

## **Gonzalez v. Johnson, Ky. 2019**

**FACTS:** In January, 2014, the Kentucky State Police and the Scott County Sheriff's Office collaborated to capture a heroin dealer in a sting operation involving a buy by a CI. Deputy Johnson (Scott County SO) was enlisted to hide during the planned transaction and observe, and be available to do a traffic stop if ordered to do so. However, after the transaction, Johnson witnessed the suspect (McLaughlin) run a traffic light and attempted a traffic stop. McLaughlin refused to stop.

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 pursuing a suspect without his siren violated KRS2 189.940 and the Scott Co. Sheriff Dept.'s practices, he continued the pursuit for about another mile.

Both parties slowed as they approached an S-curve and Johnson decided it was time to terminate the pursuit. At almost the same instant, however, McLaughlin's car fishtailed and careened out of control, striking Gonzales' car. Gonzales, the passenger, died at the scene and Spencer, the driver, died later.

The Gonzales Estate filed suit against Johnson and the Scott County Sheriff, Hampton. The trial court granted summary judgement to both, finding, based on Chambers v. Ideal Pure Milk Co., that Johnson's actions "were not the proximate or legal cause of Gonzales' death as a matter of law."<sup>1</sup>

The Court of Appeals "reluctantly affirmed," and the Estate appealed.

**ISSUE:** Is the *se no proximate cause* rule established by Chambers abandoned in Kentucky law?

**HOLDING:** Yes

**DISCUSSION:** In state wrongful death suits, 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."

Basic negligence actions all involve four elements:

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<sup>1</sup> 245 S.W.2d 589 (Ky. 1952).

- (1) the defendant owed the plaintiff a duty of care;
- (2) the defendant breached that duty of care;
- (3) a causal connection between the defendant's conduct and the plaintiff's damages; and
- (4) damages.<sup>2</sup>

Causation can be broken down into two elements: cause in fact or "legal or consequential causation." The latter "concerns the concepts of foreseeability and the public policy consideration on limiting the scope of responsibility for damages."

In the Chambers' case, precedent in similar fact situations for many years, the Court held that an 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." As in this case, in Chambers, there was no direct contact between the injured third party and the law enforcement vehicle.

The Court noted that after 67 years, Kentucky "finds itself in a nearly non-existent minority of states that have such a *per se* no proximate cause rule." In the interim, as well, Kentucky had "adopted the substantial factor test to determine legal causation."<sup>3</sup> In that new test, the Court stated:

- The actor's negligent conduct is a legal cause of harm to another if
- (a) his conduct is a substantial factor in bringing about the harm, and
  - (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.

As such, to find liability, a jury would only need to determine that the defendant's actions "were a substantial factor in bringing about the harm." In 1984, as well, Kentucky had "abandoned the traditional approach of contributory negligence in favor of the modern approach, comparative fault."<sup>4</sup> Over time, the framework of Kentucky's tort law has become "vastly different" from the time of Chambers, which among other things, did not allow for apportionment of fault. Further, KRS 189.940 had also been amended, and now requires emergency vehicles to have both warning lights and a siren in operation when exercising the privileges accorded to emergency driving. The Court noted that approximately one person a day die in a police pursuit, and almost a third of those were not involved in the pursuit.

The Court concluded that it has overruled Chambers "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." The Court remanded the case back to be presented to a jury, to assess the facts and in appropriate, "apportion fault, if fault is found."

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<sup>2</sup> Patton v. Bickford, 529 S.W.3d 717 (Ky. 2016).

<sup>3</sup> 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).

<sup>4</sup> Hilen v. Hays, 673 S.W.2d 714 (Ky. 1984).

NOTE: Although this case has been remanded back to the trial court for further reconsideration, and possible settlement or trial, it is critical to place the entire matter in context. This decision is interlocutory, “in-between” and as such, the facts and legal situation will involve additional legal issues. In recent years, there have been two similar high profile Kentucky cases, Plummer v. Lake<sup>5</sup> and Pursifull v. Abner.<sup>6</sup> In both cases, litigation ensued against law enforcement officers engaged in a pursuit that resulted in a third party suffering fatal injuries as a result of a crash with the vehicle being pursued. In the latter case, the Court agreed that Chambers controlled, and further noted that the crash was due to deliberate actions by the fleeing subject, and who was convicted of the homicide. Plummer was more complex, in that it was argued that the officers involved in fact terminated the chase due to unsafe conditions and the fleeing subject continued on.

The decision at bar (Gonzalez) has repealed Chambers as an absolute defense, and holds that fault in such matters must be decided on the facts of the specific case. A secondary defense was not discussed in this case, however, and it serves as a strong defense in such matters as well, the protections of KRS 65.2003, part of the Claims Against Local Government Act, codified at KRS 65.200 - .2006. That Act codifies the consideration of whether the government agent’s actions were discretionary or ministerial, which is discussed at length in the case of Yanero v. Davis.<sup>7</sup> If an action is deemed discretionary, KRS 65.2003 provides a great deal of immunity. It reads:

*65.2003 Claims disallowed. Notwithstanding KRS 65.2001, a local government shall not be liable for injuries or losses resulting from:*

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*(3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not be limited to:*

- (a) The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule;*
- (b) The failure to enforce any law;*
- (c) The issuance, denial, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;*
- (d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources; or*
- (e) Failure to make an inspection.*

*Nothing contained in this subsection shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.*

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<sup>5</sup> 2014 WL 1513294 (Ky. App. 2014).

<sup>6</sup> 2016 WL 5335515 (Ky. App. 2016).

<sup>7</sup> 65 S.W.3d 510 (Ky. 2001).

In the case of pursuits, the Court will look at any relevant law, such as KRS 189.940, which dictates the “lights, siren, due regard” required of emergency vehicles, whether the agency has any guiding policy or procedure and of course, the specific facts of the case. In general, however, as noted in Rowan County v. Sloas, the Court stated, “qualified official immunity applies to public officials sued in their individual capacity if their actions were discretionary rather than ministerial, made in good faith, with the scope of their authority or employment, and do not violate a person’s clearly established rights.”<sup>8</sup> Yanero defined a discretionary act as one which “involves the exercise of discretion and judgment or personal deliberation, and a ministerial act is one that is ‘absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.’” Looking to Haney v. Monsky, the Court agreed that “since few acts are purely discretionary or purely ministerial, [it] must look for the ‘dominant nature of the act.’”<sup>9</sup> As a rule, the decision to initiate a pursuit is considered to be discretionary and in Plummer, the Court agreed, “the decision to discontinue to pursuit is logically an extension of the officers’ judgement and not separate from the decisions to stop and pursue ....” The discretion, it noted, was “because it was necessary to discern the correct action in a legally uncertain environment.”

Finally, in looking a pursuit liability, the Court can look to Pile v. City of Brandenburg<sup>10</sup> and Jones v. Lathram.<sup>11</sup> In both cases, the Court agreed that the act of safely operating an emergency vehicle is primary ministerial, and in such situation, the ordinary principles of negligence will apply. However, in cases where the police vehicle does not make direct contact with the suspect vehicle or a third party vehicle, the Courts must look to the duty owed to that third party, the “special relationship” enunciated in City of Florence, Kentucky v. Chipman.<sup>12</sup> In Plummer, the Court agreed that the third party victim presented a Chipman issue, and that under the special relationship test, the officer bore no responsibility for the victim’s death as a result of the actions of the fleeing driving. The special relationship test, as follows, requires that (1) the victim must have been in state custody or otherwise restrained by the state at the time the injury producing act occurred, and (2) the violence or other offensive conduct must have been committed by a state actor.” Further, under the public duty doctrine, as recognized in Kentucky, “public officials are not required to insure the safety of every member of the public, nor are they personally accountable because the individual is a public official with the general duty of protecting the public. To impose a universal duty of care on public officials would severely impact their ability to engage in any discretionary decision-making on the spot.” As such, the place such a duty, there must be a “special relationship” between the officer and the third party victim, which is, of course, not the situation in most pursuits that end with a third party injury.

In conclusion, although Gonzalez does present a major change in pursuit litigation, when the injury is to a third party, it does not abrogate all protections to officers and agencies in such cases. The protections provides by the Claims Against Local Government Act (CALGA) and Chipman still

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<sup>8</sup> 201 S.W.3d 469 (Ky. 2006).

<sup>9</sup> 311 S.W.3d 235 (Ky. 2010).

<sup>10</sup> 215 S.W.3d 36 (Ky. 2006)

<sup>11</sup> 150 S.W.3d 50 (Ky. 2004)

<sup>12</sup> 38 S.W.3d 387 (Ky. 2001).

exist, and depending upon the specific facts of a case, may also provide a mechanism for qualified immunity for the officer. And, if the case does go to trial, the jury will have the opportunity to apportion (divide) fault among all parties, including the fleeing driver, which may further reduce any judgement against the officer and the agency.