Negotiating the Minefield

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I. Juror Attitudes

Juries are naturally antagonistic to police pursuit litigation. In fact, the initial reaction of most jurors to a police pursuit case is to give the Plaintiff's lawyer the one finger salute. Most jurors are pro-law enforcement and do not want to do anything to tie the hands of the police, and feel that these cases unreasonably restrict the ability of law enforcement to catch the bad guys. These attitudes are made even more difficult by the fact that the jury feels that any verdict will simply be paid by the local authorities, and ultimately through the taxpayers' own pockets. Because of these natural prejudices, the jury must be properly educated as to the reasons for police pursuit procedures, and why reasonable restrictions are necessary for the safety of the public.

This was dramatically demonstrated in a national television program that aired several years ago, entitled *You Be the Judge*, in which a typical police pursuit case was presented to a studio audience. We represented a mother and father who appeared on the program, who had lost their 11-year-old son when their vehicle was struck by a fleeing suspect in a police pursuit initiated by a local police department for a simple tag light violation. When the studio audience was first presented with the facts and told that suit was being brought for an improper pursuit, the initial reaction of over 90 percent of the audience was to vote against the Plaintiffs, because they wanted to support the police in attempting to catch criminals.

However, after all of the facts were shown, including death and injury statistics showing the underlying reasons for adopting reasonable police pursuit procedures, and after experts explained how the police pursuit violated pursuit procedures and resulted in an unnecessary risk to the public in light of the minor traffic violation involved, the audience voted again at the conclusion of the program. Only eight percent supported the police, with the remainder agreeing that the pursuit was unreasonable.

II. Statistical Background Pertaining to High-speed Pursuits

The number of police pursuits increases every year, even in the face of statistics showing ever-increasing deaths and injuries to innocent members of the public in these pursuits. The National Highway Traffic Safety Administration (NHTSA) Fatality Analysis Reporting System reflects that from 1998-2007, crashes involving police pursuits resulted in an average of over 350 deaths per year, and these statistics do not include the thousands of serious injuries resulting from these pursuits. The number of deaths and serious injuries from police pursuits is also substantially under-reported, since all states do not report pursuit fatality data to NHTSA, and the lack of a mandatory reporting system by local government authorities hampers attempts by NHTSA to track pursuit fatalities. The following NHTSA fatality statistics on high-speed pursuits therefore do not tell the full story of the hazards posed by police pursuits. *See Figure on Page 24.*

Studies reflect that the majority of police pursuits do not involve an attempted stop for a felony, but instead arise out of minor traffic violations or misdemeanors. *See* G. P. Alpert, U.S. Department of Justice, National Institute of Justice, *Police Pursuit: Policies and Training* (Washington D.C., May 1997). More than a decade of research also confirms that collisions are a predictable outcome of police pursuits, as studies have shown that almost 40 percent of pursuits result in an accident, for a rate of one accident in every 2.6 pursuits; that over 26 percent of pursuits resulted in property damage; that over 10 percent result in personal injury; and that between one and two percent result in a fatality. *See The Role of Technology in Supporting Police Pursuit Policies,* Memphis Shelby Crime Commission, Vol. 4, No. 1, April 2001.

Research also indicates that pursuits become dangerous very quickly, as 50 percent of all pursuit collisions occur in the first two minutes of the pursuit, and more than 70 percent

of all collisions occur before the sixth minute of the pursuit. *See Pursuit Management Task Force Report,* National Law Enforcement and Corrections Technology Center (September 1998). A 1997 National Institute of Justice study concluded that policy changes were necessary to properly balance the type of offense involved and the risk to the public, in determining whether to initiate and continue a pursuit, and further recommended additional training to police officers on police pursuit policies, as police officers involved in a pursuit tend to develop tunnel vision, and focus on catching the violator if it is the last thing they will ever do.

III. Rationale For High-speed Pursuit Policies

The rationale underlying standard operating policies for high-speed pursuits is to take some of the decision-making out of the police officer's hands in order to prevent the pursuit from being dangerously instituted and continued purely out of the police officer's anger or adrenaline rush when a violator refuses to obey his direction to stop. Thorough training to insure a proper basis for initiating and continuing a high-speed pursuit is essential, since pursuits pose a grave risk to the public, and may not be warranted under all circumstances.

In 1996, the United States National Institute of Justice commissioned a study entitled, *Police Pursuit and the Use of Force: A Final Report to the U.S. National Institute of Justice,* which determined that most suspects fleeing the police did so not because they had committed a serious crime, but because they were frightened and did not want to face the consequences of the minor charges that could be brought against them, concluding that most of the suspects would have reduced their speed and dangerous driving if the police permitted them to feel safe by backing off on the pursuit.

This report recommended that pursuit policies be adopted weighing the gravity of the offense against the risks to the public, concluding that an appropriate policy would limit lengthy high-speed pursuits to violent felons. Studies also show that a lack of training increases the risk of pursuit-related injuries, not only because the officers do not have proper training as to *how* to engage in a pursuit, but also because they do not have proper training as to *when* to initiate or discontinue a pursuit. In this regard, while most police departments provide significant, continuing training for firearms, little training is provided in pursuit policies, even though pursuits statistically pose a greater risk to the public.

Studies have also shown that contrary to conventional wisdom, more restrictive police pursuit policies do not necessarily result in an increase in crime rates, or an increase in the number of suspects fleeing the police. In fact, when the Miami Dade Police Force in Florida instituted a 'violent felony only' pursuit policy in 1992, the number of police pursuits decreased by 82 percent the following year, resulting in a commensurate decrease in collisions, injuries and fatalities, but this more restrictive policy did *not* result in an increase in crime rates, or an increase in the number of suspects fleeing the police. Accordingly, while most people generally believe that a more restrictive pursuit policy will result in more crime and more fleeing suspects, the statistics show otherwise.

IV. Applicable Georgia Law Pertaining to High-speed Pursuits

Four criteria must be met for a Plaintiff to present a police pursuit case to a jury:

(1) Proof of Proper Ante Litem Notice to the City or County – Plaintiff must plead and prove timely *ante litem* notice to the responsible municipality or county (within six months for a municipality – O.C.G.A. '36-33-5; and 12 months for a county – O.C.G.A. '36-11-1).

Practice Note: Claims for high-speed pursuits by Georgia state troopers or other state employees under the Georgia Tort Claims Act (which has separate detailed notice require-

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

FATALITY ANALYSIS REPORTING SYSTEMS

Fatalities in Crashes Involving Police Pursuit 1998-2007

Year	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Total Deaths – U.S.	322	319	305	365	386	354	343	359	410	424
Total Deaths – GA	9	24	17	18	18	16	19	16	15	24
Total Deaths – U.S. (Innocent Bystanders)	119	104	113	140	132	119	120	120	136	119
Total Deaths – U.S. (Occupants of Suspect Vehicle)	201	212	185	221	248	229	214	234	271	296
Total Deaths – U.S. (Police Officers)	2	3	7	4	6	6	9	5	3	9

ments), have been held essentially immune from suit under the law enforcement exception of the Georgia Tort Claims Act. *See e.g. Blackston vs. Georgia Department of Public Safety*, 274 Ga. App. 373 (2005); and *Hilson vs. Georgia Department of Public Safety*, 236 Ga. App. 638 (1999). *But see Georgia Dept. of Public Safety vs. Davis*, (Case No. S08G0722, decided March 27, 2009), where the Supreme Court, in a non-pursuit case, indicated that the law enforcement exception may not apply to all law enforcement related incidents.

(2) Proof of a Waiver of Sovereign Immunity – Plaintiff must plead and prove a waiver of sovereign immunity (O.C.G.A. ''33-24-51 and 36-92-2 incorporate a mandatory waiver of sovereign immunity with current limits of $500,000/$700,000, and a higher waiver to the extent of any liability insurance purchased to cover damages arising from the use of a motor vehicle).

(3) Proof of a Reckless Disregard For Proper Law Enforcement Procedures – Plaintiff must present evidence, usually through expert testimony, that the police officers acted in reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit, pursuant to provisions of O.C.G.A. '40-6-6(d)(2).

Practice Note: This is not a negligence standard, but requires proof of reckless disregard for proper law enforcement procedures.

(4) Proof of Innocent Third Party Victim Status – Plaintiff must be an innocent third party, as the fleeing suspect is not permitted to recover (unless intentional conduct is shown).

The leading cases on police pursuit issues are *Cameron vs. Lang*, 274 Ga. 122(3)(4), 549 SE2d 341 (2001), which generally discusses the immunity issue, and outlines the proof necessary to proceed with a police pursuit case under the reckless disregard standard; and *City of Winder vs. McDougald*, 276 Ga. 866, 583 SE2d 879 (2003) (a 4-3 opinion), in which the Supreme Court limited recovery in police pursuit cases to an innocent party, holding that a fleeing suspect has no cause of action under the reckless disregard standard.

V. History of Georgia Law in Police Pursuit Cases

(1) Prior to 1995, Georgia utilized a negligence standard, providing that an officer pursuing a suspect would not be relieved from the duty to drive with due regard for the safety of all persons. O.C.G.A. '40-6-6(a). In 1994, the Georgia Supreme Court held in *Mixon vs. City of Warner Robins;* 264 Ga. 385, 444 SE2d 761 (1994), that a municipality could be liable for injuries caused by a suspect who was fleeing the police if the officer failed to drive with the requisite due regard for the safety of others, and failed to balance the risk to the safety of other drivers when he persisted in his efforts to arrest [the fleeing suspect] for a minor traffic offense even after [the suspect] had escalated his flight into a high-speed chase in a residential area ... *Id.* at 264 Ga. 391.

(2) In response to *Mixon*, the Legislature in 1995 amended O.C.G.A. '40-6-6(d), by adding subsection (2):

When a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, the law enforcement officer's pursuit shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect unless the law enforcement officer acted with reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit. Where such reckless disregard exists, the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard shall not in and of itself establish causation.

By adopting a reckless disregard standard, in the place of the prior negligence standard, the Legislature limited the circumstances under which an individual injured by a fleeing suspect could recover in a police pursuit case.

(3) The Supreme Court further narrowed the right of an injured individual to recover in *City of Winder vs. McDougald, supra*, by restricting recovery, under provisions of O.C.G.A. '40-6-6(d)(2), to an innocent third party, holding that a fleeing suspect could never recover under the reckless disregard standard, no matter how outrageous the pursuit, and could only recover if the officer acted with an actual intent to cause injury.

(4) Finally, effective January 1, 2005, O.C.G.A. '40-6-6 was further amended by adding subsection (d)(4). After that date, all claims arising out of police pursuits which are brought against local government entities, their officers or other employees, arising out of the negligent or reckless operation of their vehicles, are subject to the provisions of O.C.G.A. '36-92-1, *et. seq.*, which establishes a required waiver of sovereign immunity for all local government entities for losses caused by the negligence of their officers and employees while using a motor vehicle in carrying out official duties of employment, and sets forth procedures for making such claims.

VI. Liability Under 42 U.S.C. '1983

While a municipality or county has potential liability under 42 U.S.C. '1983 for high-speed pursuits, the United States Supreme Court has virtually eliminated this cause of action under either a Fourteenth Amendment substantive due process analysis or a Fourth Amendment unreasonable seizure analysis. *Scott vs. Harris*, 127 S.Ct. 1769 (2007).

Practice Note: While Justice Scalia's opinion in *Harris* has *no* bearing on state law claims brought under O.C.G.A. '40-6-6(d)(2), defense counsel routinely attempt to use it to argue that high-

speed pursuit claims brought under state law should also be dismissed.

VII. Evidence in a Typical High-speed Pursuit Case

In order to pursue a high-speed pursuit case, counsel should send Open Records Act requests to all local government entities and law enforcement agencies involved in the pursuit, and any involved in the subsequent investigation of the pursuit. These requests should seek the applicable policies for high-speed pursuits; all videotape from the pursuing officers' vehicles; all tapes and transcripts of radio communications; all SCRT team reports; all photographs, diagrams, statements or other documents relating to the pursuit and subsequent investigation of the pursuit; any disciplinary reports or other follow-up investigations of the officer's conduct; the complete personnel and training file of the officer; all high-speed pursuit training and instructions provided to the officers; and any other reports, photographs, videos or other documents relating to the pursuit and subsequent investigations into whether the pursuit met department guidelines. Depositions of the individual police officers must be obtained after suit, and an expert retained to prove a reckless disregard for proper law enforcement procedures.

Demonstrative aids should also be used, such as aerial maps and diagrams re-creating the pursuit, a time line of the route of the pursuit, and a map reflecting the hazardous vehicle maneuvers during the pursuit, in order to demonstrate the officer's reckless disregard for proper law enforcement procedures during the pursuit. This type evidence can assist in showing the jury the numerous opportunities the police had to terminate a pursuit prior to a foreseeable collision with an innocent bystander. A re-creation of the route of the pursuit, blown up on a large scale, outlining each point at which the police had an opportunity to weigh the many hazards of continuing the pursuit against the need to apprehend the violator, can graphically demonstrate the manner in which the police officers developed tunnel vision and recklessly continued a pursuit, despite the grave dangers, until a tragic, foreseeable collision occurs.

The model policy adopted by the Georgia Municipal Association in 2006 should also be used in any pursuit litigation. Under these model guidelines, a pursuit is only justified:

> (a) When there is a reasonable suspicion that the driver of that vehicle has committed a violent felony; or (b) when there is evidence of outrageous, reckless driving generally or possibly in association with driving under the influence and these observations precede the officer's intervention through any pursuit mode.

VIII. Conclusion

Most people would agree that a police officer that pulls out his service revolver and starts shooting at a shoplifter running through a crowded mall, causing injury or death to an innocent bystander, has acted with a reckless disregard for proper law enforcement procedures. By analogy, a jury must be educated that high-speed pursuits are even more dangerous, and pose an even greater risk of injury to the public.

High-speed police pursuits cause thousands of needless deaths and injuries on the highways every year. While these cases are challenging from the Plaintiff's standpoint because of the difficult procedural and substantive legal hurdles presented, as well as the inherent pro law enforcement attitudes of most jurors, these obstacles can be overcome by demonstrating *why* police pursuit procedures are necessary for the safety of the public, and by showing that proper law enforcement procedures do not unreasonably hamper legitimate law enforcement, but instead, reduce the risk of needless death or injury to innocent bystanders caused by high-speed pursuits for minor crimes.

High-speed pursuit litigation thus serves two legitimate purposes: It not only assists families who have lost loved ones who were innocent victims of reckless pursuits, but also serves the public good by encouraging safer police procedures.

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