Police Pursuits:
An Overview of Law and Policy Considerations

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Introduction

The Supreme Court's recent decision in *Scott v. Harris* has been viewed by some as a victory for law enforcement and a carte blanche for agencies to initiate high-speed pursuits in any situation. This perception however is far from the truth. While the Court did limit the liability of law enforcement agencies to the fleeing suspect, it did not limit liability to third parties or free officers from the requirement that a seizure must be reasonable. Thus, an effective pursuit policy, written with an understanding of the particular state tort laws, is essential to protect agencies from liability when officers have chosen to initiate vehicular pursuits.

I. CIVIL LIABILITY

Creating an effective pursuit policy requires an understanding of the potential civil ramifications that vehicular pursuits may pose. Possible liability issues may be grouped as either a) potential liability to the fleeing suspect or b) potential liability to third parties. 42 U.S.C. § 1983 (§1983) exposes law enforcement agencies to civil liability under the Fourth Amendment when the agency has used excessive force to apprehend a fleeing suspect during a pursuit. State tort law is most often utilized in regard to law enforcement's responsibility to innocent third parties, though in some instances §1983 actions have come into play.[1]

A. 42 U.S.C. § 1983 Liability

Lawsuits pursuant to §1983 are likely to arise where the fleeing suspect was injured or killed. §1983 allows a citizen to bring a lawsuit against a police officer for a violation of the citizen's constitutional rights. There are two types of §1983 suits: (1) Fourth Amendment suits where the officer intentionally makes contact with the fleeing motorist's vehicle; and (2) Fourteenth Amendment suits where the injury occurred by accident. Allegations of unconstitutional seizures under the Fourth Amendment are far more common in part because the Fourth Amendment standard is an easier standard to prove. Recovery under the Fourteenth Amendment is possible but only in the instance where the officer's actions were so severe as to shock the conscience.[2]

1. Fourth Amendment Recovery

To determine whether a Fourth Amendment violation has occurred two questions must be answered affirmatively. First, was the suspect seized under the meaning of the Fourth Amendment? And if so, was that seizure unreasonable under the circumstances?

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[1] *Fagan v. City of Vineland*, 22 F.3d 1296 (3rd Cir 1994).
[2] *County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998).

In *Brower v. County of Inyo*[3] decided in 1989, the United States Supreme Court considered a case involving what has been described as a "deadman roadblock." Police had chased a stolen vehicle at high speeds for approximately 20 miles. The driver Brower was killed when he crashed into a police roadblock consisting of an 18-wheel tractor-trailer placed across both lanes of the two-lane highway in the path of Brower's flight.[4] The roadblock was "'effectively concealed' by placing it behind a curve and leaving it unilluminated. . .and by positioning a police car, with its headlights on, between Brower's oncoming vehicle and the truck, so that Brower would be 'blinded' on his approach."[5]

The Court first held that the placement of this particular roadblock was designed to produce a stop by physical force and as such was a seizure within the meaning of the Fourth Amendment.[6] A seizure is "a governmental termination of freedom of movement through means intentionally applied. Brower was meant to be stopped by the physical obstacle of the roadblock -- and . . . was so stopped."[7] The next question was whether the seizure was reasonable since the Fourth Amendment only prohibits "unreasonable" seizures. The Court held that a jury may conclude that the circumstances of the roadblock, particularly the use of headlights to blind Brower, resulted in an unreasonable seizure in violation of the Fourth Amendment.[8]

Brower was the first Fourth Amendment case involving a police pursuit that reached the Supreme Court. Its lesson is that a roadblock may be an unreasonable seizure in violation of the Fourth Amendment if officers set up a roadblock in such a manner that it is likely to kill the driver, especially when the driver is not given the option to stop. Accordingly, a roadblock must be set up in a reasonable manner, such as at the end of a long straightaway or in a way that gives the driver a reasonable opportunity to stop the vehicle.

2. Third Party Fourteenth Amendment Recovery

In cases when the officer accidentally makes contact with the suspect or the suspect's vehicle, a claim may arise under the Fourteenth Amendment due process clause, but it is unlikely to succeed. In *County of Sacramento v. Lewis*[9] decided in 1988, the Supreme Court considered whether an accident between a deputy and a motorcycle passenger resulting in death of the passenger violated the Due Process Clause of the Fourteenth Amendment.

In *Lewis* a deputy observed a motorcycle with two people approaching at a high rate of speed. The deputy attempted to stop the motorcycle by turning on his

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[3] *Bower v. County of Inyo*, 489 U.S. 593 (1989).
[4] *Bower* at 594.
[5] *Id.*
[6] *Id.* at 598.
[7] *Id.* at 599.
[8] *Id.*
[9] *Sacramento v. Lewis*, 523 U.S. 833 (1988).

blue lights and yelling at the boys to stop. The pursuit lasted for only 75 seconds over 1.3 miles in a residential neighborhood, with the motorcycle weaving in and out of oncoming traffic and forcing vehicles off the road. The motorcycle and patrol car reached speeds up to 100 miles an hour, with the deputy following at a distance as close as 100 feet; at that speed, his car would have required 650 feet to stop. The chase ended after the motorcycle tipped over as the fleeing driver attempted to make a sharp left turn. By the time the deputy slammed on his brakes, the driver was out of the way but the passenger Lewis was not. The patrol car skidded into Lewis at 40 miles an hour, propelling him some 70 feet down the road and inflicting massive injuries. He was pronounced dead at the scene.[10]

In the lawsuit, Lewis' family argued that the deputy violated Lewis' Fourteenth Amendment right to due process by causing his death through deliberate or reckless indifference to life in a high speed automobile chase aimed at apprehending a suspect. The Supreme Court disagreed and held that the due process clause under the Fourteenth Amendment is only violated when there is *arbitrary conduct that shocks the conscience*.[11] The Court explained that "a police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders."[12] The Court concluded that the deputy's actions in pursing the motorcycle did not shock the conscience and therefore was not a violation of the Fourteenth Amendment.

B. State Negligence Claims

Nearly every state has some statutory language that exempts law enforcement vehicles from normal traffic laws when in pursuit of a suspect or when traveling to an emergency.[13] States, however, vary widely on the standard of care police officers owe to third parties during pursuits. Some states grant almost no immunity and expose officers and departments to liability for simple negligence for their actions[14] while others attempt to grant complete immunity to officers engaged in pursuits.[15] It is helpful to think of this as a spectrum of liability, with the simple negligence standard on the left, gross negligence roughly in the middle, and almost complete immunity on the right.[16]

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[10] *Id.* at 853.
[11] *Sacramento* at 853.
[12] *Id.*
[13] An example is in N.C. Gen. Stat. § 20-145: "The speed limitations set forth in this Article shall not apply to vehicles when operated with due regard for safety under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation…"
[14] Nebraska and their innocent third party statute is the ultimate example of preserving proximate cause for the liability of government agencies. Neb. Rev. Stat. 13-911 (1987).
[15] California lies at this end of the spectrum, with only a slim window open for state liability in police pursuits. Cal. Veh. Code 17004 (2005).
[16] Patrick O'Connor & William Norse, *Police Pursuits: A Comprehensive Look at the Broad Spectrum of Police Pursuit Liability Law*, 57 Mercer L. Rev 511, 517 (2006).

The simple negligence and gross negligence standards represent two different approaches to what in many cases arise from almost exactly the same statutory language. The problem comes from the language in the Uniform Vehicle Code which has been adopted by a number of states. An example of this is found in Arizona state law, which states, "This section does not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons and does not protect the driver from the consequences of the driver's reckless disregard for the safety of others."[17] The confusion stems from the fact that the 'duty to drive with due regard for the safety of all persons' seems to be a simple negligence standard while the 'reckless disregard' language is the framework of a gross negligence standard. State courts have been split in deciding whether to apply the negligence or gross negligence standard, both of which appear in the uniform code's language.

1. Simple Negligence

On the left end of the spectrum, many states have chosen to set the standard of liability for police officers at simple negligence.[18] Courts in these states have been willing to find negligence on the part of the officer for simply engaging in a pursuit where there is a risk of danger, while others have even held the initial decision to pursue may be negligent in and of itself.[19] Every agency in a jurisdiction where simple negligence is the standard needs to know what actions will trigger a finding negligence under their respective state's liability standards.

In *Haynes v. Hamilton County*, the Tennessee Supreme Court applied a simple negligence standard to the police officer's actions and took a very broad view of the term 'conduct.'[20] In denying a motion for summary judgment, 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.[21] In Tennessee, factors such as weather conditions, levels of traffic, alternate methods of apprehension, and suspected criminal activity are balanced to determine whether the chase is reasonable.

Pennsylvania has taken a joint liability approach. There, the state supreme court in *Jones v. City of Philadelphia*[22] ruled that police officers can be held jointly liable with a fleeing driver. In that case a Philadelphia police officer began a police pursuit without a working siren, and the supervisor failed to terminate the pursuit. The officer collided with the vehicle and the passenger was killed. The Supreme Court of Pennsylvania ruled that even though the driver was negligent

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[17] Ariz. Rev. Stat. §28-624 (2007).
[18] At least 25 states have applied this standard.
[19] Ariz. Rev. Stat. §28-624 (2007).
[20] *Haynes v. Hamilton County*, 883 S.W.2d 606 (Tenn. 1994).
[21] *Id.* at 607.
[22] *Jones v. City of Philadelphia*, 700 A.2d. 417 (Pa. 1997).

by fleeing from the police, a governmental party is not immune from liability when its negligence, along with a third party's negligence, caused harm.

State courts differ on whether to factor in such things as the underlying crime or department pursuit policies in determining whether a chase was conducted negligently. However all states that apply the simple negligence standard have language similar to Indiana's "drivers of emergency vehicles are not relieved from the duty to drive with due regard for the safety of all persons."[23] Law enforcement officers in these states are in danger of being held liable under a proximate cause theory for almost any innocent party harmed during a pursuit.

2. Gross Negligence/Recklessness

Choosing to remain somewhere in the middle of the spectrum, some state courts have found the "reckless disregard" language to be the most appropriate standard to use when applying the Uniform Vehicle Code and similar statutes. The Iowa Supreme Court noted that while Iowa courts generally hold police officers to a standard of due care, "police protection free from the chilling effect of liability for split-second decisions" is an important justification for using the "reckless disregard" standard in police pursuits.[24] While some state courts use the term gross negligence instead of recklessness, the standards of liability are principally the same.

The common standard for gross negligence is laid out by the North Carolina Court of Appeals in *Norris v. Zambito*.[25] The suspect in that case, who at the time of the pursuit was drunk and had a history of fleeing from the police, crashed into and killed an innocent third party during the pursuit. In a lawsuit filed by the estate of the third party, the court said the Durham police could not be liable unless they engaged in "wanton conduct done with conscious or reckless disregard for the rights and safety of others."[26] The court then weighed the same factors that courts use when determining simple negligence, such as pursuit procedure and amount of surrounding traffic, to determine whether the officer had engaged in gross negligence.

Other courts have described the standard as a "conscious or reckless disregard of an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits"[27] or "when an officer is so indifferent to the consequences of his conduct as not to give a slight care as to what he is doing."[28] While balancing the same factors as in a simple negligence jurisdiction the bar is set higher in order to allow police officers the

[23] Ind. Code 9-21-1-8 (2005).
[24] *Morris v. City of Des Moines*, 534 N.W.2d 391 (Iowa 1995).
[25] *Norris v. Zambito*, 135 N.C.App. 288 (N.C. 1999).
[26] *Zambito* at 293.
[27] *Eckard v. Iredell County*, 630 S.E.2d. 134 (N.C. 2003).
[28] *Clark v. South Carolina Department of Public Safety*, 608 S.E.2d. 573 (S.C. 2005).

leeway to make the split-second decision to engage in a high speed pursuit without undue fear of liability.

2. Discretionary Immunity

Finally on the right side of the spectrum some states regard police pursuits as a discretionary as opposed to a ministerial act. Instead of adopting legislation like that found in the Uniform Vehicle Code, they have statutory language similar to that found in California's Vehicle Code. The language in California's code states that 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."[29]

No state, however, grants officers complete and total immunity, as each state that views police pursuits as a discretionary function carves out some type of exception. The Minnesota Supreme Court has ruled that discretionary immunity is only applicable if the officer is following the department's pursuit policy,[30] while the California Vehicle Code explicitly states that a department is only granted discretionary immunity if it has a pursuit policy in place.[31] The Georgia Supreme Court set the bar as high as a §1983 claim under the Fourteenth Amendment by stating 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.[32]

II. SCOTT v. HARRIS

A. Facts of the Case

In March 2001, a Georgia county deputy clocked respondent Harris' vehicle traveling 73 miles per hour in a 55 mile-per-hour zone. The deputy subsequently activated his blue flashing lights in an attempt to pull the respondent over. Instead of pulling over the respondent fled, initiating a chase on what is primarily a two-lane road at speeds in excess of 85 miles per hour. The deputy broadcast the license plate number and Deputy Scott, upon hearing the broadcast, joined in the chase. In the midst of the pursuit Harris pulled into a parking lot and was nearly boxed in but eluded capture by colliding with Scott's police cruiser before again speeding off.

Harris continued at speeds upwards of 90 miles per hour, driving through numerous red lights and forcing vehicles off the road. Six minutes and nearly ten miles after the chase had begun, Scott asked his supervisor for permission to execute a Precision Intervention Technique (PIT) maneuver to terminate the chase, which was granted. (A PIT maneuver is intended to cause a fleeing vehicle

[29] Cal. Veh. Code 17004 (2005).
[30] *Mumm v. Mornson*, 2006 Minn. LEXIS 5 (Minn. 2006).
[31] Cal. Veh. Code 17004 (2005).
[32] *Cameron v. Lang*, 544 S.E.2d 341 (Ga. 2001).

to safely spin to a stop.) Scott, however, determined the cars were moving too fast to safely execute a PIT maneuver and instead pushed the bumper of his patrol car into the back of Harris' vehicle. This contact caused Harris to lose control and crash into an embankment, rendering him a quadriplegic.

Harris sued Scott as well as numerous Georgia state entities under §1983 alleging that the contact which caused him to crash was an unconstitutional seizure under the Fourth Amendment. Scott filed a motion for summary judgment based on an assertion of qualified immunity. The district court denied the motion, finding that "there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury."[33] The United States Court of Appeals for the Eleventh Circuit agreed with this decision. It is important to note that both the district court and circuit court viewed the facts of the incident as portrayed by respondent Harris.

B. Decision and Reasoning

The overarching consideration applicable to all use of force cases under the Fourth Amendment is the objective reasonableness test laid out by the Supreme Court in *Graham v. Conner*.[34] The question then in this case is whether Deputy Scott's actions in the pursuit of Harris were reasonable under the circumstances as viewed by a reasonable person.[35]

Balancing the nature and quality of the intrusion against the importance of the governmental interest, the Court compared the probable likelihood that a high speed collision would seriously injure Harris against the actual and imminent threat posed by Harris to the public (which Scott intended to eliminate).[36] While the number of lives at risk is relevant, the Court considers what it called "relative culpability" in the balancing test. "We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability."[37] The Court went on to conclude that while the motoring public in the area was innocent, Harris was culpable because by initiating the chase he had placed himself and others in danger. Thus the intrusion, while severe, did not violate Harris' Fourth Amendment rights.

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[33] *Scott v. Harris*, 127 S. Ct. 1769 (2007). citing *Harris* v. *Coweta County*, 2003 U.S. Dist. LEXIS 27348 (N.D. Ga., Sept. 23, 2003).
[34] *Graham v. Conner*, 490 U.S. 386, 388 (1989).
[35] Justice Scalia points out that at the summary judgment stage, determining all the relevant facts and drawing all inferences in favor of the non-moving party, determining whether respondent's actions have risen to a level warranting deadly force is a pure question of law, and is not taking the decision out of the hands of the jury.
[36] Harris "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civil motorists, and to the officers involved in the chase…Scott's actions posed a high likelihood of serious injury or death to Harris –though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head…or pulling alongside a fleeing motorist's car and shooting the motorist. *Scott v. Harris* at 1778.
[37] *Scott v. Harris* at 1778.

The Court's logic boiled down to one important point, that Harris was more culpable not because of the nature of the underlying crime (in this case speeding) but because of Harris' decision, in the court's words, to "initiate" the chase by choosing not to stop for blue lights and sirens thereby endangering the public. That culpability offset or outweighed the substantial likelihood of Harris' death or serious injury if Scott collided with him.

Three other noteworthy points put the *Scott* decision in perspective. First the court never addressed the underlying offense that initiated the traffic stop and further declined to say that forcible seizures after pursuits for minor crimes are categorically unreasonable. Most pursuit policies now in place consider the nature of the underlying crime for which the suspect is being pursued along with other factors. In view of potential liability under state laws, departments should be careful in their decision whether or not to factor in the underlying offense in light of this decision.[38]

Secondly, the Court rejected the argument that the Fourth Amendment's objective reasonableness standard required Deputy Scott to discontinue the pursuit, noting that "the Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness."[39] Rather, Justice Scalia wrote that "a police officer's attempt to terminate a dangerous, high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorists at risk of serious injury or death."[40]

Third, policy makers must remember that this case did not involve a claim by an injured third party. Thus, this case does not address an officer's or city's liability in the third party injury context, particularly under state law. Review of applicable state law is still imperative in crafting any revisions to pursuit policy in light of the *Scott* decision.

C. Applicability of *Tennessee v. Garner*

Respondent Harris urged the Supreme Court in this case to apply the standards laid out in *Tennessee v. Garner*[41] because, like *Garner*, this case dealt with law enforcement's use of deadly force. Under *Garner* three preconditions must be met before an officers use of deadly force can survive Fourth Amendment scrutiny: (1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must be necessary to prevent serious physical harm, either to the officers or to others; and (3) where feasible, the officer must have given the suspect some warning.[42] Harris argued that *Garner's* preconditions were not met by Scott, making his actions *per se* unreasonable.[43]

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[38] Because *Scott* is a seizure case and not a pursuit case, the Court did not mention many of the factors often included in department's pursuit policies.
[39] *Scott* at 1779.
[40] *Id.*
[41] *Tennessee v. Garner*, 471 U.S. 1 (1985).
[42] *Garner* at 9-12.
[43] *Scott* at 1777.

The Court in *Scott* was not persuaded by Harris' arguments, however. "Respondent's argument falters at its first step; *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute deadly force."[44] They instead stated that *Garner* was just an application of the *Graham* reasonableness test to the specific circumstances of the *Garner* case. In *Garner* the officer shot a fleeing suspect in the back, while here Deputy Scott stuck another car with his own in an attempt to stop the car. "Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such 'preconditions' have scant applicability to this case, which has vastly different facts."[45] *Scott* does not overturn *Garner* but rather puts it in its place, distinguishing different standards for reasonableness depending on how and when deadly force is used. "Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of reasonableness."[46]

III. PURSUIT POLICIES

A. The Importance of Having a Pursuit Policy

Scott v. Harris grants law enforcement agencies a measure of freedom from civil liability under §1983 for vehicular pursuits, recognizing law enforcement's need to apprehend fleeing suspects. However as *Brower v. County of Inyo* illustrates, this decision should not be interpreted to allow officers unlimited discretion to begin and forcefully end pursuits as they see fit. To protect law enforcement officers from civil liability, every agency that operates vehicles with blue lights and sirens should have a policy regarding pursuits. Creating a sound policy provides a map for employees to follow, provides management the authority to oversee pursuits, and enhances the operation of any organization.

B. Factors to Consider When Creating Policy

It would be difficult if not impossible to create one policy for all law enforcement agencies in the country. Instead each agency's pursuit policy must take into account the agency's mission, size, location, and jurisdiction. "The formulation of specific agency policies must take into account local political and community perspectives and customs, perogatives and demands; often divergent law enforcement strategies and philosophies; and the impact of varied agency resource capabilities, among other factors."[47] In primarily urban and suburban areas like Atlanta, policymakers have recognized that the need to apprehend the offender does not usually outweigh the inherent risks of a pursuit in such a

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[44] *Id.*
[45] *Scott* at 1778
[46] *Id.*
[47] International Association of Chiefs of Police Model Policy, Vehicular Pursuit, Oct. 1996. http://www/theiacp.org/pubinfo/PolCtr

congested environment.[48] In more rural areas where the risks a pursuit poses to innocent motorists might be somewhat diminished, a more flexible policy for engaging in pursuits may be appropriate.

1. Specificity and Flexibility

Any pursuit policy must be specific enough to protect the police officers from liability, yet flexible enough to allow officers to do their jobs. A policy that sets specific criteria for engaging in a pursuit stands a better chance of protecting an officer from liability if it ensures that when terminating a pursuit, the officer does so in a reasonable manner. Further an effective pursuit policy can protect officers from liability to third parties under state tort laws by ensuring that officers operate with the appropriate level of care to the public when engaging in pursuits. Such a standard will answer questions like whether to pursue for misdemeanor offenses or traffic violations, and how to proceed when the violator is already operating the vehicle in a dangerous manner.

Still, any pursuit policy must be both flexible and practical. In the few seconds after the suspect begins to flee, the officer must weigh the known facts of the situation, apply the department's pursuit policy to those facts, and determine whether to engage in pursuit. The policy must be short and simple enough (if the policy is over 5 pages it is likely too long) so that the officer will be able to quickly decide whether a pursuit will be authorized in that situation.

2. Specific Conditions

No policy can account for every situation that may confront an officer when a suspect refuses to pull over. It is important to recognize that a discretionary policy does not mean that officers will always initiate the pursuit or, conversely, will never discontinue the pursuit. The essence of a discretionary policy is that the officer at all times – prior to initiation and during the pursuit, weighs the risks of the pursuit versus the danger to the public in allowing the suspect to remain at large.

While apprehension of a suspect is always desirable, a pursuit may create an even greater danger to the public than that posed by the violator being allowed to escape. Once the necessary requirements under a pursuit policy to initiate a pursuit (such as a sufficient underlying crime) have been met, a department's policy should require an officer to consider a list of factors to determine whether it is reasonable to initiate or continue a pursuit. Such factors include the following:

- Volume of traffic;
- Location of pursuit – urban, suburban, or rural area;

[48] Atlanta Police Department SOP 3050 Pursuit Policy.

- Driving abilities of the officer;
- Condition of the authorized emergency response vehicle;
- Weather conditions;
- Road conditions – poor road conditions, narrow and winding roads;
- Speeds involved; and
- Traveling against traffic – particularly on a divided highway.

The pursuing officer should continually reevaluate these conditions over the course of a pursuit as the situation may change and render the chase unnecessarily unsafe to the public. Further the pursing officer should be in contact with communications at all times, giving details such as the reason for the pursuit, present location, and direction of travel. A field supervisor should be apprised of the pursuit and should be responsible for terminating the pursuit when, in his determination, the threat created outweighs the necessity of the immediate apprehension of the suspect.

3. Pursuit Training

Due to the dangerous nature of vehicular pursuits, it is imperative that all officers receive sufficient training before they are authorized to initiate pursuits of fleeing suspects. Not only do untrained officers pose a much higher risk to the innocent public but they also expose the police department to potential legal liability. In *Usher v. Trafton*[49] a police officer engaged in the pursuit of a vehicle who would not pull over after a speeding violation. The pursuit ended up severely injuring a third party. Since the Town of Berwick could produce no evidence that the officer had been adequately trained in pursuit procedures, the court concluded that the plaintiff in the case could present a claim of negligent training to a jury under Maine tort law.[50]

In contrast, if a municipality can show that an officer has received pursuit training they are likely to be protected from negligent training tort claims. In *Chenoweth v. Wilson*[51] a van driven by a fleeing drunk driver struck and killed the plaintiff whose estate subsequently brought a negligent training claim. The Indiana Court of Appeals stated, "At the very least, uncontroverted evidence that the officer had completed the statutory training would establish the rebuttable presumption of adequate training of the officer."[52] Since defendants submitted evidence that established that Officer Chenoweth had been trained as required by law and the plaintiff presented no evidence that the training was inadequate, the plaintiff's claim of negligent training was dismissed as a matter of law at summary judgment.[53] Ensuring that officers are adequately trained in pursuit

[49] *Usher v. Trafton*, 1989 Me. Super. Lexis 161 (Me. 1989).
[50] *Usher* at 18.
[51] *Chenoweth v. Wilson*, 827 N.E.2d 44 (Ind. 2005).
[52] *Wilson* at 49.
[53] *Wilson* at 52.

procedure is essential to limit dangers to the public as well as to limit the liability of the individual law enforcement departments.

4. Consideration of the Underlying Crime

As stated earlier, the Supreme Court in *Scott v. Harris* did not take into account the underlying crime in determining whether Deputy Scott's actions constituted an unreasonable seizure. This, however, does not mean that departments should disregard the underlying crime in crafting pursuit policies for two reasons. The first is that the court did not address the underlying crime in *Scott v. Harris* at all, leaving the topic open for the Supreme Court to revisit at a later date. Second and more importantly, the underlying crime may still be relevant in third party state tort law claims against law enforcement agencies. To avoid a finding of liability in state court, agencies with a simple negligence standard may wish to evaluate whether to designate "no chase" crimes or to create firmly defined criteria regarding crimes that can lead to a pursuit.

5. Discontinuing the Pursuit

Finally, a pursuit policy should address under what circumstances a pursuit should be discontinued. In *Scott v. Harris* the Supreme Court specifically stated that a pursuit should not be discontinued simply because it is dangerous. "(W)e are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so *recklessly* that they put other people's lives in danger."[54] If that were the case, every fleeing motorist would know that all he had to do was drive dangerously enough to get the police to stop the chase. However not all state courts have been so sympathetic. In *Tetro v. Town of Stratford*[55] a vehicle attempted to elude police by driving the wrong way down a one-way street, causing a multiple car collision. The Connecticut Supreme Court rejected the officer's motion for summary judgment holding that the recklessness of the operator of the pursued car did not relieve the police of liability because the plaintiff's injury could be found to fall within the scope of the risk created by the police in maintaining the pursuit.[56] A department may want to consider discontinuing a chase if it becomes too dangerous, particularly to innocent third parties, especially if other options are available to track down the driver at a later time such as using the license plate information or even continuing to track the car by helicopter.

IV. IN-CAR VIDEO USE & RETENTION

A. Use in Court

[54] *Scott v. Harris* at 1779.
[55] *Tetro v. Town of Stratford* , 458 A.2d 5 (Conn. 1983).
[56] *Tetro* at 10.

An important point in *Scott v. Harris* is the Supreme Court's decision to use the in-car video recording made during the chase by Deputy Scott to determine the relevant facts. This is a significant departure from the established tradition, if not precedent, of courts accepting the facts in the light most favorable to the party opposing the summary judgment motion in qualified immunity cases.[57]

The Eleventh Circuit Court of Appeals, following established practice, had accepted plaintiffs' presentation of the facts in this case. "Taking the facts from the non-movant's viewpoint, [respondent] remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians…"[58] "Indeed," as Justice Scalia observes, "reading the lower court's opinion, one gets the impression that respondent, rather then fleeing from police, was attempting to pass his driving test."[59] Without the in-car video of the incident, this is the version of events the Supreme Court would have likely had to accept on appeal from the Eleventh Circuit. If that had been the case it is likely the Supreme Court would have found a question of material fact as to whether Scott violated Harris' constitutional rights, allowing the case to proceed to trial.

The facts must be viewed in the light most favorable to the non-moving party only where there is a "genuine" dispute to those facts.[60] When instead there are two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for the purposes of ruling for summary judgment.[61] The actual event recorded on the police officers' dash-mounted cameras told such a different story from Harris' that the Supreme Court disregarded Harris' version of the facts in its entirety. It explained that there was no longer a question of material fact because Harris' description was plainly inaccurate. Watching the actual tapes to review the case, the justices ruled that the facts did not support a constitutional claim against Scott. The tapes were convincing enough to sway Justice Breyer, who may have otherwise upheld the decision against summary judgment.[62] In fact the Supreme Court went so far as to chastise the lower courts for relying on plaintiffs' version of the facts, stating that "The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape."[63]

B. Policy Concerning Retention

Recent technological advances have made in-car cameras far more practical and useful. Until just a few years ago recording in-car videos on tape was the only

[57] *United States v. Diebold, Inc*. 369 U.S. 654, 655 (1962).
[58] *Harris v. Coweta County* 433 F.3d. 807, 815 (11th Cir. 2005).
[59] *Scott v. Harris* at 1775.
[60] *Scott* at 1775.
[61] *Id*.
[62] *Id.* at 1780.
[63] *Id.* at 1775.

option available. Because of this, recordings could only be kept for short periods of time due to the sheer space required to maintain all the tapes.[64] The advent of digital recording and storage devices has solved the storage problem that had plagued agencies with in-car recording devices.

Iowa City's policy exemplifies the relative ease and usefulness of the new technology.[65] In Iowa City each car is equipped with a device which records events onto a flash card located in each vehicle. When the card is full, its contents are uploaded to a police server. The flash card is then wiped clean and ready for re-use. Once the video is uploaded onto the server it is saved to DVD. The video also remains on the server for at least 90 days before it is erased. Even after the video is erased from the server a record will still exist indefinitely since the DVDs are not destroyed.

The advantages of video cameras and permanent storage are made clear in *Scott v. Harris*. Instead of being forced to accept the facts as alleged by the plaintiff, a tale of events that was clearly erroneous, the court instead granted the motion for summary judgment based on the actual events of the case as recorded by the video. Justice Breyer specifically stated in his concurring opinion that "watching the video footage of the car chase made a difference to my own view of the case."[66] Indeed, one could say that the availability of the video evidence saved the officer and agency the expense of a trial.

A further reason for adopting a digital-based video retention program is the danger of potential legal liability of the law enforcement department for destroying the recordings. In *Jones v. City of Durham*[67] a plaintiff brought a claim for obstruction of justice because the police department had misplaced or destroyed an in-car recording of a patrol car striking a pedestrian. The Supreme Court of North Carolina denied the city's motion for summary judgment, saying that evidence that the tape was misplaced or destroyed could allow a jury to find that the city was guilty of obstruction of justice.[68] The problem faced by the Durham police department in *Jones* is an example of the dangers an agency can face if the court determines it has not implemented an effective retention policy.

The *Scott* decision marked an important precedent in police chase claims that should encourage every department to seriously consider installing in-car digital video recording. When the events are recorded, the courts will not have to rely on the plaintiff's version of the facts for summary judgment motions in §1983 or state negligence claims. In proper cases this will lead to a much higher probability

[64] For example in Santa Cruz, California the Santa Cruz Police Department General Orders still states that only tapes which are deemed to possess any evidentiary value are kept, and even those are erased after 15 months. http://santacruzcopwatch.org/go , GO 45.
[65] Iowa City Police Department General Order # 31.
http://www.icgov.org/policefiles/genorder31.pdf
[66] *Scott* at 1780.
[67] *Jones v. City of Durham*, 643 S.E.2d 631 (N.C. 2007).
[68] *Jones.* at 633.

that a summary judgment motion will be granted in favor of the police department.

Conclusion

As illustrated above, an effective pursuit policy is necessary for a law enforcement agency to protect against the many ways they may face liability when an officer decides to initiate a high-speed pursuit. While the decision in *Scott v. Harris* protects officers and departments from liability under certain circumstances, officers must still respect the right of a fleeing suspect from an unreasonable seizure and must always be aware of the public's safety. An effective policy will assist officers in balancing the need to protect the public from fleeing suspects against the need to protect the public from dangerous vehicular pursuits.

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