ANGLE, ETAL. V. MILLER, ET AL., C.P. C.D. Franklin County Branch, No. A.D. 1991-86

Automobile Accident, Police Chase - Tort Claims Act

1. Where a vehicle being pursued by police at a high rate of speed collides with plaintiff's vehicle, the pursuing police officer who was not involved in the collision is not liable for an accident caused by the criminal acts of another.

2. Under the Tort Claims Act, if a police officer's conduct constitutes actual malice, he is not immune from suit.

3. Malice does not necessarily mean a particular ill-will toward another, in certain cases a showing of recklessness of consequences and a mind regardless of social duties will suffice.

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OPINION AND ORDER

WALKER, J., October 29, 1992:

FINDINGS OF FACT

On June 1, 1990, plaintiff Dale E. Angle and defendant Shawn A. Miller were involved in an automobile accident. Miller was being chased by defendant Harold J. Benchoff, a member of the Greencastle Police Department. Miller's vehicle collided with a vehicle driven by Dale E. Angle who subsequently died. Parents of the decedent brought a wrongful death and survival action.

Defendants Benchoff, the Greencastle Police Department and the Borough of Greencastle moved for summary judgment, asserting sovereign immunity. The parties briefed and argued the motion which is now ripe for disposition.

DISCUSSION

A motion for summary judgment is granted only when the moving party is entitled to judgment as a matter of law. *Mariscotti v. Tinari,* 335 Pa. Super. 599, 485 A.2d 56 (1989). The moving party has the burden of showing that no genuine issues of fact exist. *Penn Center House, Inc. v. Hoffman,* 520 Pa. 171, 553 A.2d 900 (1989), Pa. R.C.P. 1035 (b).

The following isues are before the court:

A. Whether the Tort Claims Act provides immunity to police officers and local agencies from liability in a neglgence action where the injuries were directly caused by a third-party's criminal conduct?

B. Whether as a matter of law it can be determined that defendant Benchoff acted without actual malice in his pursuit to apprehend defendant Shawn A. Miller?

A. Tort Claims Act Immunity

Two requirements must be met for a govermental immunity exception to apply. The first is that "damages would be recoverable under common law or a statute creating a cause of action." 42 Pa.C.S.A. § 8542(a)(1). The second is that the "injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties." 42 Pa.C.S.A. § 8542(a)(2).

In *Dickens v. Horner,* Pa. , 611 A.2d 693 (1992), the Supreme Court interpreted the two requirements as specifically excluding from govermental liability injuries resulting from acts of persons other than local agencies or their employees. Relying on their previous decision in *Mascaro v. Youth Study Center,* 514 Pa. 351, 523 A.2d 1118 (1987), the Supreme Court

> "held that the Legislature has clearly precluded the imposition of liability on itself or its local agencies for acts of third parties and that it has not seen fit to waive immunity for these actors or their acts." *Dickens,* Pa. at , 611 A.2d at 695.

In *Dickens,* the plaintiff was seriously injured when struck by an automobile. The defendant police officer was pursuing the vehicle that struck the plaintiff. The police officer initiated the

chase, believing the driver to be operating the vehicle without a driver's license and under the influence of drugs. In addition to the police officer, plaintiff named the township and the driver of the automobile as defendants.

The police officer and the township filed preliminary objections "asserting immunity from suit under the provisions of the Political Subdivision Tort Claims Act, 42 Pa.C.S. § 8541 et seq." *Dickens,* Pa. at , 611 A.2d at 694. The Supreme Court reversed the lower court and granted the preliminary objections, stating that they would not impose liability upon the police officer and the township for an accident caused by criminal acts of the driver of the vehicle that struck the plaintiff.

This court finds *Dickens* directly on point and controlling on the motion for summary judgment.

Defendant Benchoff was pursuing at a high rate of speed the vehicle that collided into the vehicle driven by Dale Angle. Plaintiffs assert that Benchoff was negligent for initiating and then failing to discontinue the high-speed chase and this negligence caused the collision.

Accepting the above pleaded facts as true, the court finds that the motion for summary judgment on the negligence claim must be granted because Benchoff's vehicle never contacted decedant's car. The vehicle of individual fleeing from police pursuit collided into decedant's vehicle. As in *Dickens,* this court cannot impose liability on police officers and local agencies for criminal conduct of others.

Plaintiffs attempt to distinguish *Dickens* from the instant case on causation grounds. In *Dickens,* the Supreme Court stated that the plaintiff alleged:

> "that while [the fleeing individual] was directly responsible for the accident, nevertheless, the decision of the officer to pursue [the fleeing individual] was a *proximate* cause of the accident."
> Pa. at , 611 A.2d at 694. (Emphasis added).

Plaintiffs argue that because they allege Benchofff's negligence in initiating and continuing the chase *directly* caused

the accident, a genuine issue of material fact regarding causation exists.

In supporting its argument, plaintiff cites to the concurrng opinion in *Dickens,* which states in part:

> However, I write separately to emphasize that, in my view, the decision of the majority does not eliminate liability claims against a municipality or its agents in instances where its own actions, as opposed to those of a third party, are the proximate cause of the injury.
>
> Pa. , 611 A.2d at 696, (Cappy, J., concurring).

This court finds plaintiff's argument meritorious, however, it is bound by the majority opinion in *Dickens.* The Supreme Court seemingly imported immunity to police officers and local agencies for any accidents occurring during the pursuit of a fleeing individual if the police vehicle did not actually contact the innocent bystander's vehicle. Immunity will be granted in negligence claims without addressing the issue of causation.

The plaintiff in *Dickens* alleged the following similar theory of liability:

> 19. The accident heretofore described was caused by the carelessness, recklessness and negligence of Defendant, Upper Chicester [sic] Township, through its agent, servant and/or employee acting within the course and scope of his employment by reason of the following:
>
> (a) by improperly and without cause initiating a high speed pursuit through a residential neighborhood;
>
> (b) in failing to follow accepted police practices with regard to high speed chases;
>
> (c) in initiating a high speed chase of a minor who was suspected of violating a minor traffic offense; and
>
> (d) in otherwise failing to exercise due care under the circumstances.

Dickens v. Upper Chichester Township, 123 Cmwlth. Ct. 226, 230,

553 A.2d 510, 512 (1989). The Commonwealth Court held that the trial "court did not err or abuse its discretion in concluding that the allegations...[were] sufficient to raise factual questions" and upheld the denial of the preliminary objections. *Id.* at 230-31, 553 A.2d at 513.

Although the Supreme Court did not specifically address these allegations in the *Dickens* opinion, this court assumes the majority implicitly rejected plaintiff's allegations of factual issues regarding causation of the accident. Likewise, this court also rejects plaintiffs' causation argument and grants the motion for summary judgment on the negligence claim in favor of defendants Benchoff, Greencastle Police Department, and the Borough of Greencastle.

B. Actual Malice Claim

The Political Subdivision Tort Claims Act provides:

> In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, *actual malice* or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply. (emphasis added).

42 Pa.C.S.A. § 8550. Thus, if a police officer's conduct constituted a crime, actual fraud, actual malice, or willful misconduct, the officer is not immune from suit in an individual capacity. *See Morris v. Mosser*, 84 Pa.Cmwlth. 170,173, 478 A.2d 937,939 (1984).

Plaintiffs argue that pleading facts that support an allegation of reckless behavior is sufficient to raise a factual issue as to whether Benchoff's conduct constituted actual malice.

In *Montgomery v. Dennison*, 363 Pa. 255, 270, 69 A.2d 520, 528 (1949), the Supreme Court stated "that malice does not necessarily mean a particular ill-will toward another; it comprehends in certain cases *'recklessness of consequences* and a

mind regardless of social duties.' " In the amended complaint, plaintiff alleges Benchoff:

> a. Chose to engage in, engaged in, and failed to discontinue a high-speed motor vehicle pursuit that was undertaken as a result of alleged relatively minor infractions of the traffic laws, and as a result of such pursuit Defendant Shawn A. Miller was motivated to and did in fact drive at excessively high speeds approaching or exceeding 100 miles per hour without the use of headlights, when Defendant Benchoff knew or should have known that under such conditions then and there existing such a high-speed pursuit would expose other persons, including Dale E. Angle II, to an unreasonable risk of 'harm;
>
> b. Chose to engage in, engaged in, and failed to discontinue a high-speed pursuit of a vehicle being drove by Defendant Shawn A. Miller, under the conditions then and there existing, when he knew or should have known the identity of the driver of the vehicle and the reputation and history of such driver for negligent, careless, and/or reckless driving including driving at very high speeds approaching or exceeding 100 miles per hour without the use of headlights in attempting to flee from police and which would cause an unreasonable risk of harm to other persons, including Dale E. Angle II;
>
> c. Chose to engage in, engaged in, and failed to discontinue a high-speed police pursuit through an area lined with businesses and intersections including the intersection of Route 11 and the Interstate 81 northbound exit ramp, such that Defendant Benchoff knew or should have known that such high-speed chase would expose other persons, including Dale E. Angle II, to an unreasonable risk of harm;
>
> d. Violated 75 Pa.C.S.A. § 3105 by exceeding maximum posted speed limits during the aforementioned high-speed pursuit without making use of an audible warning signal;
>
> e. Chose to engage in, engaged in, and failed ot sidcontinue a high-speed police pursuit without due regard for the safety of all persons using the highway in violation of 75 Pa.C.S.A. § 3105.

Amended Complaint, Paragraph 65, a-e.

The court finds that these allegations, if believed, could support a claim of actual malice on the part of Benchoff. Accord-

ingly, because a genuine issue of material fact exists concerning actual malice, the court denies the motion for summary judgment as to defendant Benchoff.

CONCLUSION

The motion for summary judgment as to defendants Greencastle Police Department and Borough of Greencastle is granted. The motion for summary judgment as to defendant Benchoff is denied, but plaintiff may proceed against him only under a theory of actual malice.

ORDER OF COURT

October 29, 1992, the motion for summary judgment as to defendants Greencastle Police Department and Borough of Greencastle is granted.

The motion for summary judgment as to defendant Benchoff is denied, but plaintiff may proceed against him only under a theory of actual malice.

D. L. MARTIN MACHINE COMPANY V. LOEWENGART AND COMPANY, INC. ETAL, C. P. Franklin County Branch, No. A.D. 1992-163

Environmental Law - Recovery of Clean up Costs- Pennsylvania Hazardous Sited Cleanup Act (HSCA)

1. Sections 702 (a) (3) and 1101 of HSCA have the combined effect of creating a private cause of action.

2. An individual landowner and not just governmental entities may institute an action under HSCA.

Eugene Dice, Esq., Attorney for Plaintiff

Charles E. Gutshall, Esq., Attorney for Defendants

OPINION AND ORDER

Kaye, J., September 23, 1992:

OPINION

D. L. Martin Machine Company (hereinafter "plaintiff") has filed an action in equity and at law against Loewengart and Company, Inc., Feuer Leather Group and Myron Feuer (hereinafter "defendants") in which it seeks liquidated and unliquidated damages in connection with the costs of remediation which it has incurred to remove hazardous substancesfrom a parcel of land which plaintiff purchased from defendants in 1977. The complaint alleges that defendant Loewengart has operated a leather tannery since 1946 at a manufacturing facility adjacent to plaintiff's property.[1]

Prior to 1977, when the site at issue was purchased by plaintiff from defendants, it is alleged that defendants disposed of waste materials form the tanning operation on their property, including the parcel subsequently purchased by plaintiff.

Beginning in May, 1990, plaintiff has been required by action of the Pennsylvania Department of Environmental Resources (DER) to investigate and remove chromium and lead contaminants from its soil. Plaintiff contends that these hazardous wastes were deposited on its land by defendants. Plaintiff alleges liquidated damages, to date, of $202,180 and contends that response costs will continue to be incurred for clean-up of the soil and monitoring of groundwater.

Defendants have filed a preliminary objection in the nature of a demurrer [2] to Count I of plaintiff's five-count complaint.[3]

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[1] The complaint alleges that co-defendant Feuer Leather Group, is a holding company for Loewengart and controls tha manufacturing facility located adjacent to plaintiff's property. Co-defendant Myron Feuer is the President of both Feuer Leather Group and Loewengart.

[2] In ruling on a demurrer, the Court must regard all wellpleaded material facts contained in the complaint as having been admitted, as well as all inferences reasonably deducible therefrom. Keirs v. Weber National Stored, Inc., 352 Pa. Super. 111, 507 A.2d 406 (1986).

[3] The other four counts are for declaratory judgment, strict liability in tort, negligence and nuisance.