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Changing Lanes:

Navigating the Evolving Legal Landscape of Police Pursuits

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Cars are dangerous. And they are even more dangerous when one of them is chasing another at high speeds. Because of this, police pursuits have been a challenging area in the field of law enforcement for years, if not decades. From the police perspective, these challenges include the basic operation of a motor vehicle at high speeds, the difficulty of following someone at those high speeds who is actively attempting to elude you whether in a car or in a smaller, more maneuverable vehicle (i.e. motorcycle, bike), and having the obligation to catch the suspect without injuring yourself, them, or an uninvolved third-party in the process. These challenges, and in particular the difficulties in mitigating the risk to the surrounding community, are heightened in cities and crowded urban environments. All that said, regardless of the demographics of one's city or town, it has become increasingly important for police officers – and of course their lawyers – to understand the landscape with respect to police pursuits and that which is deemed appropriate / inappropriate under the applicable law. For those of us who represent police officers, it feels like the state of law (and certainly, public perception) has become more onerous in recent years. Accordingly, our duties as the lawyers who represent these officers include proactively educating our clients on the state of the law, and then reactively defending them to the best of our abilities when they happen to make a judgment call that leads to someone's injury or death.

In recent years, this issue has generated increased publicity. On the one hand, as scrutiny on police officers has increased, and as social media has taken to highlighting any and all consequential police mistakes, police departments around the county have implemented *far more restrictive* directives and guidelines with respect to police pursuits and the circumstances in which they are deemed appropriate. In Philadelphia for example, while in the past a police officer would have been unquestionably justified to pursue someone who stole a car or robbed a store, that is no longer the case. This marks a massive paradigm shift that has occurred in a relatively short period of time, and has been very challenging for officers – and in particular proactive police officers who are members of a proactive departments and/or units – to adjust and adapt to. It also poses a host of challenges for police departments, and can lead officers into a *hobson's choice* in which neither pursuing nor refraining from pursuit appears to be a "safe" option for the community.

When a police pursuit results in injury or death, it is now almost inevitable that a lawsuit will follow. The main theories under which an injured party or their estate can recover in such circumstances include federal claims for substantive due process and/or excessive force, and state law negligence claims. As one would expect, with respect to any of these theories, the challenge for the officer / municipality in defending the suit is far greater if the person injured or killed is a totally uninvolved third-party than if they are the subject of the pursuit (i.e. someone who was fleeing police). But this distinction is not dispositive. In order to understand the full state of the law, it is necessary to conduct a case-by-case review, starting with the Supreme Court of the United States.

1. Substantive Due Process Claims

In 1998, the Supreme Court had the opportunity to consider a unique police pursuit case, in which the family of the decedent brought claims against the City of Sacramento and one of its police officers. *See County of Sacramento v. Lewis,* 523 U.S. 833 (1998). In that case, a motorcycle – operated by one man with another man sitting behind him in the passenger position – was travelling at a very high speed, prompting someone to report the behavior to police. When the defendant police officer saw the bike breaking traffic laws as reported, he pulled behind it and yelled at the riders to pull over to the side of the road. *See id.* at 833. When the riders refused, the officer pulled his vehicle closer in an attempt to pen the motorcycle in, at which time the driver accelerated and drove away at an even higher speed. *See id.* The officer pursued with lights and sirens activated, but shortly afterwards the motorcycle driver lost control, causing the bike to go to the ground and both men to fall off. The officer – in close pursuit – was unable to stop his vehicle in time and struck the *passenger* with his police car, killing him. *See id.*

The family of the passenger sued the officer and the City of Sacramento for, *inter alia*, a substantive due process claim under the 14th Amendment. After the District Court (E.D. Cal.) granted summary judgment on behalf of the officer and the County, the Ninth Circuit reversed, applying a "deliberate indifference and/or reckless disregard" standard, and finding a material fact issue as to whether that standard was satisfied by the officer's actions. On review, the Supreme Court reversed the Ninth Circuit, holding that "high-speed police chases, with no intent to harm . . . do not give rise to liability under the Fourteenth Amendment for deprivation of substantive due process." *Id.* at 854. Put simply, *Lewis* thus held that if a police officer is engaged in a high-speed pursuit that results in the injury or death of another person – irrespective of that person's role in causing the pursuit – there is only legal recourse against the officer *if* they *intended to harm* the person they were pursuing. In so holding, the Court left the door slightly ajar to a number of contextual interpretations of its holding, and even specifically noted that more culpable conduct was "a matter for close calls" that *could*, in certain circumstances, "be actionable under the Fourteenth Amendment." *Id.* at 849.

a) Third Circuit – *Sauers v. Bor. Of Nesquehoning*

In the years that followed, courts in the different federal circuits interpreted *Lewis* – which has never been overruled – in a few different ways, but for the most part continued to apply an "intent-to-harm" standard to *high-speed* police pursuits. In recent years, however, a couple of decisions have suggested a possible change. For one example, in 2018, the Third Circuit Court of Appeals decided the tragic case of *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018). In *Sauers*, a husband and wife were out driving, minding their own business. At the same time, a police officer from the small borough of Nesquehoning was on patrol and watched a yellow Dodge Neon commit a minor summary traffic offense. In response, the officer whipped his car around and pursued the Dodge, while going over radio and notifying officers in the neighboring jurisdiction that the Dodge was headed in their direction. During the pursuit, the officer exceeded speeds of 100 mph. He then lost control of his police car and crashed into the vehicle containing

the husband and wife, injuring the husband and killing the wife.[1]

As one would expect, the husband/plaintiff in *Sauers* brought a suit for substantive due process violations under a "state-created danger" theory. One of the elements of a state-created danger claim – which is common to *all* substantive due process claims – is whether a state actor acted with a degree of culpability that *shocks the conscience*.[2] The Borough filed a motion to dismiss on qualified immunity grounds, which was denied, prompting the Borough to file an interlocutory appeal asserting that the right of a plaintiff to be free from police pursuits that "shock the conscience" – absent the existence of an intent to harm – was not "clearly established" for qualified immunity purposes.

As explained by the Third Circuit, qualified immunity involves two elements: (1) whether there exists, as pled, an underlying constitutional violation; and (2) whether there is a clearly established right for the plaintiff, under existing case law, to have been free from such conduct. Accordingly, any qualified immunity argument / appeal necessarily involves an assessment of the underlying claim's validity. So in *Sauers*, the Borough – aware that an interlocutory qualified immunity appeal allows for a review of both these elements – was able to maintain credibility with the court by simply appealing the qualified immunity decision without having to substantively defend the harder-to-defend aspects of the officer's actions.

On review, the Third Circuit carefully analyzed both elements. As to the existence of a plausible constitutional violation, the Third Circuit focused entirely on the 2nd state-created danger element; whether the officer acted with a degree of culpability that "shocked the conscience." And in its analysis, the Court – instead of simply adopting the *Lewis* "intent-to-harm" standard – delineated three specific categories of police officer decision-making that would govern the applicable liability standard in police pursuit cases (i.e. to determine if the

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[1] The officer ended up pleading guilty to the criminal charge of vehicular homicide.

[2] State-created danger claims are a specific species of substantive due process claims. A general substantive due process analysis focuses on the deprivation of fundamental rights and simply asks whether a government actor engaged in constitutionally "arbitrary" conduct under circumstances which "shock the conscience." State-created danger claims, however, are more specific and are reserved for situations in which the government – even if it does not injure the plaintiff itself – creates the danger that eventually causes the alleged injury. These claims typically require the satisfaction of four distinct elements: (i) the harm ultimately caused was foreseeable and fairly direct; ***(ii) a state actor acted with a degree of culpability that shocks the conscience***; (iii) a relationship between the state and the plaintiff existed . . .; and (iv) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all." *See Henry v. City of Erie*, 728 F.3d 275, 282 (3d Cir. 2013). Due process claims in police pursuit cases – whether brought as state-created danger claims or broader substantive due process claims –are premised on the *conscience-shocking* element.

actions were in fact "conscience-shocking" under the 14th Amendment).[3] Each category – and its corresponding degree of culpability – is based on how much time the officer had to make the decision (i.e. to decide to conduct the pursuit) that resulted in the alleged harm. The three categories and their implications are as follows:

- (1) When actions are taken in a "hyper-pressurized environment" → **requires intent to harm** (same as general standard in *Lewis*);

- (2) When actions are taken within a time frame that allows an officer to engage in "*hurried deliberation"* → **requires conscious disregard of a great risk of serious harm**; and

- (3) When actions constitute "unhurried judgments" which are taken with "time for careful deliberation" → **requires deliberate indifference**

In *Sauers*, the Third Circuit found that the challenged actions of the Defendant police officer were in the 2nd category – that which allows for "hurried deliberation" – for two specific reasons. For one, the court noted that the officer had time to call the neighboring police department to tell them the offender might be coming to their jurisdiction *before* he ever pursued said offender. And second, the officer exceeded speeds of 100 mph to pursue a completely *non-violent / non-threatening* offender, who had merely committed a summary offense. Accordingly, the court found that no split-second decision was needed to track the individual down and the officer could have simply let the neighboring jurisdiction – who he had time to call – handle the stop and ensuing citation. And as such, the officer *could* be deemed to have engaged in conscious-shocking behavior *if* a fact-finder determined he had exhibited "conscious disregard of a great risk of serious harm" to the public (i.e. the second category). The Third Circuit went on to opine that in its judgment, there was at least a genuine issue of material fact as to whether the officer's actions satisfied that level of culpability and thus violated the due process rights of the plaintiff and decedent, and refused to grant summary judgment on that basis.

But despite finding the existence of a plausible due process violation, the Court in *Sauers* actually dismissed the lawsuit under the 2nd qualified immunity prong because it found *it was not clearly established* that a police officer could be subject to constitutional liability for actions taken under the second culpability category; i.e. actions taken in "conscious disregard of a great risk of harm." In its analysis, the Court explained that "[e]xisting precedent is sufficient to place a constitutional question beyond debate and to defeat qualified immunity only if it is "*controlling authority in the relevant jurisdiction"* or if a "*robust consensus of cases of persuasive authority in the Court of Appeals* has settled the question." *Id.* at 719 (quoting *Mammaro v. NJ Div. of Child Prot. & Permanency*, 814 F.3d 164, 169 (3d Cir. 2016) (emphasis added) (remaining

[3] These categories were previously applied in the Third Circuit to *other* substantive due process claims *not* involving police pursuits. *See, e.g., Haberle v. Troxell*, 885 F.3d 170 (3d Cir. 2018). It may be the case that in doing so, the Third Circuit was also guided by dicta in *Lewis*, which suggests (less specifically) a similar approach in cases *outside of the* high-speed police pursuit context. *See Lewis*, 523 U.S. at 854.

citations and quotations omitted)). With those principles in mind, the Third Circuit assessed whether the United States Supreme Court or the Third Circuit had ever found liability under sufficiently similar facts, *or* if there existed a consensus of authority among *other* Circuits that placed the right at issue beyond debate. *See id.* at 719-20.

In looking to other jurisdictions, the Third Circuit noted that the Eighth and Ninth Circuits appeared to interpret *Lewis* broadly and thus suggested that an "intent-to-harm" standard would govern in all police pursuit cases. *See id.* at 721-22 (citing *Sitzes v. City of West Mephis,* 606 F.3d 461 (8th Cir. 2010) and *Bingue v. Prunchak,* 512 F.3d 1169, 1177 (9th Cir. 2008)). Although the Third Circuit also noted that the Tenth Circuit applied a categorical approach reflecting the officer's time to act, and pointed to a case in which it had applied a "deliberate indifference" standard to the actions of an officer who crashed his car into a third-party victim while pursuing a suspected gas thief, but who never activated his lights or sirens and acknowledged that he was *not* responding to an "emergency" situation at the time. *See Sauers*, 905 F.3d, at 720-21 (citing *Green v. Post,* 574 F.3d 1294, 1309 (10th Cir. 2009)). The Third Circuit, however, also pointed to the Tenth Circuit's determination that it was "not clearly established" that a police officer could be held liable for conduct that fell below the "intent-to-harm" threshold. *See id.* at 722-23 (citing *Green*). Further, the Tenth Circuit decision to apply that lesser standard in 2009 – standing alone – did *not* "amount[] to the robust consensus of cases of persuasive authority" to constitute a clearly established right to relief in these circumstances. *See id.* Accordingly, at the time of the collision in *Sauers*, it was not clearly established that a police officer could be held liable for any pursuit in which he demonstrated a level of culpability short of intending to harm the suspect or another person.

But in so holding, the court – clearly indicating a sense of injustice with having to dismiss the lawsuit – made doubly certain that would not be the case in the future (at least not within the Circuit). The Third Circuit specifically stated that "[p]olice officers *now have fair warning that their conduct when engaged in a high-speed pursuit will be subject to the full body of our state-created danger case law. . .* [t]hat law clearly establishes that the *level of culpability required to shock the conscience exists on a spectrum tied to the amount of time a government official has to act*." *Id.* at 723 (emphasis added). In stating as much, the Third Circuit essentially eliminated the possibility that a police officer in its jurisdiction (and perhaps elsewhere) could argue in the future that the potential liability for "high-speed pursuit" was anything but clearly established, even under a lesser standard than "intent-to-harm." In framing the inquiry as such, one must also wonder about scenarios where a police officer engages in pursuits that would not be considered "high-speed," at least in comparison to the facts in *Sauers* (i.e. officer travels over 100 mph).

b) Other Circuits

Despite the Third Circuit's efforts to distinguish *Lewis*, not all jurisdictions have done the same. Although the Tenth Circuit has applied a very similar framework emphasizing the police officers' time for decision-making (*see Browder v. Casaus*, 675 F. App'x 845 (10th Cir. Jan. 11,

2017))[4], at least the Fifth, Sixth, Eighth, and Ninth Circuits generally retain the "intent-to-harm" standard for all situations in which a police officer is engaged in a high-speed pursuit with a suspect, *regardless* of whether the person harmed is the individual being pursued or a wholly uninvolved third-party. The Ninth Circuit, as relied upon by the Third Circuit in *Sauers* in rejecting the notion of a clearly established right, appears to apply the intent-to-harm standard in all "high-speed" pursuit cases. *See Bingue v. Prunchak*, 512 F.3d 1169, 1177 (9th Cir. 2008); *see also Nicholson v. City of Los Angeles*, 935 F.3d 685 (9th Cir. 2019) (looking to *Bingue* for the general proposition that "[a] suspect fleeing in a car at high speed gives an officer 'no time for reflection and precious little time for deliberation.'") (citations omitted). And the Fifth Circuit, although having had fewer opportunities to consider the issue, appears to apply *Lewis* cart blanche, holding that in a case involving a police pursuit-related death, the plaintiffs' concession that there existed *no intent to harm* required the dismissal of their substantive due process claim as a matter of law *despite* the presence of a host of factual disputes as to the actual facts and circumstances of the pursuit in question. *See O'Neal v. Cazes*, 257 F. App'x 710 (5th Cir. Oct. 1, 2007). Put differently, the conceded absence of any intent to harm rendered the objective facts of the incident irrelevant for summary judgment purposes.

The Eighth Circuit, although it recognized the possibility of a lower "deliberate indifference" standard for situations "when actual deliberation is practical," actually went a step further and appears to apply *Lewis* to *any* situation in which police officers are tasked with driving at a high speed in order to stop or prevent a crime, even in the absence of an actual police "pursuit." *See Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005). In *Larson*, police officers were responding to a call for a domestic disturbance when one of the officers drove through a red light with lights and sirens activated and collided with an uninvolved third-party who was driving in her own car, killing her. Although an *en banc* panel initially concluded that *Lewis* did not apply because the officers were not actually engaged in any police *pursuit*, the Eighth Circuit rejected that distinction and extended the application of *Lewis* to officers responding to the scene of an alleged crime, even if not involved in a chase. *See id.*; *see also Sitzes v. City of West Memphis*, 606 F.3d 461 (8th Cir. 2010) (following *Lewis* in situation where police officer responded to 911 call for robbery/alleged assault that was *not* reported to be ongoing, despite fact that officer – without lights and sirens activated – drove 80-90 mph on a 30 mph street before crashing and killing occupant of a third-party vehicle).

And perhaps most interesting among these, the Sixth Circuit – in applying the *Lewis* intent-to-harm standard – specifically addressed the relevance of a clear police policy violation pertaining to vehicle pursuits. *See Meals v. City of Memphis*, 493 F.3d 720 (6th Cir. 2007). In *Meals*, a police officer pursued a suspect at a high speed, causing the suspect to cross into oncoming traffic and strike the vehicle of a third-party victim head on, resulting in not only the suspect's death but also the driver of the other car. Although the officer had clearly violated police policy in initiating the pursuit, and despite testimony from the plaintiffs' expert that such

[4] In *Browder*, the Tenth Circuit emphasized two important factors: (1) whether the officer was "acting in service of a legitimate governmental objective," and (2) whether the officer had "time to make unhurried judgments" and/or had the "chance for repeated reflection." *See id.* at 848.

actions were entirely inappropriate under the relevant standards, the Sixth Circuit applied *Lewis* and found in favor of the police officer and the city. *See id.*

Accordingly, it is evident that in most jurisdictions, *Lewis* remains intact and will govern police pursuits in which both the subject of the pursuit *and* the officer are traveling at high speeds, even if – as suggested by the Sixth Circuit – the officer has violated policy in conducting such a pursuit. And even in the jurisdictions that apply a more fact-specific, nuanced framework (i.e. Third Circuit; Tenth Circuit), there exists a significant level of deference to the police officer so long as (s)he is pursuing an important government objective, the satisfaction of which requires them to operate their police vehicle at a high speed. Although not all of these are addressed in the above-referenced decisions, some factors that may be relevant to tip the scales in one direction or another include: the severity of the crime which triggers the pursuit, the status of the victim (i.e. suspect or uninvolved third party), whether the officer had time to go over radio and, if so, the nature of that radio call, whether the officer activated their lights and sirens, and of course the maximum speed of the officer's vehicle / speed at the time of collision (as compared to the suspect's speed).

2. Excessive Force Claims

Sometimes when a police officer engages in a pursuit which results in a collision and a death or serious injury, plaintiffs allege that the collision was intentional and assert excessive force claims under the Fourth Amendment. More specifically, when there exists a "seizure," the Fourth Amendment is in play, and there may be at least a colorable excessive force claim.

As a practical matter, these claims are *far* more likely to be asserted on behalf of the suspect who was the subject of the pursuit, because in cases involving innocent third-party victims it will be very difficult for a plaintiff's lawyer to convince a jury that the officer intended to use their vehicle as a weapon against a random person who is entirely uninvolved in the pursuit. As a result, these claims are less prevalent in the pursuit context than the above-described due process claims, which are often based on accidents. That said, these claims are important to be aware of as the consequences of a plaintiff's verdict can be catastrophic with respect to the damages awarded, particularly if the justification for the pursuit itself is questionable.

Like the due process claims, the starting point for reference are Supreme Court decisions in the police pursuit context. In *Scott v. Harris*, the Supreme Court analyzed the constitutionality of an officer's attempt to stop a fleeing motorist by ramming the motorist's car from behind. Finding in favor of the officer, the Court held that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." 550 U.S. 372, 386 (2007). The threshold issue in excessive force claims – like that at issue in *Scott* – is whether a seizure occurred. In *Scott*, the Court explained that a "Fourth Amendment seizure occurs when there is a governmental termination of freedom of movement through means intentionally applied." *Id.* at 381 (citations and quotations omitted). Unsurprisingly, the Court found that ramming another vehicle constitutes a seizure because it terminates that other driver's movement "through means intentionally applied." *See id.; see also*

Brower v. County of Inyo, 489 U.S. 593 (1989) (alleged use of roadblock to stop driver of a stolen car constituted a "seizure" under the Fourth Amendment).[5]

The facts in *Scott* are very important for situations in which police officers are faced with not only fleeing suspects, but fleeing suspects whose flight poses a legitimate risk to the public. The pursuit in that case first began when an officer clocked the plaintiff traveling 73 mph in a 55 mph zone, prompting the officer to activate lights in an attempt to stop the plaintiff for speeding. *See id.* at 374-75. From there, objective video evidence showed the plaintiff speeding away at a high speed (other evidence indicated the plaintiff exceeded 85 mph), swerve around more than 10 cars, cross the double-yellow dividing line, and cause cars going both directions to pull over to the shoulder of the road to avoid being struck. *See id.* Further, in his desperate efforts to escape, the plaintiff ran multiple red lights and conducted a series of maneuvers described by Judge Scalia in his Opinion as a "Hollywood-style car chase of the most frightening sort." *Id.* at 379-80. After a number of minutes (and after police unsuccessfully attempted to box the plaintiff in in a shopping center parking lot), Defendant police officer Scott took over as the lead vehicle conducting the pursuit, went over radio for permission to deploy a specific maneuver known as a "precision intervention technique" to try and stop the fleeing vehicle. *See id.* at 375. After receiving permission to "go ahead and take him out," Officer Scott bumped (or rammed) the back of plaintiff's vehicle with his bumper, causing the plaintiff to lose control and veer off the road, before flipping and crashing. *See id.* The plaintiff was rendered a quadriplegic as a result. *See id.*

In holding that the officer's actions did *not* violate the Fourth Amendment as a matter of law, the Court emphasized the "relative culpability" of the parties. *See id.* at 384. Explaining that the plaintiff had intentionally created the dangerous situation and thus placed not only himself, but the general public in serious danger, the Court noted that it had "little difficulty in concluding it was reasonable for Scott to take the action that he did." *Id.* The Court rejected plaintiff's argument that the officers could have prevented the injury if they simply stopped pursuing the suspect, noting the "perverse incentives" that would be created if fleeing suspects were allowed to get away any time they drove "so recklessly that they put other people's lives in danger." *Id.* at 385. In a concurring opinion, Justice Ginsburg applied a fact-specific analysis of the plaintiff's actions, focusing on whether the lives of third-parties were at risk and on whether there was a "safer way, given the time, place, and circumstances, to stop the vehicle." *See id.* at 386.

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[5] In *Brower*, the decedent stole a car and drove away in it at high speeds to flee from pursuing police officers, prompting other officers to place an 18-wheel truck completely across the highway as a roadblock to stop the decedent in his flight. Plaintiff alleged that this truck was "concealed" by being placed just behind a curve and that a police car was separately positioned with its headlights shining towards the highway in order to blind the decedent, allegedly causing decedent to crash into the roadblock, killing him. *See id.* at 594. The Supreme Court found these allegations sufficient to state a claim for relief given the allegations that the roadblock was set up "in such manner as to likely kill him." *Id.* at 599.

Returning to the concept of a "seizure," another way to frame the inquiry is whether the harm at issue results from an intentional restriction on the suspect's movement or simply from an accident. In the latter situation – which encompasses most police pursuit cases because it is rare that the officer intends to strike or nudge the suspect's vehicle with their police vehicle – any recourse under the United States Constitution is through the due process clause. One ramification of this analysis is that absent very unusual circumstances (i.e. the barricade in *Brower*), physical contact between the officer's vehicle and the suspect's vehicle is a prerequisite for an excessive force claim. And this appears to be the case irrespective of whether the plaintiff is the subject of the pursuit or an uninvolved third-party. *See, e.g., Cobb-Leavy v. Borough of Yeadon*, No. 18-1069, 2018 WL 4252385, at *2 (E.D. Pa. Sept. 5, 2018). In *Cobb-Leavy*, a police officer initiated a vehicle pursuit of a suspect, causing the suspect to lose control of his car and crash into a building, injuring one of the building's occupants. The Court disposed of the plaintiff's excessive force claim in less than a paragraph, reasoning that absent a detainment, there could exist no seizure, and thus no excessive force claim. *See id.*[6]

Another hurdle for plaintiffs asserting excessive force claims in the police pursuit context is qualified immunity. In the recent case of *Morrow v. Meachum*, the Fifth Circuit Court of Appeals held that a police officer who set up a rolling block on a highway in an effort to apprehend a fleeing motorcyclist who was travelling at break-neck speeds was afforded the protections of qualified immunity because he did not violate any "clearly established" law. 917 F.3d 870 (5th Cir. 2019)

In *Morrow*, the defendant police officer was driving a marked police SUV when he observed a motorcyclist speeding and weaving through traffic. When the officer attempted to stop him, the motorcyclist sped away. After a series of events during which the suspect exited the highway for a short time in an effort to hide, the officer was actually ahead of the motorcycle when the suspect returned to the highway to continue his flight. At that time, the officer drastically slowed his vehicle and moved towards the center of the road, making it far more difficult for the suspect to pass him. As a result, the suspect could not avoid the officer's vehicle and his motorcycle crashed into the back of the SUV, killing the suspect. His estate brought a lawsuit, alleging the officer "intentionally positioned his SUV to surprise [the decedent], to prevent him from eluding arrest . . ., and under the circumstances, to kill him." *Morrow*, 917 F.3d, at 873. In response, the officer defended his actions as a "rolling block" which he performed in order to discourage the decedent from passing in the oncoming traffic lane and so as to warn oncoming traffic of the situation. *See id.* at 873-74. At summary judgment, the District Court for the Northern District of Texas relied on *Scott v. Harris* in finding that the officer was entitled to qualified immunity. The Fifth Circuit reviewed *de novo* on appeal.

After reciting the applicable standard for qualified immunity, the Fifth Circuit noted that the second question (i.e. whether the "right at issue was clearly established") was a "doozy." *Id.*

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[6] It is worth noting that the court also rejected the plaintiff's substantive due process claim under *Lewis*, applying its intent-to-harm standard and explaining that the plaintiff's allegations as to the officer's reckless conduct in a pursuit that was not alleged to be unjustified fell short of the *Lewis* standard for liability. *See id.* at *2.

at 874 (citations and quotations omitted). Beginning with that analysis, the Court extrapolated four separate principles to guide the "clearly established" question. As articulated by the Fifth Circuit, those principles were as follows:

(1) A need to frame the constitutional question "with specificity and granularity." *Id.* at 874-75. The touchstone of the second qualified immunity prong is "fair notice" to the officer of the type of conduct for which (s)he could be liable, and the court explained that the simple existence of a generic cause of action does not satisfy this requirement. *Id.* at 875 ("The dispositive question is whether the violative nature of *particular* conduct is clearly established."). (citations and additional quotations omitted).

(2) That which is "clearly established" must be established through actual holdings, not dicta. *See id.* The court explained that officers are not charged with knowing every bit of dicta from a case (or line of cases), as "[d]ictum is not law, and hence cannot be clearly established law." *Id.* at 875-76.

(3) Qualified immunity is particularly difficult for plaintiffs to overcome in cases involving allegations of excessive force. The fact-sensitive nature of excessive force cases, which routinely "turn on 'split-second decisions," makes it the relatively rare situation in which one specific instance is able to put officers on notice of the fact that their distinct split-second decision in a separate instance is rooted in the identical concept or principle. "That means the law must be *so* clearly established that – in the blink of an eye, in the middle of a high-speed chase – every reasonable officer would know it immediately." *Id.* at 876.

(4) Courts must "think twice" before *denying* qualified immunity. *Id.* Contrary to the general principle – in most cases – that the Supreme Court limits reversals to those decisions which are "manifestly incorrect," the Fifth Circuit explained that the high Court has a different role with respect to qualified immunity. *See id.* (citations omitted). Indeed, because qualified immunity is so instrumental to the functioning of society, the Fifth Circuit noted that it would "be ill advised to misunderstand the message and deny qualified immunity to anyone 'but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

In light of those principles, the court found that the plaintiffs had failed to make the "extraordinary showing" necessary to demonstrate that there existed "controlling precedent" that governed the specific facts at issue in the case; namely, the application of a "rolling block" in the short amount of time available to the officer to both decide on a course of action and act. *See id.* at 876-77. In support, the court looked to three cases in which the Supreme Court granted qualified immunity to officers who used deadly force to end police chases. *See id.* at 877 (citing *Scott*, 550 U.S., at 386; *Plumhoff*, 572 U.S., at 769-70; *Mullenix*, 136 S.Ct., at 312). Although the Fifth Circuit did not analogize the specific *facts* of those situations to those at issue in *Morrow*, it found the granting of qualified immunity in each of those cases instructive. As part of the line same of reasoning, the court then distinguished a series of cases invoked by plaintiffs and noted – in part – that factually dissimilar cases (including *any cases "involving gunshots"*) were simply incapable of "clearly establishing" the law at issue in the pursuit context. *See id.* at 879. Given the absence of any controlling case law – or "out-of-circuit consensus necessary to

put the relevant question 'beyond debate'" – the plaintiffs were simply unable to demonstrate the "clearly established" right of fleeing suspects to be free from the type of action (i.e. the rolling roadblock) that was taken by the defendant officer. *See id.* at 879-80. Accordingly, the judgment of the district court was affirmed and there was no liability against the officer.

As noted above, it is often an uphill battle for plaintiffs seeking to bring federal claims in police pursuits gone wrong. Although circumstances do exist in which a plaintiff may be able to prevail on a substantive due process, or even excessive force claim, these cases are the exception, not the norm, and will remain so for at least as long as certain of these types of situations remain protected by qualified immunity. In *Sauers*, the Third Circuit – clearly aware of the difficulties faced by Plaintiffs in establishing due process claims even when the officer's conduct appears to have been very reckless – attempted to start re-shaping the landscape by issuing a holding that "clearly established" a lesser degree of culpability for liability *within the Third Circuit* than the intent-to-harm standard articulated in *Lewis*. While that holding may now govern (and defeat qualified immunity) *within* the Third Circuit, other circuits will need to follow suit before *Sauers*' can be invoked elsewhere for the proposition that police officers can actually be held liable for recklessness or negligence in the pursuit context.

3. Remaining Open Questions

The cases described above answer evidence the types of facts that courts are likely to emphasize when applying the holdings of *Lewis* and *Scott* to tragic situations in the police pursuit context. Clearly, in determining whether there exists a due process violation and/or unreasonable Fourth Amendment seizure, courts will look to the speed at which the officer *and* suspect were traveling, the length of the pursuit, the nature of any radio calls made by the officer (i.e. whether the calls were high-stress and hurried or whether the officer clearly had time to contemplate his/her actions based on the language of the call), whether the officer activated their lights and sirens as part of the pursuit, and the nature of the government objective being pursued by the officer (i.e. was the officer chasing a suspect wanted for a serious crime, or simply for a minor traffic violation). Although these factors are likely *less relevant* in *Lewis* jurisdictions than they might be in the 3rd and 10th Circuits, they may nonetheless play a role in other jurisdictions, whether in the excessive force and/or due process context.

All that said, some questions do remain open, including:

1. In *Lewis* jurisdictions, what happens if the pursuit is *less* than "high-speed?" (i.e. if the officer is in pursuit of a vehicle at speeds under 70 mph, and the resulting harm does not result from the high-speed nature of the pursuit, but rather some other aspect of the pursuit). Would this be enough to cause those jurisdictions to mirror the Third / Tenth Circuits in establishing a graduated framework? Or might they simply conclude that *Lewis* does not apply, and then analyze whether the police action at issue is "conscience-shocking" in accordance with existing precedent in the Circuit, even if not in the police pursuit context?

2. In any jurisdiction, what is the analysis if the suspect being pursued is not

necessarily traveling at a high-speed, but the officer is nonetheless traveling at high-speed either to get to the area of the pursuit or based on their subjective understanding of the suspect's actions at the time (even if inaccurate)? Standing alone, could that change the application of the intent-to-harm standard?

3. In non-*Lewis* jurisdictions, what is the analysis in a case where the officer is charged with vehicular homicide under a negligence or recklessness standard (i.e. as was the situation *Sauers*), but was nonetheless involved in a high-speed pursuit which caused them to drive dangerously? Would this fact necessarily defeat qualified immunity in a jurisdiction that – to date – only recognizes intent-to-harm as an actionable standard for due process claims?

4. In the excessive force context, how would courts treat a *Scott v. Harris* situation in which the officer took those same actions (i.e. bumping or ramming the suspect vehicle during the pursuit, with serious consequences) if confronted with a *slightly less egregious* scenario? Although *Scott* describes a situation in which the suspect/plaintiff appears to have been willing to do anything to avoid capture, it is not difficult to imagine a situation in which the suspect – while unquestionably breaking the law and attempting to avoid arrest – does not take any actions rising to the level of those described therein. This would certainly result in a fact-based analysis, but how would it play out?

5. Are there situations in which a fleeing suspect and third-party victim would have different recourse against an officer under the law, based on the same conduct by the officer? In other words, if a police officer engages a criminal suspect in high-speed pursuit, resulting in a car accident that harms *both* the suspect and an uninvolved third-party, might the fleeing suspect and innocent victim have different rights of recourse against the officer and/or their employer? Or would the analysis necessarily be the same?

These are only some of the questions that remain unanswered within this complex and rich area of constitutional law. The answers to these remaining questions would likely vary by jurisdiction, and potentially by the specific facts present in each situation. However, it also seems likely that some or all of these situations would be governed by the cases that already exist, and it might be that some courts would favor a broad application of the existing well-established principles above a searching factual inquiry that might have less support in established precedent. As time passes, it appears likely that courts will be faced with more of these situations, and as that happens, it is worth keeping an eye on the impact both with respect to the "clearly established" qualified immunity prong, as well as the general Fourth and/or Fourteenth Amendment analysis, as applicable to the circumstances of each case.