

IN THE COURT OF APPEALS OF IOWA

No. 8-402 / 97-0847

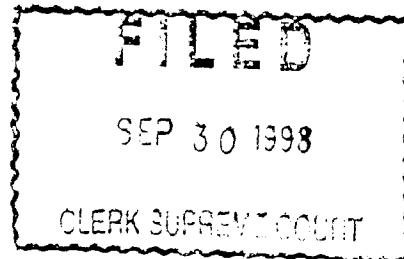
**DAVE ROSALEZ, as Administrator of the
Estate of DIANE ROSE ROSALEZ,**

Plaintiff-Appellant,

vs.

KELLY HINDMAN,

Defendant-Appellee.



Appeal from the Iowa District Court for Webster County, Joel E. Swanson,
Judge.

Plaintiff appeals from a district court ruling granting summary judgment in
favor of defendant. **AFFIRMED.**

Alfredo Parrish, Elizabeth Kruidenier, and Jennifer Larson of Parrish,
Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Jeffrey D. Farrell, Assistant Attorney
General, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

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MAHAN, J.

Dave Rosalez, as administrator of the estate of Diane Rosalez, appeals from the summary judgment ruling granted in favor of Kelly Hindman, a state trooper, in Rosalez's section 1983 excessive force claim. Rosalez contends the district court erred in determining there was no genuine issue of material fact and therefore Rosalez could not show a violation of Diane's constitutional rights. Rosalez also contends the district court erred in determining Hindman was entitled to qualified immunity. We affirm the district court.

After midnight on April 4, 1994, Hindman was driving eastbound on Business Highway 20 in his patrol car. Hindman witnessed a motorcycle traveling westbound at a high rate of speed. The motorcycle belonged to Verdean Ackerson. Diane was the passenger on this motorcycle; Lynn Markert was the driver. Hindman clocked the motorcycle at fifty-one miles per hour in a thirty mile per hour zone. Hindman then activated his lights and drove to an opening in the median to turn around.

After turning around, Hindman accelerated in an attempt to catch up to the motorcycle. At one point, the motorcycle was several blocks ahead of Hindman. Hindman lost sight of the motorcycle until he drove around a bend in the road. There he discovered Markert had failed to make a turn and had driven into a utility pole. Hindman slammed on his brakes to avoid the accident scene. Both Markert and Diane died as a result of injuries sustained in the accident.

Hindman estimates he was no closer to the motorcycle than three or four blocks at the time of the accident. The events took place in just over one minute and covered just over one mile.

Rosalez filed a lawsuit alleging Hindman caused the accident by hitting the rear wheel of the motorcycle with his patrol car. This suit originally contained three counts against the State of Iowa and Hindman in his individual and official capacities. There were the section 1983 claims and two counts based on negligence and negligence per se. All of these claims were dismissed except the section 1983 claim against Hindman in his individual capacity.

Hindman filed a motion for summary judgment on this claim. The motion was supported by affidavits from Hindman, Audra Sherman, Tad Maschino, Clifford Baldwin, and Frederick Smith, and by the accident investigation report from Michael McClintock.

Sherman, Maschino, Baldwin, and Smith witnessed events leading up to the accident, although not the accident itself. Sherman, Maschino, and Baldwin were in other vehicles on the road that evening. All three testified Hindman was some distance (150 to 200 yards or several blocks) behind the motorcycle at the time they saw him, and they believed the driver was about to lose control of the motorcycle. Both Maschino and Baldwin stated they did not observe Hindman's patrol car hit the motorcycle.

Smith also corroborates Hindman's account. Smith heard the report of the pursuit on his police scanner and sat up in time to see the motorcycle driving past his

window. He saw the motorcycle bounce several times and sparks fly. Smith heard the motorcycle crash into the utility pole and then witnessed Hindman's arrival at the accident scene. Smith stated, "Based on my observations, there was no way the trooper bumped the motorcycle during the chase."

Hindman's account of the events is further supported by McClintock's accident investigation report. McClintock determined Hindman's patrol car was a non-contact vehicle based on physical evidence found at the scene, such as skid marks and lack of damage to Hindman's vehicle. McClintock concluded it was the following factors that contributed to the accident:

1. The failure of Mr. Markert to obey the posted speed limit in the city of Fort Dodge.
2. Mr. Markert was attempting to elude Trooper Hindman to avoid prosecution.
3. Mr. Markert had a BARRED driver's license.
4. The motorcycle he was operating was improperly registered and had the license plate of another motorcycle displayed on the rear.
5. Alcohol, cocaine and methamphetamine were present in Markert's system.
6. Mr. Markert further operated his motorcycle in a reckless manner at high speeds and failed to stop at the stop intersection.
7. Diana Rosalez was a victim of circumstances the evening of her death.
8. Alcohol was present in Diana Rosalez's system, but had no bearing on the outcome of the events that transpired.
9. Consequently, Lynn Alan Markert and Diana Rose Rosalez died as a result of injuries received in a motorcycle collision with a utility pole on the early morning of April 4, 1994.

Rosalez submitted affidavits from Verdean Ackerson, Leslie Jones, and John Ayola in support of his resistance to Hindman's motion for summary judgment. These affiants did not see any part of the pursuit, nor did they see the accident. Ackerson testified about her visit to the scene the day after the accident, during which

she claims she found a part of the motorcycle with white or beige paint on it. Jones was asleep at the time of the accident and testified about what she saw at the scene following the accident. Ayola testified about what he could remember.

The district court granted summary judgment in favor of Hindman on two bases: (1) no constitutional violation and Hindman's actions were reasonable; and (2) qualified immunity.

I. STANDARD OF REVIEW. Summary judgment rulings are reviewed for error. *Gerst v. Marshall*, 549 N.W.2d 810, 811 (Iowa 1996). “We examine the record before the district court to decide whether a genuine issue of material fact exists and whether the court correctly applied the law.” *Id.* at 811-812 (quoting *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 354 (Iowa 1995)). The facts are viewed in a light most favorable to the party opposing the motion for summary judgment. *Id.* at 812. The moving party has the burden to establish there are no material facts in dispute. *Schlueter v. Grinnell Mut. Reinsurance Co.*, 553 N.W.2d 614, 615 (Iowa App. 1996). However, the nonmoving party cannot rely on their pleadings if the motion for summary judgment is properly supported; they “must set forth specific facts showing that there is a genuine issued for trial.” Iowa R. Civ. P. 237(e); *Dudden v. Goodman*, 543 N.W.2d 624, 626 (Iowa App. 1995).

II. VIOLATION OF CONSTITUTIONAL RIGHTS. A section 1983 claim requires a plaintiff to show: (1) the violation of a constitutional or federally protected right by the defendant, and (2) the defendant acted under color of state law. *Christenson v. Ramaeker*, 366 N.W.2d 905, 907 (Iowa 1985). Excessive force

claims, such as this vehicle pursuit case, are analyzed as unreasonable seizures under the Fourth Amendment. *Brower v. Inyo County*, 489 U.S. 593, 594, 109 S. Ct. 1378, 1380, 103 L. Ed. 2d 628, 634 (1989); *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 1867-1868, 104 L. Ed. 2d 443, 450 (1989).

The law is clear there is no seizure in a vehicle pursuit case until the driver of the vehicle submits to a show of authority or is stopped by use of physical force intentionally applied. *Brower*, 489 U.S. at 596-597, 109 S. Ct. at 1381, 103 L. Ed. 2d at 635-636; *California v. Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 1550, 113 L. Ed. 2d 690, 697 (1991). An unexpected crash during a pursuit caused by something other than “means intentionally applied” by police may stop the vehicle but does not constitute a seizure. *Brower*, 489 U.S. at 596-597, 109 S. Ct. at 1381, 103 L. Ed. 2d at 635-636; *see also Tagstrom v. Pottebaum*, 668 F. Supp. 1269, 1272 (N.D. Iowa 1987), *rev'd on other grounds*, 845 F.2d 1027 (8th cir. 1988); *Cole v. Bone*, 993 F.2d 1328, 1332-1333 (8th Cir. 1993); *Roach v. City of Frederickstown, Mo.*, 882 F.2d 294, 296 (8th Cir. 1989); *Patterson v. City of Joplin*, 878 F.2d 262, 263 (8th Cir. 1989).

It is undisputed the motorcycle crashed into a utility pole. However, to avoid summary judgment in this case, Rosalez must show there is a genuine issue as to whether or not Hindman hit the rear wheel of the motorcycle with his patrol car. *Id.*

Rosalez relies upon the affidavits of Ackerson, Jones, and Ayola to support his arguments. These affiants did not see the crash, nor did they witness any alleged contact between Hindman’s patrol car and the motorcycle: Ackerson visited the scene

of the crash the day after it happened; Jones was asleep at the time of the crash; and Ayola was listening to his police scanner. Furthermore, these affiants do not contradict Hindman's account of the events. Finally, while Ackerson claims to have found a part of the motorcycle with white or beige paint on it, she no longer has that part of the motorcycle and the claim that Hindman *could have* hit the motorcycle is pure speculation in the face of all the contrary evidence presented in this case. *See Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa App. 1994) (we will not draw inferences based upon speculation or conjecture in order to find an issue of material fact).

III. QUALIFIED IMMUNITY. Rosalez also contends the district court erred in determining Hindman was entitled to qualified immunity. Based upon our disposition of the appeal on the issue of violation of constitutional rights, we need not address the issue of qualified immunity.

For the foregoing reasons, we affirm the grant of summary judgment by the district court.

AFFIRMED.