

1993

# Mary Day v. The State of Utah : Brief of Appellee

Utah Court of Appeals

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UTAH COURT OF APPEALS  
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BRIEF

IN THE UTAH SUPREME COURT

DOCKET NO.

93-0135 CA

MARY DAY,

Plaintiff-Appellant,

v.

THE STATE OF UTAH, by and  
through the UTAH DEPARTMENT  
OF PUBLIC SAFETY; THE UTAH  
HIGHWAY PATROL; KEN COLYAR;  
SALEM CITY CORPORATION; a  
municipal corporation of the  
State of Utah; BRAD JAMES;  
SPANISH FORK CITY CORPORATION,  
a municipal corporation of  
the State of Utah; ED ASAY;  
PUBLIC ENTITIES 1-3; and  
JOHN DOES 1-8,

Defendants-Appellees.

Case No. [REDACTED]  
Priority 15

93-0135-CA

BRIEF OF STATE APPELLEES

Appeal from a Judgment of the Third Judicial  
District Court, Salt Lake County, State of Utah,  
the Honorable Richard H. Moffat presiding

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MAR 5 1993

COURT OF APPEALS

IN THE UTAH SUPREME COURT

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MARY DAY,	:	
Plaintiff-Appellant,	:	
v.	:	Case No. 920438
	:	Priority 15
THE STATE OF UTAH, by and	:	
through the UTAH DEPARTMENT	:	
OF PUBLIC SAFETY; THE UTAH	:	
HIGHWAY PATROL; KEN COLYAR;	:	
SALEM CITY CORPORATION; a	:	
municipal corporation of the	:	
State of Utah; BRAD JAMES;	:	
SPANISH FORK CITY CORPORATION,	:	
a municipal corporation of	:	
the State of Utah; ED ASAY;	:	
PUBLIC ENTITIES 1-3; and	:	
JOHN DOES 1-8,	:	
Defendants-Appellees.	:	

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IN THE UTAH SUPREME COURT

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MARY DAY,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	Case No. 920438
	:	Priority 15
THE STATE OF UTAH, by and	:	
through the UTAH DEPARTMENT	:	
OF PUBLIC SAFETY; THE UTAH	:	
HIGHWAY PATROL; KEN COLYAR;	:	
SALEM CITY CORPORATION; a	:	
municipal corporation of the	:	
State of Utah; BRAD JAMES;	:	
SPANISH FORK CITY CORPORATION,	:	
a municipal corporation of	:	
the State of Utah; ED ASAY;	:	
PUBLIC ENTITIES 1-3; and	:	
JOHN DOES 1-8,	:	
	:	
Defendants-Appellees.	:	

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BRIEF OF STATE APPELLEES

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STATEMENT OF JURISDICTION

Jurisdiction over this appeal is conferred upon the Utah Supreme Court by Utah Code Ann. § 78-2-2(3)(j) (Supp. 1992), providing for appellate jurisdiction over "orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original jurisdiction."

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

1. Whether the State should be subjected to liability for personal injuries caused by a collision with a vehicle whose driver was being pursued by a Utah Highway Patrol trooper for actual or suspected violations of the law.

This issue encompasses the following sub-issues:

a. Whether a law enforcement officer pursuing a suspect owes a duty to protect third parties from harm from a collision with the pursued's vehicle.

b. Whether the law enforcement officer's pursuit of a suspect is the legal cause of a collision with the vehicle driven by the suspect.

2. Whether, even under a gross negligence standard, the trial court properly granted summary judgment to the State against Day on her claims for injuries arising from a collision with the Floyd vehicle.

3. Whether the State defendants are, by statute, immune from liability for injuries arising from a collision with a vehicle under pursuit by a law enforcement officer?

a. Whether Day's claims are governed by the statute in effect on the date of the accident, even though her notice of claim against the State was not deemed denied until after the statute was repealed.

b. Whether the State is immune from liability for Day's claims even under the version of the statute in effect after her notice of claim against the State was deemed denied.

4. Whether the statute granting governmental entities immunity from liability for claims arising from a collision with a vehicle under police pursuit deprived Day of a remedy protected by the open courts clause of the Utah Constitution.

5. Whether the statute granting governmental entities

immunity from liability for claims arising from a collision with a vehicle under police pursuit violates the equal protection guarantee of the Utah Constitution.

6. Whether the statute granting governmental entities immunity from liability for claims arising from a collision with a vehicle under police pursuit violates the due process clause of the Utah Constitution.

7. Whether the State defendants are immune from liability for Day's claims under the discretionary function exception to the State's statutory waiver of immunity for negligence claims.

Standard of Review: All of the above issues are questions of law, upon which the trial court's decisions are accorded no deference and are reviewed for correctness. Allen v. Prudential Property & Cas. Ins. Co., 839 P.2d 798, 800 (Utah 1992) (reviewing summary judgment).

#### DETERMINATIVE PROVISIONS

Determinative provisions are reproduced in Addendum D to this Brief.

#### STATEMENT OF THE CASE

##### Nature of the Case

This is an appeal from a final judgment dated August 13, 1992 of the Third Judicial District Court, Salt Lake County, Utah, the Honorable Richard H. Moffat presiding, granting summary judgment to the City defendants on plaintiff's claims for personal injury and wrongful death arising from an automobile collision

involving a car that was being pursued by various law enforcement officers. Summary judgment had previously been granted on August 12, 1992 to the State defendants on all of plaintiff's claims. Day's claims against Officers James and Asay in their personal capacities had been dismissed on July 15, 1992, and her claims against Trooper Colyar in his personal capacity had been dismissed on April 14, 1992.

#### Course of the Proceedings and Disposition Below

Plaintiff filed her complaint on October 23, 1991. The defendants answered the complaint, denying all material allegations, and discovery ensued. In December 1991, UHP Trooper Colyar filed a motion for partial summary judgment on the ground that he was immune from personal liability under the Utah Governmental Immunity Act. In February 1992, all State defendants filed a motion for summary judgment on the ground that, by statute, they were immune from liability for injuries caused by a collision with a vehicle operated by a suspect under pursuit and that they owed no duty to the plaintiff or her decedent to control the conduct of a fleeing suspect. In March 1992, Salem City police officer James and Spanish Fork police officer Asay filed a motion to dismiss plaintiff's claims against them. In April 1992, based upon Colyar's motion, the court dismissed the plaintiff's claims against Colyar in his personal capacity. In May 1992, all City defendants filed a motion for summary judgment on all of plaintiff's claims and the remaining State defendants filed a motion for partial summary judgment on the ground that they were

immune from liability for plaintiff's claims under the discretionary function exception to the general statutory waiver of governmental immunity for negligence claims. In June 1992, with leave of court based upon the stipulation of the parties, plaintiff filed an amended complaint. In July 1992, the court granted James's and Asay's motion to dismiss. After full briefing and oral argument, the court granted remaining defendants' motions for summary judgment. The court entered an order dismissing the claims against the State defendants on August 12, 1992 and the claims against the City defendants on August 13, 1992. The notice of appeal was filed on September 10, 1992.<sup>1</sup>

#### Statement of Facts

For purposes of the State's motion for summary judgment, the following facts were undisputed and are set forth in the light most favorable to the plaintiff, the non-moving party.

On March 18, 1991, at 6:01 p.m., a vehicle operated by Steven Edward Floyd ran a red light at the intersection of University Avenue and East Bay Boulevard in Provo, Utah, and collided with a vehicle in which Boyd K. and Mary Day were riding. R. 767. Mr. Day was killed and Mrs. Day seriously injured in the collision. At the time of the collision, Floyd was attempting to flee Utah Highway Patrol Trooper Ken Colyar.

The pursuit had begun approximately 15 minutes earlier after Trooper Colyar attempted to stop the vehicle for a speeding

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<sup>1</sup>Plaintiff did not appeal the orders dismissing her claims against Colyar, James or Asay in their personal capacities. R. 563.

violation on I-15 near Santaquin, Utah. R. 628-33, 639-43. In response to those attempts, the vehicle, a black Buick Regal, sped up, exited the freeway at Santaquin, ran a stop sign at the bottom of the off-ramp and sped north on SR-6. R. 639-46.

After Floyd ran the stop sign, Trooper Colyar turned on the overhead lights and siren on his marked patrol car, R. 643, 647, and followed Floyd along SR-6, a two-lane rural highway, through the hamlets and small towns of Spring Lake, Payson, Salem and Spanish Fork. Trooper Colyar did not get close enough to read Floyd's license plate until two miles south of Payson. R. 640, 860.

The speeds of the two vehicles varied over the course of the pursuit. A top speed of 120 m.p.h. was reached at the beginning of the pursuit between the freeway and Spring Lake, R. 651, but then varied between 60 and 110 m.p.h. on the open stretches of highway. R. 656, 660, 609, 929. The vehicles slowed to 30 m.p.h. for a 90 degree right-hand turn on Main Street in Payson and to as little as 15 or 20 m.p.h. at other times in the towns. R. 683, 929, 1050. Although speeds reached 65 m.p.h. in Spanish Fork, most of the time they were well below that. R. 770, 771.

Some of the traffic pulled off the road to get out of the way as the two vehicles approached. R. 1040, 1051-52. Floyd passed other vehicles on both the left and right, but slowed for traffic when necessary and, except for his speed, Trooper Colyar did not consider Floyd to be driving in an unsafe manner. R. 652,

665, 925. Trooper Colyar followed, but passed other vehicles only on the left. R. 663.

There were no traffic lights in Spring City or Salem. The only traffic light in Payson was green when Floyd and Colyar passed through. With no other cars at either intersection, Floyd ran two red lights in Spanish Fork. R. 771. Trooper Colyar came to a complete stop at the first red light and allowed another car to pass through the intersection; the second light was green by the time Colyar reached it. R. 772.

After leaving Spanish Fork, Floyd headed toward the freeway. R. 773. As he attempted to enter the on-ramp, Floyd's vehicle hit the front-end of a semi-truck, spun around and came to a stop. R. 773-75. Floyd then turned to go back up the on-ramp, while Trooper Colyar drove along the left side of Floyd's car, attempting to steer Floyd toward SR-114, where Utah County Sheriff's Deputies were setting up tire rippers. R. 775-76, 780, 889, 949, 959, 965. Colyar was forced to back off, however, to avoid being rammed when Floyd swerved his car sideways toward Colyar. R. 776. Trooper Colyar considered ramming Floyd's car, but decided that the circumstances did not warrant the use of deadly force.<sup>2</sup> R. 776, 790, 890. Floyd reentered the northbound interstate, where Colyar continued the pursuit, intending to keep Floyd in sight while tire rippers were set up ahead on the

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<sup>2</sup>The vehicle pursuit policy of the Department of Public Safety provided that "[t]he use of forcible stops such as roadblocks, ramming, boxing-in and channelization are a last resort measure and should be evaluated by the officer in a similar fashion as the use of deadly force." R. 425.



interstate. R. 776, 800, 803-04, 870, 966, 968. Although Floyd wove around traffic in all three lanes and occasionally used the emergency lane, Trooper Colyar remained in the left hand lane. R. 788, 802-03. Floyd exited the freeway at University Avenue in Provo and collided with the Day vehicle.

After the pursuit ended, Colyar confirmed that, as he had suspected, the vehicle driven by Floyd was stolen. R. 692, 862. Floyd, whose identity was unknown throughout the pursuit, R. 887, was identified as a 16-year-old runaway from a half-way house in Las Vegas, Nevada, where he had been serving probation for convictions of grand larceny, grand auto theft and burglary. R. 1004. Floyd was convicted of manslaughter in the death of Mr. Day. R. 1085.

Trooper Colyar had received training in high-speed driving techniques both in 1989 at the Peace Officer Standards & Training Academy and in July 1990 at the Utah Highway Patrol Mustang school. R. 590, 595. Colyar had also been trained on the Utah Department of Public Safety vehicle pursuit policies and procedures which had first been adopted in 1987 and were in effect in March 1991. R. 423-26, 598. Those policies were:

It is the policy of the Department of Public Safety to identify and apprehend violators of the criminal law. Pursuit driving is necessitated by the suspects [sic] disregard for the law and the safety of others, and the responsibility charged to law enforcement officers to apprehend such persons.

Sworn officers of the department shall conduct pursuits in compliance with Title 41-6-14 UCA, sound professional judgement and the procedures outlined in this policy.

The vehicle pursuit procedures provided, inter alia, that "[t]he initiating officer may terminate the pursuit when . . . [i]n the opinion of the pursuing officer(s) or a supervisor, the danger created by continuing the pursuit out weighs [sic] the need for an immediate apprehension." R. 423-26. A complete copy of the Department of Public Safety vehicle pursuit policy is set forth at Addendum E to this Brief.

#### SUMMARY OF ARGUMENT

Day has no statutory right to recover against Trooper Colyar or the State for injuries resulting from the collision with the vehicle driven by Floyd, and sound public policy considerations weigh against conferring any such right as a matter of common law. Even if a gross negligence standard were applied, however, the trial court properly granted summary judgment on the ground that the undisputed facts taken in the light most favorable to Day were insufficient to support a finding that Trooper Colyar was grossly negligent in pursuing Floyd. Day's claims should not be submitted to a jury in any event because the State is immune from liability for injuries arising from the operation of an emergency vehicle. The law in effect on the date of Day's accident applies to her claims no matter when her notice of claim against the State was denied or deemed denied; however, even if the later version of the immunity act is applied, the State is immune. The statutory immunity for injuries arising out of the operation of emergency vehicles does not abrogate any of Day's rights under the open courts clause; nor does it violate equal protection or due process

principles. Finally, the State is also immune under the discretionary function exception to the statutory waiver of immunity for injuries caused by the negligence of a governmental employee.

#### ARGUMENT

##### POINT I

#### TROOPER COLYAR HAD NO STATUTORY DUTY TO PROTECT THIRD PARTIES FROM FLOYD'S NEGLIGENCE OR RECKLESSNESS

In arguing that the State should be held liable for the injuries caused by the collision, Day relies on the Utah Emergency Vehicle statute, Utah Code Ann. § 41-6-14 (1988).<sup>3</sup> That statute, however, merely provides a defense to a claim of liability, not a basis for a claim of liability in the first instance. The statute merely grants privileges and defines the scope of those privileges, leaving the question of the scope of the operator's affirmative duty to the courts to decide under the principles of common law. The statute provides:

- (1) The operator of an authorized

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<sup>3</sup>In the memoranda submitted below and Day's opening brief, the issue of whether Day had stated a valid prima facie claim was addressed in the context of determining whether the immunity statute deprived Day of a remedy protected by the open courts clause. This Court, however, has stated that the "proper mode of analysis is to first consider whether there is a legal theory upon which suit can be brought . . . before considering the separate and independent questions of whether the [defendant] is immune." Rollins v. Petersen, 813 P.2d 1156, 1162 n.3 (Utah 1991) (addressing the question of whether the defendants owed a duty to the plaintiff before reaching immunity issue). Therefore, the State defendants address this issue at the outset.

emergency vehicle,<sup>4</sup> when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges under this section, subject to Subsection (2).

(2) The operator of an authorized emergency vehicle may:

(a) park or stand, irrespective of the provisions of this chapter;

(b) proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

(c) exceed the maximum speed limits if the operator does not endanger life or property; or

(d) disregard regulations governing direction of movement or turning in specified directions.

(3) Privileges granted under this section to an authorized emergency vehicle apply only when the vehicle sounds an audible signal under Section 41-6-146, or uses a visual signal as defined under Section 41-6-132, which is visible from the front of the vehicle.

(a) The privileges under this section do not relieve the operator of an authorized emergency vehicle from the duty to operate the vehicle with regard for the safety of all persons, or protect the operator from the consequences of an arbitrary exercise of the privileges.

Utah Code Ann. § 41-6-14 (1988) (emphasis added). Nothing in the above language imposes liability or suggests that it was intended to be applied as a remedial statute to impose an affirmative duty upon the operator of an emergency vehicle. Had the legislature intended to impose such a duty, it easily could have said so expressly. See Niblock v. Salt Lake City, 100 Utah 573, 111 P.2d

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<sup>4</sup>Utah Code Ann. § 41-6-1 (1988) defines "authorized emergency vehicle" as "fire department vehicles, police vehicles, ambulances, and other publicly or privately owned vehicles as designated by the commissioner of the Department of Public Safety."

800, 804 (1941) (while the rule that statutes in derogation of common law must be strictly construed has been abrogated in this state, nevertheless, if the liability imposed on city by statute is limited to failure to keep its streets in repair and unobstructed, extension of liability further than clear intendment of statute is precluded); Stanton Transp. Co. v. Davis, 9 Utah 2d 184, 341 P.2d 207, 210 (1959) (statutes are to be liberally construed to give effect to their purpose and promote justice but they are not to be distorted beyond the intent of the legislature).<sup>5</sup>

Contrary to Day's contention, no Utah case has construed section 41-6-14 to impose any duty upon a pursuing officer.<sup>6</sup> Although courts in other jurisdictions have construed their emergency vehicle statutes to impose a duty, those statutes are significantly different from section 41-6-14. Whereas section 41-6-14(3)(a) states that the privileges do not relieve an emergency

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<sup>5</sup>Under a bill proposed in the current legislative session, S.B. No. 79, the phrase "if the operator does not endanger life or property" would be deleted from subsection 2(c) of section 41-6-14 and subsection 3(a) would be entirely deleted. A new subsection 4 would be added providing that the privileges granted to the operator of an emergency vehicle "involved in any vehicle pursuit" would apply only when (1) the operator sounds both audible and visual signals, (2) the public agency employing the operator has in effect a written vehicle pursuit policy, (3) the operator has been trained in accordance with the policy and (4) the policy conforms with standards established by the Department of Public Safety. If adopted, these amendments add further support to the State defendants' interpretation of this section.

<sup>6</sup>The only language in the Utah cases cited by Day that appears to indicate to the contrary is in the concurring opinion of Justice Crockett in Cornwall v. Larsen, 571 P.2d 925, 929 (Utah 1977), in which he inaccurately restates Justice Ellett's concurring opinion as stating that the statute "imposes" the duty to exercise reasonable care. This language simply does not bear the weight Day attempts to place upon it.

vehicle operator "from the duty to operate the vehicle with regard for the safety of all persons, or protect the operator from the consequences of an arbitrary exercise of the privileges," other statutes provide that the operator shall not be relieved of the duty to operate the vehicle with "due regard" and shall not be protected from the consequences of "reckless disregard" for the safety of others. See, e.g., 47 Okla. Stat. 1981 § 11-106 (quoted in Kelly v. City of Tulsa, 791 P.2d 826, 827 (Okla. App. 1990)). The absence of recognized standard-of-care language from the Utah statute further evidences the legislature's intent to leave the duty question to the courts. Thus, the cases Day cites which rely upon the "due regard" or "reckless disregard" language in emergency vehicle statutes to find a duty are inapposite here. See, e.g., Fiser v. City of Ann Arbor, 339 N.W.2d 413, 416-17 (Mich. 1983); Mason v. Bitton, 534 P.2d 1360, 1362 (Wash. 1975).

Even where emergency vehicle statutes are construed to impose a duty on the operator, many courts have declined to extend that duty to the protection of third parties from the negligent or reckless conduct of a person under police pursuit. In Kelly v. City of Tulsa, 791 P.2d 826 (Okla. Ct. App. 1990), for example, the plaintiff sued Tulsa City for the wrongful death of his mother who was killed in a head-on collision with a vehicle driven by a suspected drunk driver being pursued at high speeds over surface streets by a city police officer. The plaintiff alleged that the city failed to properly train and supervise the officer, that the officer failed to comply with policies and procedures regarding

pursuit and that the officer operated his vehicle with reckless disregard for the decedent's safety.

On appeal from a summary judgment for the city, the court analyzed the duty imposed by Oklahoma's emergency vehicle statute, stating:

Plaintiff's theory of negligence is not based on the operation of an emergency vehicle. Raglund [the suspected drunk driver] did not accelerate because an emergency vehicle was being driven in an exempt manner. If a fire engine or ambulance had been speeding or running stop signals, he would likely have moved out of the way as required by law. Raglund accelerated because a police officer was signaling him to stop. Plaintiff's real objection is to [the officer's] decision to initiate and continue police pursuit. This is not the consideration addressed by sections 11-106 and -405.

Id. at 828 (emphasis in original). Thus, "absent evidence that the emergency vehicle itself was being driven in an unsafe manner," the statute provided no basis for the city's liability. Id. See also Thornton v. Shore, 666 P.2d 655, 668 (Kan. 1983).

Thus, Trooper Colyar had no duty under section 41-6-14 to protect third parties from the negligence or recklessness of Floyd.

## POINT II

### SOUND PUBLIC POLICY WEIGHS AGAINST IMPOSING LIABILITY ON A PURSUING OFFICER FOR INJURIES CAUSED BY A COLLISION WITH THE VEHICLE OPERATED BY THE PURSUED

In arguing that the State should be held liable for the injuries caused by the collision with Floyd, Day overlooks a substantial body of authority holding that, for public policy reasons, a governmental entity or employee may not be held liable

for injuries caused by a person being pursued by a peace officer. Some courts address the issue as a proximate cause question; others analyze it as a question of duty.

For example, having found no statutory duty, the court in Kelly v. City of Tulsa went on to address the proximate cause element of the plaintiff's claim:

Second, we find that the officer's pursuit in this case was not, as a matter of law, the proximate cause of the accident. Where the facts of a case are undisputed, the issue of proximate cause is a question for the court. Again, the majority of jurisdictions addressing this issue refuse to impose liability on the officer for the independent acts of a law offender. The law allows police pursuit of fleeing violators as a matter of public policy; the benefit of apprehending these individuals outweighs the ordinary risks inherently involved in such pursuit. Unlike the cases relied upon by Plaintiff, the undisputed facts in this case show that Dunlap's pursuit was not so extreme or outrageous as to pose a higher threat to public safety than ordinarily incident to high-speed police pursuit.

Id. at 829 (citations omitted). Thus, "the pursuit did not create a condition for which liability may be imposed." Id.

The same conclusion was reached by the court in Thornton v. Shore, 666 P.2d 655 (Kan. 1983):

The privileges and immunities granted to police officers under K.S.A. 8-1506 would indeed be hollow if the test of due care (or due regard as used in the statute) were extended to include the acts of the fleeing motorist whom the officer is trying to apprehend. The net effect of such an extension would be to make the officer the insurer of the fleeing violator, be he or she a mentally deranged person, prison escapee, murderer, drug addict or drunk.



Id. at 661-62. Perhaps more importantly, construing the emergency vehicle statute to impose liability for the conduct of the pursued would "thwart the public policy purpose of the statute." Id. at 667-68 (noting the "strong public policy to remove drunken drivers from Kansas roads").

Thus, the court affirmed a summary judgment dismissing the plaintiffs' claims for the wrongful death of two persons killed in a collision with a Jeep whose driver was being pursued after an officer had attempted to stop him for speeding. The driver was later determined to have consumed beer and smoked marijuana the evening before the early morning accident. Id. at 657-58. See also United States v. Hutchins, 268 F.2d 69 (6th Cir. 1959) (applying Tennessee law) (United States not liable for personal injuries sustained by 14-year-old passenger in vehicle operated by suspected drunk driver who collided with another vehicle while being pursued by federal law enforcement officers); State of West Virginia v. Fidelity & Casualty Co. of N.Y., 263 F. Supp. 88, 90-91 (D. W. Va. 1967) (applying West Virginia law) (absent evidence of "utter willful, reckless, disregard for the life and property of third parties," officer not liable for personal injuries caused by collision with stolen vehicle driven by prison escapee pursued at high-speeds through urban streets); Chambers v. Ideal Pure Milk Co., 245 S.W.2d 589 (Ky. App. 1952) (police officers not liable for personal injuries sustained by driver of milk truck in collision with vehicle under high-speed pursuit); Stanton v. State, 285 N.Y.S.2d 964, 969-70 (N.Y. App. Div. 1967), affirmed, 259 N.E.2d

494, 495 (NY 1970) (officer not liable for personal injuries caused by collision with vehicle driven at night without headlights while pursued at speeds exceeding 100 m.p.h. in southbound direction in northbound lane of highway); Lewis v. Bland, 599 N.E.2d 814, 815-17 (Ohio App. 1991) (absent evidence of "willful or wanton" conduct, city of Akron not liable for personal injuries of driver and passenger sustained in collision vehicle operated by driver pursued at mid-day at high speeds through business and residential areas); Nevill v. City of Tullahoma, 756 S.W.2d 226, 233 (Tenn. 1986) (officers not liable for death of passenger in vehicle driven at night without headlights in high-speed pursuit on two-lane highway); Dent v. City of Dallas, 729 S.W.2d 114, 116 (Tex. Ct. App. 1986), cert. denied, 485 U.S. 977 (1988) (police officers and city not liable for wrongful death of man killed in collision with vehicle whose driver was being pursued by police on suspicion of attempting to pass forged drug prescription); Dewald v. State, 719 P.2d 643, 649-50 (Wyo. 1986) (absent evidence of "extreme and outrageous" conduct, patrolmen and State not liable for wrongful death resulting from collision with suspected drunk driver pursued during daytime at high speeds in downtown Laramie).

As discussed in the above cases, sound public policy weighs against imposing liability upon the State for injuries caused by a collision with the vehicle of a suspect under pursuit by the police. Therefore, the summary judgment below should be affirmed.

### POINT III

EVEN UNDER A GROSS NEGLIGENCE STANDARD, THE  
TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT  
AGAINST DAY ON HER CLAIMS ARISING FROM THE  
COLLISION WITH THE VEHICLE DRIVEN BY FLOYD

Only a distinct minority of courts hold, as Day contends, that the officer in a pursuit should be subject to liability under a simple negligence or due care standard where the plaintiff's injuries are not directly caused by a collision with the officer's vehicle. Most of the cases cited by Day for the proposition that the officer may be held liable for such injuries apply a gross negligence standard. Furthermore, a striking number of those decisions are resolved as a matter of law in favor of the officer.

In Peak v. Ratliff, 408 S.E.2d 300 (W. Va. 1991), for example, the plaintiffs sued for personal injuries sustained in a head-on collision with a stolen vehicle operated by a burglary suspect being pursued by a state trooper at high speeds on a "hilly and twisting" two-lane road passing residential areas, some businesses, a golf course and a school. The chase occurred at 5:30 p.m. on a weekday and "although traffic on the day in question was not characterized as heavy, it appears that many people use Glenwood Road at that time of day on their way home from work." The trooper was aware of the identity of the suspect. The speed limit on the road was 35 m.p.h., except in several straight stretches where the limit was 45 m.p.h., and the pursuit took place at speeds between 60 and 100 m.p.h. Before the collision which ended the chase, the suspect was observed by the trooper to pass

other vehicles in blind curves and force oncoming traffic off the road. "On such occasions, the officers slowed down and waited for preceding traffic to move to the side of the road before continuing the chase." Id. at 309.

Instructed on a standard of "reckless disregard or gross negligence," the jury found liability. The trial court, however, granted the defendants' motion for judgment notwithstanding the verdict. On appeal, the court held that the trial court properly instructed the jury on the standard of care and affirmed the judgment of dismissal on the ground that the officers' conduct did not constitute gross negligence as a matter of law. Id. at 310.

Similarly, in Boyer v. State, 594 A.2d 121 (Md. 1991), the court upheld the trial court's partial summary judgment against the plaintiffs on their theory that the pursuing state trooper was negligent in the manner in which he pursued the suspected drunk driver whose vehicle had collided with their parents' vehicle, killing them both. The plaintiffs claimed that the trooper had pursued the suspect "through heavy traffic and numerous intersections" at speeds in excess of 100 m.p.h. The court held that the trooper's alleged conduct "did not amount to gross negligence as a matter of law." Id. at 132.

Addressing the plaintiffs' claims that the trooper was negligent in deciding to pursue and continuing to pursue the suspect, the court again adopted a gross negligence standard. Id. at 135. Because the motions for summary judgment did not raise the sufficiency of the allegations to show a breach of that duty, the

court remanded the case to the trial court to consider that issue. In so doing, however, the court concluded with the following comments for the "guidance" of the trial court.

It must be remembered that the police officer's conduct should be judged not by hindsight but should be viewed in the light of how a reasonably prudent police officer would respond faced with an emergency situation.

\* \* \*

Very often when a breach of the police officer's duty is found in high speed chase cases like the present, there are particular aggravating circumstances, such as a violation of police department policies or guidelines, failure to turn on warning devices, extremely high speeds in congested areas, or other factors. There are, however, no hard rules in this area, and each case depends upon its own facts.

Id. at 137. See also West v. United States, 617 F. Supp. 1015, 1017-18 (D.C. Cal. 1985) (granting summary judgment for defendants where high-speed chase occurred on freeway); Breck v. Cortez, 490 N.E.2d 88, 94 (Ill. App. Ct. 1986) (sustaining summary judgment for defendants in nighttime chase ending with fatal crash after suspect vehicle left interstate and drove on curving wet road without headlights); Bullins v. Schmidt, 369 S.E.2d 601 (N.C. 1988) (reversing judgment based on jury verdict against defendants in high-speed nighttime chase of suspected drunk driver, who drove with only parking lights on, for 14 minutes and 18 miles, ending with head-on collision, killing both drivers).

Applying a gross negligence standard here, the undisputed facts justify summary judgment in favor of Trooper Colyar. Trooper Colyar's decision to continue to follow Floyd, keeping him in sight

while other law enforcement officers were setting up tire rippers in an effort to safely stop the pursuit, was not grossly negligent. Although reaching high-speeds at various times, the danger involved in the pursuit did not clearly exceed the legitimate need to immediately apprehend Floyd, who Colyar reasonably suspected of having engaged in conduct considerably more serious than a speeding violation. The fact that the pursuit ended tragically should not be used in hindsight to judge the risk involved in the pursuit. Until immediately before the collision, Trooper Colyar had no reason to foresee that Floyd was likely to act so recklessly as to run a red light with another vehicle entering the intersection. The risk involved in this pursuit was no greater than the risk ordinarily involved in a high-speed pursuit. Therefore, the trial court's decision granting summary judgment to the State defendants should be affirmed.

#### POINT IV

THE STATE IS IMMUNE FROM LIABILITY  
FOR DAY'S CLAIMS UNDER SECTION 7 OF  
THE UTAH GOVERNMENTAL IMMUNITY ACT

Section 7 of the Utah Governmental Immunity Act ("Act"), Utah Code Ann. § 63-30-1 to -38 (1989 & Supp. 1990), provides:

(2)(a) All governmental entities employing peace officers retain and do not waive immunity from liability for civil damages for personal injury or death or for damages to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he is being or has been pursued by a peace officer employed by the governmental entity in a motor vehicle.

Utah Code Ann. § 63-30-7(2)(a) (Supp. 1990). This section squarely

fits Day's claims.

In an attempt to avoid the effect of section 7, Day argues that section 7 does not apply here because it was repealed effective April 29, 1991 and her cause of action did not arise until sometime thereafter when her claim was denied or deemed denied by the State in accordance with section 14 the Act. This argument is spurious.

Contrary to Day's contention, a "cause of action for personal injury generally accrues when the accident occurs." Jackson v. Layton City, 743 P.2d 1196, 1199 (Utah 1987) (Howe, J., concurring). See also Jepson v. State, 205 Utah Adv. Rep. 33, 34-35 (Utah Ct. App. January 27, 1993); Fields v. Mountain States Tel. & Tel. Co., 754 P.2d 677, 678 (Utah Ct. App. 1988). In an action for personal injuries, the accident is "the last event necessary to complete the cause of action." Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981). Thus, Day's cause of action arose on the date of her accident, March 18, 1991, and section 7 applies to her claims.

Day cites sections 11, 15 and 16 of the Act in support of the proposition that her claims did not become remediable in the courts until after they were denied or deemed denied by the State. This proposition is incorrect.

Section 11 requires that a written notice of claim be filed "before maintaining an action" against a governmental entity or employee. Utah Code Ann. § 63-30-11 (1989). This requirement is a jurisdictional prerequisite only -- not an element of a cause of action. The filing of the notice of claim is an event entirely

within the control of the plaintiff and theoretically can occur even on the date of the accident itself.

Section 15(1) provides that "if the claim is denied, a claimant may institute an action in the district court against the governmental entity." (Emphasis added.) Section 16 requires that such an action be commenced within one year of when the claim is denied or deemed denied. Utah Code Ann. § 63-30-15(1) & -16 (1989). Nothing in the express language of these provisions supports Day's contention that an action against the State cannot be commenced until after the claim has been denied or deemed denied by the State.

Nor have these provisions been so interpreted by this Court. In Johnson v. State Retirement Office, 621 P.2d 1234 (Utah 1980), the plaintiffs filed their original complaint on the same day as the notice of claim. This Court reversed the district court's dismissal of the plaintiffs' claims, holding that "The filing of the original complaint on the same day as the notice of claim did not nullify the effect of the notice of claim." Id. at 1236.

Thus, a claim for personal injuries against the State is "remediable" from the date of the accident simply upon the filing of a notice of claim. Day's cause of action against the State arose on the date of the collision and section 7 of the Act applies to her claims.



POINT V

THE STATE IS IMMUNE FROM LIABILITY FOR DAY'S  
CLAIMS UNDER SECTION 10(15) OF THE UTAH  
GOVERNMENTAL IMMUNITY ACT

Even under the law in effect after the repeal of Utah Code Ann. § 63-30-7, the State is immune from liability for Day's claims. Day correctly notes that upon the repeal of section 7, Utah Code Ann. § 63-30-10(15) was enacted, which waives immunity for injuries caused by employee negligence, "except if the injury arises out of . . . the operation of an emergency vehicle while being driven in accordance with the requirements of Section 41-6-14." Utah Code Ann. § 63-30-10(15) (Supp. 1992).

Because section 63-30-10(15) contains no specific provision comparable to section 63-30-7(2)(a), expressly retaining immunity for injuries caused by a collision with a vehicle operated by a person under police pursuit, Day argues that such immunity no longer exists under subsection 10(15). This argument, however, ignores section 63-30-7(2)(b), which provides that the "[e]nactment of this subsection [63-30-7(2)] does not state nor imply that this immunity was ever previously waived or this liability specifically or implicitly recognized." Utah Code Ann. § 63-30-7(2)(b) (Supp. 1990). Just as the enactment of section 7(2) does not imply that liability previously existed, neither does its repeal imply that liability has been reinstated.

The provisions of section 7 in effect before the enactment of subsection (2), construed according to their plain and ordinary meaning, encompassed all claims for injuries arising out

of the operation of emergency vehicles, including those involving collisions with vehicles under police pursuit. The enactment of subsection (2) was expressly not intended to change the existing law concerning such collisions, but only to clarify the legislative intent in the face of a perceived legal trend in California to assert claims for injuries arising from such collisions. See Senate debate, Senator Richard J. Carling, S.B. 194, February 14, 1990.

Thus, contrary to Day's contention, the law concerning liability for injuries caused by such collisions has remained the same since the original enactment of section 63-30-7 in 1965. Under that law, the State is immune from liability for Day's claims.

#### POINT VI

##### SECTION 7 COMPORTS WITH THE OPEN COURTS CLAUSE

##### A. Section 7 Did Not Deprive Day Of A Remedy Against The State

##### 1. The State Was Absolutely Immune From Tort Liability At Common Law<sup>7</sup>

The Utah Governmental Immunity Act broadened the liability of governmental entities. See Standiford v. Salt Lake City, 605 P.2d 1230, 1235 (Utah 1980) (recognizing principle). Before the Act's adoption, however, the State was absolutely immune from tort liability at common law. See Wilkinson v. State, 134 P.

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<sup>7</sup>Subsections 1 and 2 of this Point essentially reiterate, in abbreviated form, the arguments that were made by the appellants and the State in Hipwell v. Sharp, No. 920218, which is currently under advisement by this Court.

626, 630 (Utah 1913) ("in the absence of either express constitutional or statutory authority an action against a sovereign state cannot be maintained"); Campbell Bldg. Co. v. State Road Comm'n., 70 P.2d 857, 861 (Utah 1937) ("action may not be maintained [against the State Road Commission] unless the State has, through legislative or constitutional action, given consent to be sued"); State v. District Court, 78 P.2d 502, 504 (Utah 1937) ("the state cannot be sued unless it has given its consent or has waived immunity"); Bingham v. Board of Education, 223 P.2d 432, 435 (Utah 1950) ("without legislative enactment we are unable to impose any liability or obligation upon [departments of the state]").

Thus, in immunizing the State from liability for injuries resulting from collisions between a violator being pursued by a peace officer and a third party, section 7 did not deprive Day of any remedy she would have been provided at common law.

2. The Proprietary/Governmental Function Distinction Does Not Apply To The State

In arguing that she was deprived of a remedy protected by the open courts clause, Day relies on Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989), in which this Court held unconstitutional the damages cap provision of the Act as applied to the University Hospital. In Condemarin, the plurality determined that in rendering medical treatment to the plaintiff the Hospital was performing a "proprietary," rather than "governmental" function, and therefore would have been fully liable at common law for the plaintiffs' resulting injuries. Id. at 353. Based upon that determination, the plurality held that the damages cap

provision deprived the plaintiffs of a remedy protected by the open courts clause and applied a heightened scrutiny in testing the constitutionality of the provision. Id. at 356, 368, 373. Justice Durham found that the caps violated both the equal protection and due process guarantees of the federal and state constitutions. Id. at 364. Justices Zimmerman and Stewart concurred in part based on due process and equal protection grounds, respectively. Id. at 366-69, 369-75.

In applying the proprietary/governmental function distinction to a State entity in Condemarin, however, the plurality erred. At common law, that distinction was applied only to municipal corporations, which were regarded as having a dual character and were accorded immunity only when acting as an agent of the state, i.e., in a governmental capacity, rather than as a private corporation, i.e., in a proprietary capacity. See Note, Tort Claims Against the State of Utah, 5 Utah L. Rev. 233, 236-37 (1956); Crowder v. Salt Lake County, 552 P.2d 646, 647 (Utah 1976) ("prior to 1965, actions for negligence could not have been maintained against the State or its political subdivisions for any injury caused by a defective, unsafe or dangerous condition of any road or bridge except municipalities"); Bingham v. Board of Education, 223 P.2d 432, 435 (Utah 1950) (recognizing dual character of municipal corporations and stating that "[i]f the city should be regarded as a state agency at all times, . . . there would exist no logical ground for holding it liable for damages due to negligence, since in no instance is a state held liable under

the general principles of law"). See also Hale v. Port of Portland, 783 P.2d 506 (Or. 1989) (holding damages cap conflicted with state open courts provision as applied to municipality, but not as applied to state); Prosser and Keaton, The Law of Torts, pp. 1043 & 1051 (5th ed. 1984) (at common law state entities were absolutely immune from suit, while municipalities were granted immunity only for governmental, as opposed to proprietary, activities); Restatement of Torts § 887, comment c (1939) (only the state has complete immunity from tort liability; municipal corporations are immune only for governmental functions).<sup>8</sup>

Thus, to the extent Condemarin applied the proprietary/governmental function distinction to a state entity in concluding that the plaintiffs were deprived of a remedy protected by the open courts clause, it should not be followed here. The Department of Public Safety and the Utah Highway Patrol are clearly state entities and, as such, would have been accorded absolute immunity at common law from Day's claims. Therefore, section 7 does not abrogate any common law remedy that would have been available to Day and fully comports with the open courts clause.

3. Trooper Colyar Was Engaged In A Governmental Function In Pursuing Floyd

Even applying the proprietary/governmental function distinction to the State entities here, Day had no common law remedy against them. In Standiford v. Salt Lake City, 605 P.2d 1230, 1236-37 (Utah 1980), this Court defined governmental function

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<sup>8</sup>Additional case authorities are cited at pp. 14 - 15 of the Brief of Appellant Roger Sharp in Hipwell v. Sharp, No. 920218.

as an activity "of such a unique nature that it can only be performed by a governmental agency or that is essential to the core of governmental activity."<sup>9</sup> In pursuing Floyd, a suspected violator of the law, Colyar was performing the function of law enforcement, an activity clearly "essential to the core of governmental activity." See Condemarin v. University Hospital, 775 P.2d 348, 353 (Utah 1989) (noting that law enforcement is a "'core' or 'essential' function of government" under Standiford definition). Since Colyar was performing a "governmental function" when he was pursuing Floyd, the State would have been immune at common law for injuries resulting from the pursuit. Thus, Day was not deprived of any remedy she would have been afforded at common law and section 7 fully comports with the open courts clause.

4. The Open Courts Clause Does Not Protect Any Statutory Remedy Abrogated By Section 7

In arguing that section 7 violates the open courts clause, Day relies solely upon section 41-6-14 in contending that she otherwise had a remedy for injuries arising from the collision

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<sup>9</sup>In Standiford, the Court interpreted the term "governmental function" as it appeared in section 63-30-3 of the pre-1987 version of the Utah Governmental Immunity Act. The version of the Act in effect at the time Day's claims arose, however, expressly defined the term "governmental function" as "any act, failure to act, operation, function, or undertaking of a governmental entity, whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons." Utah Code Ann. § 63-30-2(4)(a) (1989) (see Addendum D). Clearly, Colyar's pursuit of Floyd was a governmental function under this definition.

with the Floyd vehicle. The scope of rights protected by the open courts clause, however, does not include statutory remedies or remedies not in existence at the time the open courts clause was adopted. As stated by this Court in Berry v. Beech Aircraft Corp., 717 P.2d 670, 676 n.3 (Utah 1985), "the common law at the time of statehood provides a measure of the kinds of legal remedies that the framers must have had in mind (at least in scope if not in form) for the protection of life, property, and reputation." Section 41-6-14 was originally enacted in 1955, long after statehood. Thus, it was entirely within the legislature's prerogative to abrogate any right Day may have had to recover for her injuries under that section.

5. Day Has Cited No Authority To Show That She Had A Right Protected By The Open Courts Clause

Day has cited no authority whatsoever for the proposition that she had a legal remedy for her injuries against the State at common law at the time of statehood. Thus, she has failed to demonstrate any right to recover that is protected by the open courts clause and the trial court properly granted summary judgment to the State.

POINT VII

SECTION 7 COMPORTS WITH BOTH EQUAL  
PROTECTION AND DUE PROCESS  
PRINCIPLES

Day posits that Utah Code Ann. § 63-30-7(2) (a) creates an unconstitutional classification (1) between persons whose claims arose during its effective period and those whose claims arose either before subsection (2) (a) was enacted or after section 7's

repeal, and (2) between persons injured in police pursuits and those who are injured by other emergency vehicles. This argument fails for several reasons.

First, neither of the above two classifications exists. As discussed in Point V, neither the enactment of subsection (2)(a), nor the repeal of section 63-30-7 effected any change in the law. Thus, the law has uniformly applied to all persons since the original enactment of section 63-30-7 in 1955. Moreover, the immunity granted by the pre-1990 version of section 63-30-7, the pre-1991 version of that section, and section 63-30-10(15), encompasses all injuries arising from the operation of an emergency vehicle, no matter whether the claim involved a police pursuit. Thus, none of the three versions of statutory immunity for injuries arising from the operation of an emergency vehicle makes any distinction between those injured in police pursuits and those injured by other emergency vehicles.

Even if the classifications Day theorizes did exist, Day's equal protection and due process challenges fail. Based on Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989), Day contends that the usual presumption of constitutionality does not apply to section 63-30-7(2)(a) and that the burden of demonstrating the constitutionality of the statute is with the State. In Condemarin, however, the basis for applying heightened scrutiny and shifting the presumption of constitutionality was the abrogation of rights protected by the open courts clause. Id. at 357, 368 & 373. As discussed in Point VI above, section 7 does not abrogate Day's



rights under the open courts clause. Therefore, the presumption of constitutionality applies, the constitutionality of section 7 is properly measured under a minimum scrutiny test and the burden remains on Day to demonstrate the unconstitutionality of the immunity provision.

Moreover, the constitutionality of section 63-30-7 must be determined based upon an analysis of the Utah Governmental Immunity Act as a whole, the overall effect of which is to broaden the remedies of persons injured in governmental torts. Day has not undertaken such an analysis in her brief and therefore has failed to meet her burden of demonstrating the unconstitutionality of the immunity granted by section 63-30-7.

#### POINT VIII

#### DAY'S CLAIMS FALL WITHIN THE DISCRETIONARY FUNCTION EXCEPTION TO THE STATE'S WAIVER OF IMMUNITY FOR NEGLIGENCE CLAIMS

Section 63-30-10(1)(a) of the Utah Governmental Immunity Act waives immunity for injuries caused by employee negligence, "except if the injury arises out of . . . the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused." Utah Code Ann. § 63-30-10(1)(a) (1989) (effective July 1, 1990).

In applying this subsection, this Court has followed the lead of federal cases interpreting a similar provision in the Federal Tort Claims Act. See Little v. Utah State Div. of Family Services, 667 P.2d 49, 51 (Utah 1983); Frank v. State, 613 P.2d 517, 519 (Utah 1980). Thus, in Little, this Court drew a line

"between those functions ascribable to the policy making level and those to the operational level" and held that although the decision to place an autistic child in foster care may have been discretionary, the supervision of the child's placement was unrelated to that policy decision and was therefore not protected by discretionary function immunity. "[T]he question was no longer whether the child was to receive foster care but whether due care was exercised under a duty assumed . . . . \* \* \* Negligence under the Federal Tort Claims Act has been consistently held actionable where the conduct involved a non-discretionary duty to perform a professional function unrelated to policy decisions." 667 P.2d at 51-52 (emphasis added).

Again applying the discretionary function exception in Doe v. Arguelles, 716 P.2d 279 (Utah 1985), this Court held that the decision of the superintendent of a state youth detention center to place a juvenile sex offender into the community was a "decision of judgment, planning, or policy," and as such "f[alls] into the category of functions designed to be shielded under the discretionary function exception." Id. at 282. Stating, however, that the superintendent's acts implementing the policy "must be considered on a case-by-case basis to determine whether they are ministerial and thereby outside the immunity protections," the Court held that the superintendent was not immune for his alleged negligent monitoring of the treatment that had been prescribed as a condition of the release. Id. at 283. This holding was consistent with Little's holding that implemental acts fall outside

the discretionary function exception where they are unrelated to the initial policy decision.

Day's First Amended Complaint set forth three causes of action against the State and two against Trooper Colyar. The claims against the State were for (1) negligence in developing appropriate procedures for high-speed pursuits, (2) negligence in the training of law enforcement officers in high-speed pursuit procedures, and (3) negligent supervision of Trooper Colyar's pursuit of Floyd. The claims against Trooper Colyar were (1) negligence, and (2) gross negligence and careless and reckless disregard, in deciding to pursue, the manner of pursuing, and in deciding to continue to pursue Floyd. R. 467-82.

Applying the above principles to Day's claims, the conduct of the Department of Public Safety and the Utah Highway Patrol in developing policies and procedures for high-speed pursuits was clearly discretionary in nature. Absent any evidence that those agencies were negligent in implementing their established policies and procedures, their conduct in training law enforcement officers concerning high-speed pursuits and in supervising Trooper Colyar's pursuit of Floyd was also discretionary and thus shielded from liability. Unlike the failure of the superintendent in Arguelles to carry out his policy decision that the juvenile offender should receive certain treatment as a condition of his release from the detention center into the community, there is no evidence that the State agencies here failed to implement any aspect of their high-speed pursuit policy in

training and supervising Trooper Colyar.

Under the principles established in Little and Arguelles, the State is also immune from any liability based upon Trooper Colyar's conduct. Colyar's conduct in deciding to pursue, pursuing, and continuing to pursue Floyd was intimately related to the vehicle pursuit policies and procedures of the Department of Public Safety. In fact, in adopting those policies and procedures, the Department consciously vested a high degree of discretion in the individual law enforcement officer in a pursuit or potential pursuit situation.<sup>10</sup>

This Court, in Little, held that to posit immunity on such an exercise of discretion, the State "must make a showing that a conscious balancing of risks and advantages took place." 667 P.2d at 51. The record shows that both the Department of Public Safety in adopting its vehicle pursuit policy and Trooper Colyar in his decisions regarding the pursuit of Floyd made such a balancing decision. R. 407-410; 605, 664-665, 784. Absent any evidence that Trooper Colyar failed to implement the decisions resulting from that balancing process, his decisions and conduct in the pursuit of Floyd fall within the ambit of the discretionary function exception.

In arguing that the discretionary function exception does

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<sup>10</sup>The United States Supreme Court has rejected the notion that the status of the actor governs the application of the discretionary function exception. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 813 (1984).

not apply, Day distinguishes between "policies" and "procedures." This distinction is purely semantic and has no legal significance whatsoever. The fact that the Department labeled certain portions of its vehicle pursuit policy "procedures," is irrelevant to the determination of whether the State defendants were engaged in a discretionary function in carrying out that policy. As shown above, under the principles of Little and Arguelles, Day's claims fall within the discretionary function exception regardless of whether the State defendants viewed themselves as carrying out policies or procedures.<sup>11</sup>

#### CONCLUSION

For the above reasons, the judgment of the district court should be affirmed.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of February, 1993.

JAN GRAHAM  
Attorney General

  
DEBRA J. MOORE  
Assistant Attorney General

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<sup>11</sup>Day's reliance on the discretionary/ministerial function distinction is misplaced. That doctrine applies only to official immunity and was supplanted by Utah Code Ann. § 63-30-4(4), granting employees immunity except in cases of fraud or malice.

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of State Appellees were mailed this 25<sup>th</sup> day of February, 1993, postage prepaid, to:

LARRY R. KELLER  
CRAIG L. BOORMAN  
LARRY R. KELLER & ASSOCIATES  
257 East 200 South #340 (Box 10)  
Salt Lake City, UT 84111

ALLAN L. LARSON  
ANNE SWENSEN  
SNOW CHRISTENSEN & MARTINEAU  
10 Exchange Place #1100  
P.O. Box 45000  
Salt Lake City, UT 84145

  
\_\_\_\_\_

## **EXHIBITS**

## EXHIBIT A



IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

-----

MARY DAY, individually and as	:	MINUTE ENTRY
sole surviving heir to BOYD K.	:	
DAY, deceased,	:	Case No. 910906650 PI
Plaintiff,	:	JUDGE RICHARD H. MOFFAT
	:	
THE STATE OF UTAH, et al.,	:	
Defendants.	:	

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The Court having considered the motions argued to the Court on July 7, 1992 as follows:

1. Plaintiff's Motion for Partial Summary Judgment filed January 23, 1992;
2. The State's Motion for Partial Summary Judgment filed February 14, 1992;
3. The plaintiff's Supplemental Motion for Partial Summary Judgment RE: Discretionary Function Matters filed April 14, 1992; and
4. The State defendant's Motion for Partial Summary Judgment Regarding High Speed Chase Policy filed May 8, 1992 and

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now being fully advised in the premises now makes this its:

MINUTE ENTRY

The plaintiff's Motion for Partial Summary Judgment is denied. The Court is of the opinion that the plaintiff's argument that the same is inapplicable because the legislature latter amended the statute to remove the blanket immunity provided for in Section 63-30-7(2) is not well taken. The fact that the legislature saw fit to amend this statute shortly after the accident herein occurred does not change the fact that such was the law at the time of the accident and the Court does not find therefrom or for any of the other reasons raised by the plaintiff that the statute was either inapplicable or unconstitutional. Under the circumstances the Motion must be denied. In addition the Court does not find that the provisions of Section 63-30-10(15) as enacted by the legislature in 1991 gives the plaintiff any more comfort. The Court is of the opinion that the officer who engages in a pursuit pursuant to an established policy and simply exercises his best judgment in regard to how to perform that pursuit as long as it is within a reasonable intepretation of the policy is exercising a discretionary and not a ministerial duty. The Court further finds that the provisions of 63-30-7(2) were not unconstitutional and that the open Court provision was not violated by said statute. The argument of plaintiff that the

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plaintiff was prevented from using the Courts in this case because the police cannot be sued in their individual capacity thus she has no remedy does not mean that the statute has prevented the plaintiff from using the Courts. It simply means that under the circumstances of this case the plaintiff has no remedy as against the State or the municipalities involved. It is not unusual in our system of jurisprudence nor our society for relief not to be afforded to each and every person who might have some involvement with a particular mishap. Further the Court finds that it does not violate the equal protection provisions of either the State or Federal constitution, the claim being by the plaintiff that she is a class of one to whom this statute is applied and that the legislature after realizing it made a mistake changed the law and thus created her class and did not afford her equal protection. There simply is nothing in the record to indicate that this is the only individual who ever was effected by the operation of the statute above cited before it was amended nor does that necessarily mean even if she was that she was not afforded equal protection under the law. The time measured must be during the period of time that the statute is in effect not from the beginning of time to the end of time.

Insofar as the plaintiff's argument that the statute violates fundamental unfairness the Court simply does not find that to be the case. It applied while in affect to all persons

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across the board and it had a valid reason for the exemption afforded therein.

Turning to the second motion, the State's Motion for Summary Judgment, the Motion will be granted for the reasons set forth above, the same arguments apply to both motions.

Matter number 3, the plaintiff's Supplemental Motion for Partial Summary Judgment RE: The Discretionary Function, has already been noted as above the Court finding that Section 63-30-10(15) is not applicable herein by reason that the function of the highway patrolman herein fits squarely within the provisions of Section 63-30-10(15) and further the Court finds that the operation of the vehicle by the highway patrolman was in conformity with Section 41-6-14. That Section in providing that an officer may operate a vehicle in certain ways which otherwise would be violation of the law does not refer to his causing the operator of a pursued vehicle to exceed those limits and thus make the officer or his employer liable. To do so would be to say that if an officer observed an automobile being operated in an unsafe manner such that bystanders would be endangered if it continued in that fashion he would not be able to pursue if the driver continued to operate in that manner except under penalty of being held liable for damages caused by the errant driver. To place the interpretation on these two statutes requested by the plaintiff would be to provide a

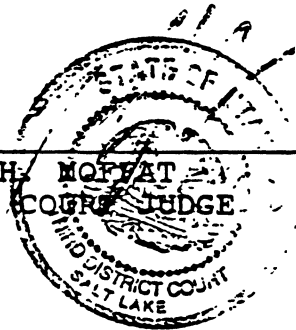
convenient loop hole for any escaping felon by his simply driving at a high rate of speed through a congested area thus requiring the officer to break off pursuit for fear that the fleeing felon might cause injury or damage for which the officer or his employer might subsequently be held liable.

In addition the Court finds that there is no causation between the actions of the officers of Salem City Corporation and Spanish Fork City Corporation and that the Motions for Summary Judgment as to those corporations should likewise be granted.

Counsel for the defendant will prepare an appropriate summary judgment with appropriate supporting findings of fact and conclusions of law.

DATED this 23 day of July, 1992.

RICHARD H. MOFFAT  
DISTRICT COURT JUDGE



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## **EXHIBIT B**

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policy on the ground of governmental immunity under Utah Code Ann. § 63-30-10(1). The parties filed supporting and opposing memoranda and an affidavit, and the Court ordered the publication and filing of all depositions taken in connection with this action, particularly the depositions of Trooper Kenneth Colyar and Steven Edward Floyd. The Court heard argument on July 7, 1992.

The Court finds that Utah Code Ann. § 63-30-7(2):

1. Confers blanket immunity on State defendants from liability for civil damages for personal injury or death resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been or believes he is being or has been pursued by a peace officer;

2. Was in effect at the time plaintiff's claims arose and is applicable to said claims;

3. Validly expresses the appropriate public policy of the State of Utah;

4. Does not violate any provisions of the Utah State Constitution or Federal Constitution.

The Court further finds that Trooper Kenneth Colyar operated his vehicle at all times in accordance with Utah Code Ann. § 41-6-14.

The Court further finds that Trooper Colyar reasonably complied with established State pursuit policy, the enactment of which is a discretionary function, and thus State defendants are entitled to discretionary function immunity.



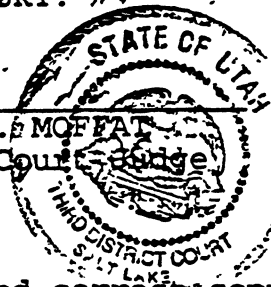
For the above reasons, IT IS ORDERED:

1. State defendants' motion for partial summary judgment regarding high speed pursuit policy is granted;
2. State defendants' motion for summary judgment is granted;
3. Summary judgment is entered in favor of State defendants and against the plaintiff, no cause of action, State defendants to recover their costs.

DATED this 12<sup>th</sup> day of August, 1992.

BY THE COURT:

  
RICHARD H. MOFFAT  
District Court Judge

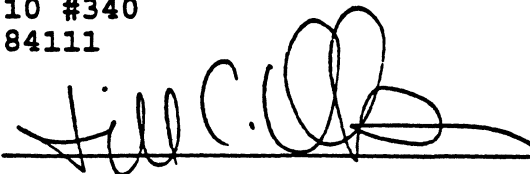


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing ORDER GRANTING STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT this 3<sup>rd</sup> day of August, 1992, to the following:

Allan L. Larson  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, Eleventh Floor  
P.O. Box 45000  
Salt Lake City, Utah 84145

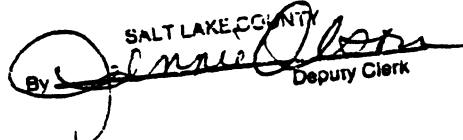
Larry Keller  
Attorney at Law  
257 East 200 South - 10 #340  
Salt Lake City, Utah 84111



## **EXHIBIT C**

FILED DISTRICT COURT  
Third Judicial District

AUG 13 1992

SALT LAKE COUNTY  
By  Deputy Clerk

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
STATE OF UTAH

---

MARY DAY, individually and as  
sole surviving heir to BOYD K.  
DAY, deceased,

Plaintiff,

ORDER AND SUMMARY JUDGMENT

vs.

THE STATE OF UTAH, by and  
through THE UTAH DEPARTMENT  
OF PUBLIC SAFETY; THE UTAH  
HIGHWAY PATROL; KEN COLYAR;  
SALEM CITY CORPORATION, a  
municipal corporation of the State  
of Utah; BRAD JAMES; SPANISH  
FORK CITY CORPORATION, muni-  
cipal corporation of the State of  
Utah; ED ASAY; and Public  
Entities 1-3; and JOHN DOES 1-8,

Defendants.

Civil No. 910906650PI

Judge Richard H. Moffat

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The Motion for Summary Judgment of the defendants Salem City Corporation, a municipal corporation of the State of Utah, Brad James, Spanish Fork City Corporation, a municipal corporation of the State of Utah, and Ed Asay, and the Motion for Partial Summary Judgment of the plaintiff coming on regularly for hearing before The Honorable Richard H. Moffat on July 7, 1992, and the parties having previously filed their respective Memoranda of Points and Authorities in support of and in opposition to the Motions for Summary Judgment, and the Court having ordered the filing and publication of all depositions taken in connection with this matter, and the Court having reviewed the depositions, affidavits,

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memoranda and pleadings on file herein, and argument having been heard, and the Court being fully advised in the premises, and the Court specifically finding and being of the opinion:

1. At the time of this accident there was in effect Section 63-30-7(2) of the Utah Code, which provided blanket immunity to the moving defendants for civil damages for personal injury or death resulting from the collision of a vehicle being operated by a violator of the law who is being pursued by a peace officer. The Court is of the opinion that said statute was a valid expression by the Utah Legislature of appropriate public policy of the State of Utah, that said section was in effect at the time of the subject accident, is applicable to the plaintiff's claims herein, and that the said statute is not violative of any provision of the Utah State or Federal Constitution.

2. There was no evidence developed or presented by the plaintiff, and there is thus no material issue of fact as to whether the conduct of Officers James and Asay (employees of Salem City and Spanish Fork City, respectively) were in any way in violation of the Emergency Vehicle Statute, Section 41-6-14, Utah Code.

3. Plaintiff presented no evidence that the acts of Officers James and Asay in any way caused or contributed to the pursuit of Mr. Floyd by Trooper Colyar, or that their acts in any way caused or contributed to the ultimate unfortunate accident involving Mr. Floyd's vehicle and that of the plaintiffs. Indeed, the evidence, by the uncontradicted testimony of Mr. Floyd himself, is to the contrary, that is, that the acts, such as they were, of Officers James and Asay were collateral, remote, and insignificant, and they were thus not the cause

in fact of the event of which plaintiff complains. Plaintiff has failed to establish one of the key elements of a negligence action, that is, cause in fact.

4. Even if the actions of the officers in some way influenced the conduct of Mr. Floyd and thus could be found to have been a "cause in fact" of the pursuit and the ultimate collision, the Court is of the opinion that the acts of Officers James and Asay were discretionary, and in any event were not the proximate cause, the sole proximate cause of the collision as a matter of law being the reckless and negligent conduct of the fleeing driver, Mr. Floyd.

In summary, the Court concludes, as to the defendants Salem City and Spanish Fork City, and Officers James and Asay, that said cities and individuals are immune by virtue of Section 63-30-7(2), as it existed at the time of the accident; that in any event, their involvement was remote, collateral and secondary, and was not the cause in fact of either the chase or the collision; that as a matter of law, the sole proximate cause of the collision was the negligent and reckless conduct of the fleeing driver; that said defendants and their employers are immune by virtue of the discretionary function exception to the waiver of immunity found in Section 63-30-10(1) of the Utah Governmental Immunity Act; and that said defendants are thereby immune.

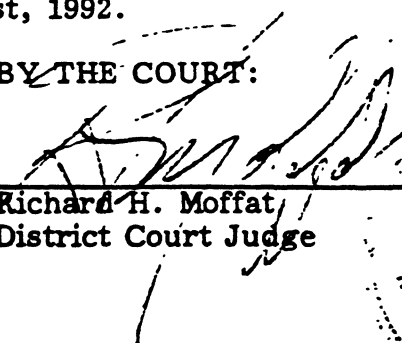
Accordingly, for the reasons above stated, it is hereby

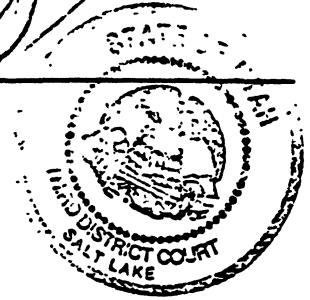
ORDERED that the Motions of the defendants Salem City Corporation, Brad James, Spanish Fork City Corporation, and Ed Asay are hereby granted, and it is further

ORDERED that summary judgment is hereby entered in favor of said defendants and against the plaintiff, no cause of action, and plaintiff's Complaint is dismissed with prejudice and on the merits, defendants to recover their costs.

DATED this 13<sup>th</sup> day of August, 1992.

BY THE COURT:

  
Richard H. Moffat  
District Court Judge



## EXHIBIT D

## 63-30-2. Definitions.

As used in this chapter:

(1) "Claim" means any claim or cause of action for money or damages against a governmental entity or against an employee.

(2) (a) "Employee" includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body, student teachers certificated in accordance with Section 53A-6-101, educational aides, students engaged in providing services to members of the public in the course of an approved medical, nursing, or other professional health care clinical training program, volunteers, and tutors, but does not include an independent contractor.

(b) "Employee" includes all of the positions identified in Subsection (2)(a), whether or not the individual holding that position receives compensation.

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

(4) (a) "Governmental function" means any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons.

(b) A "governmental function" may be performed by any department, agency, employee, agent, or officer of a governmental entity.

(5) "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, or estate, that would be actionable if inflicted by a private person or his agent.

(6) "Personal injury" means an injury of any kind other than property damage.

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

(8) "Property damage" means injury to, or loss of, any right, title, estate, or interest in real or personal property.

(9) "State" means the state of Utah, and includes any office, department, agency, authority, commission, board, institution, hospital, college, university, or other instrumentality of the state.

**History:** L. 1965, ch. 139, § 2; 1973, ch. 103, § 2; 1978, ch. 27, § 1; 1981, ch. 116, § 1; 1983, ch. 129, § 2; 1987, ch. 75, § 2; 1987 (1st S.S.), ch. 4, § 1; 1988, ch. 2, § 338.

**Amendment Notes.** — The 1987 amendment alphabetized the definitions of this section and renumbered the subsections accordingly, added present Subsection (4), and made minor changes in phraseology and punctuation.

The 1987 (1st S.S.) amendment, effective June 3, 1987, designated the former provisions of Subsection (2) as (2)(a) and added subsection

(2)(b); and substituted "includes a governmental entity's officers, employees, servants, trustees, commissioners, members of a governing body, members of a board, members of a commission, or members of an advisory body" for "means any officer, employee, or servant of a governmental entity, whether or not compensated, including" and inserted "but does not include an independent contractor" in Subsection (2)(a).

The 1988 amendment, effective February 2, 1988, in Subsection (2)(a) substituted "53A-6-101" for "53-2-15."



**63-30-7. Waiver of immunity from injury from negligent operation of motor vehicles — Exception.**

(1) (a) Immunity from suit of all governmental entities is waived for injury resulting from the negligent operation by any employee of a motor vehicle or other equipment during the performance of his duties, within the scope of employment, or under color of authority.

(b) This subsection does not apply to the operation of emergency vehicles as defined by law and while being driven in accordance with the requirements of Section 41-6-14.

(2) (a) All governmental entities employing peace officers retain and do not waive immunity from liability for civil damages for personal injury or death or for damage to property resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he is being or has been pursued by a peace officer employed by the governmental entity in a motor vehicle.

(b) Enactment of this subsection does not state nor imply that this immunity was ever previously waived or this liability specifically or implicitly recognized.

**History:** L. 1965, ch. 139, § 7; 1983, ch. 129, § 5; 1990, ch. 204, § 1.

**Amendment Notes.** — The 1990 amend-

ment, effective April 23, 1990, designated the former section as Subsection (1); added Subsection (2); and made related stylistic changes.

**Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions — Waiver for injury caused by violation of fourth amendment rights [Effective July 1, 1990].**

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of:

(a) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;

(b) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights;

(c) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;

(d) a failure to make an inspection or by making an inadequate or negligent inspection of any property;

(e) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;

(f) a misrepresentation by the employee whether or not it is negligent or intentional;

(g) or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;

(h) or in connection with the collection of and assessment of taxes;

(i) the activities of the Utah National Guard;

(j) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;

(k) any natural condition on state lands or as the result of any activity authorized by the Board of State Lands and Forestry;

(l) the activities of:

(i) providing emergency medical assistance;

(ii) fighting fire;

(iii) regulating, mitigating, or handling hazardous materials or hazardous wastes; or

(iv) emergency evacuations; or

(m) research or implementation of cloud management or seeding for the clearing of fog.

(2) (a) Immunity from suit of all governmental entities is waived for injury proximately caused or arising out of a violation of protected fourth amendment rights under Chapter 16, Title 78, which is the exclusive remedy for injuries to those protected rights.

(b) If Section 78-16-5 or Rule 12(g), Utah Rules of Criminal Procedure, or any parts of either of them are held invalid or unconstitutional, this subsection is void and governmental entities remain immune from suit for violations of fourth amendment rights.

**History:** L. 1965, ch. 139, § 10; 1975, ch. 194, § 11; 1982, ch. 10, § 1; 1985, ch. 169, § 1; 1989, ch. 185, § 1; 1989, ch. 187, § 3; 1989, ch. 268, § 29.

**Amended effective July 1, 1990.** — Laws 1989, ch. 187, § 3 amends this section effective July 1, 1990. See fourth paragraph of amendment note below.

**Amendment Notes.** — The 1985 amendment, effective March 18, 1985, added Subsection (1)(l) and made minor changes in phraseology.

The 1989 amendment by ch. 185, effective April 24, 1989, added Subsection (1)(m) and designated the first and second sentences of Subsection (2) as Subsections (2)(a) and (b).

The 1989 amendment by ch. 268, effective July 1, 1989, substituted "Board of State Lands and Forestry" for "State Land Board" in Subsection (1)(k), subdivided Subsection (1)(l) and made related punctuation changes, and rewrote Subsection (1)(l)(iii), which had read, "handling hazardous materials."

The 1989 amendment by ch. 187, effective July 1, 1990, added "arises out of" to the introductory paragraph in Subsection (1) and deleted it from the beginning of each subsection of Subsection (1); substituted "Board of State Lands and Forestry" for "State Land Board" in Subsection (1)(k); substituted "Rule 12(g), Utah Rules of Criminal Procedure" for "Subsection 77-35-12(g)" in Subsection (2); and made minor stylistic changes.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

**Compiler's Notes.** — Sections 78-16-5 and 77-35-12(g) (Criminal Procedure Rule 12(g)), cited in Subsection (2)(b), were held unconstitutional in *State v. Mendoza*, 748 P.2d 181 (Utah 1987). See case note under catchline "Constitutionality," below.

**Cross-References.** — Indemnification of public officers and employees, §§ 63-30-36 to 63-30-39.

### **63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions.**

Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury arises out of:

- (1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
- (2) assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or violation of civil rights;
- (3) the issuance, denial, suspension, or revocation of or by the failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, approval, order, or similar authorization;
- (4) a failure to make an inspection or by making an inadequate or negligent inspection;
- (5) the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
- (6) a misrepresentation by an employee whether or not it is negligent or intentional;
- (7) or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances;
- (8) or in connection with the collection of and assessment of taxes;
- (9) the activities of the Utah National Guard;
- (10) the incarceration of any person in any state prison, county or city jail, or other place of legal confinement;
- (11) any natural condition on publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or any activity authorized by the Board of State Lands and Forestry;
- (12) research or implementation of cloud management or seeding for the clearing of fog;
- (13) the management of flood waters, earthquakes, or natural disasters;
- (14) the construction, repair, or operation of flood or storm systems;
- (15) the operation of an emergency vehicle, while being driven in accordance with the requirements of Section 41-6-14;
- (16) a latent dangerous or latent defective condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located on them;
- (17) a latent dangerous or latent defective condition of any public building, structure, dam, reservoir, or other public improvement; or
- (18) the activities of:
  - (a) providing emergency medical assistance;
  - (b) fighting fire;
  - (c) regulating, mitigating, or handling hazardous materials or hazardous wastes;
  - (d) emergency evacuations; or
  - (e) intervening during dam emergencies.

**History:** L. 1965, ch. 139, § 10; 1975, ch. 194, § 11; 1982, ch. 10, § 1; 1985, ch. 169, § 1; 1989, ch. 185, § 1; 1989, ch. 187, § 3; 1989, ch. 268, § 29; 1990, ch. 15, §§ 1, 2; 1990, ch. 319, §§ 1, 2; 1991, ch. 76, § 4.

**Amendment Notes.** — The 1990 amendment by ch. 15, effective July 1, 1990, deleted the subsection designation (1) from the beginning of the section, redesignated former Subsections (1)(a) to (1)(l) as Subsections (1) to (13) and made related changes, and deleted former Subsection (2), waiving immunity from suit for violation of Fourth Amendment rights and making the provisions of Chapter 16 of Title 78 the exclusive remedy for injuries caused by such violations.

The 1990 amendment by ch. 319, effective July 1, 1990, added Subsection (13)(e) and made a related stylistic change.

The 1991 amendment effective April 29

1991, added Subsections (13) through (17) and redesignated former Subsection (13) as present Subsection (18), inserted "violation of" before "civil rights" in Subsection (2), deleted "of any property" following "inspection" in Subsection (4), made minor stylistic changes in Subsections (6) and (12), and rewrote Subsection (11), which read: "any natural condition on state lands or as the result of any activity authorized by the Board of State Lands and Forestry."

**Compiler's Notes.** — Laws 1991, ch. 76, which amended this section and §§ 63-30-4, 63-30-8, 63-30-9, 63-30-10.5, 63-30-11, 63-30-33, 63-30-34, and 63-30-36, provides in § 11 that "This act has prospective effect only and any changes to the law caused by this act do not apply to any claims based upon injuries or losses that occurred before the effective date of this act [April 29, 1991]."

#### **41-6-14. Emergency vehicles — Applicability of traffic law to highway work vehicles — Exemptions.**

(1) The operator of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges under this section, subject to Subsection (2).

(2) The operator of an authorized emergency vehicle may:

- (a) park or stand, irrespective of the provisions of this chapter;
- (b) proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
- (c) exceed the maximum speed limits if the operator does not endanger life or property; or
- (d) disregard regulations governing direction of movement or turning in specified directions.

(3) Privileges granted under this section to an authorized emergency vehicle apply only when the vehicle sounds an audible signal under Section 41-6-146, or uses a visual signal as defined under Section 41-6-132, which is visible from in front of the vehicle.

(a) The privileges under this section do not relieve the operator of an authorized emergency vehicle from the duty to operate the vehicle with regard for the safety of all persons, or protect the operator from the consequences of an arbitrary exercise of the privileges.

(b) Except for Sections 41-6-13.5, 41-6-44, and 41-6-45, this chapter does not apply to persons, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway. However, the entire chapter applies to those persons and vehicles when traveling to or from the work.

**History:** C. 1953, 41-6-14, enacted by L. 1955, ch. 71, § 1; L. 1961, ch. 86, § 1; 1965, ch. 83, § 1; 1978, ch. 33, § 4; 1987, ch. 138, § 7.

**Repeals and Enactments.** — Laws 1955, ch. 71, § 1 repealed former section 41-6-14 (L. 1941, ch. 52, § 5; C. 1943, 57-7-82; L. 1949, ch. 65, § 1), relating to applicability and exemptions from act of certain drivers, and enacted present section 41-6-14.

**Amendment Notes.** — The 1987 amendment substituted "operator" for "driver" throughout the section; in Subsection (1) substituted "Subsection (2)" for "the conditions herein stated"; substituted the present provisions of Subsection (3) for those set out in the bound volume and made minor changes in phraseology and punctuation throughout the section.

## **EXHIBIT E**

<b>STATE OF UTAH</b> Department of Public Safety <b>POLICIES AND PROCEDURES</b>	REF I-21	P 1 OF 4
	EFFECTIVE DATE 03-01-87	REVISION DATE 11-01-89
SUBJECT: Vehicle Pursuit		

I. PURPOSE:

To establish guidelines regarding the pursuit and apprehension of violators of the criminal law by department personnel.

II. LEGAL DISCLAIMER:

This policy is for departmental use only and does not apply to any criminal or civil proceeding. This policy shall not be construed as creating a higher legal standard of care or safety in an evidentiary sense with respect to third party claims. Violations of this policy will form the basis of departmental administrative sanctions only.

III. POLICY:

It is the policy of the Department of Public Safety to identify and apprehend violators of the criminal law. Pursuit driving is necessitated by the suspects disregard for the law and the safety of others, and the responsibility charged to law enforcement officers to apprehend such persons.

Sworn officers of the department shall conduct pursuits in compliance with Title 41-6-14 UCA., sound professional judgement and the procedures outlined in this policy.

IV. DEFINITIONS:

A. Pursuit:

An event involving one or more law enforcement officers attempting to apprehend a suspect operating a motor vehicle while the suspect is trying to avoid arrest by using high-speed driving or other evasive tactics, such as driving off a highway, turning suddenly or driving in a legal manner but willfully failing to yield to the officer's signal to stop.

B. Roadblock:

Establishing a physical impediment to traffic as means for stopping a vehicle using signs, devices, actual physical obstructions, or barricades.

C. Ramming:

The deliberate act of impacting a violator's vehicle with another vehicle to functionally damage or otherwise force the violator's vehicle to stop.

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D. Boxing-in:

A technique designed to stop a violator's vehicle by surrounding it with law enforcement vehicles and then slowing all vehicles to a stop.

E. Channelization:

A technique similar to a roadblock where objects are placed in the anticipated path of a pursued vehicle which tends to alter its direction.

F. Supervisor:

For the purpose of this policy, a supervisor is a member of this department of the rank of sergeant or above, or a designated officer-in-charge (OIC).

V. PROCEDURE:

- A. Upon initiating a pursuit, the officer will engage his emergency equipment in compliance with Title 41-6-76 UCA.
- B. The officer will notify dispatch and provide the following information:
  - 1. Description of the vehicle
  - 2. Number of occupants
  - 3. Reason for the pursuit
  - 4. Location, direction of travel and estimated speed
- C. No other unit should engage in the pursuit unless and until requested by a supervisor or initiating officer if no supervisor is available.
- D. All units involved in the pursuit should operate on the statewide radio channel.
- E. Notification of a pursuit by another allied agency shall not be construed as request to officers of this department to join in the pursuit, unless such request is specifically made by the pursuing agency.
- F. When the pursuit continues into the jurisdiction of an allied agency the officer or supervisor may consider requesting that allied agency to pick up and continue the pursuit.
- G. If the pursuit is concluded by an allied agency the initiating officer, if practical, should proceed to the termination point and provide arrest information and other appropriate assistance.

- H. **PURSUIT WITH PASSENGERS PROHIBITED:** Officers shall not engage in high speed pursuits when their vehicle is occupied by prisoners, suspects, complainants, witnesses or any other persons not on duty as sworn peace officers of the state. This prohibition applies whether or not the passenger has signed a waiver of liability.

I. **TERMINATION OF PURSUIT:**

The initiating officer or a supervisor may terminate the pursuit when:

1. In the opinion of the pursuing officer(s) or a supervisor, the danger created by continuing the pursuit outweighs the need for an immediate apprehension; or,
2. The subject can be identified and there is no longer a need for an immediate apprehension; or,
3. The location of the pursued vehicle is no longer known.

J. **FORCIBLE STOPS:**

1. The use of forcible stops such as roadblocks, ramming, boxing-in and channelization are a last resort measure and should be evaluated by the officer in a similar fashion as the use of deadly force.
2. Forcible stops may be undertaken only when the officer or a supervisor has reason to believe that the continued movement of the pursued vehicle would place others in imminent danger of great bodily harm or death AND
3. When the apparent risk of harm to other than the occupants of the pursued vehicle is so great as to outweigh the apparent risk of harm involved in making the forcible stop, AND
4. After all reasonable alternative means of apprehension have been considered, and rejected as impractical.
5. The tactics selected should offer the greatest probability of success with the least likelihood of injury to the general public, the officer and the subject.



K. SUPERVISORY RESPONSIBILITY:

1. Upon notification of a pursuit, the supervisor shall evaluate and consider if appropriate:
  - a. Aborting the pursuit when necessary
  - b. Ensuring tactics are in conformance with department policy
  - c. Ensuring only the necessary number of units are involved
  - d. Proper radio channels and procedures are in use
  - e. Allied agencies are notified
  - f. Post-Incident notifications
2. The supervisor should proceed to the termination point of the pursuit when practical and provide appropriate assistance and supervision at the scene.