

1993

Mary Day, individually and as sole surviving heir to
Boyd K. Day, deceased 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, municipal corporation of the State of
Utah; Ed Asay; and Public Entities 1-3; and John
Does 1-8 : Brief of Appellee

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BRIEF

UTAH COURT OF APPEALS

BRIEF

93-0135 CA
IN THE SUPREME COURT OF THE STATE OF UTAH
DOCKET NO. 920438

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

50

93-0135 CA

Plaintiff/Appellant,

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,
municipal corporation of the
State of Utah; ED ASAY; and
Public Entities 1-3; and JOHN
DOES 1-8,

SUPREME COURT NO. 920438

Priority No. 15

93-0135-CA

Defendants/Appellees.

BRIEF OF APPELLEES CITY OF SPANISH FORK,
SALEM CITY, BRAD JAMES AND ED ASAY

AN APPEAL FROM A FINAL ORDER ENTERED IN THE THIRD DISTRICT
COURT FOR SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE RICHARD H. MOFFAT, PRESIDING

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FILED

MAR 5 1993

COURT OF APPEALS

TABLE OF CONTENTS

	<u>Page</u>
JURISDICTION	1
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARD OF APPELLATE REVIEW	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	1
SUMMARY OF ARGUMENTS	7
POINT I.	
THE TRIAL COURT PROPERLY DECIDED THAT THE ACTS OF DEFENDANTS SALEM CITY CORPORATION, BRAD JAMES, SPANISH FORK CITY CORPORATION AND ED ASAY WERE NOT THE CAUSE, PROXIMATE OR OTHERWISE, OF THE PURSUIT OR THE COLLISION	7
POINT II.	
DEFENDANTS ARE IMMUNE FROM SUIT BY VIRTUE OF UTAH CODE ANNOTATED, SECTION 63-30-7(2) (AMENDED 1990 AND REPEALED 1991)	17
A. SECTION 63-30-7(2) DOES NOT VIOLATE THE OPEN COURTS CLAUSE	19
B. PLAINTIFF'S EQUAL PROTECTION CHALLENGE IS WITHOUT MERIT	25
C. SECTION 63-30-7(2) DOES NOT DENY DUE PROCESS .	25
POINT III.	
DEFENDANTS ARE IMMUNE FROM SUIT BY VIRTUE OF UTAH CODE ANNOTATED, SECTION 63-30-10(15)	26

POINT IV.

DEFENDANTS ARE IMMUNE FROM SUIT BY VIRTUE OF THE DISCRETIONARY FUNCTION EXCEPTION TO THE WAIVER OF IMMUNITY FOUND IN UTAH CODE ANNOTATED, SECTION 63-30-10(1)	28
CONCLUSION	29
ADDENDUM	30

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES</u>	
<u>Apache Tank Lines, Inc. v. Cheney,</u> 706 P.2d 614 (Utah 1985)	7
<u>Baidy v. Marah,</u> 760 S.W.2d 195 (Mo.Ct.App. 1988)	14
<u>Berry v. Beech Aircraft,</u> 717 P.2d 670 (Utah 1985)	20
<u>Brown v. Pinellas Park,</u> 557 So.2d 161 (Fla. App.2 Dist. 1990)	12, 13
<u>Chambers v. Ideal Pure Milk Co.,</u> 245 S.W.2d 589 (Ky 1952)	14, 15, 23
<u>Christensen v. Hayward,</u> 694 P.2d 612 (Utah 1989)	20
<u>Davidson Lumber v. Bonneville Investment, Inc.,</u> 794 P.2d 11 (Utah 1990)	18
<u>Dent v. City of Dallas,</u> 729 S.W.2d 114 (Tex. App. 1986)	24
<u>DeWald v. State,</u> 719 P.2d 643 (Who. 1986)	14, 15, 24
<u>Doran v. City of Madison,</u> 519 So.2d 1308 (Ala. 1988)	14, 16
<u>Downs v. Camp,</u> 113 Ill.App.2d 221 N.E.2d 46 (1969)	14
<u>Ducote v. Jackson,</u> 542 So.2d 689 (La. 1989)	12
<u>Fiser v. Ann Arbor,</u> 107 Mich.App. 367 N.W.2d 552, App.Gr. (Mich)	14
<u>Howe v. Jackson,</u> 18 Utah 2d 269, 421 P.2d 159 (1966)	21
<u>Jensen v. Mountain States Tel. & Tel. Co.,</u> 611 P.2d 363 (Utah 1980)	7, 8
<u>Kelly v. Tulsa,</u> 791 P.2d 826 (Okla. App. 1990)	24
<u>Kennedy v. City of Spring City,</u> 780 S.W.2d 164 (Tenn. 1989)	14

<u>Miami v. Horne</u> , 198 So.2d 10 (Fla. 1967)	14, 15
<u>Mitchell v. Pearson Enterprises</u> , 697 P.2d 240 (Utah 1985)	11
<u>Oberkramer v. City of Ellisville</u> , 706 S.W.2d 440 (Mo. 1986) (en banc)	14
<u>Obray v. Malmberg</u> , 26 Utah 2d 17, 484 P.2d 160 (1971)	20
<u>Pagels v. San Francisco</u> , 135 Cal.App.2d 152 P.2d 877 (1st Dist. 1955)	14
<u>Reenders v., Ontario</u> , 68 Cal.App.3d 1045, 137 Cal. Rptr. 736 (4th Dist. 1977)	14, 15, 28
<u>Roll v. Timberman</u> , 94 N.J.Super. 530, 229 A.2d 281 (1967)	14-16
<u>State of West Virginia v. Fidelity & Cas. Co. of N.Y.</u> , 263 F.Supp. 88 (D.W. Va. 1967)	23
<u>Thornton v. Shore</u> , 233 Kan. 737 P.2d 655 (1983)	14, 15, 21-23, 27
<u>Weber v. Springville City</u> , 725 P.2d 1360 (Utah 1986)	20
<u>Williams v. Melby</u> , 699 P.2d 723 (Utah 1985)	9
<u>Wrubel v. Tate of New York</u> , 174 N.Y.S.2d 687 (1958)	14
<u>Young v. Flathead County</u> , 757 P.2d 772 (Mont. 1988)	9

STATUTES

Utah Code Ann. § 78-2-2(3)(j) (1953, as amended)	1
Utah Code Ann. § 41-6-14. (Addendum B)	22, 24, 26, 27
Utah Code Ann. § 63-30-7	19
Utah Code Ann. § 63-30-7(2)	17, 19, 20, 25, 26
Utah Code Ann. § 63-30-10(15)	26
Utah Code Ann. § 63-30-2(2)	19

OTHER

Prosser and Keeton on Torts, 5th Ed., pp. 267-268 10

JURISDICTION

The Utah Supreme Court has jurisdiction to hear this appeal pursuant to U.C.A. Section 78-2-2(3)(j) (1953, as amended).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW AND THE STANDARD OF APPELLATE REVIEW

- I. Did the Trial Court err in ruling that the acts of defendants James and Asay were not the proximate cause of the pursuit or the collision?
- II. Do Utah Code Sections 63-30-7(2) (amended 1990 and repealed 1991) and 63-30-10(15) provide immunity for defendants?
- III. Are these defendants immune pursuant to the discretionary function exception to the waiver of immunity found in §3-30-10(1), Utah Code Ann.?

These defendants adopt by reference the standards of appellate review as set forth in Plaintiff's brief.

STATEMENT OF THE CASE

These defendants adopt Plaintiff's Statement of the Case with the exception of Plaintiff's characterization of Brad James and Ed Asay as pursuing police officers. There is no evidence to support this statement. The only pursuing officer was Highway Patrolman Ken Colyar. Officers Brad James and Ed Asay simply fell in behind Colyar and followed.

STATEMENT OF FACTS

Defendants adopt Plaintiffs Statement of Facts with the following additions and exceptions:

When Steven Floyd first saw Utah Highway patrolman Ken Colyar in his marked patrol car near the North Santaquin exit, he

panicked because he was in a stolen car and did not have a driver's license. R. 1029, 1033, 1095-1097 (Floyd deposition, pp. 39, 43, 105-107)

Colyar initially decided to pursue the Floyd vehicle because it was speeding, had tinted windows, no front license plate, and a young driver. Trooper Colyar was suspicious that the vehicle might have been stolen, or being used to transport contraband. Colyar decided, within a short distance up State Road 6, that Floyd was also guilty of felony evading, that is, fleeing a police officer and going more than 40 miles an hour over the posted speed limit.

R. 652-655 (Colyar deposition, Vol. I pp. 78-82)

The first officer to become involved, other than Trooper Colyar, was Officer Mellin of the Payson City Police Department. Mellin was driving a fully marked Chevrolet Caprice police car with overhead lights operating, and was sitting at a downtown intersection. Floyd went around the Payson police car, and continued on toward Salem, with Colyar close behind. Colyar assumes that Mellin fell in somewhere behind, but doesn't know for sure. R. 944-948 (Colyar deposition Vol. II. pp. 67-71)

Floyd describes the first city police car that he saw as being marked, with lights and sirens on, and either white, light-blue or gray. That car pulled out like it was attempting to get in Floyd's way; Floyd went around it with no problem, and as he

went around, the Highway Patrol car was still right on his bumper. R. 1103-1104 (Floyd deposition pp. 113-114)

After going around the Payson vehicle, neither Floyd nor Colyar ever saw it again. R. 1049, 1106; (Floyd deposition pp. 59, 116) R. 681-682 (Colyar deposition Vol. I pp. 108-109)

The pursuit continued on to Salem, at which time Officer Brad James, driving a marked white Ford LTD police car, tried to get in Floyd's way. Again, Floyd simply went around him, with Trooper Colyar close behind. James's police car had its overhead lights on, and was going in the same direction. Floyd and Colyar passed James's police car on the left, and continued on their way. R. 699-701 (Colyar deposition Vol. I pp. 126-128) R. 949-952 (Colyar deposition Vol. II pp. 72-75) Colyar believes that James fell in behind them, but doesn't know for sure, and never saw James in his rear view mirror. R. 953 (Colyar deposition Vol. II p. 76)

In Spanish Fork, Officer Ed Asay placed his marked Chevrolet sedan police vehicle at the intersection of Highway 6 and 400 South with his overhead lights on. He pulled out into the lane in which Floyd was traveling, but Floyd merely changed lanes and went around Asay's police car, as did Colyar. R. 790-791; (Colyar deposition Vol. I pp. 216-217); R. 967 (Colyar deposition Vol. II p. 90) Colyar never saw the Asay police vehicle again prior to the accident. R. 968 (Colyar deposition Vol. II p. 91)

Floyd's testimony is somewhat unclear and inconsistent with Colyar's. He recalls seeing the first police car in the vicinity of the first town, presumably Payson, and remembers seeing some additional police cars, perhaps two, in the next town. The cars were along the side of the road with their lights and sirens going, as if they were trying to get him to stop. He simply went past or around them and did not see them again. R. 1055-1056 (Floyd deposition pp. 65-66). He describes the other encounters:

Q. Let's just be clear here. Trooper Colyar starts the pursuit. It's just you and him. Then this first police car pulls out; you go around it. Colyar goes around it and the chase continues. Did you ever see the first police car again, to your knowledge?

A. Not to my knowledge.

Q. Then you go into one of these other towns and these two other police cars appear, do whatever it is they do, apparently try to get you to stop?

A. Un-huh (yes).

Q. They've got their lights and sirens going?

* * *

A. Yes, yes, sorry.

Q. And again, you go around them?

A. Yes.

Q. With no particular problem?

A. Yes.

Q. And Trooper Colyar again is right behind you, right?

A. Yes.

Q. And as I understand your testimony, you never saw those two cars again before the accident?

A. That's correct.

R. 1106-1107 (Floyd deposition pp. 116-117)

On I-15 from the North Spanish Fork on-ramp to the University Avenue exit in Provo, Colyar did not see any of the city police cars behind him. From what he heard on the radio, he believed Asay and James had backed off somewhere back around Springville. R. 968-969 (Colyar deposition Vol. II pp. 91-92)

After Floyd got back onto the freeway, the only police cars he saw were Colyar's patrol car and a white Bronco with flashing lights either behind or to the side of Trooper Colyar. The white Bronco was a Utah County Sheriffs vehicle. R. 1070-1073 (Floyd deposition pp. 80-83) R. 915 (Colyar deposition Vol. II p. 38)

The only police car that Floyd ever observed pursuing him, other than Trooper Colyar in the Highway Patrol car, was the white Bronco, which he only saw after he reentered the freeway at Spanish Fork. R. 1059, 1070 (Floyd deposition pp. 69, 80)

It was Floyd's intention during the entire pursuit to evade the Highway Patrolman. Regardless of Floyd's speed, the Highway Patrol car was always right behind him. It was Floyd's intent to drive as fast as he could, so long as the Highway Patrolman was in sight, and it didn't make any difference how many other police

vehicles were involved. Floyd's testimony is clear that, after he passed them, he did not know whether the Salem and Spanish Fork police officers were in any way involved in the pursuit.

R. 1106-1107 (Floyd deposition pp. 116-117) Their sole involvement was to make their presence known, but Floyd and Colyar would simply go around them, leaving them, perhaps, to simply fall in behind.

Q. So it was your intention during the entire pursuit from when the Highway Patrolman first turned around and started to follow you, in the vicinity of Santaquin, it was your intention to get away from him to where he could see you, could see the car, and you were going to abandon the car and head off on foot, correct?

A. Yes. R. 1113 (Floyd deposition p. 123)

* * *

Q. All right. So it was always your intent to leave the Highway Patrol car and other than a brief moment as you entered the on-ramp and had your problem with the semi, he was always right on your bumper?

A. Yes.

Q. I mean not literally, but somewhere within --

A. Two to three car lengths.

Q. Somewhere between a hundred yards or a car length or two?

A. Yes.

Q. And regardless of whether he was one car length behind you or 200 yards, if he was ever that far, your traffic and driving pattern was the same, that is, you went as fast as that Buick would take you so long as you could negotiate the traffic?

A. Yes.

Q. And it wouldn't make any difference to you whether it was just the Highway Patrol car behind you, or whether you had five police cars lined up behind the Highway Patrol car; is not that true?

A. Yes. R. 1114-1115 (Floyd deposition pp. 124-125)

SUMMARY OF ARGUMENTS

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY DECIDED THAT THE ACTS OF DEFENDANTS SALEM CITY CORPORATION, BRAD JAMES, SPANISH FORK CITY CORPORATION AND ED ASAY WERE NOT THE CAUSE, PROXIMATE OR OTHERWISE, OF THE PURSUIT OR THE COLLISION.

Plaintiff argues that negligence and proximate cause issues are factual and should not be resolved as a matter of law. But in Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614, 615 (Utah 1985) this Court said that while issues of negligence ordinarily present questions of fact to be resolved by the fact finder, when the facts are undisputed and but one reasonable conclusion can be drawn therefrom, such issues become questions of law.

Likewise, in Jensen v. Mountain States Tel. & Tel. Co., 611 P.2d 363 (Utah 1980), cited by plaintiff, this Court recognized that in appropriate circumstances summary judgment may be granted on the issue of proximate cause:

We recognize at the outset that in appropriate circumstances summary judgment may be granted on the issue of proximate cause. Id. at 365

This Court went on to say, however, that in a situation involving independent intervening cause, the primary issue is one of the foreseeability of the subsequent negligent conduct of a third person, and in such a case the issue must be resolved by the finder of fact.

This, however, is not such a case. Plaintiff suggests that in this case, one of the critical issues is whether the conduct of the fleeing driver constitutes an independent intervening cause which excuses the conduct of Trooper Colyar and/or Officers James and Asay as a proximate cause of the accident in question, suggesting of course that it does not; and further suggesting that the acts of the fleeing suspect and of all defendants were "co-proximate causes" of the pursuit and the collision.

In cases involving independent, intervening cause, the primary issue is one of foreseeability of the subsequent negligent conduct of a third person. Where there is no causation in fact, however, the issue of foreseeability never arises.

The standard definition of "proximate cause" is "that cause which in natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred." The two elements of proximate cause are cause-in-fact and foreseeability. This Court

noted the essential elements of a negligence action in Williams v. Melby, 699 P.2d 723, 726 (Utah 1985):

(1) a duty of reasonable care owed by the defendant to plaintiff; (2) a breach of that duty; (3) the causation, both actually and proximately, of injury; and (4) the suffering of damages by the plaintiff.

In determining whether there is causation "in fact", many courts use the "but for" test. That test is, simply, whether "but for the defendant's conduct, the event would not have occurred, or conversely, that the defendant's conduct is not the cause of the event if the event would have occurred without the defendant's conduct." See, e.g., Young v. Flathead County, 757 P.2d 772 (Mont. 1988).

If we assume, contrary to the evidence, that the acts of James and Asay concurred in some fashion with those of Trooper Colyar to bring about the ultimate event, then it would be proper to apply the "substantial factor" test. That test may be stated: the defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about.

The 'substantial factor' formulation is one concerning legal significance rather than factual quantum. Such a formulation, which can scarcely be called a test, is an improvement over the 'but for' rule for this special class of cases. It aids in the disposition of these cases and likewise of two other types of situations which have proved troublesome. One is that where a similar, but not identical, result would have followed without the defendant's act; the

other where one defendant has made a clearly proved but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire. In the great majority of cases it produces the same legal conclusion as the but for test. Except in the classes of cases indicated, no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it; nor will cases very often arise where it would not be such a factor when it was so indispensable a cause that without it the result would not have followed.

Prosser and Keeton on Torts, 5th Ed., pp. 267-268.

Under either test, it is clear that the acts of James and Asay were not the "cause in fact" of the collision. Plaintiff cannot meet her burden of showing that the conduct of these defendants was a substantial causative factor that led to the ultimate accident.

There is no evidence that anything that either Officer James or Officer Asay did was the cause-in-fact of Floyd's reckless driving and the resulting collision. While they made their presence known, it is undisputed that Floyd easily avoided both Officer James and Officer Asay, continuing on his way, driving as fast as he could, and that he would continue to do so as long as Trooper Colyar was in sight, which he always was.

There is no evidence that the acts of Officers James and Asay caused Floyd to speed up, slow down, change his route, or

otherwise influence his behavior or his driving pattern in any respect whatsoever. Once Floyd passed Officers James and Asay, he did not ever see their police cars again prior to the accident. Thus, there is simply no causal relationship between the acts of Officers James and Asay and the ultimate collision.

"When the proximate cause of an injury is left to speculation, the claim fails as a matter of law." Mitchell v. Pearson Enterprises, 697 P.2d 240, 246 (Utah 1985). The facts of this case do not leave even the slightest room for speculation as to causation. Reasonable minds cannot differ as to the certainty that the pursuit would have continued, and the collision occurred, regardless of the involvement of Officers James and Asay. Since the accident would have occurred in any event, the first element of proximate cause, that is, "cause in fact," is not present.

The second element of proximate cause, foreseeability, has no application to these facts. In this case, Floyd's negligent conduct did not commence subsequent to the conduct of these defendants. Floyd's negligent conduct was a continuing activity which began before and continued after the involvement of these defendants. The subsequent negligent conduct necessarily required to be foreseen by these defendants is Floyd's continued efforts to flee and elude these defendants. Floyd has testified that he was not fleeing these defendants at the time of the

accident. He could not have been because he was not even aware of their participation in the continuing pursuit. Thus, the actions of these defendants did not influence Floyd and independent intervening cause is therefore not at issue.

In Ducote v. Jackson, 542 So.2d 689 (La. 1989), the plaintiffs' vehicle was hit by a fleeing criminal suspect who was being chased by city police. State troopers received a radio call that city police were involved in a chase and fell in behind, but were never advised of the reason for the chase. Plaintiffs brought a negligence action against the state troopers, who were granted summary judgment. On appeal, the court rejected the claim that plaintiffs probably would not have been involved in the accident but for the fact that the state troopers joined in the chase. In affirming summary judgment for the state troopers, the Court of Appeals of Louisiana held:

We cannot conclude that Mr. and Mrs. Ducote probably would not have been involved in the accident but for the fact that the troopers joined the chase. The troopers' actions were not a substantial factor in causing the accident. The troopers' conduct was not the antecedent without which the accident would not have occurred. Their actions were not the cause in fact of the accident. Without causation there can be no liability.

542 So.2d at 690,691.

Plaintiff cites Brown v. Pinellas Park, 557 So.2d 161 (Fla. App.2 Dist. 1990), for the proposition that a question of fact

exists as to whether all officers involved in a pursuit should bear responsibility for the consequences of the continued pursuit.

Brown is distinguishable from the facts of this case. Brown ultimately involved fifteen officers in active pursuit. The court described the entourage as a speeding caravan. An order to terminate the pursuit had been given and was disregarded.

In this case, neither the Salem City officer nor the Spanish Fork officer initiated the chase. Neither officer was ever in a position as the primary unit in the pursuit. There was no speeding caravan. Highway Patrol Officer Colyar continued the pursuit as the primary unit without regard to participation, or lack thereof, from other officers. Furthermore, Floyd was not aware that any city police officer had fallen in behind Trooper Colyar. He never again saw either officer after passing through their individual towns, and each time he looked back, it was only Trooper Colyar that he saw.

Floyd must have known the city officers were pursuing him before their conduct could have influenced his conduct. Plaintiff did not, and cannot, establish one of the key elements of a negligence cause of action, that is, causation in fact.

Even assuming cause-in-fact, neither the acts of James nor the acts of Asay were a "proximate cause" of the collision. Proximate cause is the limitation which the courts have placed

upon the actor's responsibility for the consequences of his conduct whether because of the application of notions of foreseeability, public policy, or mere common sense.

Where the officer is in a non-contact vehicle many courts have held as a matter of law that the fleeing suspect's conduct is the sole proximate cause; that officers are not to be made insurers of the conduct of the culprits they chase; that officers are not obliged to allow offenders to escape and would, in fact, be derelict in their duty if they did not pursue offenders. See, e.g., Chambers v. Ideal Pure Milk Co., 245 S.W.2d 589 (Ky 1952); Pagels v. San Francisco, 135 Cal.App.2d 152, 286 P.2d 877 (1st Dist. 1955); Wrubel v. Tate of New York, 174 N.Y.S.2d 687 (1958); Miami v. Horne, 198 So.2d 10 (Fla. 1967); Roll v. Timberman, 94 N.J.Super. 530, 229 A.2d 281 (1967); Downs v. Camp, 113 Ill.App.2d 221, 252 N.E.2d 46 (1969); Reenders v., Ontario, 68 Cal.App.3d 1045, 137 Cal. Rptr. 736 (4th Dist. 1977); Fiser v. Ann Arbor, 107 Mich.App. 367, 309 N.W.2d 552, App.Gr. (Mich), 316 N.W.2d 916 (1981); Thornton v. Shore, 233 Kan. 737, 666 P.2d 655 (1983); DeWald v. State, 719 P.2d 643 (Who. 1986); Oberkramer v. City of Ellisville, 706 S.W.2d 440 (Mo. 1986) (en banc); Baidy v. Marah, 760 S.W.2d 195 (Mo.Ct.App. 1988); Doran v. City of Madison, 519 So.2d 1308 (Ala. 1988); Kennedy v. City of Spring City, 780 S.W.2d 164 (Tenn. 1989).

In DeWald, supra, an action was brought against the State of Wyoming and state highway patrol officers for the death of the driver of a vehicle stopped at a red light who was struck by a drunk driving suspect who had been fleeing from patrol officers.

The Wyoming Supreme Court affirmed summary judgment for the State and the officers, holding that:

When a police officer pursues a fleeing violator and the violator injures a third party as a result of the chase, the officer's pursuit is not the proximate cause of those injuries unless the circumstances indicate extreme or outrageous conduct by the officer. To put it another way, the possibility that the violator will injure a third party is too remote to create liability until the conduct of the officer becomes extreme.

719 P.2d at 650.

In so holding, the Wyoming Supreme Court cited and specifically stated that it agreed with the analysis and holdings of Roll, supra, Chambers, supra, Reenders, supra, City of Miami, supra, and Thornton, supra..:

[T]he majority view expressed in other jurisdictions in similar cases holds that the police officer is not liable. The reasoning which underlies the rejection of liability in these cases is two-fold: (1) it is the duty of a police officer to apprehend those whose reckless driving makes use of the highway dangerous to others; (2) the proximate cause of the accident is the reckless driving of the pursued, notwithstanding recognition of the fact that the police pursuit contributed

to the pursued's reckless driving.
(Citations omitted)

719 P.2d at 649, citing Roll, supra, at 284.

In Doran, supra, occupants of a vehicle with which a pursued vehicle collided brought an action against the police officers and the city for injuries sustained in the collision. The court conceded that "[t]here can be little doubt that the high speed pursuit by the police officers contributed to [the suspect's] reckless driving. . .", but held that the actions of the driver of the pursued vehicle were the proximate cause of the injuries.

Some jurisdictions hold that since there can be more than one cause of an occurrence, it is foreseeable that a police officer's pursuit could be a proximate cause of an injury to a third party injured by the pursued suspect, but no court which has held the conduct of a back-up or lagging officer, not actively involved in the pursuit, to be a proximate cause of a third party's injury. The facts of this case make it impossible for the actions of the officers from Spanish Fork and Salem City to be a proximate cause of Mr. Day's death. Their actions were far too remote and the trial court appropriately so ruled.

Plaintiff points out to the Court that the depositions of Trooper Ken Colyar and fleeing suspect Steven Floyd constitute the only discovery which has been undertaken in the instant case. She argues that summary judgment must not be granted if discovery

is incomplete, since information sought in discovery may create genuine issues of material fact sufficient to defeat the motion. However, plaintiff filed no Rule 56(f) motion and made no other record that the defendants' Motion for Summary Judgment should have been delayed to allow for further discovery.

In any event, plaintiff's rationale ignores the underlying elements of causation. Further discovery will not divulge any information which will create a genuine issue as to causation. Floyd must have known the city officers were pursuing him before their conduct could have influenced his conduct, and he has testified that he did not.

Under the best of circumstances, plaintiff's depositions of the city officers may elicit an admission of intent to engage in the pursuit until the bitter end. The intent of the city officers, however, is not controlling. The actions of Floyd were not affected by anything the city officers did. He was completely unaware of their involvement and his behavior was not influenced by their involvement -- or lack of involvement.

POINT II.

DEFENDANTS ARE IMMUNE FROM SUIT BY VIRTUE OF
UTAH CODE ANNOTATED, SECTION 63-30-7(2)
(AMENDED 1990 AND REPEALED 1991)

Utah Code Ann. Section 63-30-7(2) provides blanket immunity to these defendants "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. . . ."

Plaintiff's cause of action arose on the date of the accident, March 18, 1991. A tort cause of action accrues when it becomes remediable in the courts. Davidson Lumber v. Bonneville Investment, Inc., 794 P.2d 11, 19 (Utah 1990). Plaintiff suggests that her cause of action became remediable in the courts on August 21, 1991, more than five months after the accident from which she claims injury, reasoning that a notice of claim is a precondition to suit and must be submitted within one year after the injury producing incident. Such claim is deemed denied 90 days after submission, at which time the claimant may commence an action against a government entity or employee.

Plaintiff filed her notice of claim on May 27, 1991, and it was deemed denied on August 21, 1991. According to plaintiff's reasoning, she could not commence this lawsuit before her claim was denied, and thus her cause of action became remediable in the courts only after the August 21, 1991 denial. It is on that date that she contends her cause of action accrued.

The Immunity Act does not distinguish between accrual of a claim and accrual of a cause of action. The two are used interchangeably. A "claim" is defined as "any claim or cause of

action for money or damages" §63-30-2(2) (emphasis supplied). Therefore, the Act does not contain different rules for determining when a "claim" arises and when a "cause of action" arises.

Plaintiff's contention is also contrary to the express intent of the Legislature. In repealing §63-30-7, it stated:

Section II. Informational Section. 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.

L. 1991, Ch. 76, §11 (Addendum A). The Legislature expressly stated that the repeal of §63-30-7(2) did not affect claims for injuries that occurred before repeal. In this case, plaintiff's injuries occurred before repeal, so she cannot contend that §63-30-7(2) is inapplicable. This provision of the Utah Governmental Immunity act was in effect at the time plaintiff's cause of action arose and is the controlling law for this case, barring plaintiff's cause of action.

Plaintiff also claims that Utah Code Ann. §63-30-7(2) violates the open courts provisions, the equal protection provisions, and the due process provisions of the Utah Constitution, and thus is not controlling.

A. SECTION 63-30-7(2) DOES NOT VIOLATE THE OPEN COURTS CLAUSE

Utah's open courts clause permits the Utah Legislature to abrogate an existing remedy if one of two standards is satisfied.

First, there must be an "effective and reasonable alternative remedy" that is "substantially equal in value" to the eliminated remedy. Berry v. Beech Aircraft, 717 P.2d 670, 680 (Utah 1985). Second, in the absence of an alternative remedy, the abrogation stands only if (a) "there is a clear social or economic evil to be eliminated," and (b) the abrogation is not "an arbitrary or unreasonable means for achieving the objective." Id.

Plaintiff contends that §63-30-7(2) eliminates an otherwise existing remedy at common law. She cites no authority for the proposition that she had a remedy at common law that was eliminated by §63-30-7(2).

An essential element of a claim for negligence is an actionable duty of care owed by a defendant to a particular plaintiff. Weber v. Springville City, 725 P.2d 1360, 1363 (Utah 1986). The existence of a legal duty is a question of law to be determined by the court. Id.

Utah's Supreme Court has on two occasions addressed the issue of whether law enforcement officers owed actionable legal duties to enforce Utah's laws. In Obray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160, 162 (1971) the Court held that a sheriff had no actionable duty to investigate a burglary. In Christensen v. Hayward, 694 P.2d 612, 613 (Utah 1989) the Court held that a deputy had no duty to arrest a person who appeared to be attempting to operate a motorcycle while drunk. No Utah

appellate court has addressed the converse issue of whether a law enforcement officer has a duty not to enforce the law in certain circumstances.

While there is no actionable duty to enforce the law, once an officer undertakes to enforce a law, reasonable care is required.

The Utah Supreme Court has construed §41-6-14 to impose an actionable duty on emergency vehicle operators. See e.g. Howe v. Jackson, 18 Utah 2d 269, 421 P.2d 159, 161 (1966). No Utah appellate court has held that this duty extends to persons who are injured by violators of the law who are attempting to elude emergency vehicles. All Utah decisions that construe §41-6-14 involve a collision between the operator of an emergency vehicle and another car.

In Thornton v. Shore, 666 P.2d 655 (Kan. 1983), the Kansas court addressed the issue of whether a duty similar to that articulated in §41-6-14 extends to people injured by fleeing felons. The case involved a police pursuit of a speeder who refused to stop. Id. at 657. During the pursuit, the speeder committed other violations of the law including reckless driving, attempting to elude an officer, speeding, and running stop signs. Id. The pursuit ended when the speeder ran a stop sign and collided with another car. Two occupants of the other car were killed, and the father of one decedent sued the pursuing police

officer. Id. at 658. The officer was granted summary judgment. On appeal, the issue was whether the officer had liability under K.S.A. 8-1506, statute that parallels Utah Code Ann. §41-6-14. (Addendum B).

The appellant's argument on appeal was that the officer had an actionable duty to abandon the continued pursuit of fleeing violators who engage in "extreme recklessness." Id. at 659. This contention was based on K.S.A. 8-1506 which granted certain immunities to emergency vehicle drivers but nevertheless required them to "drive with due regard for the safety of all persons using the highway," and did not immunize them from "reckless disregard for the safety of others." Id.

The Supreme Court of Kansas rejected appellant's contention, holding that the officer had no duty to the decedent. It found that the immunities given to emergency vehicle drivers would be "hollow" if the test of due regard in the statute "were extended to include the acts of the fleeing motorist whom the officer is trying to apprehend." Id. at 661-62. Such extension, according to the court, would "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 662.

The Thornton court went on to review decisions on the question from other jurisdictions. From Kentucky's highest court

in Chambers v. Ideal Pure Milk Co., 245 S.W.2d 589, 590-91, (Ky. 1953) it quoted:

To argue that the officer's pursuit caused Shearer [the fleeing violator] to speed may be factually true, but it does not follow that the officers are liable at law for the results of Shearer's negligent speed [collision with third car]. Police cannot be made insurers of the conduct of the culprits they chase.

The Thornton court also noted the sound policy reasons for not extending an officer's duty to cover negligence of fleeing motorists. It quoted from State of West Virginia v. Fidelity & Cas. Co. of N.Y., 263 F.Supp. 88 (D.W. Va. 1967):

We are not prepared to hold an officer liable for damages inflicted by the driver of a stolen vehicle whom he was lawfully attempting to apprehend for the fortuitous reason only that the criminal drove through an urban area. To do so would open the door for every desperado to seek sanctuary in the congested confines of our municipalities, serene in the knowledge that an officer would not likely give chase for fear of being liable for the pursued's recklessness. Such is not now the law nor should it be law.

After reviewing decisions from across the nation, the Thornton court adopted the "majority view" which holds that law enforcement officers are not liable for the acts of fleeing violators. Id. at 662. It specifically held that the "due regard" requirement only applied "to the police officer's physical operation of his own vehicle and not to the decision to chase or continue the chase of a law violator." Id. at 668.

Since the Thornton decision other courts have refused to hold police liable for the recklessness of a fleeing motorist.

See DeWald v. State, 719 P.2d 643 (Wyo. 1983) (decision to continue pursuit was not proximate cause of fleeing motorists' collision with another car); Kelly v. Tulsa, 791 P.2d 826 (Okla. App. 1990) (duty of care does not extend to decision to pursue fleeing motorist); Dent v. City of Dallas, 729 S.W.2d 114, 117 (Tex. App. 1986) (following the "majority rule" that police officers have no liability to third parties who are killed by fleeing motorists).

In the present case, defendants were operating emergency vehicles, patrol cars, at the time of the pursuit. They had activated their flashing lights and sirens. They are therefore entitled to the protections of §41-6-14.

Officers James and Asay's duties under §41-6-14 should not extend to the negligent acts of the fleeing motorist, Steven Floyd. This would make them insurers of the acts of any fleeing suspects. It would allow any criminal to take refuge in the midst of a populated area, assured of the fact that an officer will not pursue because he may be held liable for the criminal's recklessness.

The majority rule demonstrates that plaintiff does not have a remedy at common law. Therefore, the immunity conferred by §63-30-7(2) does not abrogate any right of plaintiff and the open courts clause does not apply.

B. PLAINTIFF'S EQUAL PROTECTION CHALLENGE IS WITHOUT MERIT

Plaintiff claims that §63-30-7(2) violates her rights under the equal protection clause of the Utah Constitution. She claims to have been singled out because she cannot sue government defendants for her injuries, but those with claims arising before or after the period that §63-30-7(2) was effective can do so. This, she claims, is unequal treatment.

As noted above, plaintiff did not have a cause of action for failure to terminate the pursuit of a fleeing motorist. No one had such a cause of action. Therefore, there is no unequal treatment. All citizens had the same rights before, during and after the period that §63-30-7(2) was in effect.

C. SECTION 63-30-7(2) DOES NOT DENY DUE PROCESS

Plaintiff contends that §63-30-7(2) deprives her of a remedy to sue government defendants for continuing the pursuit of Floyd. This abrogates her interest in having a day in court and therefore violates her due process rights under the Utah Constitution. She further contends that it is fundamentally unfair to apply §63-30-7(2) because the bill repealing it was approved by the Governor days before the accident.

Since plaintiff never had a remedy for defendants' involvement in the pursuit of Floyd, there is no deprivation or unfairness.

POINT III.

DEFENDANTS ARE IMMUNE FROM SUIT BY VIRTUE OF
UTAH CODE ANNOTATED, SECTION 63-30-10(15)

Assuming plaintiff's cause of action arose sometime after the bar effectuated by §63-30-7(2), or assuming §63-30-7(2) to be unconstitutional, defendants are immune by virtue of U.C.A. §63-30-10(15).

In 1991, when 63-30-7 was repealed, Section 63-30-10(15) was enacted, retaining immunity for the operation of an emergency vehicle while being driven in accordance with the requirements of Section 41-6-14.

Section 41-6-14 exempts the operator of an authorized emergency vehicle, when in the pursuit of an actual or suspected violator of the law, from the usual traffic laws so long as the officer's vehicle sounds an audible signal or uses a visual signal and the officer acts "with due regard for the safety of all persons."

There has been no allegation by the plaintiff that Ed Asay or Brad James violated any of the provisions of Section 41-6-14. Specifically, there is no allegation that either James or Asay exceeded the maximum speed limit, disregarded traffic signs or signals, or operated without audible or visual signals. The only allegations against James and Asay are that they joined in the chase at various times and for various distances.

The officers' duties or liabilities under Section 41-6-14 should not extend to the reckless acts of a fleeing felon. Such an extension would make the officers and their employers insurers of the acts of any fleeing suspects. It would allow any criminal to seek refuge in the midst of a populated area, assured by the fact that an officer would not pursue because he may be held liable for the criminal's recklessness, an unrealistic extension of liability.

The emergency vehicle statute has been in effect in Utah, in one form or another, since 1955; yet there is no Utah authority which applies the emergency vehicle statute to impose liability on a pursuing police officer for collisions between fleeing suspects and innocent third parties.

Other jurisdictions have refused to extend liability to pursuing police officers for the reckless acts of the suspects they pursue, so long as the officers themselves comply with the emergency vehicle statute.

In Thornton v. Shore, supra, the Supreme Court of Kansas held that an officer was entitled to the privileges and immunities granted by statute where he was operating his authorized emergency vehicle in full compliance with the requirements of the statute at the time of the accident, on the basis that the officer was not the insurer of the violator he was pursuing.

In Reenders v. Ontario, 68 Cal.App.3d 1045, 137 Cal. Rptr. 736 (4th Dist. 1977), the California court stated that the emergency vehicle statute had nothing whatever to do with the case inasmuch as plaintiff's injury was not caused by any negligent or wrongful act or omission in the operation of any motor vehicle by an employee the defendant city within the meaning of the Act. The court pointed out that the facts did not indicate any negligent operation of the police vehicles, and that it was not the negligent operation of those vehicles of which the plaintiff complained, but rather that the officers were negligent in undertaking and continuing their pursuit. The court concluded that considerations of public policy preponderated against the imposition of any duty upon a municipality and its police officers to refrain from pursuing a lawbreaker who is already operating a vehicle on the public streets in a reckless and dangerous manner; a reasonable and just conclusion.

POINT IV.

DEFENDANTS ARE IMMUNE FROM SUIT BY VIRTUE OF
THE DISCRETIONARY FUNCTION EXCEPTION TO THE
WAIVER OF IMMUNITY FOUND IN UTAH CODE
ANNOTATED, SECTION 63-30-10(1)

These defendants adopt herein by reference the argument of the State of Utah, contained in POINT VIII of its Brief.

CONCLUSION

For the reasons stated above, this Court should affirm the trial court's ruling, granting summary judgment to all defendants.

RESPECTFULLY SUBMITTED this 26th day of February, 1993.

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ADDENDUM CONTENTS

Addendum A	L1991, Ch. 76 §11
Addendum B	KSA 8-1506, UCA 41-6-14
Addendum C	UCA 63-30-7(2) (amended 1990, repealed 1991)
Addendum D	UCA 63-30-10(15)

ADDENDUM A

CHAPTER 76**S. B. No. 218**

Passed February 27, 1991

Approved March 14, 1991

Effective April 29, 1991

**GOVERNMENTAL IMMUNITY ACT
AMENDMENTS**

By Ronald J. Ockey

AN ACT RELATING TO GOVERNMENTAL IMMUNITY; CLARIFYING THE SCOPE AND COVERAGE OF GOVERNMENTAL IMMUNITY; AND MAKING TECHNICAL CORRECTIONS.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:

63-30-4. AS LAST AMENDED BY CHAPTER 129, LAWS OF UTAH 1983

63-30-8. AS ENACTED BY CHAPTER 139, LAWS OF UTAH 1965

63-30-9. AS ENACTED BY CHAPTER 139, LAWS OF UTAH 1965

63-30-10. AS LAST AMENDED BY CHAPTERS 15 AND 319, LAWS OF UTAH 1990

63-30-10.5. AS ENACTED BY CHAPTER 75, LAWS OF UTAH 1987

63-30-11. AS LAST AMENDED BY CHAPTER 75, LAWS OF UTAH 1987

63-30-33. AS LAST AMENDED BY CHAPTER 220, LAWS OF UTAH 1989

63-30-34. AS LAST AMENDED BY CHAPTER 75, LAWS OF UTAH 1987

63-30-36. AS LAST AMENDED BY CHAPTER 30, LAWS OF UTAH 1987

REPEALS:

63-30-7. AS LAST AMENDED BY CHAPTER 204, LAWS OF UTAH 1990

*Be it enacted by the Legislature of the state of Utah:***Section 1. Section Amended.**

Section 63-30-4, Utah Code Annotated 1953, as last amended by Chapter 129, Laws of Utah 1983, is amended to read:

63-30-4. Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.(1) (a) Nothing contained in this chapter, unless specifically provided, ~~shall~~ may be construed as an admission or denial of liability or responsibility ~~(in so far as)~~ by or for governmental entities or their employees ~~[are concerned]~~.

(b) If immunity from suit is waived by this chapter, consent to be sued is granted, and liability of the entity shall be determined as if the entity were a private person.

(c) No cause of action or basis of liability is created by any waiver of immunity in this chapter, nor may any provision of this chapter be construed as imposing strict liability or absolute liability.

(2) Nothing in this chapter ~~shall~~ may be construed as adversely affecting any immunity from suit ~~which~~ that a governmental entity or employee may otherwise assert under state or federal law.(3) (a) ~~The remedy~~ Except as provided in Subsection (b), an action under this chapter against a governmental entity or its employee for an injury caused by an act or omission ~~which~~ that occurs during the performance of ~~such~~ the employee's duties, within the scope of employment, or under color of authority is ~~after the effective date of this act,~~ a plaintiff's exclusive ~~of~~ remedy.(b) A plaintiff may not bring or pursue any other civil action or proceeding ~~by reason of~~ based upon the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless:

(i) the employee acted or failed to act through fraud or malice; or

(ii) the injury or damage resulted from the conditions set forth in Subsection 63-30-36(3)(c).

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

Section 2. Section Amended.

Section 63-30-8, Utah Code Annotated 1953, as enacted by Chapter 139, Laws of Utah 1965, is amended to read:

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.~~Immunity~~ Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located ~~thereon~~ on them.**Section 3. Section Amended.**

Section 63-30-9, Utah Code Annotated 1953, as enacted by Chapter 139, Laws of Utah 1965, is amended to read:

63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement — Exception.~~Immunity~~ Unless the injury arises out of one or more of the exceptions to waiver set forth in Section 63-30-10, immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir, or other public improve-

ment. ~~Immunity is not waived for latent defective conditions.~~

Section 4. Section Amended.

Section 63-30-10, Utah Code Annotated 1953, as last amended by Chapters 15 and 319, Laws of Utah 1990, is amended to read:

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 ~~[of any property]~~;

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

(6) a misrepresentation by ~~[the]~~ 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 ~~[state lands]~~ publicly owned or controlled lands, any condition existing in connection with an abandoned mine or mining operation, or [as the result of] 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; ~~[or]~~

(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

~~[(13)]~~ (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.

Section 5. Section Amended.

Section 63-30-10.5, Utah Code Annotated 1953, as enacted by Chapter 75, Laws of Utah 1987, is amended to read:

63-30-10.5. Waiver of immunity for taking private property without compensation.

(1) ~~[Immunity]~~ As provided by Article I, Section 22 of the Utah Constitution, immunity from suit of all governmental entities is waived for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation.

(2) Compensation and damages shall be assessed according to the requirements of Chapter 34, Title 78, Eminent Domain.

Section 6. Section Amended.

Section 63-30-11, Utah Code Annotated 1953, as last amended by Chapter 75, Laws of Utah 1987, is amended to read:

63-30-11. Claim for injury — Notice — Contents — Service — Legal disability.

(1) A claim arises when the statute of limitations that would apply if the claim were against a private person begins to run.

(2) Any person having a claim for injury against a governmental entity, or against an employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority shall file a written notice of claim with the entity before maintaining an action, regardless of whether or not the function giving rise to the claim is characterized as governmental.

(3) (a) The notice of claim shall set forth:

(i) a brief statement of the facts;

(ii) the nature of the claim asserted; and

(iii) the damages incurred by the claimant so far as they are known.

(b) The notice of claim shall be:

(i) signed by the person making the claim or that person's agent, attorney, parent, or legal guardian; and ~~shall be~~

(ii) directed and delivered to the responsible governmental entity according to the requirements of Section 63-30-12 or 63-30-13.

(4) (a) If the claimant is under the age of majority, or mentally incompetent and without a legal guardian ~~(or imprisoned)~~ at the time the claim arises, the claimant may apply to the court to extend the time for service of notice of claim.

(b) (i) After hearing and notice to the governmental entity, the court may extend the time for service of notice of claim.

(ii) The court may not grant an extension that exceeds the applicable statute of limitations.

(c) In determining whether or not to grant an extension, the court shall consider whether the delay in serving the notice of claim will substantially prejudice the governmental entity in maintaining its defense on the merits.

Section 7. Section Amended.

Section 63-30-33, Utah Code Annotated 1953, as last amended by Chapter 220, Laws of Utah 1989, is amended to read:

63-30-33. Liability insurance — Insurance for employees authorized — No right to indemnification or contribution from governmental agency.

(1) (a) A governmental entity may insure any or all of its employees against liability, in whole or in part, for injury or damage resulting from an act or omission occurring during the performance of an employee's duties, within the scope of employment, or under color of authority, regardless of whether or not that entity is immune from suit for that act or omission.

(b) Any expenditure for that insurance is for a public purpose.

(c) Under any contract or policy of insurance ~~(executed under authority of this section.)~~ providing coverage on behalf of a governmental entity or employee for any liability defined by this section, regardless of the source of funding for the coverage, the insurer has no right to indemnification or contribution from the governmental entity or its employee ~~(with respect to)~~ for any loss or liability covered by the contract or policy.

(2) Any surety covering a governmental entity or its employee under any faithful performance surety bond has no right to indemnification or contribution from the governmental entity or its employee ~~(with respect to)~~ for any loss covered by that bond based on any act or omission for which the governmental entity would be obligated to defend or indemnify under the provisions of Section 63-30-36.

Section 8. Section Amended.

Section 63-30-34, Utah Code Annotated 1953, last amended by Chapter 75, Laws of Utah 1987, is amended to read:

63-30-34. Limitation of judgments against governmental entity or employee — Insurance coverage exception.

(1) (a) Except as provided in Subsection ~~(+3+)~~ (2), a judgment for damages for personal injury against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds \$250,000 for one person in any one occurrence, or \$500,000 for two or more persons in any one occurrence, the court shall reduce the judgment to that amount~~(;).~~

(b) A court may not award judgment of more than \$250,000 for injury or death to one person regardless of whether or not the function giving rise to the injury is characterized as governmental.

~~(+2+)~~ (c) Except as provided in Subsection ~~(+3+)~~ (2), if a judgment for property damage against a governmental entity, or an employee whom a governmental entity has a duty to indemnify, exceeds \$100,000 in any one occurrence, the court shall reduce the judgment to that amount, regardless of whether or not the function giving rise to the damage is characterized as governmental.

~~(+3+)~~ (2) The damage limits established in this section do not apply to damages awarded as compensation when a governmental entity has taken or damaged private property for public use without just compensation.

Section 9. Section Amended.

Section 63-30-36, Utah Code Annotated 1953, as last amended by Chapter 30, Laws of Utah 1987, is amended to read:

63-30-36. Defending government employee — Request — Cooperation — Payment of judgment.

(1) Except as provided in Subsections (2) and (3), a governmental entity shall defend any action brought against its employee arising from an act or omission occurring:

(a) during the performance of the employee's duties;

(b) within the scope of the employee's employment; or

(c) under color of authority.

(2) (a) Before a governmental entity may defend its employee against a claim, the employee shall make a written request to the governmental entity to defend him:

(i) within ten days after service of process upon him; or

(ii) within a longer period that would not prejudice the governmental entity in maintaining a defense on his behalf; or

(iii) within a period that would not conflict with notice requirements imposed on the entity in con-

action with insurance carried by the entity relating to the risk involved.

(b) If the employee fails to make a request, or fails to reasonably cooperate in the defense, the governmental entity need not defend or continue to defend the employee, nor pay any judgment, compromise, or settlement against the employee in respect to the claim.

(3) The governmental entity may decline to defend, or subject to any court rule or order, decline to continue to defend, an action against an employee if it determines:

(a) that the act or omission in question did not occur:

(i) during the performance of the employee's duties; ~~or~~

(ii) within the scope of his employment; or

(iii) under color of authority; ~~or~~

(b) that the injury or damage resulted from the fraud or malice of the employee; or

(c) that the injury or damage on which the claim was based resulted from:

(i) the employee driving a vehicle, or being in actual physical control of a vehicle:

(A) with a blood alcohol content equal to or greater by weight than the established legal limit; ~~or~~

(B) while under the influence of alcohol or any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(C) while under the combined influence of alcohol and any drug to a degree that rendered the person incapable of safely driving the vehicle; or

(ii) the employee being physically or mentally impaired so as to be unable to reasonably perform his job function because of the use of alcohol, because of the nonprescribed use of a controlled substance as defined in Section 58-37-4, or because of the combined influence of alcohol and a nonprescribed controlled substance as defined by Section 58-37-4.

(4) (a) Within ten days of receiving a written request to defend an employee, the governmental entity shall inform the employee whether or not it shall provide a defense, and, if it refuses to provide a defense, the basis for its refusal.

(b) A refusal by the entity to provide a defense ~~shall~~ is not ~~be~~ admissible for any purpose in the action in which the employee is a defendant.

(5) ~~If~~ Except as provided in Subsection (6), if a governmental entity conducts the defense of an employee, the governmental entity shall pay any judgment based upon the claim, ~~or any compromise or settlement of the claim, except as provided in Subsection (6).~~

(6) A governmental entity may conduct the defense of an employee under ~~an agreement with the employee that~~ a reservation of rights under which the governmental entity reserves the right not to

pay a judgment, if the conditions set forth in Subsection (3) are established.

(7) (a) Nothing in this section or Section 63-30-37 affects the obligation of a governmental entity to provide insurance coverage according to the requirements of Subsection 41-12a-301 (3) and Section 63-30-29.5.

(b) ~~[A] When a governmental entity may refuse~~ declines to defend, or declines to continue to defend, an action against its employee under the conditions set forth in Subsection (3), ~~but~~ it shall still provide coverage up to the amount specified in Sections 31A-22-304 and 63-30-29.5.

Section 10. Repealer.

Section 63-30-7. Waiver of immunity for injury from negligent operation of motor vehicles — Exception. Utah Code Annotated 1953, as last amended by Chapter 204, Laws of Utah 1990, is repealed.

Section 11. Informational Section.

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.

ADDENDUM B

KANSAS STATUTES ANNOTATED
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CHAPTER 8. AUTOMOBILES AND OTHER VEHICLES
ARTICLE 15. UNIFORM ACT REGULATING TRAFFIC; RULES OF THE ROAD
OBEDIENCE TO AND EFFECT OF TRAFFIC LAWS

06. Authorized emergency vehicles; rights, duties and liability of drivers
hereof.

The driver of an authorized emergency vehicle, when responding to an
agency call or when in the pursuit of an actual or suspected violator of the
or when responding to but not upon returning from a fire alarm, may
exercise the privileges set forth in this section, but subject to the
limitations herein stated.

The driver of an authorized emergency vehicle may:

- Park or stand, irrespective of the provisions of this article;
- Proceed past a red or stop signal or stop sign, but only after slowing
as may be necessary for safe operation;
- Exceed the maximum speed limits so long as such driver does not endanger
or property;
- Disregard regulations governing direction of movement or turning in
specified directions; and
- Proceed through toll booths on roads or bridges without stopping for
payment of tolls, but only after slowing down as may be necessary for safe
operation and the picking up or returning of toll cards.

The exemptions herein granted to an authorized emergency vehicle shall
apply only when such vehicle is making use of an audible signal meeting the
requirements of K.S.A. 8-1738 and visual signals meeting the requirements of
A. 8-1720, except that an authorized emergency vehicle operated as a police
vehicle need not be equipped with or display a red light visible from in front
of the vehicle.

The foregoing provisions shall not relieve the driver of an authorized
agency vehicle from the duty to drive with due regard for the safety of all
persons, nor shall such provisions protect the driver from the consequences of
careless disregard for the safety of others.

History: L. 1974, ch. 33, s 8-1506; L. 1977, ch. 43, s 1; July 1.

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.

ADDENDUM C

CHAPTER 204

S. B. No. 194

Passed February 19, 1990

Approved March 12, 1990

Effective April 23, 1990

**GOVERNMENTAL IMMUNITY FOR
DAMAGES OF POLICE PURSUED VEHICLE**

By Richard J. Carling

AN ACT RELATING TO GOVERNMENTAL IMMUNITY; PRESERVING GOVERNMENTAL IMMUNITY FOR PEACE OFFICERS DRIVING MOTOR VEHICLES IN PURSUIT OF ACTUAL OR SUSPECTED VIOLATORS OF THE LAW; AND MAKING TECHNICAL CORRECTIONS.

THIS ACT AFFECTS SECTIONS OF UTAH CODE ANNOTATED 1953 AS FOLLOWS:

AMENDS:

**63-30-7, AS LAST AMENDED BY CHAPTER 129,
LAWS OF UTAH 1983**

Be it enacted by the Legislature of the state of Utah:

Section 1. Section Amended.

Section 63-30-7, Utah Code Annotated 1953, as last amended by Chapter 129, Laws of Utah 1983, is amended to read:

**63-30-7. Waiver of immunity for 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 [~~provided, however, that this section shall~~].

(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.

ADDENDUM D

gent 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 Subsections (14) through (18) and

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, 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