

COMMONWEALTH OF KENTUCKY
SUPREME COURT
APPEAL NO. 2018-SC-000224-DG

LUIS J. GONZALEZ, II, Administrator
of the Estate of Luis J. Gonzalez

APPELLANT

v.

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

AN APPEAL FROM COURT OF APPEALS OF KENTUCKY
CASE NO. 2016-CA-001911

Amicus Curiae Brief of PursuitSAFETY

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2018, ten (10) copies of this brief were served via Federal Express with a \$150 filing fee upon Susan Stokley Clary, Clerk of the Supreme Court, State Capitol, Room 209, 700 Capitol Ave., Frankfort, KY 40601, and one copy served upon: Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Kimberly N. Bunnell, Judge, Fayette Circuit Court, 120 North Limestone, Lexington, KY 40507; D. Barry Stilz and Robert C. Stilz, III, Kinkead & Stilz, 301 East Main Street, Suite 800, Lexington, KY 40507; and William Garmer, Jerome Prather, John Norman, Garmer & Prather, PLLC, 141 North Broadway, Lexington, KY 40507.

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PURPOSE AND INTEREST OF AMICUS CURIAE

Every day, police officers across the country engage in hundreds of high-speed vehicle pursuits. All too often, however, these pursuits, which the U.S. Department of Justice has described as “the most dangerous of all ordinary police activities,”¹ result in death, serious personal injury, and property damage, making police pursuits a major, yet under-addressed, public safety concern. Although police chases occur more frequently than police shootings, police pursuits have received comparatively little attention.

Founded in 2007, PursuitSAFETY is a nationwide 501(c)(3) non-profit dedicated to addressing this important public safety issue and preventing innocent bystanders and police officers from being needlessly killed or permanently and seriously injured during police chases.² PursuitSAFETY also provides support and assistance to the bereaved family members of pursuit-related accident victims, who include small children, teenage drivers, and the elderly. By advocating on behalf of innocent victims, PursuitSAFETY hopes to bring attention to this important issue and ultimately reduce the number of pursuit-related injuries and fatalities.

In carrying out its mission, PursuitSAFETY does not advocate for a ban on police pursuits. Rather, PursuitSAFETY urges adherence to proper procedure and law enforcement agency pursuit policies that restrict pursuits to those situations in which

¹ Hugh Nugent, Edward F. Connors, III, J. Thomas McEwen and Lou Mayo, “Restrictive Policies for High-Speed Police Pursuits,” NCJ 122025 at 23 (1990).

² The Court is invited to visit PursuitSAFETY’s website for more in-depth information about its mission and public safety goals. Many poignant, tragic cases involving the deaths of innocent victims throughout the United States, including Kentucky, are featured on the web site. *See* www.PursuitSAFETY.org.

the need for immediate apprehension outweighs the risks to innocent bystanders, and where apprehension cannot be accomplished by means other than high-speed pursuit. Where the pursuit involves anyone other than a violent felony offender who poses an imminent threat to the public, the need for immediate apprehension will almost never outweigh the very substantial risk to other motorists and innocent bystanders of the pursuit itself.

Although public safety concerns dictate that dangerous police pursuits be undertaken only in limited circumstances involving suspected violent offenders, the overwhelming majority (over 90 percent) of pursuits are initiated in response to traffic violations, misdemeanors, or non-violent felonies such as car theft.³ In other words, in over 90 percent of cases, the fleeing suspect poses no threat – imminent or otherwise – to the public sufficient to justify the initiation of a risky vehicle pursuit that places innocent bystanders and police officers at risk of harm.⁴

In order to avoid such unnecessary risks to the public, and thereby preserve innocent lives, there must be both adherence to, and meaningful enforcement of, police pursuit policies. For the reasons stated more fully herein, PursuitSAFETY submits that meaningful enforcement necessarily includes the potential for civil

³ Thomas Frank, “High-speed police chases have killed thousands of innocent bystanders,” *USA Today*, July 30, 2015 (citing data from the International Association of Chiefs of Police showing that out of 17,000 chase records across the country since 2001, 92% were initiated in response to a misdemeanor, traffic infraction, or non-violent felony such as car theft).

⁴ See, e.g., Richard G. Zevitz, *Police Civil Liability and the Law of High Speed Pursuit*, 70 Marq. L. Rev. 237, 272 (1987) (noting “the opinion of many law enforcement professionals that where no danger is imminent, excessive speed in pursuit of the minor traffic violator poses an unnecessary risk to the pursuing officer, as well as to the public, and therefore is not warranted”).

liability for police officers who fail to adhere to pursuit policies designed to keep them and the public safe. PursuitSAFETY thus respectfully urges this Court to create at least the potential for police officer civil liability by overruling prior precedent and holding that a police officer's pursuit of a fleeing suspect can, in appropriate cases, proximately cause a third party's injuries. Without such a ruling, dangerous and unwarranted police pursuits will not be deterred and will continue to result in more needless deaths.

DISCUSSION

I. The Police Pursuit Problem.

Police pursuits, which have killed more than 6,200 people since 1999,⁵ present a serious problem for both the public and police departments. Indeed, the tragic accidents that have resulted from pursuits testify to their danger. While there are no federal mandatory reporting requirements for pursuit-related crashes, injuries, or deaths – and thus no comprehensive, nation-wide data on the number and outcomes of police pursuits – the statistics that *are* available through voluntary reporting programs, including the National Highway Traffic Safety Administration (NHTSA)'s Fatality Analysis Reporting System (FARS), are alarming.

In 2012, state and local law enforcement agencies conducted an estimated 68,000 vehicle pursuits (roughly 186 per day).⁶ In terms of fatalities, it is estimated

⁵ Thomas Frank, "Black people are three times likelier to be killed in police chases," *USA Today*, December 1, 2016.

⁶ Brian A. Reaves, Ph.D., "Police Vehicle Pursuits, 2012-2013," *Bureau of Justice Statistics*, NCJ 250545 (May 9, 2017).

that one out of every 100 high-speed pursuits results in a fatality,⁷ and that an average of 355 people, or about one person per day, are killed annually during police pursuits.⁸ Because reports to FARS are voluntary, it is estimated that this figure could be as high as 400-500 deaths per year.⁹ In terms of police officer deaths, from 1994 through 1998, an average of one law enforcement officer was killed every 11 weeks in a pursuit, and one percent of all U.S. law enforcement officers who died in the line of duty lost their lives in vehicle pursuits.¹⁰ Figures such as these reveal that police vehicle chases occur far more frequently than police shootings,¹¹ and that they have killed nearly as many people as justifiable police shootings.¹²

And, while it is impossible from the available data to determine with any precision how many innocent bystanders have been killed during police pursuits, a 2015 investigation by USA Today, which analyzed each of the 11,506 pursuit-related fatalities reported to NHTSA from 1979 through 2013, determined that at least 2,456 (or just over 21%) of those killed were bystanders, although this figure could be as high as 2,750.¹³ Other studies have estimated that as many as 42 percent of persons killed or injured in police pursuits are innocent bystanders.¹⁴

⁷ John Hill, "High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction," *FBI Law Enforcement Bulletin*, July 2002, 14-18.

⁸ Reaves, *supra* n.6 (citing statistics from 1996 to 2015).

⁹ Justin Thompson, "Police Pursuits: Are No-Pursuit Policies the Answer?," *Criminal Justice Institute School of Law Enforcement Supervision* at 5 (October 21, 2005).

¹⁰ *Id.*

¹¹ Hugh Nugent, Edward F. Connors, Ill, J. Thomas McEwen and Lou Mayo, *supra*, n.1.

¹² Frank, *supra*, n. 3.

¹³ *Id.*

¹⁴ Hill, *supra*, n. 7.

Equally as disturbing as the statistics recited above is the fact that 9 out of 10 deadly pursuits are initiated *not* for purposes of apprehending a dangerous violent offender, but in response to traffic violations, misdemeanors, or non-violent felonies such as car theft. According to an analysis of records of 63,500 chases from 2002 through 2014 in the state of California, almost 90% were for vehicle-code violations, including speeding, vehicle theft, and reckless driving.¹⁵ The analysis further showed that chases had been initiated for: missing license plates or expired registrations (almost 4,900 chases); safety violations that endangered the driver only (almost 1,000 chases, including 850 drivers not wearing a seat belt and 23 motorcycle riders not wearing a helmet); and driving too slowly (90 chases).¹⁶ In fact, a mere 5% of police pursuits were initiated in order to apprehend someone suspected of a violent crime.¹⁷

II. The Need for Enforceable Pursuit Policies.

Initiating vehicle pursuits of persons who have committed a legal violation but who pose no threat to the public is likely a product of conventional police wisdom, which for generations has dictated that effective law enforcement demands the apprehension of suspects, even if such apprehension comes at great social costs.

According to Dr. Geoffrey Alpert, a professor of Criminology at the University of South Carolina and one of the nation's leading experts on police pursuits, this chase-at-all-costs approach is grounded in two widespread misconceptions concerning pursuit driving: First, that suspects who flee the police "have a dead body

¹⁵ Frank, *supra* n. 3.

¹⁶ *Id.*

¹⁷ *Id.*

in the trunk,” and second, that if police refrain from chasing fleeing suspects, everyone will flee.

With respect to the first misconception, and as explained above, the overwhelming majority of people who flee are not serious or violent offenders who pose a risk to the public by remaining at large but are minor offenders who have used very poor judgment. The second and related misconception is that if police do not chase fleeing suspects, then everyone will flee.¹⁸ This “classic myth” about pursuit driving has been largely dispelled by studies showing that in jurisdictions with well-publicized restrictive pursuit policies, only a very small percentage of those ordered to stop with lights and/or siren continue to flee. “As an example, research by the Orlando, Florida, Police Department documented that only 107 suspects fled from more than 40,000 stops between March 2004 and February 2005. This occurred after the department’s highly restrictive pursuit policy was made public.”¹⁹

With pursuits and pursuit-related injuries and deaths on the rise,²⁰ police forces began to adopt restrictive pursuit policies that allow pursuits in limited circumstances, typically when a more serious crime has been committed.²¹ Today, all state police and highway patrol agencies, 97% of local police departments, and 96% of sheriffs’ offices have written vehicle pursuit policies.”²² Because of the significant risks to which police pursuits expose the public, these policies recognize that police

¹⁸ Geoffrey P. Alpert and William C. Smith, “Police Pursuits After *Scott v. Harris*: Far from Ideal?”, *Ideas in American Policing* (June 2008).

¹⁹ *Id.*

²⁰ Hill, *supra* n. 7.

²¹ Cynthia Lum and George Fachner, “Police Pursuits in An Age of Innovation and Reform,” *The IACP Police Pursuit Database* at 4 (September 2008).

²² Reaves, *supra* n. 6.

vehicle pursuits must be undertaken with due care, and only after a reasonable determination has been made that the benefits of potential apprehension outweigh the risks of injury to the police officers themselves, the public, and the suspects in the fleeing vehicle. Experience borne of tragedy teaches that adherence to proper police procedure greatly reduces the numbers of innocent deaths and injuries.²³

Of course, in addition to having policies in place, it is critical that all agencies provide adequate compliance training to officers who might become involved in pursuits. PursuitSafety thus advocates for rigorous pursuit training for the nation's police officers.

III. The Need for Civil Liability to Ensure Compliance, Deter Dangerous Conduct, and Prevent Unnecessary Death and Injury.

Pursuit policies can save lives, but their effectiveness depends upon the extent to which compliance is actually and meaningfully enforced. It is PursuitSAFETY's belief that such meaningful compliance and enforcement can only be achieved through the actual or potential imposition of civil tort liability upon law enforcement agencies or officers who fail to exercise due regard for the safety of third persons, and where such failure results in harm to third persons. Beyond simply providing compensation to innocent victims, police officer civil liability serves the critical function of deterring unreasonably dangerous conduct. Indeed, there can be little doubt that “[d]eterrence is a real and present virtue of the tort system. The actual or

²³ G. Alpert, D. Kenney, R. Dunham, and W. Smith, *Police Pursuits: What WE Know* (Washington, DC: Police Executive Research Forum, 2000); Jeff Martin, “Pursuit Termination: A Lifesaver?”, *Law and Order* 49 (2001): 30-33.

potential imposition of civil tort liability changes the behavior of others.”²⁴ PursuitSAFETY thus urges the Court, in deciding this case, to recognize that in many instances, innocent victims of police pursuits and their family members are not simply seeking an adequate legal remedy but are “ask[ing] the legal system to take steps to prevent repetition of their tragedy.”²⁵

Put simply, raising the specter of civil liability by allowing civil suits against police officers in pursuit cases to go forward where there is sufficient evidence to warrant a jury’s consideration of a lack of due regard will alone save lives in Kentucky, even if such suits are ultimately unsuccessful, because the potential for civil liability will discourage thoughtless behavior and increase accountability.²⁶

Appellant has cited to this Court numerous opinions from foreign jurisdictions demonstrating the majority view that proximate cause in police pursuit cases is a jury question. One case that was not cited in the Appellant’s Brief, which is similarly instructive, is the Georgia Supreme Court decision in *Mixon v. City of Warner Robins*,²⁷ in which the Georgia Supreme Court was confronted with the identical issue presented to this Court; that is, whether, as a matter of law, the acts of the fleeing suspect being pursued by police were the sole proximate cause of the fatal collision.

In deciding this issue, the Georgia Supreme Court had to interpret the state’s emergency operation vehicle statute, Official Code of Georgia Annotated § 40-6-6

²⁴ Andrew F. Popper, “In Defense of Deterrence,” *Albany Law Review*, 75 *Albany Law Review* 181 (2012).

²⁵ *Id.* at 182.

²⁶ PursuitSAFETY notes that juries are often reluctant to find fault with police officers who are serving the public, just as they are often reluctant to fault with doctors in malpractice actions, and thus defense verdicts are generally more common in pursuit cases.

²⁷ 444 S.E.2d 761 (Ga. 1994).

(virtually identical to Kentucky’s emergency vehicles statute, KRS § 189.940), which provided that “[t]he pursuing officer ‘shall not be relieved... from the duty to drive with due regard for the safety of all persons.’” OCGA § 40-6-6(d).²⁸ The Georgia Supreme Court observed that § 40-6-6(d) did not specifically provide that a pursuing officer can be held civilly liable for an injury occasioned by a fleeing criminal suspect, rather than by the officer himself, but neither did it specifically prohibit the imposition of civil liability under those circumstances. The Court further noted that the statute recognized the long-standing policy that “an officer’s performance of his professional duty is not to be considered paramount to the duty that he owes to other members of the driving public.”²⁹ The Court thus concluded that

the officer’s avoidance of civil liability cannot derive from the mere intervening flight of the criminal suspect but is solely dependent upon the officer’s own adherence to his duty to drive with the requisite due regard for the safety of others. Accordingly, if a vehicular pursuit is undertaken or performed without the requisite due regard for the safety of all persons and an injury occurs as the consequence, the officer can be held civilly liable even though the injury was actually inflicted by the fleeing criminal suspect.³⁰

PursuitSAFETY recognizes and appreciates the competing policy interests of police being able to apprehend lawbreakers on the one hand, and of innocent

²⁸ In response to *Mixon*, the Georgia legislature amended OCGA § 40-6-6(d) to provide that an officer’s pursuit of a suspect is only a proximate or contributing proximate cause of damage, injury, or death caused by the fleeing suspect where the officer acted with reckless disregard for proper law enforcement procedures. *City of Winder v. McDougald*, 276 Ga. 866 (2003). Thus, in the amendment to the statute, the Georgia Legislature addressed the *evidentiary standard* required of plaintiffs who would allege that a high-speed pursuit was a proximate cause of their damages.

²⁹ *Mixon*, 444 S.E.2d at 764.

³⁰ *Id.*

members of the public not being subjected to unreasonable risk on the other. However, PursuitSAFETY agrees with the Georgia Supreme Court's decision in *Mixon* and similar cases from other jurisdictions that, as a matter of sound public policy, a police officer's duty to apprehend should not be elevated above the rights of innocent bystanders where injury or death is "in fact" caused by the unreasonable initiation or continuation of a dangerous pursuit. Given that 9 out of 10 pursuits involve minor infractions or non-violent offenses, this Court should give due consideration to the significant interest of innocent members of the public not to be subjected to unreasonable risk of injury as the police carry out their law enforcement duties under circumstances which require them to pursue fleeing suspects.

CONCLUSION

Regrettably, between the date of the filing of this Amicus Brief and the time this case is actually decided by this Court, there will likely be dozens of deaths across the United States as a result of police pursuits. Some of these deaths will likely occur in the Commonwealth of Kentucky. PursuitSAFETY strongly believes that many such deaths can be prevented through the imposition of civil liability upon police officers who fail to comply with pursuit policies or to exercise due regard for the safety of others. Holding that a police officer's pursuit of a fleeing suspect cannot, as a matter of law, proximately cause a third party's injuries, thereby insulating police officers from liability, regardless of the degree of danger the chase poses to the fleeing suspect, innocent bystanders, and the police officers themselves, will result in more lives being lost. On the other hand, if officers know they may be held civilly liable for taking unreasonable risks and not complying with pursuit policies designed to

protect them and the public, it is likely that they will default to pursuit safety training rather than the adrenalin of the chase itself.

While PursuitSAFETY is an ally of law enforcement, and works diligently with law enforcement agencies throughout the U.S in an effort to promote safer alternatives to high-speed pursuits for minor infractions, its primary focus is on protecting the rights of pursuit-related accident victims. In short, PursuitSAFETY strongly believes that accountability through civil liability will further such victims' interests by providing an adequate legal remedy and preventing future tragedies. The mere possibility of a civil liability will encourage adherence to proper police procedure, deter unreasonably dangerous conduct, and ultimately save lives in the Commonwealth of Kentucky.

Respectfully submitted,

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