

IN THE
SUPREME COURT OF MISSOURI

NO. SC88612

DEBRA SOUTHERS, individually and as Next Friend of
Rodney I. Clark, a minor, and Lakoda D. Clark, a minor,
and TERRY LARSON, and KATHLEEN HAMMETT,

Plaintiffs/Appellants

v.

THE CITY OF FARMINGTON, BYRON RATLIFF,
LARRY LACY, and RICHARD BAKER,

Defendants/Respondents

APPEAL FROM THE CIRCUIT COURT OF ST. FRANCOIS COUNTY
STATE OF MISSOURI

CAUSE NO. 04CV614699

THE HONORABLE KENNETH W. PRATTE
PRESIDING JUDGE, DIVISION 2

APPELLANTS' SUBSTITUTE REPLY BRIEF

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REPLY

I. Appellants did not, at any time before the trial court or during argument before the Court of Appeals, Eastern District, stipulate to any fact.

Specifically, Respondents’ contention that “The parties **stipulated** and agreed under Rule 74.04 that non-party Officer ***Barton*** ***was the only pursuing officer***” is disingenuous. *See* Respondents’ Substitute Brief¹ at 7 (emphasis in original). First, the assertion takes out of context a statement made by Appellants in their Response to the summary judgment motion. The “stipulation” attributed to Appellants regarding this issue is in the section of the Response titled “Additional Material Facts.” LF at 157. This section was included by Appellants in their Response pursuant to Rule 74.04(c)(2). That rule directs:

The response may also set forth additional material facts ***that remain in dispute***. . .

Rule 74.04(c)(2) (emphasis added). Was the “additional material fact” at issue poorly worded? Perhaps. Could the “fact” have been worded in another manner? Certainly. But, by virtue of the place it was inserted by Appellants in their Response, the statement sets forth a material fact remaining in dispute – not an admission of fact as contended by Respondents.

Further, Respondents’ assertion to this Court also ignores multiple other contrary contentions set forth by Appellants in their Response as well as pages of

¹ Hereinafter “Substitute Brief”.

argument in Appellants’ Suggestions in Opposition. Indeed, facts establishing that multiple police officers employed by the City of Farmington – including Respondent Ratliff² – violated departmental policy dictating the manner in which officers direct and engage in the pursuit of a fleeing felon serve as the foundation of Appellants’ argument against summary judgment and allegations of negligence against Respondents. *See* LF at 156, ¶ 15; LF at 159, ¶ 20; LF at 160, ¶¶ 23, 24, 25; *See also* LF at 163, 168-169, 172. In fact, in response to the Statement of Uncontroverted Material Facts set forth in Respondents’ summary judgment motion, Appellants unequivocally stated:

Corporal Ratliff knew that he, Officer Barton and Sergeant Lacey were involved in the pursuit of the fleeing vehicle. . .

LF at 156, ¶ 15. Afterward, in their Suggestions, Appellants plainly stated:

. . . the chase involved two too many patrol cars pursuant to the department pursuit policy, including the car involved in the collision – Defendant Ratliff’s patrol car.

LF at 168. Discussing the negligent conduct of the officers involved in the pursuit, Appellants later argued:

Defendant Ratliff’s patrol car met Clark’s car on Maple Valley Drive because Defendant Lacey failed to direct, in any manner, the course and direction of the pursuit, Defendant Ratliff was involved in the pursuit contrary to department policy, Lacey

² Hereinafter “Ratliff”.

failed to direct Ratliff to end his pursuit after becoming aware of Ratliff's involvement. . .

LF at 168-169. Such language hardly amounts to an admission or an assertion that "Officer Barton was the only pursuing officer". The point, ignored by Respondents in their Brief, is that Ratliff negligently joined and participated in the pursuit contrary to Missouri law, departmental policy and the absence of instruction by Respondent Lacey³ to engage and assist.

II. The evidence put forward by Appellants in their Response to the summary judgment motion creates a genuine issue that Respondents acted negligently and that their actions caused injury to Appellants.

Indeed, Respondents assert that the record "fails to establish any negligent conduct". *See* Substitute Brief at 20-23. In so stating, Respondents seem to suggest that a police officer may operate his patrol car at any extreme high speed so long as the officer has activated his lights and sirens. According to Respondents, the only relevant inquiry for this Court is whether Ratliff operated his patrol car at a "very fast" speed after activating his lights and siren. *See* Respondents' Substitute Brief at 21-22. That position is not supported by either Missouri statute or case law. *See* Section 300.100.2 R.S.Mo. (2000); Section 304.022.5 R.S.Mo (2002); Oberkramer v. City of Ellisville, 706 S.W.2d 440, 441 (Mo.banc 1986); Oberkramer v. City of Ellisville, 650 S.W.2d 286, 291 (Mo.App.E.D. 1983); *See also* Brief of Appellant at 25-28. Missouri law dictates

³ Hereinafter "Lacey".

that a police officer may exceed “the prima facie speed limit” so long as he “does not endanger life or property” and that the officer is held to the “highest degree of care”. Section 304.022.5; Oberkramer, 650 S.W.2d at 291. Interestingly, Respondents’ Substitute Brief (and the Eastern District’s opinion) is remarkably silent with regard to any analysis of the circumstances under which the officers pursued the fleeing suspect and whether Ratliff and Lacey “endangered life” through their conduct (or failure to act).

This case is about more than just lights, sirens and speed. This case involves the genuine dispute about whether Ratliff exercised due care when he operated his patrol car without regard of the traffic conditions and topographical circumstances existing at the time of the pursuit, information suggesting the identity and direction of the fleeing vehicle and suspect, departmental policy prohibiting his participation in the vehicle pursuit and the presence of alternative routes. This Court should permit a jury to consider evidence suggesting that in addition to operating his vehicle at speeds in excess of 90 miles per hour, Ratliff drove his vehicle through a residential neighborhood with limited visibility, during congested rush-hour traffic conditions, despite knowing information which would have led to the apprehension of the suspect at a later time and in direct contravention of departmental policy. This Court should also permit a jury to settle the dispute whether Lacey acted reasonably when he failed to act as required by the “Vehicular Pursuit” policy. Did Ratliff’s conduct “endanger life” and property? No dispute exists that two people died and two children were severely

injured as a result of the collision. The fact that Ratliff activated his sirens and lights prior to the collision does not excuse his failure to comply with the mandates of Section 300.100 and Section 304.022.5. *See* Brief of Appellant at 31-36. Should this Court find that the facts put forward by Appellants in their Response to the summary judgment are deficient, this counsel cannot imagine a fact pattern sufficient to establish a violation of these statutes.

III. Monica Clark's actions do not shield Respondents from liability.

Finally, Respondents cannot pass the buck and avoid liability by blaming Monica Clark for the collision. According to Respondents, Ms. Clark's "criminal conduct caused the accident". *See* Substitute Brief at 22-23. The characterization of Ms. Clark's conduct as "criminal" is curious; afterall, a dispute exists as to whether Ratliff complied with requirements of Section 304.022, thereby requiring Ms. Clark to yield to his patrol car. *See* above and Brief of Appellant at 28-36. Appellants suppose that Respondents are arguing that the Ms. Clark's conduct "intervened" between Ratliff's conduct and the collision, thereby serving as the "proximate" cause of the injuries sustained by Appellants rather than the acts and omissions charged in the pleadings and discussed in the parties' briefs. In any case, the negligence of the driver of a vehicle is not imputed to the passengers in the vehicle with no control over its operation. Will v. Gilliam, 439 S.W.2d 498, 502 (Mo. 1969); *but see* Teeter v. Mo. Highway & Transp. Comm'n, 891 S.W.2d 817, 819-821 (Mo.banc 1995).

In Missouri, liability for negligence is limited to injuries which are reasonably foreseeable. Oberkramer, 650 S.W.2d at 298. An act may constitute proximate cause of an injury only if the injury was reasonably foreseeable. A new and unforeseeable force breaks the causal chain. However, the defendant shall remain liable for an injury when an intervening force which was foreseeable intervenes between the defendant's negligent acts and causes an injury that the defendant's conduct might not otherwise have produced. Id. In Oberkramer, the Eastern District recognized:

If the foreseeable likelihood that third person may act in a particular manner is one of the hazards which make a person negligent, such an act of a third party, whether innocent, intentionally tortuous or criminal, does not prevent that person from being liable for the harm caused thereby.

Oberkramer, 650 S.W.2d at 299 (*citing* Scheibel v. Hillis, 531 S.W.2d 285, 286 (Mo.banc 1976)).

Here, Respondents' position is undermined by the "Vehicular Pursuit" policy. The policy acknowledges the danger posed to the public by vehicular pursuits through the municipality. The policy mandates that the officer initiating the pursuit consider "the amount of pedestrian and vehicular traffic" in the area through which the pursuit progresses. The policy's dictate recognizes the inherent risk of injury posed to the public by traveling through highly-populated areas at high speeds. Common sense suggests that the danger to the public is created and

increased by vehicles moving through areas with more – and moving – obstacles for both the pursued as well pursuing vehicles to avoid. The conduct of Monica Clark – a motorist pulling into the path of a patrol car moving at high speed which had just crested a hill – is exactly the type of event foreseeable in a pursuit. To suggest otherwise is an argument against common sense.

As this Court is aware, a “genuine issue” exists where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts. Hare v. Cole, 25 S.W.3d 617, 618 (Mo.App.W.D. 2000). And, the record is viewed in the light most favorable to the non-movant. Id. The facts underlying the disputes at issue in this appeal genuinely remain in dispute. Accordingly, the grant of summary judgment was improper and inappropriate.

WHEREFORE, for the reasons set forth herein and in the Brief of Appellants (filed in the Court of Appeals, Eastern District, and transmitted to this Court by the Clerk of that Court), Appellants respectfully request this Court make and enter its Order reversing the Judgment entered by the trial court granting Respondents’ Motion for Summary Judgment and remanding this cause to the Circuit Court of St. Francois County for reinstatement and further proceedings.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT

RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained Missouri Supreme Court Rule 84.06(b) and, according to the word count function on the word processing program by which it was prepared, contains 1,637 words, exclusive of cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing the Brief of Appellant in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Appellants' Reply Brief and a diskette containing same were deposited on this 31st day of October, 2007, in the United States mail, postage pre-paid, addressed to Mr. Mark H. Zoole, Attorney at Law, 1200 S. Big Bend Boulevard, St. Louis, Missouri, 63117.

Matthew J. Devoti

Subscribed and sworn to before me this 31st day of October, 2007.

Notary Public

My commission expires:

APPENDIX

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Revised Statutes of Missouri

Section 300.100 R.S.Mo. (2000)A1

Section 304.022 R.S.Mo. (2002)A2

Missouri Rules of Civil Procedure

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