreme Court denied discretionary review of that opinion and ordered the opinion not to be published.

The Estate makes similar arguments to those made in the unpublished cases cited as to why we should not follow *Chambers*. However, as in those cases, we can find no rational reason why this Court is not bound to follow *Chambers*.

While the substantial factor test explained in *Deutsch* recognizes there can be more than one cause of an injury and, therefore, brings into doubt whether

the *Chambers* reasoning could survive a *post-Deutsch* substantial factor analysis, the *Chambers* "per se no proximate cause rule" is one that arises from policy and limits the liability of the officers.

KRS 189.940 does not abrogate *Chambers*. That statute was enacted to alert drivers of an emergency vehicle to prevent a collision with the police vehicle itself and, while the legislature could have added language specifically abrogating *Chambers*, it did not.

Finally, the adoption of comparative fault does not make *Chambers* any less authoritative. Although "the rationale for the doctrine of superseding cause has been substantially diminished by the adoption of comparative negligence," *Pile*, 215 S.W.3d at 42, it has not been extinguished. *Pursifull*, 2016 WL 5335515 at 5. The adoption of comparative fault itself does not give this Court any reason to conclude that *Chambers* has been implicitly overruled. Although there are some distinguishing facts, it remains that Deputy Johnson did not cause McLaughlin to act intentionally or wantonly. That was McLaughlin's choice.

Having concluded that *Chambers* has not been overruled, we have no choice but to follow that precedent. It is the function of this Court to follow the decisions of the highest Court of this Commonwealth and we do not have the liberty to make new policy by overruling decisions of that Court. *Louisville Tr.*

Co. v. Johns-Manville Prod. Corp., 580 S.W.2d 497, 499 (Ky. 1979). However, we are not precluded from constructively criticizing a case from our highest court or stating reasons why that case should be overruled. *Special Fund v. Francis*, 708 S.W.2d 641, 642 (Ky. 1986).

No doubt, the public need for police pursuits is, if not more, viable today than it was in 1952. As noted by the United States Supreme Court in the context of a 42 United States Code (U.S.C.) § 1983 action, we would be "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." *Scott v. Harris*, 550 U.S. 372, 385, 127 S. Ct. 1769, 1779, 167 L.Ed.2d 686 (2007). However, there is an increasing need to place limitations on the choice to pursue and the manner of that pursuit.

Whether attributable to the increased number of motorists involved in crime, the glamorization of police pursuits on television, in movies and video games, or the increased propensity among the criminally minded to flee police, police pursuits have become increasingly dangerous for the officers, the suspects and innocent third parties. The statistics are startling. In 2003, there were an estimated 35,000 police pursuits across the United States and nearly forty percent of those pursuits resulted in crashes. 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 (2006).

These statistics have led to changes in police procedures in Kentucky as well as local and state police departments across the nation. For instance, the Louisville Metro Police Department has adopted procedures for police pursuits in the Department's Standard Operating Procedures including precluding pursuit for non-violent felony offenders when the identity of the suspect is known. *See Mattingly v. Mitchell*, 425 S.W.3d 85, 87 (Ky.App. 2013). Additionally, the enactment of KRS 189.940 demonstrates the legislature's awareness of an increase in accidents involving emergency vehicles.

These same statistics have caused courts in other jurisdictions to view the proximate cause as a question of fact if the plaintiff alleges negligence on the part of police in commencing or continuing pursuit. *Haynes*, 883 S.W.2d at 612. Still others have taken the view that "proximate cause [is] a question of fact if the plaintiff alleges that the police officer's decision to pursue constituted gross negligence." *Id*. at 613. After its extensive survey of caselaw, the Tennessee Supreme Court concluded that present-day public policy demanded that it overrule the "per se no proximate cause rule" adopted in that jurisdiction in favor of a rule that weighs the risk of injury to the public against the need to immediately arrest the suspect consistent with that state's law "as it relates to proximate and

superseding intervening causation and with the critical public policy considerations." *Id*.

The "per se no proximate cause rule" in cases of police pursuits and injuries to third parties when struck by a fleeing suspect's vehicle is now followed only by a minority of jurisdictions. *Id*. at 612. The public policy behind permitting police pursuits now competes with the concurrent and significant policy of protecting the public from the real and extreme dangers of such pursuits to innocent travelers. As the Tennessee Supreme Court reasoned:

> We recognize that police officers have a duty to apprehend law violators and that the decision to commence or continue pursuit of a fleeing suspect is, by necessity, made rapidly. In the final analysis, however, a police officer's paramount duty is to protect the public. Unusual circumstances may make it reasonable to adopt a course of conduct which causes a high risk of harm to the public. However, such conduct is not justified unless the end itself is of sufficient social value. The general public has a significant interest in not being subjected to unreasonable risks of injury as the police carry out their duties. We agree with the Texas Supreme Court's observation, that "[p]ublic safety should not be thrown to the winds in the heat of the chase."

Id. at 611 (quoting *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992)).

While we may agree with the rationale of the Tennessee Supreme Court, we are bound by the rationale of *Chambers* issued by the then-highest Court in this Commonwealth. Any change in that law must come from our Supreme

Court or our legislature. If again presented with the issue, we urge the Supreme Court to review this important issue.

We hold that Deputy Johnson's actions were not the proximate cause of Gonzales's death as a matter of law. Because Deputy Johnson's actions could not be the proximate cause of Gonzalez's death, Sheriff Hampton's hiring and training of Deputy Johnson could not be the proximate cause of his death. *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840, 844 (Ky. 2005). Consequently, the claims against Sheriff Hampton for negligent hiring and training cannot proceed.

For the reasons stated, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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