POLICE MUTUAL AID, HOT PURSUIT AND POLICE PITFALLS

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CIVIL LIABILITY CONSIDERATIONS

Police pursuits can lead to colorable claims under both State and Federal law depending upon the circumstances. Federal claims are generally filed under 42 USC Sec. 1983 alleging violation of the injured party’s rights secured under the 4th or 14th Amendments to the United States Constitution. State law claims can be brought in certain circumstances against political subdivisions for willful or wanton operation of motor vehicles by safety forces when responding to “emergency calls”. Employees can be held individually liable for any bad faith, wanton, malicious or reckless misconduct where a duty of care is owed to the plaintiff.

FEDERAL CLAIMS

4TH Amendment

The 4th Amendment to the US Constitution protects against unreasonable searches and seizures. In order to constitute a “seizure” in the context of a vehicular pursuit, the suspect’s freedom of movement must be terminated “through means intentionally applied”. Brower v. County of Inyo 489 US 593 (1989). To be actionable, the seizure must be “unreasonable”. Id. at 599. Actions taken during pursuits that have caused “seizures” under the 4th Amendment include:

- Parking an un-illuminated 18-wheel truck across a road behind a blind curve with vehicle headlights aimed so as to obscure the fleeing suspect’s vision. Id.
- Intentionally ramming a fleeing suspect’s vehicle to terminate a pursuit (the Court found the action was reasonable as a matter of law). Scott v. Harris 550 US 372 (2007)
- Intentionally shooting at the driver of a fleeing vehicle but inadvertently hitting a passenger. Rodriguez v. Passinault 637 F. 3d 675 (6th Cir., 2010)
- Pulling a police vehicle across a road without flashing lights allegedly leaving a motorcyclist and his passenger insufficient time to react. Buckner v. Kilgore 36 F. 3d 539 (6th Cir., 1994)
- Allegedly ramming a fleeing motorcyclist and forcing him into a utility pole. Hockenberry v. Carrollton 110 F. Supp. 2d 597 (ND Oh, 2000)
- Executing a PIT maneuver (forcing the rear wheels of the pursued vehicle sideways until the driver loses control). Again, the court found the action reasonable as a matter of law. Black v. Blue Ash 2010 WL 1027414 (SD Oh, 2010)
Various courts have determined that the following are not “seizures” under the 4th Amendment:

- Shooting at but missing a fleeing suspect. *Adams v. Auburn Hills* 33 F. 3d 515 (6th Cir., 2003)

**14th Amendment**

If no “seizure” is involved then Federal pursuit cases are reviewed under the substantive due process component of the 14th Amendment. The 14th Amendment's due process clause protects against the deprivation of life, liberty or property without due process of law. Substantive due process claims can be pursued only when there is no other Constitutional provision (such as the 4th Amendment) that applies more specifically to the case. *Albright v. Oliver* 510 US 266 (1994); *Graham v. Connor* 490 US 386 (1989). Substantive due process protects against arbitrary governmental action that “shocks the conscience” and is illegal regardless of the process that is afforded. *County of Sacramento v. Lewis* 523 US 833 (1998); *Pearson v. City of Grand Blanc* 961 F. 2d 1211 (6th Cir., 1992).

In *Lewis*, the Court specifically addressed the standard for liability to be applied in substantive due process claims arising from vehicular pursuits. The Court pointed out that the levels of conduct necessary to fulfill the “shocks the conscience” standard will vary from case to case depending on all of the surrounding circumstances.

The Court noted that deliberate indifference to a prisoner’s serious medical needs is sufficient to “shock the conscience” in non-emergency situations. However, the Court found that a far higher standard was required in emergency situations such as vehicular pursuits. The Court referred to previous 8th Amendment cases holding that plaintiffs claiming excessive force in the suppression of prison riots were required to show that the force was applied “maliciously and sadistically for the very purpose of causing harm”. *Whitley v. Albers* 475 US 312 (1986). The Court then adopted a similar standard in vehicular pursuit cases requiring an intent to injure:
Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.

*County of Sacramento v. Lewis, supra at 834.*

Cases of interest interpreting *Lewis* are:

- *Jones v. Byrnes* 585 F. 3d 971 (6th Cir., 2009) - despite multiple violations of departmental policies, failure to call off pursuit after subject extinguished his lights didn't demonstrate an intent to injure an innocent third party struck by the fleeing vehicle.
- *Meals v. Memphis* 439 F. 3d 720 (6th Cir., 2007) - despite multiple violations of departmental policies, failure to call off pursuit didn't demonstrate an intent to injure an innocent third party struck by the fleeing vehicle.
- *Lowder v. Linndale* 2011 WL 1256941 (ND Oh., 2011) - allegations of wantonness and recklessness are insufficient to meet the intent to injure standard articulated in *Lewis*.
- *Black v. Blue Ash* 2010 WL 1027414 (SD Oh, 2010) - officer allegedly lying about nearly being rammed in order to justify a pursuit and statements to the effect that he intended to “take out” plaintiff's car did not raise an issue of fact about intent to injure.
- *Williams v. Bowling* 2008 WL 4397426 (SD Oh, 2008) - plaintiff, a fleeing suspect, produced no evidence that officer intended to injure him when he struck him with a police cruiser.

**Bottom Line on Federal Claims**

In order to succeed on a 4th Amendment excessive force claim arising out of a vehicular pursuit, the plaintiff must show that a “seizure” has occurred through the termination of freedom of movement by means intentionally applied. If the plaintiff proves that a seizure has occurred, determining the reasonableness of the force used is usually, though not always, an issue of fact for the jury to decide at trial.

To succeed on a 14th Amendment substantive due process claim, the plaintiff must show an intent to injure or worsen the plaintiff's legal plight, a much more demanding standard than the 4th Amendment “reasonableness” standard.
In order to hold an individual liable on either claim, the plaintiff must also show that the individual’s actions violated clearly established law. In order to hold a political subdivision liable on either claim, the plaintiff must show that the Constitutional violation was caused by a policy, custom or practice maintained by the political subdivision.

**STATE LAW CLAIMS**

State law claims against political subdivisions and their employees seeking monetary damages for injury, death or loss to persons or property are governed by Ohio’s Political Subdivision Tort Liability Act, RC Ch. 2744. Claims against political subdivisions and their employees are governed by different standards.

**Political Subdivisions**

Political subdivisions are generally immune from claims for injury, death or loss to persons or property unless one of the five immunity exceptions listed at RC Sec. 2744.02(B) applies. *Franks v. Lopez* 69 Ohio St. 3d 345 (1994). One of those immunity exceptions relates to the willful or wanton operation of a motor vehicle by safety forces in response to an “emergency call”. RC Sec. 2744.02(B)(1)(a). Courts have held that virtually any call to duty is an “emergency call” and therefore a vehicular pursuit will almost always qualify. There is slight internal conflict in the statute because the operation of a law enforcement agency or the enforcement or nonperformance of laws is an immune governmental function under RC Secs. 2744.01(C) and 2744.02(A).

The political subdivision’s liability under these conflicting provisions is generally resolved according to whether there was physical contact between the police vehicle and the injured party. If there was physical contact then the operation of the vehicle is implicated and the focus turns to whether there was willful or wanton misconduct, a matter that is up to a jury to decide at trial. If there was no physical contact, courts generally find that the true issue in the case is the decision to pursue or not pursue, an immune law enforcement function.

- *Shalkhauser v. Medina* 2002-Ohio-222

**Employees**

Unlike political subdivisions, the immunity of employees does not depend on the nature of the function they are performing. Instead, as long as a duty of care is owed, employees can be held liable for any conduct that is committed maliciously, in bad faith,
wantonly or recklessly. RC Sec. 2744.02(B)(6)(b). Whether conduct amounts to malice, bad faith, wantonness or recklessness is generally (but not always) a matter for a jury to determine at trial.

Recent Emergency Call Cases

- **Anderson v. City of Massillon**, 2012-Ohio-5711 (Ohio Supreme Court). Plaintiff filed suit after her husband and grandson were killed when their vehicle collided with a fire engine. The court of appeals found that there were issues of fact as to whether the firefighters were reckless. As to the city, the court held that the terms willful and wanton were “functional equivalents” of reckless. The city and employees appealed to the Supreme Court objecting to the “functional equivalent” standard adopted by the appellate court. The Supreme Court held that the terms “willful,” “wanton” and “reckless” have separate meanings under the law.
  - “Willful misconduct” implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury.
  - “Wanton misconduct” is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result.
  - “Reckless conduct” is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another which is unreasonable under the circumstances and substantially greater than negligent conduct.

- **Smith v. McBride**, 130 Ohio St.3d 51 (2011). The Court found that a responding officer may provide assistance to another law enforcement officer regardless of the existence of a mutual-aid agreement. The Court further held that immunity under R.C. Chapter 2744 is not conditioned on the existence of a mutual-aid agreement. Because the plaintiff did not appeal portions of the lower court decisions finding that the officer did not operate his vehicle in a willful or wanton manner, the Court found that summary judgment in favor of Clinton Township was proper.

- **Swint v. Auld** 2009-Ohio-6799 (1st Dist.). Plaintiff filed suit after being attacked by a dog claiming that a police officer failed to assist during the attack. Specifically, plaintiff claimed that the officer acted wantonly and willfully when he positioned his car in such a way as to discourage bystanders from assisting the
plaintiff. The appellate court voiced some skepticism on the issue of whether parking could be considered operation of the vehicle. In any event, the court found that there were no allegations that could make out willful or wanton misconduct so it determined that the village was entitled to immunity.

- **Whitley v. Progressive Ins. Co.** 2010-Ohio-356 (1st Dist.). Plaintiffs argued that the conduct of a deputy responding to an emergency call was willful and wanton per se because the deputy failed to activate his lights and sirens and, as a result, should not have been permitted to enter an intersection against a red traffic signal. The court rejected this argument, holding that a driver of an emergency vehicle does not automatically lose immunity under R.C. Chapter 2744 by failing to activate the vehicle’s lights or siren on an emergency run.

- **Moore v. Honican** 2011-Ohio-2109 (1st Dist.). Plaintiff was seriously injured when his disabled pickup truck was struck by a cruiser operated by a sheriff’s deputy. The deputy had been utilizing his mobile data computer to investigate a van operated by a potential intoxicated driver with a license plate that was not illuminated. The van, which obstructed the deputy’s view, swerved to avoid the truck leaving the insufficient time to react. The appellate court held that the deputy was on an emergency call because it was undisputed that the license plate light on the van was not working thus giving rise to a call to duty for a potential traffic violation. However, the court held that there were issues of material fact as to whether the deputy’s actions were wanton or willful. In particular, there was evidence that the deputy had taken his eyes off the road for as long as 30 seconds while driving 60-65 mph and the deputy did not brake or take evasive action. Thus, the court held that summary judgment in favor of the deputy and the county was improper.

- **Mashburn v. Dutcher**, 2012-Ohio-6283 (5th Dist.). A volunteer firefighter was responding to a multi-vehicle accident in his personal vehicle with lights and siren activated. The firefighter was traveling 60 mph in a 55 mph zone and moved left of center to pass vehicles. He successfully passed two vehicles, but a third vehicle proceeded to make a left hand turn in front of him causing a collision and the death of the third vehicle’s driver. Plaintiff filed suit against the firefighter and the joint fire district for which he worked alleging that the firefighter acted recklessly and wantonly. The trial court granted summary judgment to both the firefighter and the fire district and the appellate court affirmed. The court noted that there was no evidence that the firefighter failed to utilize his lights and siren, no evidence that the he violated any departmental
policies or regulations and no evidence that he violated any provisions of Ohio law.

- **Burlingame v. Burlingame** 2011-Ohio-1324 (5th Dist.). Plaintiffs’ decedents were killed when their van was struck by a 20-ton fire truck travelling at 40 mph through a red light. The siren on the fire truck malfunctioned while en route so the driver of the fire truck utilized his air horn and mistakenly believed that he had a green light when he entered into the intersection where the collision occurred. The trial court granted summary judgment, but the appellate court reversed finding that the firefighter’s alleged violations of traffic statutes and departmental policies were factors that a jury could consider to determine that the officer’s conduct was reckless.

- **Iannuzzi v. Harris** 2011-Ohio-3185 (7th Dist.). A sheriff’s deputy claimed that he clocked a vehicle travelling at 59 miles per hour in a 45 mile-per-hour zone. As he pulled out into traffic, a vehicle driven by Plaintiff collided with the deputy’s patrol car. A witness to the accident testified that he did not observe any speeding vehicles in the area of the accident. The witness also testified that the patrol car’s lights were activated but he did not hear a siren. The court of appeals concluded that the witness’ testimony raised a genuine issue of material fact as to whether the deputy was responding to an emergency call. Therefore, summary judgment was denied to the county. Nevertheless, the deputy was entitled to immunity pursuant to R.C. 2744.03(A)(6) because the plaintiff failed to allege in the complaint that the deputy acted with malice, in bad faith, wantonly or recklessly.

- **Adams v. Ward** 2010-Ohio-4851 (7th Dist.). A police officer was involved in a vehicular pursuit of a suspected felon. The officer was traveling westbound at approximately 45 mph with his lights and siren activated as he approached an intersection where he faced a red light. Neither the suspect nor the officer stopped for the red light. However, the officer slowed down to around 40 mph and he checked to make sure there was no cross traffic approaching prior to running the red light. The officer was partially through the intersection when plaintiff’s car, traveling northbound, collided with the officer’s cruiser. The trial court granted summary judgment to the officer and the city. The court of appeals affirmed. While there was diminished visibility at the time of the accident and the officer did not strictly comply with the city’s pursuit policy, the court determined that the officer did not take an unreasonable risk during the pursuit. The court noted that the officer was traveling at most 10 mph over the speed
limit, his lights and sirens were activated, he was familiar with the road, he slowed through the intersection, he attempted to assure that he had clear passage and it was daylight on a clear, dry day.

• *Spain v. Bentleyville* 2009–Ohio–3898 (8th Dist.). Plaintiff was walking down the street when he was struck by a police cruiser that was left of center. The police officer operating the vehicle was engaged in routine patrol of the village and became distracted by a camera case that fell off the car seat causing the vehicle to travel left of center. The officer looked back at the road just before he struck the plaintiff. The trial court denied summary judgment on immunity grounds and the appellate court affirmed. The court stated “we cannot logically construe the term ‘emergency call’ to include the performance of basic patrol duties. To do so would make the exception for police officers on ‘emergency calls’ to swallow the general rule that a political subdivision may be held liable for injury caused by its employees’ negligent operation of motor vehicles.”

• *Perlberg v. Cleveland* 2009–Ohio–1788 (8th Dist.). Plaintiff filed suit after being involved in a collision with an ambulance at an intersection. At the time, the ambulance was on its way to pick up a patient and had its lights and sirens activated. The ambulance was traveling at 35 mph prior to entering the intersection but slowed to 15 mph through the intersection. The ambulance driver stated that he looked both ways before proceeding through the intersection, honked his horn and that all traffic yielded to the ambulance. Plaintiff testified that he did not hear sirens from the ambulance and did not see it until it was directly in front of him immediately before he struck it. The trial court denied summary judgment for the city, and the city appealed. The appellate court reversed. The court held that the paramedics were on an emergency call, even though they were not transporting a patient at the time of the accident. Further the court held that the paramedics did not act willfully or wantonly.

• *Longley v. Thailing* 2009–Ohio–1252 (8th Dist.). Plaintiff filed suit alleging negligence but not willful or wanton misconduct after she was rear-ended by a police officer on the highway. At the time of the accident the officer was concluding the investigation of a motorist stopped in the breakdown lane. The court of appeals held that the officer was still engaged in an emergency call as he was leaving the investigation and re-entering the flow of traffic. Accordingly, the city was immune because R.C. §2744.02(B)(1)(a) provides a complete defense for negligence that occurs while an officer is responding to an emergency call.
• *Stevenson v. Prettyman* 2011-Ohio-718 (8th Dist.). Plaintiff filed suit against a city and a police officer claiming that she was injured in a collision with a police cruiser that was transporting a prisoner to a hospital. Plaintiff claimed that the officer failed to stop at an intersection with a flashing red light while the officer claimed that he did stop. Notably, the plaintiff did not dispute that the officer acted with caution and did not include any allegations regarding the officer’s speed. The court found that the officer was engaged in an emergency call and, because the plaintiff did not meet her burden to show that the officer acted willfully or wantonly, both he and the city were entitled to summary judgment.

• *Campbell v. Massucci* 2010-Ohio-4084 (11th Dist.). The court held that a genuine issue of material fact existed as to whether a fire fighter acted willfully or recklessly while driving to a brush fire in his own vehicle which was not equipped with lights and siren with the knowledge that the brush fire was not endangering any lives.

**Bottom Line on State Law Claims**

If there is no physical contact between the law enforcement vehicle and the injured party, the political subdivision is likely immune. If there is physical contact, the political subdivision can be held liable for willful or wanton misconduct by its employee. In either scenario an employee of a political subdivision can be held liable for malicious, bad faith, wanton or reckless misconduct. The existence of malicious, bad faith, wanton, reckless or willful misconduct is generally, but not always, an issue for the jury. Evidence that can lead to questions of fact concerning malicious, bad faith, wanton, reckless or willful misconduct includes:

• Excessive speed
• Improper lane usage
• Violation of internal pursuit policies prohibiting caravanning, shadowing, ramming, barricading, shooting at fleeing vehicles, use of unmarked vehicles, etc
• Violation of state statutes concerning use of lights and sirens
• Violation of state statutes concerning approaches to intersections