

IN THE IOWA SUPREME COURT

NO. 21-0980

AMBER MARTINEZ, Individually and on behalf of her minor child,
I.M. and ISABEL ASHLEY, an adult single person,

Plaintiffs/Appellees,

VS.

STATE OF IOWA,

Defendants/Appellant

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY, IOWA
Case No. LAcl143648
THE HONORABLE SAMANTHA GRONEWALD

FINAL BRIEF OF APPELLEES
AMBER MARTINEZ, Individually and on behalf of
her minor child, I.M., and ISABEL ASHLEY, an adult
single person

STEVE HAMILTON
MOLLY M. HAMILTON
Hamilton Law Firm, P.C.
12345 University Avenue, Suite 309
Clive, Iowa 50325
(515) 309-3536
(515) 309-3537 (FAX)
steve@hamiltonlawfirm.com
molly@hamiltonlawfirm.com
ATTORNEYS FOR APPELLEES

TABLE OF CONTENTS

Table of Contents..... 2

Table of Authorities..... 3

Statement of Issues Presented for Review..... 4

Routing Statement..... 6

Statement of the Case..... 6

Statement of Facts..... 6

Preservation of Error..... 17

Standard of Review..... 17

ARGUMENTS

I. WHETHER IOWA CODE 321.231(5) ESTABLISHES A DUTY OF CARE BETWEEN SERGEANT TJEPKES AND AMBER MARTINEZ..... 17

II. THERE IS A DUTY TO AVOID RECKLESS CONDUCT ENDANGERING MEMBERS OF THE PUBLIC DURING LAW ENFORCEMENT PURSUITS OF FLEEING SUSPECTS..... 27

III. THE USE OF DEADLY FORCE VIA A MOTOR VEHICLE USED TO PURSUE A FLEEING FUGITIVE POSES SIGNIFICANT RISKS TO INNOCENT CITIZENS..... 28

Conclusion..... 30

Request for Oral Argument..... 31

Certificate of Filing..... 32

Certificate of Service..... 32

Certificate of Compliance..... 33

TABLE OF AUTHORITIES

Cases:

Ex Parte Brown v. Mitchell, 182 So.3d 495 (2015)..... 23
Bullins v. Schmidt, 322 N.C. 580, 369 S.E. 601 (1988)..... 22
County of Sacramento v. Lewis, 118 S.Ct. 1708..... 29
District of Columbia v. Hawkins, 782 A.2d 293 (2001)..... 23
Dooley v. City of Cedar Rapids, 800 N.W.2d 755 (2011)..... 18
*Estate of Aten by and through Kitchens for the Benefit
of Aten v. City of Tucson, Ariz.* 141, 817 P.2d 951
(1991)..... 21, 22, 23
Jones v. Crawford, 1 A.3d 299 (Delaware, 2010)..... 24
Kolbe v. State, 625 N.W.2d 721 (Iowa, 2001)..... 18
Mastbergen v. City of Sheldon, 515 N.W.2d 3, 4 (Iowa, 1994). 18
McFarlin v. State of Iowa, 881 N.W.2d 51 (Iowa, 2016)..... 18
Morris v. Leaf, 534 N.W.2d 388 (Iowa, 1995)..... 20
Pearson v. City of Atlanta, 231 Ga. App. 96 (Georgia, 1998). 24
Roadman v. Bellone, 319 Pa 483, 108 A.2d 754 (1954) 24
Ross v. City of Jacksonville, 274 So3d 1180 (Fla 2019)..... 24
Saarinen v. Kerr, 84 N.Y.2d 494; 644 N.E.2d 988 (1994).. 20, 21
Tennessee v. Garner, 471 U.S. 1, 11 (1985)..... 29
Tidwell v. City and County of Denver, 83 P.3d 75 (2003)..... 23
Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009)..... 27

Statutes:

Iowa Code §321.231..... 21, 30
Iowa Code §321.231(5)..... 17, 18, 19

Other:

4 ALR 4th 24
Cooling the Hot Pursuit: Toward a Categorical Approach,
73 Indiana L.J..... 28
Hugh Nugent U.S. Dept of Justice Restrictive Policies
for High Speed Police Pursuits..... 28, 29
Restatement of Torts 2d Sec. 500..... 25, 26

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER IOWA CODE 321.231(5) ESTABLISHES A DUTY OF CARE BETWEEN SERGEANT TJEPKES AND AMBER MARTINEZ.

Cases:

Mastbergen v. City of Sheldon, 515 N.W.2d 3, 4 (Iowa, 1994)
Kolbe v. State, 625 N.W.2d 721 (Iowa, 2001)
Dooley v. City of Cedar Rapids, 800 N.W.2d 755 (2011)
McFarlin v. State of Iowa, 881 N.W.2d 51 (Iowa, 2016)
Bullins v. Schmidt, 322 N.C. 580, 369 S.E. 601 (1988)
District of Columbia v. Hawkins, 782 A.2d 293 (2001)
Estate of Aten by and through Kitchens for the Benefit of Aten v. City of Tucson, Ariz. 141, 817 P.2d 951 (1991)
Morris v. Leaf, 534 N.W.2d 388 (Iowa, 1995)
Ex Parte Brown v. Mitchell, 182 So.3d 495 (2015)
Tidwell v. City and County of Denver, 83 P.3d 75 (2003)
Jones v. Crawford, 1 A.3d 299 (Delaware, 2010)
Pearson v. City of Atlanta, 231 Ga. App. 96 (Georgia, 1998)
Ross v. City of Jacksonville, 274 So3d 1180 (Fla 2019)
Roadman v. Bellone, 319 Pa 483, 108 A.2d 754 (1954)
Saarinen v. Kerr, 84 N.Y.2d 494; 644 N.E.2d 988 (1994)

Statutes:

Iowa Code §321.231(5)

Other:

4 ALR 4th

Restatement of Torts 2d Sec. 500

II. THERE IS A DUTY TO AVOID RECKLESS CONDUCT ENDANGERING MEMBERS OF THE PUBLIC DURING LAW ENFORCEMENT PURSUITS OF FLEEING SUSPECTS.

Cases:

Thompson v. Kaczinski, 774 N.W.2d 829 (Iowa 2009)

III. THE USE OF DEADLY FORCE VIA A MOTOR VEHICLE USED TO PURSUE A FLEEING FUGITIVE POSES SIGNIFICANT RISKS TO INNOCENT CITIZENS.

Cases:

County of Sacramento v. Lewis, 118 S.Ct. 1708
Tennessee v. Garner, 471 U.S. 1, 11 (1985)

Other:

Cooling the Hot Pursuit: Toward a Categorical Approach,
73 Indiana L.J.
Hugh Nugent, et al., U.S. Dept of Justice Restrictive Policies
for High Speed Police Pursuits @ 21, 1279, 1280 (1999)

ROUTING STATEMENT

Appellees also believe this case should be assigned to the Supreme Court so that some parameters on endangerment of the public by law enforcement conduct may be made known.

STATEMENT OF THE CASE

This is a case of an ill-advised police chase of a low level criminal suspect involving the Iowa Department of Public Safety (DPS), that went terribly awry.

The pursued fugitive, to wit, Scott Grimes, attempted to escape the DPS officers on a busy hilly thoroughfare in Des Moines, Iowa, during afternoon rush hour exceeding the posted speed limit of 35 mph by approximately 45-55 mph while crossing into the opposite lanes of traffic. Predictably, it ended in a terrible crash with Amber Martinez, catastrophically injured when Grimes struck the Martinez vehicle head on in the Martinez lane of travel.

That person, Amber Martinez, and two of her children made state tort claims which were administratively denied. They brought this suit in the Iowa District Court, Polk County for injuries and loss of companionship. Defendant State of Iowa moved for summary judgment which was denied. Defendant State then applied for interlocutory appeal which was granted.

STATEMENT OF FACTS

Amber Martinez (Amber) was a resident of Des Moines, Iowa, on August 22, 2016. She grew up in a military family. She

lived in the United States and Germany as her family moved a lot. She eventually returned to Des Moines, attended and graduated from Valley High School in West Des Moines, Iowa, in the year 1995. (Pltf. MSJ Resistance App. Ex. 1, p. 1, para. 1-3: App. 194).

In assessing her education, she called herself an average student while taking course work at DMACC.

She took employment at Medicaid then Amerihealth which performed as Medicaid contractors. (Pltf. MSJ Resistance App. Ex. 1, p. 2, para. 6,7: App. 195).

Before August 22, 2016, she opined she enjoyed a happy life with her husband and two children. (Pltf. MSJ Resistance App. Ex. 1, p. 2, para. 6, App. 195).

When she worked for Medicaid and the Medicaid contractors, she worked in one of the Ruan Buildings in downtown Des Moines (Pltf. MSJ Resistance App. Ex. 1, p. 2, para. 7: App. 195) while living on Amherst Street in the middle part of Des Moines.

To help the family financially, she arranged to have her parents provide day care for her minor son, I.M., who was then 8 years old. (Pltf. MSJ Resistance App. Ex. 1, p. 2, para. 8: App. 195).

Amber had done this several summers before the year 2016. She would take I.M. to her parents' house in the Urbandale area each day, dropping him off in the morning. After work she would

drive the same route, returning to pick I.M. up then driving to her home on Amherst. (Pltf. MSJ Resistance App. Ex. 1, p. 2, para. 8: App. 194).

Amber's parents lived on Brookview Drive in Urbandale, Iowa. To travel there after work, Amber would leave the downtown area, drive north on Merle Hay Road, then turn left or west on Meredith and continue on Meredith for several blocks. She would then turn left or north on Lochner to Brookview where her parents lived. She would normally have some conversation with her mother, pick up I.M. and return to her home on Amherst in Des Moines. (Pltf. MSJ Resistance App. Ex. 1, pp. 2, 3; para. 9: App. 195-196).

On the day of the accident, she traveled this route to pick up her son after work as she had done many times before at approximately 5:30 p.m. but did not make it to her Lochner turnoff. (Pltf. MSJ Resistance App. Ex 1, p. 2, para. 8: App. 194).

She reached Meredith drive via Merle Hay, then traveled a short distance in a westerly direction on Meredith but was struck by an eastbound car, that crested a hill on Meredith right in front of her in her lane of travel. That car was going in the neighborhood of 70 to 90 miles per hour in her lane with Sergeant Tjepkes right behind. (Pltf. MSJ Resistance App. Ex. 8, p. 3 para. 11, 12: App. 257). That vehicle, driven by escapee Grimes, had run several lights at speeds of 70-90 mph and crossed over into Amber's

westbound lane just before cresting a hill and crashing into her. Grimes acknowledged there is nothing Amber could have done to avoid the collision. (Pltf. MSJ Resistance App. Ex. 8, p. 3, para. 11, 12: App. 257). (Pltf. MSJ Resistance App. Ex. 13 App. 140: App. 331). Grimes was being pursued by Sergeant Tjepkes at that time. (Pltf. MSJ Resistance App. Ex. 9, Dashcam: App. 260).

Amber's injuries have changed her life. She has depression. She is in pain. She cannot sleep. Her financial life is a train wreck. One page of her medical records gives a clear picture. (Pltf. MSJ Resistance App. Ex. 3: App. 202). She has a fracture of ribs, a fracture of her right fibula and left tibia, a closed fracture of right wrist, a fracture of the second cervical vertebrae, closed fracture of left ulna, closed fracture of left ankle, multiple abdominal traumas, open fracture of right femur, osteomyelitis of skull, compartmental osteoarthritis of both knees resulting in chronic pain, significant cognitive dysfunction, and mood lability. Three years after her accident, she has a traumatic brain injury with a psychotic disorder. (Pltf. MSJ Resistance App. Ex. 3: App. 202).

Amber describes Meredith in the area of her accident, as a residential area with rolling hills. (Pltf. MSJ Resistance App. Ex. 1, p. 4, para. 15: App. 197). There are two lanes in each direction, but no median. The speed limit is 35 mph. Some sidewalks are as close as five feet from the traveled portion of

the street. Drivers frequently pop from side streets onto Meredith from both directions. (Pltf. MSJ Resistance App. Ex. 1, p. 4, para. 14, 17: App. 197).

At the time of the accident, it was afternoon rush hour and the street was crowded. Due to the rolling hills on Meredith, one cannot see or hear emergency vehicles or any other vehicles for more than a short distance ahead from either direction. (Pltf. MSJ Resistance App. Ex. 8, p. 2, para. 6: App. 256).

On that date, August 22, 2016, Scott Grimes was driving a stolen vehicle with Kayla Schultz as his passenger. He was aware that law enforcement was looking for him because he was a fugitive. So he was careful to avoid violating rules of the road that would draw attention. (Pltf. MSJ Resistance App. Ex. 8, p. 2: App. 256).

A week or so earlier, Grimes had been confined in the Warren County jail but escaped. (Pltf. MSJ Resistance App. Ex. 8, para 15: App. 258). However, the term "escape" is a little egregious. The jail was under long needed construction. Scott simply walked out of an unlocked door of the jail. Sheriff Vos agrees with this version. (Pltf. MSJ Resistance App. Ex. 10; Vos Depo, @14, 15: App. 264).

Sheriff Vos said that Scott was an inmate well known to them. He has not been difficult in previous encounters. (Pltf. MSJ Resistance App. Ex. 10; Vos Depo. pp. 9, 10: App. 263). Sheriff Vos has booked persons known to assault officers, but never would

have guessed they (Grimes or Schultz) would have assaulted an officer. (Pltf. MSJ Resistance App. Ex. 10; Vos Depo. P. 23: App. 266).

Grimes also claims he did not assault an officer. His alleged assault was pulling out of the grasp of a law enforcement person (Pltf. MSJ Resistance App. Ex. 8; Para. 16: App. 258).

Vos confirmed that Scott Grimes escaped in that, "he quickly before the door shut, went out the door..." (Pltf. MSJ Resistance App. Ex. 10; Vos Depo. p. 15: App. 264). He confirmed there was nothing about the escape that was violent. "Correctional Officer Hahn never said he was assaulted or nothing like that, so..." (Pltf. MSJ Resistance App. Ex. 10; Vos Depo. p. 15: App. 264).

Grimes had traveled through western Iowa, Nebraska, Kansas, Wyoming, and Colorado, and at some point DPS became aware that he was headed back to Iowa. (Pltf. MSJ Resistance App. Ex. 12; Mackaman Depo. p. 21, ln. 1-4; pp. 22; ln. 1: App. 301).

The FBI fugitive task force became aware Grimes was returning to Iowa. Multiple attempts were made at tracking his exact location via pen register and cellular site simulator vehicle. On August 22, 2016, federal and state law enforcement agents cited a phone ping southbound on Highway 169 near Winterset, Highway 92 East towards Interstate-35 Indianola, and finally Interstate 35 and Interstate 80 mixmaster near Altoona. (Pltf. MSJ

Resistance App. Ex. 12; Mackaman p. 49; ln. 20-21, 25; p. 50; ln. 1-2, 13-17; App. 308; p. 53, ln. 10-13; App. 309). At the same time, various state and federal law enforcement officers, including the F.B.I. tactical team were converged in the New Virginia area. (Birmingham Depo. p.22, ln. 21-25; p. 23; ln. 1-8: App. 35).

Based on the cell site technology Agent Mackaman "locked" on the Grimes cell phone just west of mixmaster near the East 14th Street off-ramp and he was able to directly observe the 4Runner with Kansas plates and Scott Grimes as driver with a passenger. (Pltf. MSJ Resistance App. Ex. 12; Mackaman Depo. p. 56; ln. 2-21; App. 309). Grimes was exiting a gas station parking lot and Mackaman made a U-turn in order to follow the Grimes vehicle back onto Interstate 80/35 westbound. (Pltf. MSJ Resistance App. Ex. 12; Mackaman Depo. p. 57, ln. 1-13; App. 310).

Grimes proceeded west on I-80 at approximately 5:30 p.m. All law enforcement personnel, both federal and state, agreed that they did not wish to attempt a stop of Grimes on I-80 because of the danger posed largely to them in stopping a car on I-80. Agent Mackaman testified that the traffic on Interstate 80 westbound at the time was bumper to bumper, when he radioed for assistance from Sergeant Tjepkes, a twenty-nine year Department of Public Safety veteran. (Pltf. MSJ Resistance App. Ex. 12; Mackaman Depo. p. 57,

ln. 9-13: App. 34). (Pltf. MSJ Resistance App. Ex. 7; Tjepkes Depo. p. 66, ln. 9-16; App. 244; p. 21; ln. 1-5: App. 233).

Grimes was followed until he exited when he turned south on 86th Street, in the Johnston/Des Moines area. (Pltf. MSJ Resistance App. Ex. 8; para. 5: App. 256). Agent Liebe, who was a Department of Transportation investigator, was involved in following Grimes on Interstate 80 and as he exited, testified that there was a "ton of traffic on NW 86th and we were jockeying for a position" (Pltf. MSJ Resistance App. Ex. 6; Liebe Depo. p. 49 ln. 22-24: App. 217) and also heavy traffic on Meredith Avenue. (Pltf. MSJ Resistance App. Ex. 7; Tjepkes Depo. 25, ln. 19: App. 234).

Grimes was followed by Sergeant Tjepkes as he proceeded south on 86th, then east on Meredith. Grimes traveled a short distance east on Meredith, then turned south onto a residential street known as Iltis. (Pltf. MSJ Resistance App. Ex. 8; para. 8: App. 256). (Pltf. MSJ Resistance App. Ex. 7; Tjepkes Depo. 24, ln. 4-13: App. 233). There was little to no traffic on Iltis as it was a quiet residential side street. (Pltf. MSJ Resistance App. Ex. 7; Tjepkes Depo. p. 24; ln. 9-16: App. 233). The plan was to have one of the following vehicles maneuver in front of Tjepkes blocking Grimes path, then Tjepkes would "light him up" meaning turn on his signals to stop Grimes. (Pltf. MSJ Resistance App. Ex. 6; Liebe Depo. p. 54 ln. 19-25; App. 218) (Pltf. MSJ Resistance App. Ex. 7; Tjepkes Depo. p. 24, ln. 12-22: App. 233).

However, the DPS plans went sour when Grimes immediately drove over a curb to get around the vehicle blocking his path, then accelerated away from multiple law enforcement vehicles. (Pltf. MSJ Resistance App. Ex. 7; Tjepkes Depo. p. 24, ln. 12-25; App. 233). All of this is on dash cam for the Court to see. (Pltf. MSJ Resistance App. Ex. 9; App. 260).

Sergeant Tjepkes followed Grimes a short distance on 78th where Grimes ran a stop sign, turning from 78th to Meredith heading east. (Pltf. MSJ Resistance App. Ex. 8; para. 10; App. 257). As he headed east, Grimes and Tjepkes ran through stop lights increasing their speeds steadily to 90 mph weaving in and out of traffic with Tjepkes behind at approximately the same speed. This happened during rush hour, at approximately 5:45 pm. There were cars on side streets that would have been struck had they pulled out. (Pltf. MSJ Resistance App. Ex. 8; para. 11; App. 257). Grimes crested a hill in the westbound lane striking a car head on. (Pltf. MSJ Resistance App. Ex. 8; para. 12; App. 257). The westbound Martinez vehicle could have done nothing to avoid this accident. (Pltf. MSJ Resistance App. Ex. 8; para. 13; App. 257).

Sergeant Tjepkes knew there was an outstanding "federal warrant, state charges, and in a stolen vehicle" about Scott Grimes as stated by Agent Mackaman on radio communications. (Radio at 3 min 56 sec) (Pltf. MSJ Resistance App. Ex. 15; App. 355).

Sergeant Tjepkes re-stated his reliance on Agent Mackaman in his deposition that he was "going by reliable information from Special Agent Mackaman." (Pltf. MSJ Resistance App. Ex. 7; Tjepkes Depo. 40, ln. 25, p. 41, ln. 1-2: App. 237-238). During the drive from the exit ramp at NW 86th Street to Meredith Avenue, a planning conversation took place between Sergeant Tjepkes and Agent Liebe. Sergeant Tjepkes had difficulties providing specific facts and specific source of information for any history or risk of violence on the part of Grimes. (Pltf. MSJ Resistance App. Ex. 7; Tjepkes Depo. p. 16, ln. 16-25; P. 17, ln. 1-9: App. 231-232). After multiple questions relating to Grimes' risk of violence which satisfies the imminent harm to the public if a pursuit is not undertaken, Sergeant Tjepkes testified "I knew there was a history of violence with Scott Grimes and one of his association that-suspected was in the vehicle with him, they had stolen multiple vehicle. I'm not sure how those happened, but-so there's imminent danger that they're going to steal another vehicle and whether they're going to harm somebody not based on their history of violence, it could certainly be a suspicion. And so-so that's the reason I initially pursued him." (Pltf. MSJ Resistance App. Ex. 7; Tjepkes Depo. p. 58, ln. 11-22: App. 242). Sergeant Tjepkes also conceded that property theft or damage alone does not qualify for serious imminent harm. (Pltf.

MSJ Resistance App. Ex. 7; Tjepkes Depo. p. 58, ln. 23-25; App. 242).

During the planning of the stop of Grimes, Sergeant Tjepkes stated three different times on radio communication recording at 5 minutes, 5 seconds; 5 minutes, 44 seconds; and 6 minutes, 7 seconds, that he wanted to get Grimes into an area to make the stop where they might not run or turn into a pursuit and create a problem or traffic hazard. (Pltf. MSJ Resistance App. Ex. 15; Radio Comm.: App. 355)

Likewise, Sergeant Tjepkes indicated he exited Interstate 80 at NW 86th Street at 4 minutes, 46 seconds and the stop of Grimes and the pursuit does not start until 7 minutes, 3 seconds. (Pltf. MSJ Resistance App. Ex. 15; Radio Comm: App. 355). Sergeant Tjepkes testified that he knew of the risk in attempting a stop and risk of pursuit in a heavy traffic/rush hour particularly on I-80, because of danger to officers of being on the side of the road/shoulder area, and danger of other drivers and potential that they may be distracted and therefore unable to react to the emergency situation. (Pltf. MSJ Resistance App. Ex. 7; Tjepkes Depo. p. 19, ln. 20-25; p. 20, ln. 1-14: App. 232).

Sergeant Ludwig, public information officer for the Department of Public Safety from 2015 through 2019, in an interview, speaking on behalf of the department stated "All cops love a chase. And they'll go, [t]he thing about the patrol is that

you'll get chases from other states that might get into your jurisdiction, that's really where you lick your chops." (Pltf. MSJ Resistance App. Ex. 16; Ludwig Depo. p. 18, ln. 13-14; App. 360; **Depo. Ex. R: App. 366-369**).

The Fatality Analysis Reporting System maintained by the United States Department of Transportation confirms that since 1979 of those killed during police pursuits 55% of the time it is the driver, but 40% of the deaths were of bystander drivers, passengers, pedestrians, passengers in pursuit vehicle, and a police officer. (Pltf. MSJ Resistance App. Ex. 16; Ludwig **Depo. Ex. R: App. 366-369**).

PRESERVATION OF ERROR

Amber Martinez does not dispute that error is preserved.

STANDARD OF REVIEW

Amber Martinez agrees with the State's identification of the standard of review on motions for summary judgment.

ARGUMENT I

WHETHER IOWA CODE 321.231(5) ESTABLISHES A DUTY OF CARE BETWEEN SERGEANT TJEKES AND AMBER MARTINEZ.

Amber Martinez agrees that as Defendant states, law enforcement personnel "under many circumstances" do not owe a particularized duty to protect individuals but a general duty to the general public. (Appellant Brief, p. 16).

However, Iowa Code 321.231(5) merits a closer look.

Section 321.231(5) states:

"The provisions of this section shall not relieve the driver of an authorized emergency vehicle or the rider of a police bicycle from the duty to drive or ride with due regard for the safety of all persons, nor shall such provisions protect the driver or rider from the consequences of the driver's or rider's reckless disregard for the safety of others."

Defendant quotes this statute then cites many cases regarding public duty.

These include *Mastbergen v. City of Sheldon*, 515 N.W.2d 3, 4 (Iowa, 1994). That case resolved on the public duty doctrine for negligence not reckless claims. *Kolbe v. State*, 625 N.W.2d 721 (Iowa, 2001) involved a suit for negligence against the State due to erroneous issuance of a driver's license to a visually impaired individual. The grant of judgment turned on discretionary function of the State and no duty to the general public for a negligence claim.

Dooley v. City of Cedar Rapids, 800 N.W.2d 755 (2011) an unpublished decision, also finds no duty but is actually a proximate cause case because there the fleeing motorist who struck an innocent third party was already traveling approximately 100 mph when the officer engaged in pursuit.

McFarlin v. State of Iowa, 881 N.W.2d 51, (Iowa, 2016) is a more detailed discussion of the general or public duty. There

a boater on Storm Lake did not take sufficient heed of dredging pipelines concealed slightly beneath the surface of the lake.

Tragically, he struck the dredge pipeline with the outer drive unit of his boat, causing the drive unit to flip into the back of the boat, causing the death of a child by its still spinning propellor.

In that case, the Supreme Court discussed the public duty doctrine at length. It eventually held that certain statutes did not create a cause of action. It stated that to find a right of action there is a four-part test:

"(1) whether the plaintiff is a member of a class for whose benefit the statute was enacted; (2) legislative intent, whether implicit or explicit, to create or deny a remedy, (3) whether a private cause of action is consistent with the underlying purpose of the statute; (4) whether the implication of a private cause of action will intrude into an area over which the federal government has exclusive jurisdiction or which has been delegated exclusively to a state administrative agency." 881 N.W.2d @ 57.

This four-part test demands an analysis of Iowa Code 321.231(5). As far as criteria (1) is concerned, this statute would give protection to innocent motorists such as Amber whose financial and personal wellbeing are destroyed by fleeing fugitives pursued by law enforcement. The language, "nor shall such provisions protect the driver or rider from the consequences of the driver's or rider's reckless disregard for the safety of others," suggests the consequence which would be civil damages.

Government agencies do not make it a practice to criminally prosecute their own. (3) A private cause of action is quite consistent with the statute, and a private action does not implicate the conditions in (4) above.

Turning to *Morris v. Leaf*, 534 N.W.2d 388 (Iowa, 1995), that case is actually a proximate cause, not a no duty case. In *Morris* the fleeing motorist was speeding before any pursuit was initiated. If the fleeing driver is already fleeing, the continued act of driving is not a proximate cause. The *Morris* Court had the opportunity to say simply, "No duty." However, it went quite a bit further. It cited *Saarinen v. Kerr*, 644 N.E.2d 988 (1994), a New York case which allowed a cause of action by an innocent injured motorist struck by a fleeing motorist, against a law enforcement person pursuing the fleeing suspect.

Of further interest is the fact that New York's civil liability decision was based on a statute almost identical to Iowa's.

New York's vehicle code permits the driver of an authorized emergency vehicle to proceed past red traffic lights and stops (sic) signs, exceed the speed limit and disregard regulations regarding the direction of traffic, as long as certain safety precautions are observed. 644 N.E.2d @499.

However, there are consequences to the above:

"[T]he foregoing provisions shall not relieve the driver of an authorized emergency 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 his reckless disregard for the safety of others."

"This statute establishes the standard for determining an officer's civil liability for damages resulting from the privileged operation of an emergency vehicle." 644 N.E.2d @500.

The above finding of recklessness was later reversed although the State of New York adhered to the determination that liability turned on whether there was recklessness. "[W]e hold that a police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in disregard of the safety of others." *Saarinen v. Kerr*, 84 N.Y.2d 494 @ 501, 644 N.E.2d 988 (1994).

Many other states have a statute that is almost identical to the Iowa and New York statute and they allow civil suits against law enforcement based on the statute. See *Estate of Aten by and Through Kitchens for the Benefit of Aten v. City of Tucson, Ariz.* 141, 817 P.2d. 951 (1991).

In *Aten*, Arizona had a statute similar to Iowa's 321.231.

A. If an authorized emergency vehicle is driven in response to an emergency call, in pursuit of an actual or suspected violator of law or in response to but not on return from a fire alarm, the driver may exercise the privileges provided in this section subject to the conditions stated in this section.

B. If the driver of an authorized emergency vehicle is operating at least one lighted lamp displaying

a red or red and blue light or lens visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle, the driver may:

1. Notwithstanding this chapter, park or stand.
2. Proceed past a red or stop signal or stop sign, but only after slowing down as necessary for safe operation.
3. Exceed the prima facie speed limits if the driver does not endanger life or property.
4. Disregard laws or rules governing the direction of movement or turning in specified directions.

C. The exemptions authorized by this section for an authorized emergency vehicle apply only if the driver of the vehicle while in motion sounds an audible signal by bell, siren or exhaust whistle as reasonably necessary and if the vehicle is equipped with at least one lighted lamp displaying a red or red and blue light or lens visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red or red and blue light or lens visible from in front of the vehicle.

D. This section does not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons and does not protect the driver from the consequences of the driver's reckless disregard for the safety of others."

Aten allowed the suit to proceed and went on to confirm that it formerly followed the "no proximate cause" rule where a law enforcement officer chased a fugitive. However, it no longer did so. It cited that other cases agreed with Arizona. *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E. 601 (1988) allowed suits upon a showing of gross negligence. Illinois allowed such suits as well. The dissent in *Aten* recites that "Arizona and the majority

of cases no longer follow that rule (no duty rule)." 169 Ariz @957, 817 P.2d 153.

District of Columbia v. Hawkins, 782 A. 2d. 293 (2001) found gross negligence and liability to third party decedents for law enforcement pursuing a fleeing felon who struck and killed two (2) occupants of a third car. The facts generating recklessness where the high speed chase took place over "nearly a mile of city streets in a densely populated urban neighborhood near schools and into an intersection known to be crowded during rush hour." 782 A. 2d @ 303.

A second *District of Columbia* case confirmed the District's liability for emergency vehicles was only on the basis of gross negligence. "[C]laims arising from the operation of an emergency vehicle on an emergency run cannot be established except upon proof of gross negligence on the part of the operator". 782 A. 2d. @ 571.

Alabama grants immunity for such cases on discretionary function grounds. *Ex parte Brown v. Mitchell*, 182 So.3d. 495 (2015).

Colorado provides for governmental immunity. See *Tidwell v. City and County of Denver*, 83 P.3d 75 (2003). However immunity not granted because there was evidence officer did not utilize lights or siren.

Jones v. Crawford, 1 A. 3d. 299 (Delaware, 2010) held an injured third party could prove gross negligence and proximate cause where escapee pursued by police crashed into plaintiff vehicle injuring plaintiff.

Pearson v. City of Atlanta, 231 Ga. App. 96 (Georgia, 1998) held that there would be no liability because conduct did not rise to the level of gross negligence.

Ross v. City of Jacksonville, 274 So.3d 1180 (Fla. 2019), held that officer pursuing a suspect was not liable as a matter of law because he did not act in a grossly negligent fashion and because he pursued a suspected forcible felon within policy guidelines.

In Pennsylvania, it was held in *Roadman v. Bellone*, 319 Pa 483, 108 A. 2d 754 (1954) that certain statutes did not shield the driver or the city "from the consequences of reckless disregard for the safety of others." 108 A. 2d.@488.

For an exhaustive list, see 4 ALR 4th.

In this case, the facts presented are somewhat unique. Grimes, the fleeing suspect, has given testimony by an affidavit. Proximate cause complications are avoided because he was not driving erratically before the intercept was attempted. To the contrary, he was driving "under the radar" because he wanted to avoid being identified. (Pltf. MSJ Resistance App. Ex. 8; Para. 9: App. 257).

Grimes also stated he determined his speed by the actions of Sergeant Tjepkes in pursuit, avoiding the dichotomy of decision to pursue versus manner of driving raised in Defendant State's Brief. Grimes clearly drove his vehicle in a manner based on Tjepkes' driving. (Pltf. MSJ Resistance App. Ex. 8; Para. 10, 11: App. 257). Had Tjepkes backed off slightly, Grimes would have turned onto a side street and abandoned the vehicle.

Lastly, Defendant argues that there is not enough evidence to support a claim of gross negligence, one should consider how chases result. Once Grimes chose to flee, the result is assured. It is going to be by a crash. The only two ways it can end are if the fleeing fugitive has an epiphany and decides to obediently pull over or a crash involving only the fleeing motorist or the fleeing motorist and an innocent third party. Once the chase starts, it only ends in a certain way. This is not just a high probability. It is a virtual certainty.

In analyzing case under a gross negligence or recklessness standard, some of the above cases cite to *Restatement of Torts 2d. Sec. 500*.

That requires a number of factors to be present. The actor must know or have reason to know of facts which create a high degree of risk of physical harm to another deliberately proceeds to act in conscious or deliberate indifference to that risk. Here, Sergeant Tjepkes knew of the risk that Grimes would

flee. They had talked about it and did not want to risk a stop and injury to themselves on the interstate. It was rush hour. Meredith was a four (4) lane street with a 35 mph speed limit. Sergeant Tjepkes ran stop signs and red lights keeping up with Grimes. He did so right to the moment Grimes began driving in the opposite lane.

Restatement requires that the actor intend his act and know of the risk. Here, Tjepkes acted intentionally. He accelerated to chase Grimes. He followed him through a stop sign at 78th and Meredith and the chase video shows him to run several red lights. It also shows the terrain to be four lane traffic, rush hour traffic and hilly.

Restatement provides that if the actor knows of others clearly within the zone of danger, this conclusively establishes the actor's knowledge of danger.

It is clear the conduct of Sergeant Tjepkes meets the criteria of recklessness. The street was narrow four (4) lane traffic. It was residential in character on Meredith, yet crowded due to rush hour. It was hilly establishing the higher risk of injury when the fugitive he chased would cross the center of the road and injure others. On the other hand, even if one claims that crossing the centerline by Grimes was not foreseeable, it is clear that if Grimes continued at his ever increasing rate of speed, someone in the eastbound lane would have been struck and injured.

ARGUMENT II

THERE IS A DUTY TO AVOID RECKLESS CONDUCT ENDANGERING MEMBERS OF THE PUBLIC DURING LAW ENFORCEMENT PURSUITS OF FLEEING SUSPECTS.

There is, of course, a general rule of tort law, widely accepted, that there is no duty to prevent a third party from injuring a bystander.

However, Iowa law determined duty based on more recent pronouncements in *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa, 2009). The criteria are: "(1) the relationship between the parties, (2) reasonable foreseeability of harm to the person who is injured, and (3) public policy considerations."

Thompson goes on to state that

"[I]n most cases involving physical harm, courts need not concern themselves with the existence or content of this ordinary duty, but instead may proceed directly to the elements of liability set forth in section 6. . . . However, in exceptional cases, the general duty to exercise reasonable care can be displaced or modified. An exceptional case is one in which an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases. (authorities omitted). In such an exceptional case, when the court rules as a matter of law that no duty is owed by actors in a category of cases, the ruling 'should be explained and justified based on articulated policies or principles that justify exempting [such] actors from liability or modifying the ordinary duty of reasonable care.'" 774 N.W.2d @834, 835.

The Court should utilize this analysis to determine whether this is such a case that warrants withholding of this matter from a jury decision.

ARGUMENT III.

THE USE OF DEADLY FORCE VIA A MOTOR VEHICLE USED TO PURSUE A FLEEING FUGITIVE POSES SIGNIFICANT RISKS TO INNOCENT CITIZENS.

The problem posed by high-speed pursuits is certainly controversial but probably more dangerous even than apprehending a fleeing felon by threat or use of a firearm.

"Imagine that you are driving home from an enjoyable evening out with your significant other, children, friends or with whomever you would choose to share this enjoyable evening. As you proceed through the same intersection that led you home so many times before, you do not even notice the car that is approaching from the left at well over eighty miles per hour. Without having experienced a comparable scenario, it is difficult to fathom the sense of loss that would accompany the first few moments of consciousness following the crash in which you learn of the deaths of your loved ones. However, it proves much more arduous task to comprehend the range of emotions you would feel when you discover that you were struck by a driver being chased by police for stealing \$17 worth of gas." *Cooling the Hot Pursuit: Toward a Categorical Approach*, 73 *Indiana L.J.* @ 1277.

Indeed, the motor vehicle has been determined to be the deadliest weapon in the police arsenal, surpassing even firearms. *Hugh Nugent U.S. Dept Of Justice Restrictive Policies For High Speed Police Pursuits* @ 1279, 1280.

"Considering that police officers throughout the country initiate hundreds of high-speed automobile chases every day, police pursuit is a major public concern." *Citing Hugh Nugent Et Al., U.S. Dept Of Justice Restrictive Policies For High Speed Police Pursuits @21 (1999).*

"Unfortunately, the number of people who have experienced a similar sequence of events is appalling." 73 Ind. L.J. 1277.

This treatise goes on to explain that Federal claims have been rendered essentially nonexistent under the "shocks the conscience" standard of conduct under the Fourteenth Amendment. *County of Sacramento v. Lewis*, 118 S. Ct. 1708.

In the course of the decision, Justice White observed:

"The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is *constitutionally unreasonable*. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect." Nugent @ 1290 citing *Tennessee v. Garner*, 471 U.S. 1, 11 (1985).

The lesson from the above, of course, is that a motor vehicle is as deadly as a firearm, more so in some cases. Where all cases involving the threat of use of a firearm do not end in major injury or death, the pursuit of a fleeing fugitive has as

much or greater chance of ending in death or catastrophic injury. A felon in close quarters is logically more apt to surrender than a felon who is in a car and perceives (imprudently) more wiggle room for an avenue of escape.

CONCLUSION

The Court should make a determination that there is evidence that Sergeant Tjepkes was reckless and indifferent to the risk of injury to third persons when he started then maintained the chase of Scott Grimes given that he was a low level risk fugitive. Other factors enter into the determination of recklessness because he was aware the street was narrow. It was a 35 mph zone. It was hilly and drivers approaching from the east would have no way of perceiving an approaching vehicle fleeing law enforcement.

The Court should give the Iowa Statute 321.231 the effect its text demands, to wit; that reckless law enforcement persons be responsible for the consequences of their acts. Other courts have done this without failure of their government or undue financial stress.

The State's claims against liability leave Amber no more than roadkill. The State would argue under its position that if a law enforcement chased a fugitive through a school zone, thinking the fugitive had some moving violations, and that chase went

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs.App.P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This brief has been prepared in a monospaced typeface using Courier New in 12 characters per inch and contains 663 number of lines of text, excluding the parts of the brief exempted by Iowa R.App.P.6.903(1)(g)(2).

 /s/ Steve Hamilton
STEVE HAMILTON, AT0003128
ATTORNEY FOR APPELLEE