AS CORRECTED: SEPTEMBER 26, 2019
RENDERED: JUNE 13, 2019
TO BE PUBLISHED

FINAL
DATE 9/26/19 JAF

Supreme Court of Kentucky

2018-SC-000224-DG

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

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2016-CA-001911-MR
FAYETTE CIRCUIT COURT NO. 15-CI-00791

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

OPINION OF THE COURT BY JUSTICE LAMBERT

REVERSING AND REMANDING

Luis Gonzalez was killed when a criminal suspect crashed head-on into his vehicle during a high-speed chase which was initiated by Scott County Deputy Sheriff Jeremy Johnson. Johnson's vehicle was not involved in the actual collision. Gonzalez's estate filed a wrongful death suit against both Deputy Johnson and Scott County Sheriff Tony Hampton. The Fayette Circuit Court granted summary judgment in favor of Deputy Johnson and Sheriff

Hampton based on *Chambers v. Ideal Pure Milk Co.*,[1] and its *per se* no proximate cause rule. We now overrule *Chambers* insofar as it holds an officer cannot be the proximate or legal cause of damage inflicted on a third party by a fleeing suspect. We adopt the majority rule that will allow juries to determine whether a pursuing officer's actions were a substantial factor in causing injury to a third party and apportion fault accordingly.

I. FACTUAL AND PROCEDURAL BACKGROUND

In January of 2014, officers from the Scott County Sheriff's Department and the Kentucky State Police joined forces to carry out a sting operation to apprehend a suspected heroin dealer. Their plan was to have a man named Gregory buy from the dealer, and then have a confidential informant buy the heroin from Gregory.

At around 9 p.m. the suspected dealer pulled into the agreed upon meeting place. Deputy Johnson was instructed to conceal his presence during the exchange and wait for a lead officer's order to perform a traffic stop on the suspect if possible. During this time Deputy Johnson ran the suspect's license plate number and learned the name of the car's registered owner.

After the exchange, Gregory identified the dealer as "Chief," an alias used by Kennan McLaughlin. An officer with the Lexington Police Department who was in contact with the lead officers confirmed his identity. Lexington Police officers then went to McLaughlin's home in Fayette County to stake it out.

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[1] 245 S.W.2d 589 (Ky. 1952).

Meanwhile, Johnson witnessed McLaughlin run a red light and, without authorization, began to pursue him. A litany of things went wrong with the pursuit. To begin, it had been raining, making the well-traveled road slippery. Further, the cruiser Deputy Johnson was using that evening was a K-9 unit, and K-9 Officer Hugo was in the back seat. The partition in the cruiser was unlocked, and the restless dog was able to poke his head through the partition into the front seat. Finally, while the lights on Deputy Johnson's cruiser were functioning, the siren was not. Deputy Johnson claimed he did not realize the siren was broken until two miles into the pursuit. He testified that, though he knew pursing a suspect without his siren violated KRS[2] 189.940 and the Scott Co. Sheriff Dept.'s practices, he continued the pursuit for about another mile.

As McLaughlin and Deputy Johnson were approaching an S-curve, they both slowed down. It was at this time that Johnson assessed the situation and decided to terminate the pursuit. But, almost immediately after he decided to stop pursuing McLaughlin, he saw McLaughlin's car fishtail out of control and hit what Johnson thought was the guardrail. Tragically, McLaughlin actually hit the decedent Luis Gonzalez's car. Luis was pronounced dead at the scene. Geneva Spencer, the driver, also later died due to her injuries.

Gonzalez's estate filed a wrongful death suit against both Deputy Johnson and Tony Hampton, the Scott Co. Sheriff. Before discovery was complete, the trial court granted summary judgment in Deputy Johnson and

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[2] Kentucky Revised Statute.

Sheriff Hampton's favor. The court found that, based on *Chambers*, Deputy Johnson's actions were not the proximate or legal cause of Gonzalez's death as a matter of law. The Court of Appeals also held that it was bound by *Chambers* and reluctantly affirmed.

The single issue presented by this appeal is whether this Court should abandon the *per se* no proximate cause rule established by *Chambers*. Based on the following, we reverse.

II. PER SE NO PROXIMATE CAUSE RULE

"Appellate review of a summary judgment involves only legal questions and a determination of whether a disputed material issue of fact exists. So we operate under a de novo standard of review with no need to defer to the trial court's decision."[3]

For the purposes of a wrongful death suit such as this one, KRS 411.130(1) provides: "Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it." To demonstrate that the defendant was negligent a plaintiff must show that (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty of care; (3) a causal connection between the

[3] *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 905 (Ky. 2013) (internal footnotes omitted).

defendant's conduct and the plaintiff's damages; and (4) damages.[4] The causal connection element is 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. The scope of duty also includes a foreseeability component involving whether the risk of injury was reasonably foreseeable.[5]

In *Chambers*, this Court held that a police officer's actions could, as a matter of law, never be the proximate or legal cause of damages suffered by a third party struck by a fleeing suspect.[6]

Like here, the police cruiser in *Chambers* did not contact the plaintiff-occupied vehicle. Officers Robert Chambers and Jack Long were patrolling in their cruiser at 3 a.m. and noticed a man named Wren Shearer sitting in a parked car. *Id.* at 590. The policemen were familiar with Shearer's criminal record and believed him to be a "suspicious character." *Id.* They turned their cruiser around to investigate, and Shearer fled. *Id.* During the officers' pursuit the cruiser's lights and siren were on and the officers "fired shots into the air in an effort to halt Shearer." *Id.* The speeding Shearer hit a horse-drawn milk

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[4] *Patton v. Bickford*, 529 S.W.3d 717, 729 (Ky. 2016).

[5] *Lewis v. B & R Corporation*, 56 S.W.3d 432, 437 (Ky. App. 2001) (internal footnotes omitted).

[6] *Chambers*, 245 S.W.2d at 591.

wagon owned by Ideal Pure Milk Co. while it was making a left turn. *Id.* at 589-90. A jury ruled in favor of Ideal Milk and awarded damages. *Id.* at 590.

On appeal, Officers Chambers and Long argued for reversal on the basis that they were not the proximate cause of the damage to the wagon or its driver. *Id.* This Court agreed and held:

> To argue that the officers' pursuit caused Shearer to speed may be factually true, but it does not follow that the officers are liable at law for the results of Shearer's negligent speed. **Police cannot be made insurers of the conducts 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.

Id. at 591 (emphasis added). This was the entirety of the holding on the matter. The *Chambers* court provided no statutory support or legal precedent to defend this bare conclusion, and was thus, judge-made law. Nonetheless, based on the *Chambers* holding, Kentucky began to apply what is commonly referred to as the *per se* no proximate cause rule. Because of this, our trial courts and juries were precluded from ever finding that police officers were the cause of any damage suffered by a third party who is hit by a fleeing suspect.[7]

Today, sixty-seven years post-*Chambers*, Kentucky finds itself in a nearly non-existent minority of states that have such a *per se* no proximate cause

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[7] We note that the per se no proximate cause rule does not apply when an officer directly causes damage to a third party. *See, e.g., City of Brooksville v. Warner*, 533 S.W.3d 688 (Ky. App. 2017), review denied (Dec. 7, 2017) (holding an officer was not entitled to official immunity in suit by third party who was struck by officer who negligently pursued suspect).

rule. The following is a non-exhaustive list of states that do not: *Seals v. City of Columbia*, 575 So.2d 1061 (Ala. 1991); *Estate of Aten v. City of Tucson*, 817 P.2d 951 (Ariz. Ct. App. 1991); *City of Caddo Valley v. George*, 9 S.W.3d 481 (Ark. 2000); *Tetro v. Town of Stratford*, 458 A.2d 5 (Conn. 1983); *Jones v. Crawford*, 1 A.3d 299 (Del. 2010); *City of Pinellas Park v. Brown*, 604 So. 2d 1222 (Fla. 1992); *Mixon v. City of Warner Robins*, 444 S.E.2d 761 (Ga. 1994); *Athay v. Stacey*, 128 P.3d 897 (Idaho 2005); *Suwanski v. Village of Lombard*, 794 N.E.2d 1016 (Ill. App. Ct. 2003); *City of Indianapolis v. Earl*, 960 N.E.2d 868 (Ind. Ct. App. 2012); *Morris v. Leaf*, 534 N.W.2d 388 (Iowa 1995); *Robbins v. City of Wichita*, 172 P.3d 1187 (Kan. 2007); *Boyer v. State*, 594 A.2d 121 (Md. 1991); *Harrison v. Town of Mattapoisett*, 937 N.E.2d 514 (Mass. App. Ct. 2010); *Smith v. City of West Point*, 475 So. 2d 816 (Miss. 1985) (overruling on different grounds recognized by *Jackson v. Daley*, 739 So.2d 1031 (Miss. 1999)); *Moody v. Kansas City Board of Police Commissioners*, 539 S.W.3d 784 (Mo. Ct. App. 2017); *Lee v. City of Omaha*, 307 N.W.2d 800 (Neb. 1981); *Tice v. Cramer*, 627 A.2d 1090 (N.J. 1993); *Selkowitz v. Nassau County*, 379 N.E.2d 1140 (N.Y. 1978); *Argabrite v. Neer*, 75 N.E.3d 161 (Ohio 2016); *State ex rel. Oklahoma Dept. of Public Safety v. Gurich*, 238 P.3d 1 (Okla. 2010); *Lowrimore v. Dimmitt*, 797 P.2d 1027 (Or. 1990); *Jones v. Chieffo*, 700 A.2d 417 (Pa. 1997); *Seide v. State*, 875 A.2d 1259 (R.I. 2005); *Clark v. S.C. Dept. of Public Safety*, 608 S.E.2d 573 (S.C. 2005); *Haynes v. Hamilton County*, 883 S.W.2d 606 (Tenn. 1994); *Travis v. City of Mesquite*, 830 S.W.2d 94 (Tex. 1992); *Day v. State ex rel. Utah Dept. of Public Safety*, 980 P.2d 1171 (Utah 1999); *Morais v.*

Yee, 648 A.2d 405 (Vt. 1994); *Mason v. Bitton*, 534 P.2d 1360 (Wash. 1975); *Peak v. Ratliff*, 408 S.E.2d 300 (W.Va. 1991); *Estate of Cavanaugh v. Andrade*, 550 N.W.2d 103 (Wis. 1996); and *DeWald v. State*, 719 P.2d 643 (Wyo. 1986).

In addition, significant changes have occurred in Kentucky's law regarding causation since *Chambers* was rendered. In 1980, for example, we adopted the substantial factor test to determine legal causation.[8] Under that test:

> The actor's negligent conduct is a legal cause of harm to another if
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> (a) his conduct is a substantial factor in bringing about the harm, and
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> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.[9]

Therefore, to establish liability, a jury need only find that a defendant's actions were a substantial factor in bringing about the harm suffered by the plaintiff.

In addition, four years after *Deutsch*, Kentucky abandoned the traditional approach of contributory negligence in favor of the modern approach, comparative fault.[10] Comparative fault allows a jury to apportion liability to the parties of a negligence suit in direct proportion to their individual fault.[11] Thus, Kentucky's current tort law is vastly different from that which existed

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[8] *Deutsch v. Shein*, 597 S.W.2d 141 (Ky. 1980), *abrogated on other grounds by Osborne v. Keeney*, 399 S.W.3d 1 (Ky. 2012).

[9] *Deutsch*, 597 S.W.2d at 144. (quoting Restatement of Torts, Second § 431).

[10] *Hilen v. Hays*, 673 S.W.2d 714 (Ky. 1984).

[11] *Hilen*, 673 S.W.2d at 718; KRS 411.182.

when *Chambers* was decided. During that time, there was no apportionment of fault because, as a matter of law, blame could only reside with one party. These changes helped open the door for officers to be apportioned their fair share of liability for negligently pursuing a suspect.

Statutory changes have also been made. The statute controlling the conduct of police officers when responding to an emergency, KRS 189.940, states:

> (7) KRS 189.910 to 189.950 does not relieve the driver of any emergency or public safety vehicle from the **duty to drive with due regard for the safety of all persons and property upon the highway.**

(emphasis added). This is substantially the same language of that used by KRS 189.320, the controlling statute when *Chambers* was decided which was later replaced by KRS 189.940.[12] However, KRS 189.940 was recently amended to include the following requirements:

> (5) The driver of an emergency vehicle desiring the use of any option granted by subsections (1) through (3) of this section shall give warning in the following manner:
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> (a) By illuminating the vehicle's warning lights continuously during the period of the emergency; and
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> (b) By continuous sounding of the vehicle's siren, bell, or exhaust whistle[.]

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[12] *Page v. Dodds*, 433 S.W.2d 656, 658 (Ky. 1968) ("KRS 189.320 states that certain designated emergency vehicles 'shall have the right of way with due regard to the safety of the public.'"); *Myers v. Able*, 417 S.W.2d 235, 237 (Ky. 1967) ("KRS 189.320 and 189.390(6) give emergency vehicles the right to disregard traffic regulations at intersections when due regard for the safety of the public is observed.").

We feel this amendment demonstrates our legislative branch's acknowledgement of the need for increased precautions by law enforcement when responding to emergencies. And this concern is justified. From 1996 to 2015, an average of 355 people (about 1 per day) were killed annually in pursuit-related crashes.[13] *Id.* During this period, about two-thirds (65%) of pursuit-related fatalities involved occupants of the vehicle being pursued. *Id.* at 6. A third of those killed were occupants of a vehicle not involved in the pursuit (29%) or bystanders not in a vehicle (4%). *Id.* Officers are also put at risk during pursuits: occupants of the pursuing police vehicle accounted for slightly more than 1% of the fatalities from 1996 to 2015. *Id.*

We of course do not criticize the actions of the men and women of law enforcement lightly. However, we agree with the reasoning of the Supreme Court of Tennessee in that

> [w]e 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.[14]

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[13] Brian A. Reaves, Ph.D., *Police Vehicle Pursuits 2012-2013* 6 (U.S. Dept. of Justice Special Report May 2017), https://www.bjs.gov/content/pub/pdf/pvp1213.pdf.

[14] *Haynes v. Hamilton County*, 883 S.W.2d 606, 611 (Tenn. 1994) (internal footnote omitted).

Thus, we now overrule *Chambers v. Ideal Pure Milk Co.* insofar as it created a *per se* no proximate cause rule. We instead hold that an officer can be the cause-in-fact and legal cause of damages inflicted upon a third party as a result of a negligent pursuit. The duty of care owed to the public at large by pursuing officers is that of due regard in accordance with KRS 189.940.

Applying this new standard, we hold that the factual allegations in this case were sufficient to create a disputed issue of material fact as to whether Deputy Johnson negligently conducted his pursuit of McLaughlin. A jury will be able to assess the facts and circumstances and duties, including statutory duties, of each of the parties and properly apportion fault, if fault is found.

III. CONCLUSION

Chambers v. Ideal Pure Milk Co. is overruled insofar as it holds there is a *per se* no proximate cause rule where there is no contact with the pursuing vehicle, but injury or damage occurs, due to an allegedly negligent pursuit. We reverse the ruling of the Kentucky Court of Appeals and remand to the Fayette Circuit Court for proceedings consistent with this opinion.

Minton, C.J.; Buckingham, Hughes, Keller, Lambert, VanMeter and Wright, J.J.; sitting.

Minton, C.J.; Buckingham, Hughes, Keller, Lambert and Wright, J.J.; concur.

VANMETER, J., DISSENTING: I respectfully dissent from the majority's opinion overturning sixty-seven years of precedent based on changes in the

way this Court views causation and a national trend to move away from the *per se* no proximate cause rule regarding police pursuits. Although the majority acknowledges that amendments to the statute controlling the conduct of police officers contain "substantially the same language" as that used at the time of the *Chambers* decision, the majority leans on a small change in the police pursuit statute, KRS 189.940(5)(a)-(b)—that a pursuit vehicle must give warning by using both his warning lights and "continuous sounding of the vehicle's siren"—to justify changing public policy so as to impose liability on police officers for the actions of third parties during a police chase. I disagree and would leave this public policy decision to the legislature.

First, the current KRS 189.940(7) states that any emergency responder has a "duty to drive with due regard for the safety of all persons and property upon the highway." The former KRS 189.320 and KRS 189.390, in place at the time of the *Chambers* decision, set forth that an employee operating an emergency vehicle must do so "with due regard to the safety of the public," and "with due regard for safety of all persons using the street," respectively. KRS 189.080(2), in place at the time of *Chambers*, also identified the proper times for the use of a police siren to be when "in the immediate pursuit of an actual or suspected violator of the law."

"[O]ur rules of statutory construction presume that the legislature is aware of the state of the law at the time it enacts a statute . . . including judicial construction of prior enactments." *St. Clair v. Commonwealth*, 140 S.W.3d 510, 570 (Ky. 2004) (citations omitted). Upon enacting the 1970

amendments to the police pursuit statutes, the General Assembly is presumed to have been aware of the holding in *Chambers* shielding law enforcement officers from liability for the negligence of third parties during an active police chase. Therefore, by merely making minor changes and consolidating statutes, the General Assembly implicitly endorsed the holding in the *Chambers*. Without a significant change in the language of a statute, long-standing public policy shielding law enforcement from liability should not be changed by the courts. *See Kentucky State Fair Bd. v. Fowler*, 310 Ky. 607, 614, 221 S.W.2d 435, 439 (1949) ("[t]he public policy of a state is to be found: first, in the Constitution; second, in the Acts of the Legislature; and third, in its Judicial Decisions. . . . It is only where the Constitution and the Statutes are silent on the subject that the Courts have an independent right to declare the public policy[]"). The Legislature has had every opportunity to abrogate the decision made in *Chambers* to adhere to the *per se* no proximate cause rule, and we should view its minor changes in more recent amendments as an endorsement of that judicial decision, not as a springboard to overrule sixty-seven years of precedent.

This approach is even endorsed by the Tennessee Supreme Court in the *very case* relied on by the majority. In *Haynes v. Hamilton County*, 883 S.W.2d 606, 611 (Tenn. 1994), the Tennessee Supreme Court overruled its adherence to the *per se* no proximate cause rule and acknowledged the change in Tennessee Code Annotated since the court's most recent affirmance of the *per se* no proximate cause rule. Tenn. Code Ann. § 55-8-108(e) states that, during

a police pursuit, a law enforcement officer is not "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.*" (emphasis added). Tennessee's departure from the *per se* no proximate cause rule was in response to the significant change in its state code.

Kentucky's statutes carry no such description of law enforcement's liability during a police pursuit, but merely adhere to the same "due regard" standard of care since *Chambers* was decided in 1952. The General Assembly has amended the police pursuit statutory scheme multiple times since the *Chambers* decision and has not abrogated *Chambers* nor made any significant changes to suggest that the decision in *Chambers* no longer comports with the "due regard" standard of care. We should leave the determination of whether public policy no longer supports this rule to the legislative branch, and not overrule precedent the General Assembly has implicitly endorsed. *St. Clair,* 140 S.W.3d at 570.

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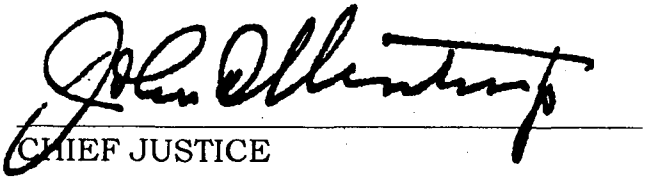
ORDER DENYING APPELLEES' PETITION FOR REHEARING OR MODIFICATION
ORDER CORRECTING OPINION ON COURT'S OWN MOTION

The Petition for Rehearing or Modification, filed by the Appellees, of the Opinion of the Court, rendered June 13, 2019, is DENIED. However, on the Court's own motion, the Opinion of the Court rendered June 13, 2019, is corrected by substitution of the attached Opinion in lieu of the original. Said substitution is to correct the misspelling of Appellant's name and does not affect the holding of the Opinion as originally rendered.

All sitting. All concur.

ENTERED: September 26, 2019.



CHIEF JUSTICE