

Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability and Law

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I. INTRODUCTION TO PURSUIT ISSUES AND LAW

“In this case, two people lost their lives in a high-speed vehicular police pursuit. While we must resolve the issues presented by the circumstances of this appeal, the legal and social conundrum created by such police pursuits will unfortunately persist beyond our disposition.”¹

Law enforcement’s need to pursue criminal suspects has existed, in all probability, since the first laws were ever written. From the days of travel by foot, to horse, and now in the age of motorized transportation, however, one thing has become clear: police pursuits can be extremely dangerous. In 2003 there were an estimated 35,000 police pursuits across the United States.² Nearly forty percent of those pursuits, or 14,000, resulted in crashes. Of that number at least half resulted in injuries. Additionally, there were 350 pursuit-related fatalities. Of these fatalities, approximately one-third were innocent bystander

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1. *Suwanksi v. Village of Lombard*, 342 Ill. App. 3d 248, 249 (2003).

2. Statistics compiled by the National Highway Traffic and Safety Administration’s Fatality Analysis Reporting System (FARS) for 2003.

deaths.³ A particularly challenging component of the almost instantaneous decisions that have to be made by patrol officers is that pursuits can escalate into a danger zone very rapidly. One study opined that fifty percent of all police collisions occur in the first two minutes of the pursuit, and more than seventy percent of all collisions occur within six minutes of the pursuit.⁴ Thus, fleeing suspects and pursuing officers are inevitably engaged in a potentially hazardous relationship with little margin, or time, to avoid error.

This Article will survey and analyze the current status of the law on police pursuits. Because of the wide scope of the topic, this article will primarily focus on the legal liability associated with law enforcement officers and municipalities for injuries arising out of high-speed pursuits and emergency responses. This Article will also discuss other forces and trends involved in the realm of police pursuit law.

A. *The Psychology of Police Pursuits*

The need to apprehend suspects in order to maintain a lawful society is obvious. The manner and method of apprehensions, especially in cases of automobile pursuits, is however, an object of criticism and disagreement for many commentators. For instance, some question the purpose of pursuit: “[t]oo many officers and administrators are unable to answer the question, ‘what were you going to do when you caught up to him?’ With no plan, the chase will likely take on the characteristics of a drag race.”⁵ Additionally, it has been suggested that a majority of officers focus on catching the violator, “if it’s the last thing (they’ll) ever do.”⁶ While admiring the constitution of the officers, many question the need for pursuit when the majority of police pursuits arise out of minor traffic violations.⁷ In at least one state, less than twenty percent of pursuits arise from felonies.⁸ But restricting pursuits to violent felonies is not the solution, as shown by the testimony of a California police officer:

3. Because the statistics are compiled by voluntary submissions, some organizations estimate that the figures could be twice as high as stated by FARS.

4. John Hill, *High-Speed Police Pursuits: Dangers, Dynamics, and Risk Reduction*, FBI Law Enforcement Bull. (July 2002), available at www.fbi.gov/publications/leb/2002/july2002/july02leb.htm.

5. G.P. ALPERT & L.A. FRIDELL, *POLICE VEHICLES AND FIREARMS: INSTRUMENTS OF DEADLY FORCE* (1990).

6. Hill, *supra* note 4.

7. *Id.*

8. See Lisa Schuetz, *Many Police Departments Didn't Follow Law on Chase Data*, WISC. ST. J., Sept. 5, 2005 (“More than 80 percent of the time, police list traffic violation as the reason for starting the pursuit.”).

[w]e now have a very restrictive pursuit policy. Is the public better served, I'm not sure. Ask the woman who was tied up in the trunk of a car. When the kidnap suspect was about to be pulled over for a traffic violation, he ran. Because of policy the officers did not chase. The woman was later found dead in Los Angeles. She could have been saved. Does she have any less of a right to protection from criminals as you do from a police pursuit?⁹

Pursuit psychology may affect the fleeing offender as well. In a survey of jailed suspects who had been involved in a high-speed pursuit, seventy percent (not surprisingly) stated they would have slowed down if police had terminated the pursuit.¹⁰ In contrast, a similar survey revealed that fleeing suspects often did not know whether a pursuit had been called off.¹¹ The result is that a fleeing suspect may choose to maintain dangerous speeds even after the officer disengages from a pursuit. Of course, fleeing suspects are themselves the primary cause of any harm resulting from pursuits, as even the most critical commentators would have to concede.

B. Pursuit and the Media

The influence of the media on police pursuits is sadly underestimated.¹² Movies frequently portray images of outlaws outrunning a slew of pursuing police officers. A police car, in apparent desperation to catch a fleeing vehicle, skids out of control, drives off a strategically placed car ramp, and causes a six-car pileup. Movies often glorify pursuits. On primetime television, the series "Cops" and "America's Scariest Police Chases" have captivated the viewing public's fascination, and networks are quick to report on developing police chases. Modern American history is imprinted with images of an infamous white Blazer with a battery of California patrol vehicles and news helicopters in pursuit. Such images may be entertaining, or even sometimes funny, but the resulting truth and consequences of pursuits are not to be found in most such reports.¹³

9. See www.pursuitwatch.org/forum/viewtopic.php?t=25. For further commentary and opinion on this debate, see www.pursuitwatch.org.

10. Hill, *supra* note 4. This may be an oversimplification, however, because the suspect would have little fear of arrest and prosecution if no officer were pursuing him.

11. See Schuetz, *supra* note 8 ("[s]tudies elsewhere show that fleeing suspects often don't know when the pursuit has been called off.").

12. See Michael R. Davis, *Police Pursuit, Dangers and Liability Issues*, Criminal Justice Institute, School of Law Enforcement Supervision, Session XX, at 4 (Nov. 6, 2002).

13. *Id.*

Likewise, video game producers have capitalized on the marketability and excitement of police pursuits. Currently and astonishingly, there are video games on the market in which the entire object of the game is to outrun police officers, kill pedestrians, and cause complete destruction in the process. Considering the number of pursuits and pursuit-related injuries which occur every year, some would argue that fiction has contributed to reality in the minds of those who refuse to stop for law enforcement.

C. Pursuit Training, Policy, and Techniques

To increase mental preparedness for and efficiency of pursuits, law enforcement departments can utilize defensive driving courses for their officers, establish policies regarding pursuits, and invest resources in alternative pursuit techniques.

1. Defensive Driving Courses. Defensive driving schools teach officers how to drive more efficiently in a variety of simulated conditions. These courses teach principles such as vehicle dynamics, center of gravity, weight transfer, 360-degree awareness, and some basic physics. Pursuit Intervention Technique (“PIT”) training is conducted, in which officers are taught methods to disable vehicles by precision based bumping.¹⁴ Training aids can also be incorporated at these schools. The “SkidCar” has been utilized to teach officers controlled driving techniques under a variety of road conditions.¹⁵

2. Pursuit Policies. Many municipalities have written policies that set the parameters of what is acceptable and what will not be tolerated during pursuits. Such policies must, however, leave room for the exercise of an officer’s discretion because the circumstances and timing of each potential or real pursuit will vary. Policies thus may provide factors officers should consider when engaging in a pursuit, and most policies fit into one of three basic models: (1) judgmental—allowing officers to make all major decisions relating to initiation, tactics, and termination; (2) restrictive—placing certain restrictions on officers’ judgments and decisions, for example, the supervisor makes the final call; and (3) discouragement—cautioning or discouraging any pursuit, except under the most severe of circumstances.¹⁶ Each model, as

14. See *Pursuit Intervention Technique: Myth v. Fact* (2006), <http://www.policedriving.com/article59.htm>.

15. See The Thompson Defensive Driving System (TDDS) for a more detailed discussion of the SkidCar. See Davis, *supra* note 12, at 9.

16. ALPERT & FRIDELL, *supra* note 5.

appropriate, provides for the individual officer's discretion in deciding when and in what manner to pursue.

3. Alternatives to Pursuit Techniques. One method worth considering to decrease the number of fleeing suspects, thus pursuits, is the legislative process. Most states currently classify vehicular fleeing as a misdemeanor.¹⁷ More stringent laws applicable to those who flee such as classifying vehicular flight as a felony would logically reduce the number of persons fleeing law enforcement officers.¹⁸

On the technology side, there are a number of devices available to assist in preventing and stopping pursuits, although financial barriers may limit their practical application. Helicopters can maintain excellent observational vantage points. Tire deflation devices, most frequently used as retractable spiked barrier strips, are sometimes used in an effort to avoid pursuits. Auto arrestor systems emit electrical pulses that destabilize a vehicle's computers.¹⁹ Patrol cars can fire vehicle-tagging devices onto fleeing vehicles where they communicate with GPS technology to pinpoint that vehicle's location and movement.

D. Legal Liability and Uniform Vehicle Code 11-106

Lawsuits stemming from pursuits have proliferated in the last several years. Case law from state to state varies widely, even though the legislature of most states has adopted and incorporated the Uniform Vehicle Code as it applies to emergency vehicles.²⁰ In nearly every state case discussed in section II of this Article, the reviewing court has made some finding regarding the state's emergency vehicle statute and the liability exposure of pursuing officers, the standard of that liability, or its applicability to a police pursuit generally. Uniform Vehicle Code 11-106 provides:

(a) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Park or stand, irrespective of the provisions of this chapter;

17. See ARK. CODE ANN. § 5-54-125(d) (2002) ("[f]leeing by means of any vehicle or conveyance shall be considered a misdemeanor.").

18. See Davis, *supra* note 12, at 13.

19. *Id.* at 13-14.

20. UNIFORM VEHICLE CODE 11-106 (2005).

2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the maximum speed limits so long as life or property are not thereby endangered;
4. Disregard regulations governing direction of movement or turning in specified directions.

(c) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of an audible signal meeting the requirements of 12-401 (d) and visual signals meeting the requirements of 12-214 of this code, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a special visual signal visible from in front of the vehicle.

(d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of the driver's reckless disregard for the safety of others.²¹

While the terminology appears clear on its face, the delineation of two different standards, that of "the duty to drive with *due regard* for the safety of all persons," and "the consequences of the driver's *reckless disregard* for the safety of others," has created much confusion and varying results in the courts.²² In fact, practically every state has said something different about the two standards. It should be noted that this model rule also applies to drivers of emergency vehicles, such as ambulances responding to emergency calls. While the cases discussed below concern police pursuit, drivers of other emergency vehicles may also seek to apply the same reasoning and legal conclusions if they find themselves the subject of a lawsuit.

II. STATE LAW CLAIMS

This portion of the Article collects and analyzes leading and recent state law cases on police pursuit liability. Generally, the particular approach a state adopts on police pursuit falls into one of seven categories: (1) negligence; (2) recklessness; (3) gross negligence; (4) willful and wanton conduct; (5) hybrid of negligence and gross negligence; (6) discretionary immunity with limited exceptions; and (7) written policy immunity. Furthermore, the standards of recklessness, gross negligence, and willful and wanton conduct are similar enough to combine into a single category of "higher standards of liability."

21. *Id.*

22. *See id.*

In understanding the effect of these differing standards, it is helpful to think of the various approaches on a continuum representing the degree of difficulty in holding a police officer liable for injuries resulting from a pursuit. This will be called the “Police Pursuit Continuum.” On the Police Pursuit Continuum, those states in which it is easiest to hold a pursuing officer liable for pursuit-related injuries, or those states that apply a standard of mere negligence, fall on the far left. Likewise, states where pursuing officers are immune or nearly immune from liability are found on the far right of the Continuum. States that apply standards such as gross negligence lie in the middle range of the Continuum.

Today the majority of states lie toward the left side of the Continuum. This has not always been the case. A dramatic shift in public policy has occurred in the last thirty years. Reasons for this shift may include the increased number of pursuit related fatalities, and the reluctance of courts to shift responsibility from officers who violate standard police conduct during the course of a pursuit.

In deciding the standard of liability to be imposed, practically every state conducts a balancing analysis, weighing the benefits of the potential apprehension against the risks of endangering the public. In effect, courts and legislatures must resolve the tension between the many limitations regarding how and when an officer should pursue, which can put the public at risk from criminals, and insufficient controls on police pursuit, which can result in accidents, injuries, and deaths.²³

Pursuit law is flexible by nature. A tragic ending in a small town might trigger a chain reaction of legislative fury with two goals: (1) defend the legislative public image with a strong showing of confidence and initiative and (2) meet the public needs for public welfare and the pursuit of justice.²⁴ There are economic issues at stake as well. The existence of a well written departmental policy defining acceptable pursuits may reduce insurance premiums and, in at least one state, may completely relieve an officer and the county from liability.²⁵ The *absence* of a formal policy may be the key to losing a lawsuit which could carry a high dollar price tag.

23. See Schuetz, *supra* note 8 (“More than 80 percent of the time, police list traffic violation as the reason for starting the pursuit.”).

24. See www.Kristieslaw.org for an example of a grass roots effort to change police pursuit law.

25. See *Nguyen v. City of Westminster*, 103 Cal. App. 4th 1161 (2003).

At the very least, consideration of the following cases can serve as a benchmark for comparing facts and outcomes. The leading or recent cases involving police pursuits for each state is discussed below.²⁶

A. *Negligence*

The states that offer the most preferable treatment to plaintiffs lie at the far left end of the Police Pursuit Continuum. Courts in these states hold officers pursuing a fleeing suspect to a standard of mere negligence, thus allowing the officers to be held liable for any negligent acts or omissions that occur during the pursuit. Some courts have been willing to find negligence on the part of the officer for simply conducting a pursuit when there is a risk of danger. Other courts have held that the initial decision to pursue may be negligent in and of itself. Today this standard has emerged as the prevailing view in many states. Many of the cases discussed here overruled earlier law that granted officers immunity or substantially less liability.

1. Negligence Generally. The first state in this survey, Alabama, applies the negligence standard of care found at the left end of the Continuum. In *Seals v. City of Columbia*,²⁷ a fleeing motorist struck a vehicle head-on during a police chase, severely injuring the plaintiff's decedent. The City of Columbia and the pursuing officer moved for summary judgment on the basis that the officer ceased pursuit of the suspect once a police roadblock was in place. In opposition, Seals offered the testimony of both an eyewitness and an expert witness that the officer negligently continued the pursuit despite the roadblock.²⁸ The trial court granted the motion, and on appeal the defendants asked the Alabama Supreme Court to affirm based on the facts of *Blair v. City of Rainbow City*.²⁹ However, the court differentiated *Blair* because in that case, it was the fleeing offender who was killed in the chase, and "the fleeing offender was responsible for his own injuries . . . because . . . he could have pulled over at any time during the chase."³⁰ The

26. Dr. Geoffrey Alpert, Director of Research for the College of Criminal Justice at the University of South Carolina, has remarked that the number of police pursuits undertaken and those that result in injury are remarkably consistent from study to study, from jurisdiction to jurisdiction, and regardless of pursuit policy. See www.deadlyforce.com.

27. 641 So. 2d 1247 (Ala. 1994).

28. *Id.* at 1249.

29. 542 So. 2d 275 (Ala. 1989). In *Blair*, a fleeing offender ignored police sirens and signals to pull over, and died as a result of injuries when his own motorcycle left the road. *Id.* at 276.

30. *Seals*, 641 So. 2d at 1250 (citing *Blair*, 542 So. 2d at 276).

defendants also attempted to rely on *Doran v. City of Madison*,³¹ which provided that, “[t]he mere fact that a police officer exceeds the maximum speed limit during a pursuit . . . does not present a genuine issue of material fact as to the liability of that officer for negligence.”³² The plaintiff in *Seals*, however, offered evidence that the pursuing officer did not back off once the roadblock was in place, contrary to proper procedure. This created a genuine issue of material fact and the Alabama Supreme Court overruled the grant of summary judgment.³³ Thus, in Alabama, eyewitness and expert witness testimony as to negligence can create an issue of material fact, although the officer may exceed the speed limit during a pursuit without fear of negligence, and a pursuing officer is generally not liable for injuries to the fleeing offender.

The Pennsylvania Supreme Court overruled settled precedent and held that police officers can be jointly liable with a fleeing driver in *Jones v. City of Philadelphia*.³⁴ During a pursuit, a police vehicle collided with the plaintiff’s car injuring the plaintiff and killing his wife. The trial court, relying on *Dickens v. Horner*,³⁵ held that the defendants were not liable for the fleeing driver’s acts.³⁶ On appeal, the plaintiff alleged that the pursuing officer negligently conducted the pursuit without a working siren, the officer’s supervisor negligently failed to terminate the pursuit, and the municipality negligently failed to maintain the vehicles.³⁷ The Pennsylvania Supreme Court, overruling *Dickens*, held that a jury could find the defendants jointly liable with the fleeing driver and that the defendants’ own negligence was a substantial factor causing the plaintiff’s injuries.³⁸ Therefore, in Pennsylvania, a governmental party is not immune from liability when its negligence, along with a third party’s negligence, causes harm.³⁹

31. 519 So. 2d 1308 (Ala. 1988).

32. *Id.* at 1314.

33. *Seals*, 641 So. 2d at 1250. *See also* *Seals v. City of Columbia*, 575 So. 2d 1061 (Ala. 1991). The first time *Seals* came to the Alabama Supreme Court, the court reversed a dismissal by the trial court in favor of the defendants and remanded for further proceedings. *Seals*, 575 So. 2d at 1064.

34. 700 A.2d 417 (Pa. 1997).

35. 611 A.2d 693 (1992).

36. *Jones*, 700 A.2d at 419.

37. *Id.*

38. *Id.* at 420.

39. *Id.* *See Lindstrom v. City of Curry*, 763 A.2d 394 (Pa. 2000) for an analysis of the duty owed to the fleeing driver.

The Tennessee Supreme Court also applied a negligence standard in *Haynes v. Hamilton County*.⁴⁰ The appeal arose out of a high-speed police pursuit of a traffic violator which ended in tragedy when the violator's car went out of control and collided with a third vehicle, killing all three teenage occupants.⁴¹ The court held that negligent police conduct in either the initiation or continuation of a high-speed chase can be the proximate cause of injuries to innocent third parties.⁴² In so holding, the court stated that its previous holdings in *Nevill v. City of Tullahoma*⁴³ and *Kennedy v. City of Spring Hill*⁴⁴ interpreted Tennessee Code Annotated section 55-8-108(e)⁴⁵ too narrowly by excluding all conduct except the physical operation of the officer's own vehicle for finding negligence.⁴⁶ In its analysis, the court observed that "conduct" is a broad term and includes the decision to commence or continue a high-speed pursuit.⁴⁷ The court then concluded that unreasonable conduct could form the basis of liability in an action brought by an injured party.⁴⁸ In determining whether the decision to initiate or continue pursuit is reasonable, factors such as speed and area of the pursuit, weather and road conditions, the presence or absence of pedestrians and other traffic, alternative methods of apprehension, applicable police regulations, and the danger posed to the public from the suspect should be considered.⁴⁹ The court further held that general principles of proximate and superseding intervening causation previously adopted by the Tennessee courts are to be applied in accidents involving a fleeing suspect and an innocent third party.⁵⁰ It should be noted that three years later, the Tennessee Court of Appeals in an unpublished opinion, created an exception to the negligence standard when officers are pursuing a stolen police car.⁵¹

In *Estate of Cavanaugh v. Andrade*,⁵² the Wisconsin Supreme Court was asked to decide whether a municipality and its police officers could be liable for injuries arising out of a high-speed pursuit caused by the

40. 883 S.W.2d 606 (Tenn. 1994).

41. *Id.* at 607.

42. *Id.*

43. 756 S.W.2d 226 (Tenn. 1988) (Drowota, J., dissenting).

44. 780 S.W.2d 164 (Tenn. 1989) (Drowota, J., dissenting).

45. TENN. CODE ANN. § 55-8-108(e) (2001).

46. *Haynes*, 883 S.W.2d at 608.

47. *Id.* at 610.

48. *Id.* at 611.

49. *Id.*

50. *Id.* at 613.

51. *Crumley v. City of Smyrna*, 1997 Tenn. App. LEXIS 45 (1997).

52. 550 N.W.2d 103 (Wis. 1996).

pursued vehicle.⁵³ The court had previously held that ministerial acts, not within the scope of immunity, are found when the duty “is absolute, certain and imperative, involving merely the performance of a specific task”⁵⁴ The court decided that the adoption of written guidelines containing certain factors for pursuing officers as required under the emergency vehicle statute⁵⁵ is absolute, certain, and imperative.⁵⁶ Therefore, the city was not found immune from liability.⁵⁷ The court then looked to the city’s policy. Because the city did not consider severity of the crime as a factor when it adopted its guidelines, the court found a question as to negligence.⁵⁸ Turning to the officer, the court acknowledged that the decision to initiate or continue a high-speed chase is a discretionary act subject to immunity, but found that a negligence action could still be sustained against the officer for his physical operation of the vehicle, or for the failure to drive with due regard for others.⁵⁹

Because of the dangers inherent in high-speed pursuits, many law enforcement agencies authorize helicopter support to monitor the pursuit from above. Once air support arrives, ground units may be ordered to disengage from the pursuit, and their actions are thereafter more carefully scrutinized. In *Estate of Aten v. Tucson*,⁶⁰ a fleeing suspect led Arizona security officers and police cars on a long and dangerous pursuit, including driving on public sidewalks. The evidence showed that a police helicopter arrived at the pursuit scene shortly after the two police cars initiated pursuit. The pursued vehicle collided with the plaintiff’s decedent and killed her.⁶¹ In opposing the defendants’ motion for summary judgment, the plaintiff pointed to the police department procedures on air support, which stated:

When air support is used to assist in a hot pursuit . . . the dispatcher shall then advise the ground units that the air support unit has visual

53. *Id.* at 106-07.

54. *Id.* at 107 (quoting *Kimps v. Hill*, 200 Wis. 2d 1, 10-11 (1996)).

55. Wis. Stat. § 346.03(b) (1999) (stating “[e]very law enforcement agency which uses authorized emergency vehicles shall provide written guidelines for its officers . . . when otherwise in pursuit of actual or suspected violators. The guidelines shall consider, among other factors, road conditions, density of population, severity of crime and necessity of pursuit by vehicle.”).

56. 550 N.W.2d at 108.

57. *Id.*

58. *Id.* at 109.

59. *Id.* at 114. The court apparently reached this conclusion by reconciling two statutes: Wis. Stat. § 893.80(4) and § 346.03(5).

60. 817 P.2d 951 (Ariz. 1991).

61. *Id.* at 952.

contact, and the air support unit will then coordinate the remainder of the pursuit. *Pursuing ground units will immediately slow down and respond to the directions of the air support unit.*⁶²

The Arizona Court of Appeals for the Second Division stated that negligent or reckless behavior by the fleeing driver does not, under the emergent majority view, result in a lack of proximate cause between the victim's injuries and any negligence by the police.⁶³ Because the record showed the dispatcher notified the pursuing officers of the helicopter's arrival, the court concluded that reasonable persons could differ on whether the officers proximately contributed to the accident by not abandoning the chase, even if the defendants' conduct contributed "only a little" to the damages.⁶⁴ The dissent argued that gross negligence should be the applicable standard.⁶⁵

In *Kelly v. City of Tulsa*,⁶⁶ the plaintiff appealed a ruling by the trial court that the due care requirement imposed under the Oklahoma emergency vehicle statute⁶⁷ does not apply to an officer's initial decision to pursue a law violator.⁶⁸ The Oklahoma Court of Appeals for the Second Division held that the decision to initiate and continue the pursuit could not be the basis for the city's liability for negligence, absent evidence that the emergency vehicle itself was being driven in an unsafe manner.⁶⁹

Under the negligence standard, officers may find themselves liable even when it is the fleeing vehicle which is being driven in an ultra-hazardous manner. In *Tetro v. Town of Stratford*,⁷⁰ a fleeing vehicle attempted to elude police by driving the wrong way down a one-way street and collided with two cars.⁷¹ The Connecticut Supreme Court held that the recklessness of the operator of the pursued car does not relieve the defendants of liability, because the plaintiff's injury may fall within the scope of the risk created by the defendants in maintaining a police pursuit at high speeds in the wrong direction on a busy one-way street.⁷² The evidence showed that the occupants of the fleeing vehicle

62. *Id.* (emphasis added).

63. *Id.* at 954. See *Tetro v. Town of Stratford*, 189 Conn. 601, 607 (1983).

64. *Aten*, 817 P.2d at 954. The court did not provide the length of time the officers engaged in the chase before air support arrived. *Id.* at 951.

65. *Id.* at 956 (Roll, J., dissenting).

66. 791 P.2d 826 (Okla. Civ. App. 1990).

67. OKLA. STAT. tit. 47, §§ 11-106 to -405 (2004).

68. *Kelly*, 791 P.2d at 828.

69. *Id.*

70. 458 A.2d 5 (Conn. 1983).

71. *Id.* at 7.

72. *Id.* at 10.

were not endangering anyone when the pursuing officers first confronted them, and the officers violated the announced town policy by conducting the pursuit at high speeds through busy city thoroughfares and on one-way streets.⁷³ Therefore, the trial court properly submitted questions of both negligence and proximate cause to the jury.⁷⁴

Officers may not be found liable, at least in Missouri, when the fleeing suspect is clearly out of control. In *Stanley v. City of Independence*,⁷⁵ an officer observed shortly after beginning pursuit that “this guy is going nuts on us.”⁷⁶ Therefore, there was no way to tell if the collision could have been avoided if the officer had abandoned the pursuit.⁷⁷ Put another way, “there is nothing other than speculation to reach a conclusion that the officer’s conduct was a cause of the accident.”⁷⁸

The Indiana Court of Appeals was asked to reconcile two statutes in determining liability in *Patrick v. Miresso*,⁷⁹ after a police officer arrived at a robbery in progress and engaged in a high-speed pursuit. During the pursuit, the officer collided with the plaintiff at an intersection.⁸⁰ The defendants argued that Indiana Code section 34-13-3-3(8),⁸¹ part of the Indiana Tort Claims Act,⁸² provided immunity on the grounds that effectuating a pursuit is an “enforcement of the law.”⁸³ However, this would conflict with Indiana Code section 9-21-1-8,⁸⁴ which provides that drivers of emergency vehicles are not relieved from the duty to drive with due regard for the safety of all persons.⁸⁵ The court held that the statutes irreconcilably conflict, but that the legislature is presumed to be aware of Indiana Code section 9-21-1-8 because it came first in time.⁸⁶ Also, section 9-21-1-8 is more specific

73. *Id.* The officers began pursuing the vehicle because the occupants looked “young.” *Id.* at 6-7.

74. *Id.* at 10.

75. 995 S.W.2d 485 (Mo. 1999).

76. *Id.* at 488.

77. *Id.*

78. *Id.* The court added that the only conceivable casual link between the officer and the collision is the “conjectural effect of his pursuit on the pursued vehicle.” *Id.*

79. 821 N.E.2d 856 (Ind. App. 2005).

80. *Id.* at 858.

81. IND. CODE § 34-13-3-3(8) (2005).

82. IND. CODE § 34-13-3 (2005).

83. “A government entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from . . . the adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or false imprisonment.” *Patrick*, 821 N.E.2d at 860.

84. IND. CODE § 9-21-1-8 (1991).

85. *Patrick*, 821 N.E.2d at 861.

86. *Id.* at 867.

and, given the disfavor for repeal by implication, the court concluded that "the legislature did not intend to 'sanction negligent and reckless conduct, and [cause] hardship to the individual injured by the enforcement.'"⁸⁷ Therefore, governmental immunity did not apply.⁸⁸ This holding bears further review, however, because the case has been transferred to the Indiana Supreme Court for further consideration.

In *Mason v. Bitton*,⁸⁹ the Washington Supreme Court, upon reviewing the record, determined that during the entire course of a pursuit no information was transmitted to the supervising officers stating the purpose of the pursuit.⁹⁰ Furthermore, during the pursuit several officers independently formed the opinion that the suspect would not voluntarily stop, that the suspect probably could not be stopped, and that continuing the chase would pose a serious risk of fatal accident.⁹¹ The court concluded that the officers' conduct in allowing the pursuit to continue violated departmental policies and was evidence of possible negligence.⁹²

The Utah Supreme Court held officers to a duty of reasonable care in *Day v. State*.⁹³ The court stated that while the laws of the road do not necessarily apply to police officers during a pursuit, officers nonetheless owe a duty of reasonable care under certain circumstances to motorists on the road.⁹⁴ The test is whether the officer acted reasonably and with appropriate care for the safety of others in light of all the circumstances.⁹⁵ Factors appropriate to this test include density of traffic and population in the area; whether the area is rural or urban, freeway or city streets; presence of pedestrians and school zones; the weather and visibility; and the urgency of apprehending the fleeing suspect.⁹⁶

In a series of consolidated cases titled *Robinson v. Collins*,⁹⁷ the Michigan Supreme Court overruled established precedent in reaching its conclusion.⁹⁸ In summary, the court concluded that the police owe a

87. *Id.* at 868.

88. *Id.*

89. 534 P.2d 1360 (1975).

90. *Id.* at 1364.

91. *Id.*

92. *Id.* The Washington State Patrol policy reads, "[w]hen, in the judgment of the officer . . . it becomes evident that continued pursuit will bring about unwarranted danger . . . the officer shall cease the chase." *Id.* at 1362-63.

93. 980 P.2d 1171 (Utah 1999).

94. *Id.* at 1181. The court later suggests the reasonable care standard is similar to negligence. *Id.* at 1186.

95. *Id.*

96. *Id.* at 1181.

97. 613 N.W.2d 307 (Mich. 2000).

98. *Id.* at 322.

duty to innocent passengers and pedestrians but not to passengers who are engaged in encouraging or abetting the fleeing suspect.⁹⁹ An innocent person may seek recovery against a governmental agency, pursuant to the motor vehicle exception to governmental immunity, if that person is injured as a result of a police pursuit in which the police physically force a fleeing car off the road or into another vehicle.¹⁰⁰ Innocent persons who suffer injuries may sue an individual police officer for negligence only if the officer's conduct is the proximate cause of the accident, meaning the officer's conduct must be the one most immediate, efficient, and direct cause of the accident.¹⁰¹

While it is very rare, occasionally pursuing officers will be found to have acted outside the scope and course of their employment. For example, in *Bittner v. St. Louis Police Board of Commissioners*,¹⁰² police officers previously threatened and beat up an individual for his alleged involvement with a female who was romantically connected with the police sergeant's son. When the individual saw unmarked police cars outside the female's residence on a later date, he fled with the police in hot pursuit and collided with the plaintiff's car.¹⁰³ The Missouri Court of Appeals for the Third Division noted that even though the officers did not conduct the pursuit negligently, the pursuit was based on a personal vendetta and outside the scope and course of employment. Thus, the officers were not entitled to immunity under the statute.¹⁰⁴ However, because the officers were not acting within the course of their employment, the municipality was not liable under the doctrine of respondeat superior.¹⁰⁵

The states of Alaska, Hawaii, Idaho, Kentucky, Massachusetts, Montana, Nevada, New Hampshire, New Mexico, and South Dakota either apply a negligence standard or have not yet addressed the issue of police pursuit liability.¹⁰⁶

99. *Id.* at 312.

100. *Id.* See MCL 691.1405; MSA 3.996(105).

101. *Robinson*, 613 N.W.2d at 311.

102. 925 S.W.2d 495 (Mo. App. E.D. 1996).

103. *Id.* at 497. During the pursuit, the officers did not turn on their sirens or flashing lights, and continued the pursuit beyond the St. Louis city limits. *Id.*

104. *Id.* at 498.

105. *Id.* The evidence does not show whether the Sergeant ordered the officers to apprehend the individual. See *id.* If so, could the plaintiff argue that the municipality is liable even though the pursuit was outside the scope of employment?

106. See *Hildebrandt v. City of Fairbanks*, 957 P.2d 974 (Alaska 1998); *Upchurch v. State*, 454 P.2d 112 (Haw. 1969); *Masters v. State*, 668 P.2d 73 (Idaho 1983) (holding the officer and the state of Idaho negligent and the proximate cause of plaintiff's injuries); *State v. Anderson*, 12 P.3d 883 (Kan. 2000) (holding an officer's negligence does not bar an involuntary manslaughter action against the fleeing driver); *Chambers v. Ideal Pure Milk*

2. Roadblocks. A police roadblock can be an effective tool in stopping a fleeing offender, but liability issues may result. In *City of Caddo Valley v. George*,¹⁰⁷ a truck thief led multiple police officers in a high-speed pursuit reaching speeds of ninety miles-per-hour. A police roadblock was constructed consisting of two patrol cars blocking the road, leaving enough room for a car to pass slowly in the middle. The plaintiff's car was attempting to pass between the patrol cars when the pursued truck crashed into it, severely injuring the plaintiff. At trial, ten percent of the fault was apportioned to the officers, and the trial court held Caddo Valley jointly and severally liable, but limited its liability to \$25,000, the amount of minimum required insurance coverage.¹⁰⁸

In Arkansas, municipal corporations are not immune from liability to the extent that they are covered by insurance.¹⁰⁹ However, all political subdivisions must carry liability insurance on their motor vehicles or shall become self-insurers.¹¹⁰ Additionally, a municipal corporation's immunity for negligent acts begins where its insurance coverage leaves off.¹¹¹ Relying on these statutes, the Arkansas Supreme Court was only left with the question of negligence.¹¹² "[A] negligent act arises from a situation where an ordinarily prudent person in the same situation would foresee such an appreciable risk of harm to others that he would not act or at least would act in a more careful manner."¹¹³ Looking to the evidence, the court found that the pursuing officer knew a roadblock was in place, was told twice to back off by his superior officer, had received no training or instructions on police pursuits, and

Co., 245 S.W.2d 589 (Ky. 1952) (holding that the actions of the police officers were not the legal or proximate cause of the accident); *Horta v. Sullivan*, 638 N.E.2d 33 (Mass. 1994) (holding that high-speed pursuits do not involve policy-making or planning for purposes of immunity); *H.C. Johnson v. Brown*, 345 P.2d 754 (Nev. 1959) (holding driver may be responsible for ordinary negligence); *Saltzman v. Saltzman*, 475 A.2d 1 (N.H. 1984); *Silva v. City of Albuquerque*, 610 P.2d 219 (N.M. App. 1980) (holding that officer's conduct was an unlawful response which violated both the speed laws and his statutory obligations to stop, making him negligent as a matter of law); *Anderson v. Lanning*, 50 N.W.2d 67 (S.D. 1951).

107. 9 S.W.3d 481 (Ark. 2000).

108. *Id.* at 484. One of the officers was standing on the centerline of the highway with his gun drawn hoping to prevent the stolen truck from colliding with plaintiff's car, but the truck accelerated and the officer had to jump out of the way. *Id.* at 483.

109. *Id.* See ARK. CODE. ANN. § 21-9-301 (2003).

110. 9 S.W.3d at 484. See ARK. CODE. ANN. § 21-9-303(a).

111. 9 S.W.3d at 484. See ARK. CODE. ANN. § 21-9-303(b).

112. 9 S.W.3d at 486.

113. *Id.* See *Ouachita Wilderness Inst. v. Mergen*, 947 S.W.2d 780 (Ark. 1997).

was pursuing too closely.¹¹⁴ This was found to be sufficient evidence of negligence.¹¹⁵

In *Board of County Commissioners of Teton County v. Basset*,¹¹⁶ the plaintiffs were driving towards the city of Jackson when they encountered a police roadblock and, at the direction of the officers, passed through the roadblock just ahead of the high-speed flight of an armed and pursued suspect. The suspect's car crashed into plaintiffs' vehicle just after it cleared the roadblock.¹¹⁷ The Wyoming Supreme Court reversed the ruling of the trial court and held the officers to a standard of negligence.¹¹⁸ In rejecting defendants' argument that the officers were qualified and thus immune from liability, the court stated that the concept of discretionary immunity is necessarily limited only to those high-level discretionary acts exercised at a truly executive level.¹¹⁹ In this case, the officer participated in deciding where to establish the roadblock and neglected to warn the plaintiffs that a dangerous high-speed pursuit was approaching.¹²⁰ Acknowledging that these decisions involved discretion, the court nonetheless concluded they did not involve planning or policy formation and were not of an executive policy nature. Thus, the decisions were operational and not subject to immunity.¹²¹

3. Liability for Passengers. While the states allowing recovery for mere negligence generally deny liability for injuries sustained by the driver of a fleeing vehicle, there is less consistency among the courts regarding liability arising out of injuries sustained by passengers in fleeing vehicles. In the Florida case *Fisher v. Miami-Dade County*,¹²² the plaintiff was a passenger in a car driven by an intoxicated repeat offender, who reached speeds of 100 to 120 miles-per-hour when the vehicle lost control and crashed into a pole, killing both the driver and passenger.¹²³ In addressing whether a duty was owed to passengers in a vehicle pursued by the police, the Florida Court of Appeals for the Third District reasoned that any pursuit would essentially stop if police officers were first required to determine if there were a passenger and

114. 9 S.W.3d at 486.

115. *Id.*

116. 8 P.3d 1079 (Wy. 2000).

117. *Id.* at 1081.

118. *Id.* at 1082.

119. *Id.* at 1087.

120. *Id.*

121. *Id.* at 1087-88.

122. 883 So. 2d 335 (Fla. App. 2004).

123. *Id.* at 335.

if that passenger had been involved in a crime.¹²⁴ Because “the police are our thin blue line protecting society,” the court concluded that police owe no duty to passengers in a fleeing vehicle.¹²⁵

Compare this with the result reached in *Dee v. Pomeroy*,¹²⁶ in which the plaintiff was a passenger in a fleeing car that struck boulders blocking the street where it entered the sand dunes and a beach.¹²⁷ The Oregon Court of Appeals held that in light of the nature of the underlying traffic offense (speeding), the speed at which the car was traveling (75 miles-per-hour), and the officer’s knowledge of the boulders at the end of the street, the issue of negligence could be properly submitted to the jury against the officer.¹²⁸ As to the city, the court noted that there was evidence of negligence in the training of the officer and in the emergency vehicle operation policy.¹²⁹

4. Innocent Third Party Statute. Legislative action has perhaps made Nebraska the most plaintiff favorable state for injured third parties in police pursuit lawsuits. Nebraska’s “innocent third party statute” provides, “[i]n case of death, injury, or property damage to any innocent third party proximately caused by the action of a law enforcement officer employed by a political subdivision during vehicular pursuit, damages shall be paid to such third party by the political subdivision employing the officer.”¹³⁰ In *Henery v. City of Omaha*,¹³¹ the city appealed the district court’s judgment, arguing that the passenger on a speeding motorcycle was not an innocent third party under the statute.¹³² The court took special note of the pursuing officer’s testimony that the passenger had not done anything wrong, and concluded that although the passenger exhibited poor judgment, she did not lose her

124. *Id.* at 337.

125. *Id.* Despite the Florida court’s holding, it remains unclear in some states whether a duty exists if the officer knows or should have known of the passenger, or if the passenger is held against his will. *See also* Fawcett v. Adreon, 2001 Tenn. App. LEXIS 621 (2001); Parish v. Hill, 513 S.E.2d 547 (N.C. 1999); Robinson v. City of Detroit, 571 N.W.2d 34 (Mich. App. 1999).

126. 818 P.2d 523 (Ore. App. 1991).

127. *Id.* at 524.

128. *Id.* at 527. It is not clear if the officer was aware of passengers in the fleeing vehicle. *See id.* at 524.

129. *Id.* at 527. The court so held even though the plaintiff did not introduce any evidence of inadequate supervision. *Id.*

130. NEB. REV. STAT. § 13-911 (1987).

131. 641 N.W.2d 644 (Neb. 2002).

132. *Id.* at 648. It is unclear why defendants did not argue proximate cause on appeal. *See id.* at 648.

innocent third party status.¹³³ Apparently the proximate cause standard is not difficult to achieve for the plaintiff in Nebraska; in this case, the officer had his overhead lights activated, gave short blasts of his horn in an attempt to get the suspect's attention, and was far enough behind the motorcycle to miss witnessing the crash.¹³⁴ Nevertheless, the court concluded that the officer's actions were the proximate cause of the injuries.¹³⁵

B. Higher Standards of Liability—Recklessness, Gross Negligence, and Willful and Wanton Conduct

Moving to the right along the Police Pursuit Continuum, a collection of states hold plaintiffs to proof of a higher standard—something beyond simple negligence. Usually the standard entails evidence that police ignored an obvious risk while conducting the pursuit. While this standard is more difficult for the plaintiff to prove than the negligence standard, evidence of any negligence in the pursuit combined with expert testimony could get the case past summary judgment and to a jury. In analyzing the following cases, it appears that many of the courts have developed a factors test to assist in determining whether liability should be imposed.

1. Recklessness. In *Rochon v. State*,¹³⁶ the Vermont Supreme Court held that Vermont's emergency vehicle statute requires a showing of recklessness before imposing liability.¹³⁷ In *Rochon* the plaintiffs appealed from a grant of summary judgment in favor of the State of Vermont for personal injuries caused by an accident with a police cruiser that was traveling to the scene of an emergency.¹³⁸ The court noted that the language of 23 Vermont Statutes Annotated section 1015(c) comes from section 11-106 of the Uniform Vehicle Code, and has been interpreted by other jurisdictions.¹³⁹ The court noted that plaintiffs' claim that the statute authorizes a negligence standard not persuasive, because the other jurisdictions only examined the "due regard" language,

133. *Id.* at 649.

134. *Id.* at 646.

135. *Id.* at 647. However, the city was entitled to reimbursement from various entities for sums paid under the statute. *Id.* at 649.

136. 862 A.2d 801 (Vt. 2004).

137. *Id.* at 802. See 23 VT. STAT. ANN. § 1015 (1981).

138. *Rochon*, 862 A.2d at 802. While this is not a police pursuit case, it interprets the emergency vehicle statute that is generally applied in high-speed pursuits, and the court analyzes hot pursuit cases from other jurisdictions. *Id.*

139. *Id.* at 804.

without referencing the “reckless disregard” language.¹⁴⁰ Therefore, “any construction of this section to impose a standard of care of less than recklessness would make the ‘reckless disregard’ clause ineffectual surplusage.”¹⁴¹ Because the court concluded that the statute acts as a bar to negligence and imposes liability only upon a showing of recklessness, it did not reach the issue of whether the discretionary function exception to the sovereign immunity waiver applied.¹⁴²

Many states struggle in analyzing the emergency vehicle statute in an effort to find the appropriate standard when confronted with the terms “due care” and “reckless disregard.” The Iowa Supreme Court resolved this issue in *Morris v. City of Des Moines*.¹⁴³ Viewing the decisions of other jurisdictions, the court decided due regard is simply a negligence standard, while reckless disregard is a higher standard than negligence.¹⁴⁴ The court then noted that Iowa courts consistently hold police officers owe a duty to the public in general.¹⁴⁵ However, assuring “police protection free from the chilling effect of liability for split-second decisions” is an important policy justification.¹⁴⁶ With this in consideration, the court held that the appropriate standard is recklessness, which is met if the officer has intentionally done an act of an unreasonable character in disregard of an obvious risk so great as to make it highly probable that harm would follow.¹⁴⁷

In the New York case of *Csizmadia v. Town of Webb*,¹⁴⁸ an intoxicated plaintiff was fleeing from police on a motorcycle when he crashed into a police roadblock. The New York Supreme Court, looking to the Vehicle and Traffic Law section 1104, concluded that liability should be invoked only when the questioned conduct rises to the level of recklessness.¹⁴⁹ This standard requires evidence that the officer intentionally committed an act of unreasonable character, disregarded an obvious risk with likely harm, and did so with conscious indifference as to the outcome.¹⁵⁰ The court further stated that liability should not be imposed for “a mere

140. *Id.* at 805.

141. *Id.* (quoting *City of Amarillo v. Martin*, 971 S.W.2d 426, 430 (Tex. 1998)).

142. *Id.* at 806.

143. 534 N.W.2d 388 (Iowa 1995).

144. *Id.* at 390.

145. *Id.* See *Mastbergen v. City of Sheldon*, 515 N.W.2d 3 (Iowa 1994); *Sankey v. Richenberger*, 456 N.W.2d 206 (Iowa 1990); *Hildenbrand v. Cox*, 369 N.W.2d 411 (Iowa 1985); *Smith v. State*, 324 N.W.2d 299 (Iowa 1985).

146. *Morris*, 534 N.W.2d at 391 (quoting *Sankey*, 456 N.W.2d at 210).

147. *Id.*

148. 735 N.Y.S.2d 222 (2001).

149. *Id.* at 224.

150. *Id.*

failure of judgment.”¹⁵¹ According to the record, the roadblock provided an escape route for the plaintiff had he chosen not to stop, the exigencies of the situation did not require consultation with a superior officer, and there were no hazards to pedestrians in the area.¹⁵² The court held the officer’s conduct was not reckless because it was taken “in the interest of stopping a motorist whose conduct on the road presented a clear and immediate threat to public safety.”¹⁵³

The Mississippi Supreme Court recently articulated ten factors to support a finding of reckless disregard in the context of police pursuits.¹⁵⁴ The factors considered were: (1) length of chase; (2) type of neighborhood; (3) characteristics of the streets; (4) the presence of vehicular or pedestrian traffic; (5) weather conditions and visibility; (6) the seriousness of the offense for which the police are pursuing the suspect; (7) whether the officer proceeded with sirens and blue lights; (8) whether the officer had available alternatives which would lead to the apprehension of the suspect besides pursuit; (9) the existence of a policy which prohibits pursuit under the circumstances; and (10) the officer’s rate of speed in comparison to the posted speed limit.¹⁵⁵ In *City of Ellisville v. Richardson*,¹⁵⁶ the pursuit lasted less than a mile through a residential area with medium traffic, and the officer knew the identity of the fleeing suspect. While suggesting that reasonable minds could differ on whether the officer’s actions constituted reckless disregard under the facts, the court nevertheless concluded that there was substantial evidence to support the trial court’s findings.¹⁵⁷

The Rhode Island Supreme Court chose to apply a reckless disregard standard in *Seide v. State of Rhode Island*.¹⁵⁸ Reckless disregard is defined as “a heedless indifference to the consequences of [the officer’s actions].”¹⁵⁹ The court held that the evidence could show reckless disregard because the officers continued a dangerous pursuit despite being told to stop, and the defendants had the plaintiff wait at a roadblock meant to stop the fleeing driver.¹⁶⁰ The court also comment-

151. *Id.*

152. *Id.* at 224-25.

153. *Id.* at 225 (quoting *Saarinen v. Kerr*, 644 N.E.2d 988 (N.Y. 1994).

154. *Johnson v. City of Cleveland*, 846 So. 2d 1031, 1037 (Miss. 2003).

155. *Id.* (McRae, J., concurring) (citing *City of Jackson v. Brister*, 838 So. 2d 274, 279-80 (Miss. 2003)) (McRae, J., concurring).

156. 913 So. 2d 973 (Miss. 2005).

157. *Id.* at 979. A two-judge dissent argued that “reckless disregard” is a standard higher than gross negligence. *Id.*

158. 875 A.2d 1259 (R.I. 2005).

159. *Id.* at 1267 (quoting *Roberts v. Kettelle*, 356 A.2d 207, 214 (R.I. 1976)).

160. *Id.* at 1269-70.

ed that evidence of defendants' failure to comply with the departmental pursuit policy could support a finding of reckless disregard.¹⁶¹

2. Gross Negligence. The District of Columbia applies a gross negligence standard in police pursuit cases. In *District of Columbia v. Hawkins*,¹⁶² police responded to a hit and run call. The fleeing suspect reached speeds of ninety miles per hour, and crashed into a car killing both the car's occupants. The speed limit in the area was twenty-five miles-per-hour and the pursuing officers were aware of the residential characteristics of the neighborhood, populated with schools and day care centers. The suit was brought under the District of Columbia Wrongful Death and Survival Acts.¹⁶³

On review, the court reiterated that, "the District of Columbia cannot be held liable for claims arising out of the operation of a police car on an emergency run unless the officer driving the car acted with gross negligence."¹⁶⁴ Gross negligence is present when either the officer acted in bad faith or in disregard of an obvious risk with probable harm.¹⁶⁵ The court also identified factors that courts should consider in determining gross negligence: chase duration, neighborhood type, street characteristics, presence of other traffic, weather conditions, and the seriousness of the alleged offense.¹⁶⁶ The court held that under the circumstances, a reasonable juror could find the police officer's conduct was grossly negligent.¹⁶⁷

North Carolina also applies a standard of gross negligence.¹⁶⁸ In *Eckard v. Iredell County*,¹⁶⁹ a suspect, who had earlier thrown rocks at cars, forcibly ejected the driver of a white Blazer and began driving erratically, but under the speed limit, on a highway.¹⁷⁰ Police officers instituted a pursuit, and after several miles, attempted to stop the Blazer with a moving roadblock, which unfortunately did not work and

161. *Id.* at 1272.

162. 782 A.2d 293 (App. D.C. 2001).

163. *Id.* at 296. See District of Columbia Wrongful Death Act, D.C. CODE § 16-2701 (2001) and District of Columbia Survival Act, D.C. CODE § 12-101 (2001).

164. *Hawkins*, 782 A.2d at 300 (quoting *District of Columbia v. Henderson*, 710 A.2d 874, 875 (D.C. 1998)).

165. *Id.*

166. *Id.*

167. *Id.* at 303.

168. *Eckard v. Iredell County*, 603 S.E.2d 134 (N.C. App. 2003).

169. *Id.* at 134.

170. The driver was 17 years old and living with her parents. She had hitchhiked to a hospital the day before the accident for unspecified treatment, but was released the same day. She then received spiritual guidance at least twice before the accident. *Id.* at 137.

resulted in the death of the woman.¹⁷¹ A moving roadblock is supposed to occur when police units surround a moving vehicle on all sides and the vehicle in front begins to decrease its speed to a stop, preventing the fleeing motorist from proceeding.¹⁷² The court in *Eckard* defined gross negligence thusly: “when an officer consciously or recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits.”¹⁷³ Analyzing the initial decision to pursue, the court determined that the fleeing driver appeared mentally unstable and had stolen a car; therefore, the decision to pursue instead of possibly identifying the suspect was not gross negligence.¹⁷⁴ As to the pursuit itself, the court concluded that despite the excessive number of units involved and some other minor irregularities, the pursuit was not grossly negligent.¹⁷⁵ Because the defendants only conducted the moving roadblock for about three miles and it was undertaken at relatively low speeds, their conduct did not amount to gross negligence.¹⁷⁶ Upon reflection, the court noted that the gross negligence standard in regards to police pursuits is very high and is rarely met.¹⁷⁷

The North Dakota Supreme Court likewise applied a gross negligence standard in *Jones v. City of Langdon*.¹⁷⁸ The trial court, in attempting to resolve the discrepancy between the terms “due regard” and “reckless disregard,” had settled on a simple negligence standard of liability.¹⁷⁹ The North Dakota Supreme Court disagreed, holding that the appropriate standard is gross negligence, which requires the officer to manifest a mental attitude of indifference that evinces a reckless disregard toward the safety and well being of others.¹⁸⁰ The court also considered the following factors helpful in determining gross negligence: the reason for pursuing the vehicle, the nature of the violation, the speed and duration of the pursuit, the weather and road conditions, and the presence of innocent bystanders and traffic in the area.¹⁸¹

Procuring testimony of experienced law enforcement officers may help the plaintiffs overcome the gross negligence hurdle. In the South

171. *Id.* at 138.

172. *Id.* at 140-41.

173. *Id.* at 139.

174. *Id.*

175. *Id.* at 140.

176. *Id.* at 141. The pursuit took place at speeds of 25 miles-per-hour. *Id.*

177. *Id.* at 142.

178. 489 N.W.2d 576 (N.D. 1992)

179. *Id.* at 579.

180. *Id.* at 581.

181. *Id.* See also *Fiser v. City of Ann Arbor*, 339 N.W.2d 413 (Mich. 1983).

Carolina case *Clark v. South Carolina Department of Public Safety*,¹⁸² the plaintiff brought an action against the defendants after a fleeing vehicle killed his daughter.¹⁸³ On appeal, the court agreed with the trial court's definition of gross negligence: "the failure to exercise a slight degree of care" and "when a person is so indifferent to the consequences of his conduct as not to give slight care as to what he is doing."¹⁸⁴ The court upheld the judgment of the trial court, highlighting that the supervising officers did not monitor the pursuit, and the fleeing suspect had no intention of stopping, which the suspect demonstrated by running innocent drivers off the road.¹⁸⁵ Finally, experienced law enforcement officers testified that the pursuit should have been discontinued.¹⁸⁶

The Virginia Supreme Court first undertook a discretionary-ministerial analysis before settling on a gross negligence standard.¹⁸⁷ In *Colby v. Boyden*,¹⁸⁸ the court applied a four-factor test to determine if the actions at issue were discretionary.¹⁸⁹ Additionally, the court noted that police pursuits "involve necessarily discretionary, split-second decisions balancing grave personal risks, public safety concerns, and the need to achieve the governmental objective."¹⁹⁰ To hold that the officer's acts were merely ministerial would ignore the realities of police pursuits and would inhibit officers faced with decisions to pursue in the future.¹⁹¹ Therefore, the defense of sovereign immunity was available to police officers in a pursuit case.¹⁹² However, in Virginia, a government agent entitled to the protection of sovereign immunity is not immunized from suit, rather the degree of negligence which must be shown to impose liability is elevated from simple to gross negligence.¹⁹³ Gross negligence is defined as the "absence of slight diligence, or the want of even scant care."¹⁹⁴ In *Colby* the officer activated his lights and siren for part of the time, drove no faster than five miles-per-hour

182. 608 S.E.2d 573 (S.C. 2005).

183. *Id.* at 575-76.

184. *Id.* at 576.

185. *Id.* at 578.

186. *Id.*

187. *Colby v. Boyden*, 400 S.E.2d 184 (Va. 1991).

188. 400 S.E.2d 184 (Va. 1991).

189. *Id.* at 186. The factors are: (1) nature of the function the employee performs; (2) extent of the government's interest and involvement in the function; (3) the degree of control and discretion exercised over the employee by the government; and (4) whether the act in question involved the exercise of discretion and judgment. *Id.*

190. *Id.* at 187.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 189 (quoting *Frazier v. City of Norfolk*, 362 S.E.2d 688 (Va. 1987)).

over the speed limit, and swerved and braked in an attempt to avoid the collision.¹⁹⁵ Therefore, the trial court correctly held that the plaintiff failed to establish a prima facie case of gross negligence.¹⁹⁶

In *Sergeant v. City of Charleston*,¹⁹⁷ undercover officers involved in a major drug sting first engaged in a shoot-out and then in a high-speed pursuit, which ended tragically when a bicyclist was killed.¹⁹⁸ The court had previously held in *Peak v. Ratliff*,¹⁹⁹ that when police are engaged in a vehicular pursuit of a known or suspected law violator, and the pursued vehicle collides with the vehicle of a third party, the pursuing officer is not liable for injuries unless the officer's conduct amounts to reckless conduct or gross negligence, in addition to being a substantial factor in bringing about the collision.²⁰⁰ Applying the principle articulated in *Peak* to the case at hand, the Supreme Court of Appeals of West Virginia concluded that the officer's conduct did not amount to gross negligence because: (1) the pursuit took place during daylight hours, under good weather conditions; (2) the suspect vehicle was traveling under the speed limit; (3) the officers did not try to run the vehicle off the road, set up a roadblock, or otherwise interfere with the driver's ability to control his vehicle; and (4) the suspects were armed drug dealers who had just shot at police officers.²⁰¹ Therefore, summary judgment on behalf of the officers and their respective superiors was proper.²⁰²

The state of Delaware also applies a gross negligence standard.²⁰³

3. Willful and Wanton Conduct. In *Suwanski v. Village of Lombard*,²⁰⁴ an officer spotted a vehicle with so much junk and debris piled on both its roof and hood that it looked "ridiculous." The teetering and tottering of the debris led the officer to believe the vehicle was

195. *Id.*

196. *Id.*

197. 549 S.E.2d 311 (W. Va. 2001).

198. *Id.* at 315. At some point during the incident, the suspect's front and back tires were shot out and the pursuit continued with the suspect driving on the wheel rims of his vehicle. The trial court found this did not interfere with the suspect's ability to steer and/or otherwise control the car. The court noted the appellant did not raise this issue on appeal. *Id.*

199. 408 S.E.2d 300 (W. Va. 1991).

200. *Id.* at 304.

201. *Sergeant*, 549 S.E.2d at 318-19.

202. *Id.* at 321.

203. See *Pauley v. Reinoehl*, 848 A.2d 561 (Del. 2003) (holding the driver of an emergency vehicle liable for actions that are grossly negligent or amounting to willful and wanton negligence).

204. 794 N.E.2d 1016 (Ill. App. 2003).

unsafe. When the officer attempted to stop the vehicle, the suspect led the officer on a wild chase through the city streets, leaving a trail of trash and debris, before colliding with the car driven by the plaintiff.²⁰⁵

The Appellate Court of Illinois for the Second District began by stating that when an innocent third party is injured during a police chase, it may be determined that the police are one of the proximate causes of the injury.²⁰⁶ The court next looked to the Local Governmental and Governmental Employees Tort Immunity Act,²⁰⁷ which provides that, "[a] public employee is not liable for his act or omission . . . unless such act or omission constitutes willful and wanton conduct."²⁰⁸ Willful and wanton conduct is defined as an actual intention to cause harm or "an utter indifference to or conscious disregard for the safety of others."²⁰⁹ The court noted that the following facts indicated the absence of willful and wanton conduct: dry weather and dry roads, time of day, day of the week, light traffic conditions, and the fleeing vehicle was stolen and dropping debris on the roadways.²¹⁰ On the other hand, the court also identified facts to support a finding of willful and wanton conduct: the nature of the area, the length and duration of the pursuit, an earlier near collision, and the speeds of the chase reaching 100 miles-per-hour.²¹¹ Because the issue was ultimately a matter for the jury, the court reversed the order granting summary judgment to the defendants.²¹²

The New Jersey Supreme Court, in *Fielder v. Stonack*,²¹³ sought to define exactly what constituted willful and wanton conduct in the context of a police pursuit. Immunity is available to public employees unless their conduct falls outside the scope of employment or constitutes a crime, actual fraud, actual malice, or willful misconduct.²¹⁴ The court took special note of the legislative goal of promoting vigorous law enforcement by removing the threat of civil liability.²¹⁵ Therefore, the court held that in the context of a police pursuit, willful misconduct is limited to a "knowing violation of a specific command by a superior, or

205. *Id.* at 1019.

206. *Id.* at 1022.

207. 745 ILL. COMP. STAT. 10/2-202 (West 1998).

208. *Id.*

209. 745 ILL. COMP. STAT. 10/1-210 (West 1998).

210. *Swanski*, 794 N.E.2d at 1024.

211. *Id.*

212. *Id.* at 1025.

213. 661 A.2d 231 (N.J. 1996).

214. *Id.* at 233; N.J. STAT. ANN. 59:3-14 (2005).

215. *Fielder*, 661 A.2d at 243.

a standing order, that would subject that officer to discipline.”²¹⁶ The court further defined willful misconduct as containing two separate elements: (1) disobeying either a specific standing order or a specific command from a superior and (2) knowledge of the standing order or command and intending to violate it.²¹⁷ Furthermore, lack of good faith may be relevant to the state of mind necessary for this standard.²¹⁸ The court further noted that since the occurrence of the events in this case, the New Jersey Attorney General had issued revised guidelines for vehicular pursuits.²¹⁹ Therefore, if a local police department adopted these guidelines, they would serve as a standing order that could warrant liability if not followed.²²⁰

In *Robertson v. Roberts*,²²¹ decedent Robertson was killed in an automobile accident that occurred during a high speed pursuit when Robertson’s vehicle proceeded through an intersection and collided with an Ohio State Highway Patrol car in pursuit of a fleeing suspect. The trial court granted summary judgment to the defendants, and the Ohio Court of Appeals reviewed the grant.²²² The court found that an officer engaged in an emergency call is immune from liability unless his conduct was willful and wanton.²²³ The totality of the circumstances also had to be considered when determining whether conduct was willful and wanton.²²⁴ Moreover, the court said that the line between willful and wanton misconduct and negligence is a fine one depending on the facts of the case, a matter generally for the jury to decide.²²⁵ The court concluded that the pursuing officer had an opportunity to warn the decedent of the pursuit at the intersection but failed to do so.²²⁶ Hence, there were genuine issues of material fact as to whether this conduct evidenced willful and wanton conduct.²²⁷ As to the Bazetta Township Police Department, the court also determined that issues of material fact existed as to whether the department was willful and

216. *Id.* There were no allegations of fraud, malice, or criminal conduct. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 243 n.5.

220. *Id.*

221. 2004 Ohio App. Lexis 6729 (2004).

222. *Id.* at 7.

223. *Id.* at 10-11. See R.C. 2744.02(B)(1)(a).

224. *Id.* at 12. See *Reynolds v. Oakwood*, 528 N.E.2d 578 (Ohio App. 1987).

225. *Id.* at 13.

226. *Id.* at 15-16.

227. *Id.* The decedent drove up to an intersection that an officer was securing in response to the pursuit. The officer acknowledged that the decedent was unaware of the pursuit, and did not attempt to get the decedent’s attention by rolling down his window or using an external speaker or lights. *Id.*

wanton in failing to provide their officers with training on police pursuit and securing intersections.²²⁸ Likewise, the court noted that issues existed as to Bazetta Township's liability due to failure to properly train and adopt policies.²²⁹

C. *Hybrid—Gross Negligence and Negligence*

In resolving the apparent discrepancies between the “due care” and “reckless disregard” standards, some courts have chosen to use the standards interchangeably, depending on the situation or the parties. In *Bower v. State*,²³⁰ the plaintiff filed a complaint containing eleven counts, naming the State of Maryland, the County Commissioners of Charles County, the pursuing officer, and the Charles County Sheriff's Department as defendants when a fleeing drunk driver crashed into another vehicle, killing a married couple.²³¹ The Maryland Court of Appeals addressed each defendant's liability.²³² As to the county and the state, the court held that section 19-103 of the Transportation Article²³³ imposed liability when a police officer conducts a pursuit negligently.²³⁴ As to the officer, the court applied a gross negligence standard, which requires evidence of wanton or reckless disregard for the safety of others.²³⁵ In this case, the officer was not grossly negligent, although he was driving at high speeds on a congested road.²³⁶

The Louisiana Court of Appeals also applied two different standards but with a different twist. In *Richard v. Miller*,²³⁷ the court stated that due care is synonymous with ordinary negligence, and reckless disregard connotes conduct that is, in effect, gross negligence; this reckless disregard–gross negligence standard applies only when the pursuing officer falls under the emergency vehicle statute.²³⁸ In all

228. *Id.* at 18. The court based this conclusion on R.C. 2935.031, which provides, “any agency . . . that employs a . . . police officer . . . shall adopt a written policy for the pursuit in a motor vehicle.” *Id.* at 18-19.

229. *Robertson*, 2004 Ohio App. Lexis 6729, at 20-21.

230. 594 A.2d 121 (Md. 1991).

231. *Id.* at 124.

232. *Id.* at 127-28.

233. Md. Code, Transportation § 19-103 (2003).

234. *Bower*, 594 A.2d at 129-30. The court found that plaintiffs, however, failed to allege in the complaint that the county owned the vehicles driven by the officers. *Id.* The court recommended the plaintiffs amend their complaint if at all possible. *Id.*

235. *Id.* at 131. The court decided upon a gross negligence standard based upon the pre-1985 language in the Maryland Tort Claims Act. *Id.*

236. *Id.* at 132.

237. 867 So. 2d 983 (La. App. 2004).

238. *Id.* at 986.

other situations, the officer is held to a due regard-negligence standard.²³⁹ In *Richard* the officer did not proceed past any stop signals, exceed the speed limit, or move against the normal flow of traffic. Because this did not place the officer within the provisions of the statute, the applicable standard was ordinary negligence.²⁴⁰ The court then stated that the officer was negligent if he subjected other motorists to unreasonable risks of harm.²⁴¹ Because the officer obeyed all traffic signals and speed limits, the court determined that the officer's actions were not negligent and were not a cause in fact of the collision.²⁴² In conclusion, under Louisiana law, an officer in pursuit of a suspect is liable for gross negligence if he is acting under the emergency vehicle law; otherwise, the officer is liable for mere negligence.²⁴³ Thus, Louisiana takes an unprecedented middle ground among the varying degrees of police pursuit liability. If the officer can maintain the pursuit while abiding by all the laws of the road, it is unlikely he will ever be found negligent.²⁴⁴ In addition, public policy seeks to curb repeat fleeing criminals, thus police can enter pursuits with additional liability protection.²⁴⁵

D. Discretionary Standard

The states in this category fall on the right side of the Police Pursuit Continuum. These states offer police officers and municipalities the most protection from liability for injuries that result from a high-speed pursuit. However, this immunity is not necessarily absolute. Some courts have carved out exceptions for malicious conduct or for conducting the pursuit in a certain fashion. Regardless, so long as officers in these states are well trained in the applicable law, they may engage in high-speed pursuits and usually avoid liability concerns.

239. *Id.*

240. *Id.* at 987. See LA. REV. STAT. ANN. 32:24 (2004) ("the driver must be . . . responding to an emergency call . . . and the accident . . . must arise [from] . . . proceeding past a red or stop signal or stop sign; or exceeding the maximum speed limits; or moving or turning against the flow of traffic . . .").

241. *Richard*, 867 So. 2d at 988.

242. *Id.*

243. *Id.* at 986-87.

244. An officer could be negligent here if he began ramming the fleeing suspect while traveling the speed limit.

245. Gross negligence is defined by the court as "the want of even slight care and diligence," a difficult standard indeed. *Richard*, 867 So. 2d at 986 (quoting *State v. Vinzant*, 7 So. 2d 917 (La. 1942)). This approach to pursuit liability creates a catch-22 for Louisiana plaintiffs, and makes it one of the more favorable states for defendants. See *id.*

The Georgia Supreme Court recently analyzed police pursuit law in a consolidated appeal concerning a case arising in Peach County, Georgia, and a case arising in the City of Savannah.²⁴⁶ Both appeals concerned the interplay of proximate cause and qualified immunity.²⁴⁷ The Georgia Supreme Court announced its decision in *Cameron v. Lang*.²⁴⁸ The court stated that the decision to pursue and the act of pursuing is a discretionary rather than a ministerial act, and that the only way to hold a police officer liable would be through evidence that he or she acted with malice or intent to injure the plaintiff.²⁴⁹ Therefore, any time a police officer, supervising sergeant, lieutenant, captain, or chief of police is sued in a pursuit case in Georgia, the plaintiff will have to prove that the police officer or official acted with actual malice—a subjective intent to injure the plaintiff—in order to avoid summary judgment.

In regard to the liability of the city, the court looked to the dichotomy of law that has developed in Georgia for insured and non-insured cities and counties.²⁵⁰ The court essentially decided that where there is no liability insurance, there is no waiver of the city's governmental immunity.²⁵¹ Thus, without a waiver of immunity, the court never looks to the emergency vehicle statute because the statute expressly provides that its provisions shall apply only to "issues of causation and duty and shall not affect the existence or absence of immunity which shall be determined as otherwise provided by law."²⁵² Thus, where a city has not purchased insurance, there will be no waiver in Georgia and the city will have sovereign immunity in a pursuit case. If liability insurance has been procured, the court decided that a plaintiff must prove that the officers acted with "reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit."²⁵³ Therefore, when there is no insurance, the city will have immunity; if the city has purchased insurance the plaintiff will have to show reckless disregard for proper law enforcement procedures, but the liability is only to the extent of the relevant insurance coverage.²⁵⁴ Looking at the facts of *Cameron*, the court noted that there

246. *Cameron v. Lang*, 274 Ga. 122, 544 S.E.2d 341 (2001).

247. *See Williams v. Solomon*, 242 Ga. App. 807, 531 S.E.2d 734 (2000); *Lang v. Becham*, 243 Ga. App. 132, 530 S.E.2d 746 (2000).

248. *Cameron*, 274 Ga. at 122, 544 S.E.2d at 343.

249. *Id.* at 125-26, 549 S.E.2d at 346.

250. *Id.* at 126, 549 S.E.2d at 346.

251. *Id.* at 127, 549 S.E.2d at 347.

252. *Id.* at 124, 549 S.E.2d at 345. *See O.C.G.A. § 40-6-6* (2002).

253. *Cameron*, 274 Ga. at 128, 549 S.E.2d at 348. *See O.C.G.A. § 40-6-6(d)(2)*.

254. *Cameron*, 274 Ga. at 127, 549 S.E.2d at 347.

was a question of fact regarding the Peach County officer's reckless disregard for proper law enforcement procedures and based this decision on evidence presented by the plaintiff through an expert witness.²⁵⁵ According to this decision, where insurance exists, it may well be required that many police pursuit cases go to juries, because plaintiffs will seek to create questions of fact through an expert witness.

In the final analysis, in Georgia the only party likely to ever pay out any money in any police pursuit case, unless there is evidence of malice, will be the city's insurer. Additionally, the fleeing suspect in Georgia has no cause of action for injuries.²⁵⁶

Maine has held that the decision to initiate a pursuit is discretionary in nature and thus subject to immunity.²⁵⁷ Interestingly, this immunity applies regardless of the municipality's particular policy regarding pursuits.²⁵⁸ In *Selby v. Cumberland County*,²⁵⁹ a high-speed pursuit resulted in a serious collision and an action against the pursuing officer and the municipality. The defendants alleged that they were entitled to absolute immunity because their conduct was discretionary under the Maine Tort Claims Act.²⁶⁰ The plaintiff countered that the police department's pursuit policy discouraged high-speed pursuits involving minor traffic offenses.²⁶¹ The Supreme Judicial Court of Maine, relying on *Doucette v. City of Lewiston*,²⁶² held that an act could be discretionary even though the discretion is not unfettered.²⁶³ In this case, the defendant officer was called upon to exercise judgment about how to handle a particular traffic law violation—an act essential to the accomplishment of a basic governmental objective.²⁶⁴ The defendant officer's conduct did not "lose its discretionary character merely because there are policy guidelines delineating how the discretion should be exercised."²⁶⁵

255. *Id.* at 129, 549 S.E.2d at 348.

256. *See City of Winder v. McDougald*, 276 Ga. 866, 583 S.E.2d 879 (2003).

257. *Selby v. Cumberland County*, 796 A.2d 678 (2002).

258. *Id.* at 683.

259. 796 A.2d 678 (Me. 2001).

260. 14 M.R.S.A. § 8111 (2001).

261. *Selby*, 796 A.2d at 680. The policy provides, "[a] deputy may pursue a vehicle only when he has probable cause to believe the violator has committed or is attempting to commit a serious crime . . ." *Id.* In this case the crime was speeding. *Id.*

262. 697 A.2d 1292 (Me. 1996).

263. *Selby*, 796 A.2d at 681.

264. *Id.*

265. *Id.* at 681-82. Compare this result with *Horta v. Sullivan*, 638 N.E.2d 33 (Mass. 1994) (holding the high-speed pursuit of a vehicle does not involve policy-making or planning for purposes of immunity).

The Minnesota Supreme Court recently created an exception to the discretionary immunity afforded officers in police pursuits when the officer's discretion is limited by the police department's pursuit policy.²⁶⁶ In *Mumm v. Mornson*,²⁶⁷ an innocent bystander was killed during the police pursuit of a suicidal woman.²⁶⁸ The lower courts denied summary judgment to the officers on the basis that the officers' conduct could be considered willful or malicious and therefore outside the realm of official immunity.²⁶⁹ The Minnesota Supreme Court, retreating from its earlier holdings that police pursuit is within the wide range of discretionary police conduct,²⁷⁰ chose instead to focus on the specific conduct at issue in the pursuit.²⁷¹ The police department's pursuit policy provided that, "[o]fficers shall not initiate a pursuit or shall discontinue a pursuit in progress whenever . . . the officer can establish the identification of the offender so that an apprehension can be made at another time unless [the crime is a violent felony]."²⁷² The officers did not dispute that they knew the identity of the fleeing suspect and that they knew the suspect had not committed a violent felony.²⁷³ Relying on a previous holding, the court concluded a public employee's actions become ministerial if there is a policy that defines a "sufficiently narrow standard of conduct."²⁷⁴ In this particular situation, the court held that the department's policy gives no discretion to the officers to exercise independent judgment.²⁷⁵ Therefore, the officers were not entitled to discretionary immunity.²⁷⁶ Thus, the court recognized the right of the governing entity to eliminate the discretion of its employees by adopting policies that discourage pursuits under certain circumstances.²⁷⁷

In Texas, government employees are entitled to official immunity from a suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their

266. *Mumm v. Mornson*, 2006 Minn. LEXIS 5 (2006).

267. 2006 Minn. LEXIS 5.

268. *Id.* at 6.

269. *Id.* at 8.

270. *See Pletan v. Gaines*, 494 N.W.2d 38, 41 (Minn. 1992).

271. *Mumm*, 2006 Minn. LEXIS at 38.

272. *Id.* at 40. MPD Policy Manual § 7-405.

273. *Id.* at 41.

274. *Id.* *See Anderson v. Anoka Hennepin Indep. Sch. Dist.* 11, 678 N.W.2d 651, 658-59 (Minn. 2004).

275. *Mumm*, 2006 Minn. LEXIS at 42.

276. *Id.*

277. *Id.* at 47.

employment.²⁷⁸ In *City of Lancaster v. Chambers*,²⁷⁹ the Texas Supreme Court was asked to resolve confusion in the Texas courts on whether a police officer operating a vehicle in the scope of the officer's authority is performing a discretionary or ministerial act.²⁸⁰ The court held the decision to pursue a particular suspect fundamentally involves the officer's discretion, because the officer must elect whether to undertake pursuit.²⁸¹ Beyond this initial decision, a high-speed pursuit involves the officer's discretion in a number of ways including: which route should be followed, at what speed, should back-up be called, and how closely to conduct pursuit.²⁸² Therefore, a police pursuit is a discretionary act.²⁸³ However, the official immunity that accompanies discretionary acts is dependent on the officer acting in good faith.²⁸⁴ As to good faith, the court adopted the following test: whether a reasonably prudent officer, under the same or similar circumstances, could have believed that the need to immediately apprehend the suspect outweighed a clear risk of harm to the public in continuing the pursuit.²⁸⁵ While this standard appears similar to a general negligence test, the court refuted the similarity by stating that no equivalence should be implied, and the plaintiff must show that "no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts."²⁸⁶ As to the immunity of the municipality, if the officer is immune from suit, then he is not *personally liable* as required to hold a governmental unit liable.²⁸⁷

Colorado grants immunity so long as the pursuing officer utilizes emergency lights and sirens. In *Tidwell v. City & County of Denver*,²⁸⁸ police officers were in pursuit when the fleeing suspect collided with a limousine, killing its driver and seriously injuring its passenger. The passenger brought an action against the city, and the action was

278. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). See *Baker v. Story*, 621 S.W.2d 639, 644 (Tex. Civ. App. – San Antonio 1981).

279. *Chambers*, 883 S.W.2d at 650.

280. *Id.* at 653.

281. *Id.* at 655.

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 656.

286. *Id.* at 656-57 (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993)). The court noted that officers are acting within the scope of their authority as long as they are using their patrol car in the pursuit. *Id.* at 658.

287. *Id.* at 658. See TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (2005) (emphasis added).

288. 83 P.3d 75 (Col. 2003).

appealed to the Colorado Supreme Court.²⁸⁹ Under the Colorado Governmental Immunity Act ("GIA"), a governmental entity is generally immune from tort liability in connection with the operation of an emergency vehicle so long as the vehicle is operating with emergency lights and siren activated.²⁹⁰ However, the lights and sirens requirement is waived if the emergency vehicle is in pursuit of a suspected violator to obtain verification or evidence of guilt.²⁹¹ In this case, the officer failed to activate his lights and siren.²⁹² The court, in attempting to harmonize the GIA, construed the verification exception merely to permit a reasonably safe pursuit of a suspect, without lights and siren, only where the officer was trying to confirm his suspicions that the driver had violated title 42 or the officer otherwise had no probable cause or reasonable suspicion to stop the vehicle.²⁹³ In this case, the officer testified that he had probable cause to stop the driver because of his careless driving. Because the officer had the requisite suspicion to stop the subject, he should have used emergency signals.²⁹⁴

E. California—Written Policy Immunity

California sits alone at the right edge of the Police Pursuit Continuum. Law enforcement officers in California are immune from injuries arising out of a police pursuit, and the municipality that employs the officers is immune if it has adopted a written policy governing police pursuits. In *Nguyen v. City of Westminster*,²⁹⁵ police officers spotted a stolen van and engaged in pursuit. Attempting to elude police, the van entered a high school parking lot just as classes had ended and sped toward an area where several students were gathering. One of the officers rammed the van twice. The van lost control and struck a trash dumpster, which was propelled into the plaintiff student causing injuries. Before the incident, defendant's police department adopted a policy concerning vehicle pursuits. This policy set forth eleven factors for determining whether to initiate, continue, or discontinue a pursuit.²⁹⁶

289. *Id.* at 77. The fleeing driver was convicted of vehicular homicide. *Id.*

290. COLO. REV. STAT. § 24-10-106(1)(a) and 42-4-108(3) (2003).

291. COLO. REV. STAT. § 42-4-108(3) ("the verification exception").

292. *Tidwell*, 83 P.3d at 81. The officer had activated the "stage one" lights or "wigwags," but not the "stage three" lights and siren. *Id.*

293. *Id.* at 82. A Title 42 violation is careless driving.

294. *Id.* at 84.

295. 127 Cal. Rptr. 2d 388 (2002).

296. *Id.* at 390. The factors considered are: (1) the seriousness of the suspected offense; (2) the safety of the public and pursuing officers; (3) vehicular and pedestrian traffic in the area; (4) the location of the pursuit; (5) speeds involved; (6) time of day; (7) weather conditions; (8) road conditions; (9) familiarity of officers with the area; (10) quality

Under the California Vehicle Code, a public employee is not civilly liable for injuries or death “resulting from the operation, in the line of duty, of an authorized emergency vehicle . . . in the immediate pursuit of an actual or suspected violator of the law”²⁹⁷ A public entity, on the other hand, may be held liable for injuries caused to a third party during a police pursuit even though the individual officer is immune.²⁹⁸ However, the code provides a limited exception to entity liability: any public agency that adopts a written policy on pursuits complying with the statute is immune from liability for injury during a pursuit.²⁹⁹ With the statute in mind, the court in *Nguyen* examined the departmental policy.³⁰⁰ The policy was poorly organized and contained little detail, but did list specific and objective factors police personnel must consider when engaging in a pursuit.³⁰¹ The court rejected plaintiff’s argument that immunity should not apply because the officers failed to comply with the policy, holding that the extent to which the policy was implemented and was followed in the particular pursuit is irrelevant.³⁰²

In deciding the case, the court expressed displeasure with the statute, stating that the current law provides a “get out of liability free card” to public agencies that go through the formality of adopting such a policy.³⁰³ In conclusion, police officers are immune from liability during police pursuits, and public entities are immune so long as they adopt written policies governing pursuits, regardless of whether the officer chooses to abide by the policy during the pursuit. It should be noted, however, that grassroots campaigns to change California pursuit law have appeared in the general assembly the last few years.³⁰⁴

of radio communications; and (11) the capabilities of the police vehicles involved. *Id.*

297. *Id.* See CAL. VEH. CODE § 17004 (2005).

298. See *Brummett v. County of Sacramento*, 21 Cal. 3d 880 (1978).

299. See CAL. VEH. CODE § 17004.7(c).

(1) It provides that, if available, there be supervisory control of the pursuit. (2) It provides procedures for designating the primary pursuit vehicle and for determining the total number of vehicles to be permitted to participate at one time in the pursuit. (3) It provides procedures for coordinating operations with other jurisdictions. (4) It provides guidelines for determining when the interests of public safety and effective law enforcement justify a vehicular pursuit and when a vehicular pursuit should not be initiated or should be terminated.

Id.

300. *Nguyen*, 127 Cal. Rptr. 2d at 391-92.

301. *Id.* at 392-93.

302. *Id.* at 393.

303. *Id.*

304. See www.kristieslaw.com.

III. FEDERAL CLAIMS

Federal constitutional claims for damages under 42 U.S.C. § 1983 (“§ 1983”)³⁰⁵ are asserted less frequently than state law claims and have provided relief to injured parties in narrow circumstances. Section 1983 provides for money damages when a person acting under color of law—for the government—violates the constitutional rights of a citizen.³⁰⁶ The United States Constitution provides no such remedy, but only confers rights and civil liberties upon individuals. The purpose of § 1983 is to provide a remedy if a government actor violates a person’s constitutional rights or commits federal statutory violations, thereby forcing states to recognize the rights, privileges, and immunities embedded in the Fourteenth Amendment³⁰⁷ and the United States Constitution. In actions based upon police pursuits, the plaintiffs have used § 1983 to assert claims that the plaintiffs’ substantive due process rights under the Fourteenth Amendment were violated.³⁰⁸ In other cases, where officers terminated a fleeing suspect’s freedom of movement, the suspect’s Fourth Amendment right to be free from unreasonable seizures has been asserted. The overarching constitutional concern in police pursuits seems to be striking the appropriate balance between the interests of the state in protecting the welfare of its citizens and the right of an individual to be free from unwarranted governmental intrusion of his person.³⁰⁹

A. *Fourteenth Amendment Substantive Due Process Claims*

The Fourteenth Amendment of the United States Constitution protects constitutional deprivations, including the right to life, liberty, or property.³¹⁰ In the context of high-speed pursuits, the United States Supreme Court in *Sacramento v. Lewis*,³¹¹ held that such deprivations must meet a “shocks the conscience” standard.³¹² The court rejected a showing of deliberate or reckless conduct, answering that “only a purpose to cause harm unrelated to the legitimate object of the arrest

305. 42 U.S.C. § 1983 (2005).

306. *Id.*

307. U.S. CONST. amend. XIV.

308. The Due Process Clause of the Fourteenth Amendment reads, “[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § I.

309. *See Galas v. McKee*, 801 F.2d 200, 200 (6th Cir. 1986).

310. *See* U.S. CONST. amend. XIV, § I.

311. 523 U.S. 833 (1998).

312. *Id.* at 836.

will satisfy the element of arbitrary conduct shocking to the conscience.”³¹³

In *Lewis* the actual pursuit was brief, lasting only a matter of seconds over 1.3 miles. In that short distance and time span, a sheriff’s deputy pursued a fleeing motorcycle at speeds reaching 100 miles per hour while in close proximity to the motorcycle in a residential neighborhood. The passenger on the motorcycle was killed after the deputy struck him when the motorcycle crashed trying to make a turn.³¹⁴ The Court granted certiorari to resolve a conflict among the circuits over the standard of care applicable to law enforcement officers for substantive due process violations.³¹⁵

The Court observed that decisions made by law enforcement officers during the course of a high-speed pursuit are necessarily made in high-pressure situations, leaving officers with no meaningful opportunity to deliberate the alternatives to the pursuit.³¹⁶ Certainly, the facts of *Lewis* give credence to this rationale, given that the entire pursuit lasted just over one minute.³¹⁷ Another important consideration in the Court’s decision was that there was no evidence that the high-speed chase involved intent on the part of the police officer to physically harm the fleeing suspects.³¹⁸

In reversing the court of appeals denial of summary judgment for the officer, the Supreme Court applied a shocks the conscience test.³¹⁹ The Court thus ruled that a victim in a high speed pursuit must meet the difficult burden of proving that law enforcement officers intended to cause them harm.³²⁰

Other circuits have followed the Supreme Court’s decision in *Sacramento v. Lewis*.³²¹ In *Davis v. Township of Hillside*,³²² the

313. *Id.*

314. *Id.* at 837.

315. *Id.* Compare *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) (adopting a “gross negligence” standard) with *Evans v. Avery*, 100 F.3d 1033, 1038 (1st Cir. 1996) (applying a “shocks the conscience” standard).

316. *Lewis*, 523 U.S. at 852.

317. *Id.* at 836.

318. *Id.* at 855.

319. *Id.*

320. *Id.* Six justices joined Justice Souter in the majority opinion. *Id.* Justice Stevens concurred because he would have granted qualified immunity before reaching the constitutional issues. *Id.* at 859 (Stevens, J., concurring). Justices Scalia and Thomas concurred because they would have held there is no substantive due process right to be free from reckless conduct during a police chase. *Id.* at 860 (Scalia, J., concurring).

321. See *Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001); *Onossian v. Block*, 175 F.3d 1169 (3d Cir. 1999), *cert. denied*, 528 U.S. 1004 (1999); *Salamacha v. Lynch*, 1998 U.S. App. Lexis 38854 (2d Cir. 1998).

322. 2006 WL 1111111 (2d Cir. 2006).

Third Circuit held that in the absence of evidence that police officers intended to physically harm the suspect in a high speed car chase, the officers' conduct towards plaintiff, an innocent bystander, did not shock the conscience.³²³ Similarly, in *Ward v. City of Boston*,³²⁴ the court granted summary judgment to the officers because their conduct, in alleged violation of the victim's substantive due process rights did not shock the conscience.³²⁵ The court held that despite the violation of several departmental regulations and direct orders from the dispatcher to discontinue the chase, the officers' conduct nevertheless did not meet the shocks the conscience standard.³²⁶ Further, there was no evidence that the officers acted with a purpose to cause harm unrelated to the legitimate object of arrest.³²⁷

Despite the Supreme Court's decision in *Sacramento v. Lewis*, the Eighth Circuit Court of Appeals in *Feist v. Simonson*³²⁸ distinguished *Sacramento v. Lewis* and applied a less stringent "deliberate indifference" standard of proof in a pursuit case.³²⁹ The court concluded that the pursuing officer had adequate time during the course of the pursuit, which lasted six minutes and covered six miles, to re-evaluate the need and danger of continuing the pursuit.³³⁰ Eschewing the intent-to-harm standard of *Lewis*, the Eighth Circuit panel affirmed the denial of qualified immunity to the pursuing police officer, concluding that the deliberate indifference standard applies to a high-speed pursuit case if the pursuing police officer "had ample time to deliberate . . . [and] made a deliberative decision to continue the chase and to be indifferent to the dangers obviously inherent in his conduct."³³¹

However, the deliberate indifference standard set out in *Feist* did not last long. In *Helseth v. Burch*,³³² the Eighth Circuit, sitting en banc, specifically overruled *Feist*. *Helseth* concerned a motorist who was severely injured when a vehicle pursued by police officer Burch crashed into the motorist's car killing his passenger and leaving him a quadriplegic. Prior to the accident, Burch attempted to stop the fleeing suspect with four Pursuit Intervention Tactics ("PIT") maneuvers, in which the

322. 190 F.3d 167 (3d Cir. 1999).

323. *Id.* at 169.

324. 367 F. Supp. 2d 7 (D. Mass. 2005).

325. *Id.* at 9.

326. *Id.* at 15.

327. *Id.* at 14.

328. 222 F.3d 455 (8th Cir. 2000).

329. *Id.* at 465.

330. *Id.* at 463-64.

331. *Id.* at 464.

332. 258 F.3d 867 (8th Cir. 2001).

officer drives alongside the rear of the fleeing vehicle, turns, and hits the vehicle's rear end, causing it to spin and stop. Just over six minutes after Burch entered the pursuit, the fleeing suspect ran a red light and collided with Helseth's pick-up truck. Burch moved for summary judgment as to all Helseth's claims brought under § 1983, and the district court dismissed all but the plaintiff's substantive due process claim.³³³

In overruling *Feist*, the full Eighth Circuit noted that *Sacramento v. Lewis* reaffirmed that the substantive component of the Due Process Clause protects a private citizen against an abuse of power by an executive official that shocks the conscience.³³⁴ The Court observed that, for high-speed pursuits, the Supreme Court rejected the deliberate indifference standard, which is characterized as a "midlevel" fault standard.³³⁵ Expounding on the doctrine of *stare decisis*, the Eighth Circuit noted that "[o]ur principal problem with the decision in *Feist* is that the panel paid too little heed to the Supreme Court's holding in *Lewis*, instead relying on a portion of the Court's justification for that holding."³³⁶ The court continued, "[f]or the lower federal courts, an explicit Supreme Court holding is like a statute in that its plain language must be obeyed. [cits. omitted]. *Lewis* plainly stated that the intent-to-harm standard, rather than the deliberate indifference standard, applies to all high-speed pursuits aimed at apprehending suspected offenders."³³⁷

Resoundingly, the Court in *Helseth* noted that since *Lewis*, all other circuits have examined the issue and have applied the intent-to-harm standard in pursuit cases, without regard to the potentially limiting factors identified by the panel in *Feist*—the length of the pursuit, the officer's training and experience, the severity of the suspect's misconduct, or the perceived danger to the public in continuing the pursuit.³³⁸ With *Feist* overruled, the Eighth Circuit concluded that the only harm intended by Burch's conduct was incidental to Burch's legitimate objective of arresting the suspect and that intent did not, as a matter of law, establish a substantive due process violation.³³⁹

333. *Id.* at 869.

334. *Id.* at 870.

335. *Id.*

336. *Id.* (emphasis added).

337. *Id.* at 870-71. See Erik Savas, *Hot Pursuit: When Police Pursuits run over Constitutional Lines*, MICH. ST. L. REV. 857 (1998) for further discussion on federal claims.

338. *Helseth*, 258 F.3d at 871.

339. *Id.* at 872.

B. Fourth Amendment Excessive Force Claims

The Supreme Court has applied a Fourth Amendment excessive force analysis in pursuit cases when a patrol car has been affirmatively used as a weapon to assist in the detention of the fleeing suspect.³⁴⁰ In *Brower v. County of Inyo*,³⁴¹ the administrator of the decedent's estate filed a § 1983 complaint against the county and county officers, who placed a roadblock allegedly designed to deceive the decedent into crashing into the roadblock. The complaint alleged that the officers, under color of law, wrongfully seized the deceased, violating his Fourth Amendment right to be free from unreasonable seizures.³⁴² The Court determined that the complaint sufficiently alleged that the officers, under color of law, sought to stop the deceased by means of roadblock and succeeded in doing so, which was enough to constitute a "seizure" within the meaning of the Fourth Amendment.³⁴³ However, the Court warned that "[s]eizure alone is not enough for § 1983 liability; the seizure must be 'unreasonable.'"³⁴⁴ Here, the seizure was unreasonable because the officers set up the roadblock in a manner as to cause serious injury to the suspect.³⁴⁵

Circuit courts have used a similar analysis. In *Harris v. Coweta County*,³⁴⁶ the Court held that an officer's act of ramming his patrol vehicle into a fleeing motorist's vehicle, causing the suspect to lose control and crash (and thereby become quadriplegic) stated a claim under § 1983 for violation of the suspect's Fourth Amendment right to be "free from the use of excessive force in the course of an investigatory stop or other 'seizure' of the person."³⁴⁷

The Eleventh Circuit's analysis centered on the Supreme Court decision in *Tennessee v. Garner*,³⁴⁸ a case concerning a police officer's use of deadly force to stop a fleeing felon. The Eleventh Circuit had little difficulty determining that ramming the suspect's car could

340. *Brower v. County of Inyo*, 489 U.S. 583 (1989).

341. *Id.*

342. *Id.* at 594. Plaintiff specifically alleged that defendants (1) caused an 18-wheel tractor-trailer to be placed across both lanes of a two-lane highway in the path of Brower's flight, (2) "effectively concealed" this roadblock by placing it behind a curve and leaving it unilluminated, and (3) positioned a police car, with its headlights on, between Brower's oncoming vehicle and the truck, so that Brower would be blinded on his approach. *Id.*

343. *Id.* at 599.

344. *Id.*

345. *Id.*

346. 433 F.3d 807 (11th Cir. 2005).

347. *Id.* at 821.

348. 471 U.S. 1 (1985).

constitute use of deadly force.³⁴⁹ In addition, none of the circumstances that would have justified the use of deadly force to stop a fleeing suspect were present, such as the commission of a crime involving threatened infliction of serious physical harm or the existence of an eminent threat of serious physical harm to the officer or others.³⁵⁰ In fact, the fleeing suspect was sought merely for speeding (seventy-three miles-per-hour in a fifty-five mile-per-hour zone) and there were no known warrants for his arrest.³⁵¹ Under these circumstances, the Eleventh Circuit noted that a jury could conclude that Harris's Fourth Amendment right to be free from an unreasonable seizure had been violated.³⁵²

Harris v. Coweta County was distinguished by *Troupe v. Sarasota County*,³⁵³ a case in which police were informed that the suspect had forty prior arrests and nineteen convictions, was out on bond for attempted murder, and was known to have run from police.³⁵⁴ Similar Fourth Amendment seizure claims were addressed in *Hernandez v. Jarman*,³⁵⁵ where officers were entitled to summary judgment on qualified immunity grounds in an excessive force action where an officer shot plaintiff after a lengthy pursuit.³⁵⁶ In the case of *Adams v. Auburn Hills*,³⁵⁷ the court was asked to decide whether an officer used excessive force by shooting at a car during a police stop. Although the officer's bullet hit plaintiff's car, the plaintiff was not hit, plaintiff was able to leave the scene, and the car was still operable.³⁵⁸ Thus, the plaintiff was not seized within the meaning of the Fourth Amendment.³⁵⁹

IV. CONCLUSION AND RECOMMENDATIONS

The legal ramifications of police pursuits continue to grow and evolve. Despite the view of some states that negligence rules should apply to the actions of officers in pursuits, this approach may curb law enforcement effectiveness. A more fruitful response should be towards deterring future offenders and maximizing the effectiveness of police personnel

349. *Harris*, 433 F.3d at 821.

350. *Id.* at 818.

351. *Id.*

352. *Id.* at 821.

353. 419 F.3d 1160 (11th Cir. 2005).

354. *Id.* at 1169 n.9.

355. 340 F.3d 617 (8th Cir. 2003).

356. *Id.* at 624.

357. 336 F.3d 515 (6th Cir. 2005).

358. *Id.* at 520.

359. *Id.*

during a pursuit. Injuries and loss of life must be minimized whenever possible. Resources thus must be allocated to expand and accelerate research and development of pursuit technology. Federal, state, and local governments should further public education about police pursuits and consider toughening penalties for fleeing violators.

Municipalities without pursuit guidelines should adopt guidelines for officers engaged in pursuits. Guidelines can be kept current by comparison to the policies of other jurisdictions with periodic editing and review to correspond with new developments in the law. Such guidelines should articulate how and under what circumstances pursuits are to be conducted. Training sessions can be offered explaining the importance of these guidelines and the realities of police pursuits, particularly the social and legal consequences.

In the end, lawbreakers will continue to flee those sworn to enforce and uphold the law. But there may well come a day when the need for police pursuits can be reduced or eliminated. Vehicles of the future might come equipped with advanced GPS and identification systems that can accurately transmit the identification of the driver and the vehicles location.³⁶⁰ Until that day, however, education of the public, stiffer penalties for offenders, and increased training of officers will have to suffice.

360. Courts will undoubtedly be diligent, however, to safeguard citizens' rights to privacy under the Fourteenth Amendment.