



ALABAMA MUNICIPAL INSURANCE CORPORATION
MUNICIPAL WORKERS COMPENSATION FUND, INC.



Loss Control Division

HIGH-SPEED POLICE PURSUIT

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INTRODUCTION

High-speed police pursuits attract the attention of nearly everyone. Nothing is more

exciting than watching the good guys chase down and apprehend the bad guys. Entertainment companies have begun to cash in on the public's interest in these chases. One national network regularly shows videos of the nation's most dramatic and dangerous high-speed chases.

However, this excitement does not come without a cost. While most chases end without injury, some chases result in severe injuries and casualties to not only the pursued offender but to police officers and members of the general public also. With these injuries and deaths come lawsuits against the police and governmental entities. On occasion, the plaintiff will be the offender who was attempting to escape, and his claim will be that the police should have let him go rather than chase him. More often, the plaintiff will be a pedestrian or a third-party motorist who became entangled in the chase. This person's claim will be that the police should have never initiated the chase or that the police negligently or wantonly conducted the chase.

There is a hot national debate ongoing concerning when, if at all, police should be involved in high-speed pursuits. One side says that police should use their discretion and should not terminate a chase merely because of an increased risk to the public. As support for this position, it is maintained that most persons who flee from apprehension are ultimately charged with a much more severe offense (e.g. kidnaping, trafficking, etc.) than the offense of which the police initially suspected the person. The opposite view is that by chasing an offender, the police magnify the risk of injury to the general public. For example, prior to a police chase, you merely have a drunk driver on the road. Once the chase begins, you have a drunk driver operating his or her vehicle at an extraordinary rate of speed.

Recent decisions; including a United States Supreme Court decision issued five years ago, deferred to officer discretion in high speed pursuit situations. But while a plaintiff's burden of proof may be higher, these cases are still not without risk. Maintenance of a good well-reasoned policy regarding police pursuit is as important as ever.

**GOVERNMENTAL ENTITY AND OFFICER LIABILITY FOR INJURIES
SUSTAINED AS A RESULT OF A HIGH-SPEED POLICE PURSUIT**

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (hereinafter "*Lewis*"), the United States Supreme Court addressed the issue of whether a plaintiff could state a claim under the due process clause of the Fourteenth Amendment to the United States Constitution for injuries received in a highspeed police chase. After concluding that a claim could be stated under the Fourteenth Amendment's substantive due process clause, the court determined the standard of culpability required before officers can be held liable to fleeing motorists or their passengers for injuries sustained.

The United States Supreme Court decided the *Lewis* case on May 26, 1998. The facts of that case are as follows: On May 22, 1990, at 8:30 in the evening, Deputies Smith and Stapp had responded to a dispatch call to break up a fight. *Lewis*, 523 U.S. at 836. After dealing with this situation, Deputy Stapp returned to his patrol car and observed 18-year-old Brian Willard operating a motorcycle at a high rate of speed. *Id.* Willard was carrying 16-year-old Phillip Lewis as a passenger. *Id.* Deputy Stapp turned on his overhead emergency lights, yelled at Willard to stop the motorcycle, and pulled his patrol car closer to Deputy Smith's patrol car in an attempt to block the motorcycle's path. *Id.* Willard, however, was able to maneuver past Deputies Stapp and Smith, and Deputy Smith activated his emergency lights and siren and began pursuing the motorcycle at a high rate of speed. *Id.* at 836-37. As Willard attempted to make a sharp left turn, the motorcycle tipped over. *Id.* at 837. Deputy Smith attempted to stop his patrol car, but he hit passenger Lewis who was killed by the blow. *Id.* Lewis' parents and the representatives of his estate sued Deputy

Smith and the Sacramento County Sheriffs Department under § 1983 for violation of Lewis' Fourteenth Amendment substantive due process right to life. *Id.*

The Court held that when a high-speed police pursuit ends due to the fleeing motorist's loss of control of her vehicle or by the police accidentally crashing into the fleeing offender, there is no seizure under the Fourth Amendment. *Id.* at 843-44. Because the Fourth Amendment only covers searches and seizures, if there is no seizure, the Fourth Amendment's more specific provisions do not apply to the plaintiffs claims. *Id.* However, this does not leave the injured party without a claim. The Lewis court sought to establish the circumstances, under which an injured fleeing driver could recover under the Fourteenth Amendment's Substantive Due Process Clause. The decision, however, does not by any means make the plaintiffs' burden any easier to carry.

Prior to the Court's decision in *Lewis*, ample authority existed for the proposition that a plaintiff who was injured in a high-speed police pursuit could not state a claim under the Fourteenth Amendment's substantive due process clause because the plaintiffs claims fell within the more specific provisions of the Fourth Amendment. However, in *Lewis*, the Court held that the "more specific constitutional provision" rule only applies when the plaintiff's claims are actually covered by a more specific constitutional amendment. *Id.*

The Fourth Amendment to the United States Constitution provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" U.S. Const. Amend. 4. When a high-speed police pursuit ends due to the fleeing motorist's loss of control of her vehicle or by the police accidentally crashing into the fleeing offender, there is no seizure under the Fourth Amendment. *Id.* at 844-45. Because the Fourth Amendment only covers searches and seizures, if there is no seizure, the Fourth Amendment's more specific provisions do not

apply to the plaintiff's claims. *Id.* at 843-44. This, of course, means that cases of this type could not be dismissed under the "more specific constitutional provision" rule and must be analyzed under the substantive due process provisions of the Fourteenth Amendment. In applying a substantive due process analysis to the facts in *Lewis*, the Court found no violation of due process for reasons discussed in more detail below.

A. THE SUPREME COURT'S DECISION IN *LEWIS* DEFINES THE STANDARD OF CONDUCT TO WHICH AN OFFICER IS HELD UNDER THE FOURTEENTH AMENDMENT'S SUBSTANTIVE DUE PROCESS CLAUSE

The Supreme Court in *Lewis* addressed the level of culpability necessary to hold a police officer liable to an injured fleeing motorist or passenger under § 1983 based on a substantive due process analysis. *Lewis*, 523 U.S. at 840-41. Prior to this decision, a split existed among the Circuit Courts of Appeals as to whether the required level of culpability was action by the officer which demonstrated "deliberate indifference or reckless disregard" or that higher level of culpability expressed as conduct which "shocks the conscience." *Id.* at 839-40.

The Supreme Court has "emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government. . . . Our cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be arbitrary in the constitutional sense. . . ." *Id.* at 846 (internal citations and quotations omitted). In determining the level of culpability to impose liability on a police officer involved in a high-speed police pursuit, the Supreme Court drew a parallel between high-speed pursuits and conduct towards prisoners. *Id.* at 852-53.

When government officials are sued by prisoners under the Fourteenth Amendment's substantive due process clause for what the prisoners contend to be unconstitutional prison conditions, a government official can be held liable under § 1983 for deliberate indifference. *Id.* at 851-53. The deliberate indifference standard is used when government officials have the luxury of actually deliberating the consequences of their decisions. *Id.* at 853. In these cases where government officials have had the luxury of actually deliberating the consequences of their actions, being deliberately indifferent to the prisoners' conditions rises to the level of shocking and egregious. *Id.* at 851-53.

However, in situations in which government officials are forced to make decisions in haste, under pressure, and without the luxury of a second chance, a level of culpability higher than deliberate indifference is necessary to establish liability. *Id.* at 853-54. For example, when prison officials are faced with prisoner riots and violent disturbances, liability turns on whether the official's conduct was made in a good faith effort to maintain or restore discipline or whether the official's conduct was malicious and sadistic for the very purpose of causing harm to the prisoners. *Id.* at 853-53. Thus, when government officials are not afforded the luxury of deliberating the consequences of their decisions, the deliberate indifference standard, by definition, does not apply. *Id.* at 853-54. Rather, to be liable, a government official faced with making an immediate decision, must have intended to injure or harm the prisoner. *Id.*

The Supreme Court drew an analogy between prison riot situations and police high-speed pursuit cases. *Id.* at 852-53.

Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against

each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made in haste, under pressure, and frequently without the luxury of a second chance. 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.

Id. at 853 (internal quotations and citations omitted). Because high-speed pursuits call for quick decisions by police officers with little time to deliberate the consequences of their actions, a police officer cannot be held liable under § 1983 unless the officer intended to physically harm the fleeing offender. *Id.* at 854.

The Supreme Court in *Lewis* analyzed the facts of the case to determine if any such intent existed. After enunciating the level of culpability required under § 1983 to hold an officer liable for violating an offending person's substantive due process rights in a police pursuit situation, the Supreme Court noted the following concerning Deputy Smith's level of care:

Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes. Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response. While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce Willard's lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part.

Lewis, 523 U.S. at 855. Importantly, the Supreme Court noted that whether Smith was

liable under other general tort law principles, or whether Smith had followed policies and procedures of sound practice in high-speed chases, he did not intend to injure Lewis, and his conduct did not shock the conscience. *Id.* Therefore, the Supreme Court held that Smith was entitled to summary judgment on the claim under § 1983 for violation of Lewis' substantive due process rights. *Id.*

B. THE SUPREME COURT'S DECISION IN LEWIS STRENGTHENS AN OFFICER'S QUALIFIED IMMUNITY ARGUMENT

The Eleventh Circuit has recognized that some circumstances may indeed exist in which a person's substantive due process rights are violated even when a Fourth Amendment "seizure" does not occur. *Jones v. City of Dothan*, 121 F.3d 1456, 1461 (11th Cir. 1997).

In *Wilson v. Northcutt*, 987 F.2d 719, 722 (11th Cir. 1993), we recognized that under some circumstances, an individual not actually seized by an officer may have a Fourteenth Amendment substantive due process right to be free from excessive force used on them by the officer. Similar to the standard used to evaluate Fourth Amendment excessive force claims, the standard used to evaluate substantive due process excessive force claims looks to a number of factors, including "the need for force and the amount of force used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Again*

similar to the standard used to evaluate Fourth Amendment excessive force claims, this standard does not establish a "bright line" that would readily alert officers to a violation. Therefore, "qualified immunity applies unless the application of the standard would inevitably lead every reasonable [official] in [the officer's] place to conclude the force was unlawful."

Jones, 121 F.3d at 1461 (emphasis added). Thus, the Eleventh Circuit has indicated that officers will be entitled to qualified immunity on claims of substantive due process violations in all situations except those where every reasonable officer would conclude that a violation of substantive due process rights occurred. *Id.* Since the *Lewis* case raises the standard of proof which must be established by plaintiffs seeking recovery under federal due process grounds, those situations in which qualified immunity would not apply are further minimized.

C. THE QUALIFIED IMMUNITY DEFENSE TO FEDERAL CLAIMS

Regardless of the constitutional amendment under which plaintiffs have sought recovery based on injuries in high-speed chases, qualified immunity has often been a primary line of defense against such claims.

A two-part analysis is employed to determine the issue of qualified immunity: At the outset, "[t]he defendant public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir. 1988) (quoting *Zeigler v. Jackson*, 716 F.2d 847 (11th Cir. 1983) (per curiam)). A government official can prove this "by showing objective

circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." *Rich*, 841 F.2d at 1564 (quoting *Barker v. Norman*, 651 F.2d 1107, 1121 (5th Cir. Unit A 1981)).

In regard to this first prong of the qualified immunity inquiry, the Eleventh Circuit has held that "it is axiomatic that a law enforcement officer has the discretionary authority to pursue and apprehend a fleeing suspected offender." *Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1568 (11th Cir. 1992). In *Adams*, the court of appeals held that the officers were clearly acting within the scope of their discretionary authority when they pursued the plaintiff who was driving without a valid license and a warrant for arrest was outstanding. *Adams*, 962 F.2d at 1568.

The second part of the qualified immunity analysis, once the defendant satisfies his burden in the first part, requires the plaintiff to show lack of good faith on the defendant's part. *Rich*, 841 F.2d at 1563-1564. "This burden is met by proof demonstrating that the defendant public official's actions violated `clearly established constitutional laws.'" *Id.* This second prong of the qualified immunity's objective reasonableness test presents two questions: "(1) what was the clearly established law at the time of the deputies' actions, and (2) whether the deputies' conduct violated the clearly established law?" *Adams*, 962 F.2d at 1568; *Rich*, 841 F.2d at 1564. The burden rests with the plaintiff to show that the defendants violated clearly established constitutional laws. However, in high speed chases that end by the fleeing driver losing control of his or her car or by the law enforcement officer accidentally colliding with the fleeing driver, defendants can readily show that their conduct does not violate any clearly established constitutional laws.

An Eleventh Circuit judge has written, "Unless the pursuing officer, despairing of apprehending the pursued safely, deliberately undertakes to bring him into custody by assaulting him with deadly force, I believe that the efforts would be constitutional." *Adams*, 962 F.2d at 1572-1573 (Hill, J.) (concurring) ("A law enforcement officer may pursue one subject to arrest for a crime if he attempts to flee. . . . [T]he law enforcement officer is not constitutionally required to be a mere observer of the flight of his quarry. He can try to cause the pursued driver to bring the car to a stop and submit to custody."). The Sixth Circuit opinion *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986), was cited favorably as an example of a high-speed chase which ended tragically for the fleeing person, although the pursuing police officers merely followed the fleeing person and did not physically use their cars to end the chase. *Id.* (Hill, J.) (concurring).

The author has searched for any case in any jurisdiction in which a police officer who pursued a suspect vehicle but had no physical contact--or only accidental contact--with that vehicle was held liable for the suspect's injuries resulting from the suspect's loss of control of the vehicle. There are no such cases. A reasonable police officer could believe that his or her actions, in chasing a fleeing driver who subsequently loses control of her car, are lawful in light of clearly established law and the information possessed by the police officer at the time the conduct occurred.

D. LEWIS AS APPLIED IN LOUDERMILK V. SCOTTSBORO

In October, 1998 the United State District Court for the Northern District of Alabama discussed the *Lewis* decision in deciding *Loudermilk v. City of Scottsboro, et al*, CV-97-5-2457-NE (October 13, 1998). In *Loudermilk* a driver suspected of driving under the influence was pursued from the City of Scottsboro to the Madison County line, then back

through Scottsboro up Sand Mountain to Pisgah where her car flipped on a curve. As a result of the accident she was rendered a paraplegic.

In granting summary judgment for the defendants, the Court found that the decision to pursue *Loudermilk* was not made arbitrarily nor did the officer's conduct "shock the conscience."

The Court did find a significant difference between the chase in *Lewis* which lasted 75 seconds and the chase in *Loudermilk* which lasted at least 36 minutes. The Court found that the officers in *Loudermilk* had time to make an unhurried decision, unlike the *Lewis* officers. As a result, the *Loudermilk* Court did not apply the "actual harm" standard applied in *Lewis*. The Court determined that the appropriate standard was the "deliberate indifference" standard. As noted by the *Loudermilk* Court, however, that standard is still high.

The Court discussed the competing obligations officers must face in these situations. Is the danger greater if the pursuit is continued or if it is abandoned? To be found responsible for violating the plaintiff's constitutional rights under the deliberate indifference standard, the *Loudermilk* Court held that the officer's conduct must "be characterized as 'an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement to be barred by the Fourteenth Amendment'" *Loudermilk, slip op. at 17*, citing *Lewis*, 118 S. Ct at 1713.

The Court found that even though Scottsboro's officer "had time to consider whether apprehending a suspected DUI offender warranted the dangerous chase . . . the officer was not deliberately indifferent to the risks involved." *Id.* at 17-18. As mitigating factors, the

Court also noted that the officer did not use her vehicle assertively and that when conditions worsened she slowed her chase and fell as much as a half mile behind Loudermilk. *Id.* at 18.

It is important to understand *Loudermilk* as a victory for prudent law enforcement decisions regarding high speed chases, but it also includes a cautionary message regarding reckless judgment or decisions regarding chases that are deliberately indifferent to the risks involved. It is clear from reading *Loudermilk* that if the officer had not demonstrated concerns about the risks of allowing Loudermilk to remain on the road, or if the officer had been reckless or aggressive in the use of her vehicle in the chase, the Court's decision may have been quite different.

E. STATE LAW NEGLIGENCE AND WANTONNESS CLAIMS

In addition to federal claims, plaintiffs often seek recovery in high-speed chase cases based on state law negligence and wantonness theories.

In *Blair v. City of Rainbow City*, 542 So.2d 275 (Ala. 1989), the Supreme Court of Alabama was faced with the state-law claims of a plaintiff who was injured in a high-speed police chase. Late on a Saturday night in 1985, a police officer viewed Blair, who was riding a motorcycle, speeding on Interstate 59. The officer pulled behind Blair and signaled Blair to pull over by turning on his emergency lights and sirens. Blair refused to stop, and the pursuit proceeded through two counties on Interstate 59 and Highway 77. Speeds of up to 120 miles per hour were reached. Blair lost control of his motorcycle at a curve in the road, and he died several days later from his injuries. The supreme court held:

The rule governing the conduct of [a] police [officer] in pursuit of an escaping offender is that he must operate his car with due care and, in doing so, *he is not responsible for the acts of the*

offender. Although pursuit may contribute to the reckless driving of the pursued, the officer is not obliged to allow him to escape.

In [previous cases], the issue was whether the officers were liable for injuries inflicted on a third party by the *fleeing offender*. This case involves injuries suffered by the offender himself. If pursuing officers are not responsible for the actions of the offender if the fleeing offender injures a third party, it is only logical to conclude that officers are also not responsible for the actions of the fleeing offender when he injures himself, as is the case here. The evidence is without contradiction that [Blair] could have slowed down and stopped at any time during the chase; the choice to speed and drive recklessly to evade capture was [Blair's] alone.

Blair v. City of Rainbow City, 542 So. 2d 275, 276 (Ala. 1989). Thus, the supreme court affirmed the trial court's entry of summary judgment in favor of the defendants on the plaintiff's claim of negligence. *Blair*, 542 So. 2d at 277; *but see Seals v. City of Columbia*, 575 So. 2d 1061 (Ala. 1991) (recognizing claims for negligence, wantonness, and negligent or wanton training and supervision against police officer and agency for injuries suffered by third party in collision with pursued vehicle).

F. STATE LAW DISCRETIONARY FUNCTION IMMUNITY

As to a fleeing offender's state law claims, the contours of Alabama's discretionary immunity for municipal officers closely resemble the federal defense of qualified immunity. *See Sheth v. Webster*, 145 F.3d 1231 (11th Cir. 1998); Ala. Code § 6-5-338(a). Discretionary functions under Alabama law are those functions "as to which there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice involving what is just and proper under the circumstances." *Wright v. Wynn*, 682 So. 2d 1, 2 (Ala. 1996). In most situations, discretionary function immunity will serve as a good defense to state law claims arising out of high-speed chases.

LAW ENFORCEMENT AGENCY HIGH-SPEED PURSUIT POLICIES

It is generally advisable for municipal police departments to adopt and implement a high-speed pursuit policy and to train its officers with respect to the policy. Generally, a good written policy contains guidelines for officers as to which factors are conducive to high-speed pursuit and which factors are not conducive to high-speed pursuit. A written policy also normally contains rules concerning when a chase should not be initiated and when a chase should be discontinued. These rules outline the parameters of circumstances under which a high-speed chase should be conducted. Within those parameters, however, there lies an area in which an officer's discretion must be utilized.

Experts in the area of high-speed pursuit complain that many policies fail to address an essential element of high-speed pursuits. This element involves the number of vehicles participating in the high-speed chase, and the interaction of officers from different law enforcement agencies. Some experts stress the need for a commanding officer who is removed from the chase to be in charge of the chase. For example, a commanding officer at headquarters would instruct patrolling officers as to when to initiate a chase and when to discontinue a chase. The rationale behind this is that patrolling officers involved in a chase experience a burst of adrenaline and cannot make rational decisions concerning the chase. A commanding officer who is removed from the excitement may make more rational decisions. Other experts, however, disagree. They argue that the officer who is removed from the chase cannot make informed decisions about the chase because he cannot see the full environment in which the chase is occurring. Policies which take either approach are not likely to be found deficient under the present status of the law. The *Lewis* case provides sufficient discretion for reasonable officers to make "split-second" decisions in the context

of a high-speed chase as long as those decisions are consistent with well-established law.

The League of Municipalities has copies of model high-speed pursuit policies as well as policies from other jurisdictions. It may be well worth your time to review your municipality's high-speed pursuit policy against the backdrop of the *Lewis* decision and other model policies.

MISCELLANEOUS RESOURCES

AELE Law Library of Case Summaries
Civil Liability of Law Enforcement Agencies & Personnel
High-Speed Pursuit
<http://www.aele.org/CC111.html>

"Negligent Vehicular Police Chase," 41 Am Jur Proof of Facts 2d 79.

"The Evaluation of Risk: Initial Cause vs. Final Outcome in Police Pursuits,"
Business, Transportation and Housing Agency
Department of California Highway Patrol
August 1995

This is the most extensive study by a governmental entity of high-speed chases. The study was conducted by M. J. Hannigan, Commissioner of the California Highway Patrol, and Officer K. A. Hawkins, California Highway Patrol. The report analyzes data from actual chases, including the risk to pedestrians and fellow motorists, the initial suspected crime from which the suspect is fleeing, the final charges against the suspect, fatality and injury rates, etc.

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<p>NOTE: This document is not intended to be legal advice. It does not identify all the issues surrounding the particular topic. Public agencies are encouraged to review their procedures with an expert or an attorney who is knowledgeable about the topic. Reliance on this information is at the sole risk of the user.</p>
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