LEGAL DEFENSE TRUST TRAINING BULLETIN

MICHAEL P. STONE, GENERAL COUNSEL

6215 River Crest Drive, Suite A, Riverside, CA 92507
Phone (909) 653-5152 Fax (909) 656-0854

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DOES RAMMING A FLEEING VEHICLE VIOLATE THE FOURTH AMENDMENT?

By Michael P. Stone
and Marc J. Berger

Where police in a high-speed car chase ram the fleeing vehicle, running it off the road and seriously injuring the suspect, there is liability under the Fourth Amendment? Last month, the United States Supreme Court addressed that question in *Scott v. Harris*, 2007 DJDAR 5925 (April 30, 2007). In an 8-1 decision authored by Justice Scalia, with Justice Stevens dissenting, the high Court held no Fourth Amendment violation occurred.

This is welcome news to law enforcement officers. The Justices, in the course of rejecting the plaintiff's attempt to minimize the danger he caused in a 10-mile chase on a Georgia country road, characterized the videotape of the pursuit as "a Hollywood-style car chase of the most frightening sort...." *Id.* at 5927. Since televised police chases are a common "breaking news" event over Southern California television channels, we thought it would be useful to share our impressions of this new Supreme Court decision.

As you know, California settled many of its own state-law issues arising from car chases in 1987 by enacting *Vehicle Code,* section 17004.7, which immunizes law enforcement agencies from liability if they adopt sufficient written policies governing the conduct of vehicle pursuits. A thorough revision of that statute takes effect July 1, 2007.

The particulars of the immunity are beyond the scope of this article. But as an overview, taking section 17004.7 in conjunction with section 17004, the immunity protects both the agency and the officer from liability under state negligence law. See *Colvin v. City of Gardena* (1992) 11 Cal. App. 4th 1270 (holding a City's policy insufficient for failure to provide for procedures to determine the number and priority of pursuit vehicles). Because a major purpose of the immunity is to encourage the adoption of such written policies, the immunity applies whether or not the written policy was followed in the particular case, and even if an innocent third party is injured. *Ketchum v. State* (1998) 62 Cal. App. 4th 957 (rejecting a constitutional due process challenge to applying the immunity against an innocent third party). The new amendments collect the lessons of experience to formulate far more detailed and specific guidelines for a sufficient policy than contained in the 1987 version. The state law does not protect against federal civil rights liability, a fact that makes this new Supreme Court decision more than a matter of mere academic interest to the California law enforcement community. See *Montes v. United States* (9th Cir. 1994) 37 F.3d 1347.

The new statute, more than twice the length of the original, lists many new features that must be contained in a sufficient policy. Annual training in following the policy has now been made a mandatory part of any sufficient policy, along with new provisions anticipating "PIT" tactics, air support, continuing risk assessment, and post-pursuit review.

In *Scott v. Harris*, plaintiff Victor Harris was clocked driving 73 miles per hour in a 55-mile-per-hour zone. When a deputy sheriff attempted to stop him for speeding, Harris evaded officers at speeds over 85 miles per hour. Deputy Timothy Scott became the lead driver in the pursuit, and was authorized to use a "PIT" maneuver. Eventually, Deputy Scott instead applied his push bumper to the rear of the fleeing vehicle, pushing it off the road into a crash that rendered Harris quadriplegic. Harris brought a federal civil rights suit for excessive force under the Fourth Amendment.

Scott moved for summary judgment, arguing that his use of force was reasonable as a matter of law. The motion was denied by the trial court and Circuit Court of Appeals on the ground that a

material factual dispute existed as to whether Scott's use of force was reasonable. The Supreme Court reversed. The decision breaks new ground in Fourth Amendment jurisprudence on a couple of points.

Before exploring the Fourth Amendment implications, it bears mention that appellate courts reviewing defense summary judgment rulings must construe the factual evidence in favor of the plaintiff. That usually means deferring to the plaintiff's version of any disputed material fact. In this case, Harris introduced evidence that "there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty" and he "remained in control of his vehicle." *Id.* at 5927 (quoting from the Court of Appeals opinion). The Supreme Court observed that "reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test...." *Id.*

The Supreme Court noted, however, an "added wrinkle in this case" that the record contained a videotape of the pursuit, which "quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals." *Id.* The Court described the videotape as showing the car driving narrow roads "shockingly fast." *Id.* The Court observed the plaintiff's car swerving around cars, crossing the center line, forcing cars to the shoulder, running red lights, and driving in the center left-turn lane, with patrol cars forced into similar maneuvers to keep up. The Court found, "Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." *Id.*

Deviating from the normal standard for reviewing summary judgment motions, the Court stated, "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* Here, the plaintiff's "version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of

Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Id.*

This is not the first time an appellate court has found the evidence on supposedly "disputed" facts so one-sided that the facts could be treated as undisputed for purposes of a summary judgment motion. But it is certainly one of the first instances where the "record" that established the facts as undisputed consisted entirely of a videotape. This is not a startling development in this high-tech era, but the only way to give effect to a videotape as the "record" is for the Court to craft its own verbal description of its visual observations from the tape. Thus the entire body of documentary evidence was discounted by the Court's verbal recitation of its observation of a stream of visual images.

In fact, the dissent by Justice Stevens does take issue with the Court's description. Justice Stevens speculates that the cars pulled over on the shoulder were in no danger because they had heard the police sirens and pulled over, so they faced no greater danger than if an ambulance were passing by. The majority answered an ambulance poses "vastly less" risk and is a risk that society accepts. *Id.* at 5929, n. 6. The majority agreed with Justice Stevens' observation that no bystanders were actually endangered by Deputy Scott's ramming maneuver, and pointedly commented that Deputy Scott obviously waited for a time when the road was clear to perform the maneuver. *Id.* at 5929, fn. 7. The opinion thus reinforces the legal rule that it take a "genuine" fact dispute to overcome a summary judgment motion.

Once the Supreme Court disposed of the factual issues, it applied the facts to the familiar Fourth Amendment standard of "objective reasonableness" under the totality of the circumstances per *Graham v. Conner* (1989) 490 U.S. 386, 388. The plaintiff sought to have the case analyzed as a factual variant of *Tennessee v. Garner* (1985) 475 U.S.1, where the Court found the Fourth Amendment was violated by shooting a fleeing teenage burglary suspect in the back of the head. The plaintiff argued that *Garner* established an absolute rule that any use of deadly force violates the Fourth Amendment unless (1) the suspect posed an immediate threat of serious physical harm to the

officer or others, (2) deadly force was necessary to prevent escape, and (3) the officer gave all feasible warnings.

Rejecting plaintiff's argument, the Supreme Court held, "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id.* at 5927-28. Instead, it was "simply an application of the Fourth Amendment's 'reasonableness' test ... to the use of a particular type of force in a particular situation."

The preconditions in *Garner* had "scant applicability to this case, which has vastly different facts." *Id.* at 5928. The threat posed by an unarmed suspect fleeing on foot was not "even remotely comparable to the extreme danger to human life posed by respondent in this case." The Court concluded, "Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.' Whether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable." *Id.*

Testing for reasonableness, the Supreme Court opinion strikes a blow in favor of the societal interest of individual responsibility, by ruling that in balancing the risks, the culpability of the fleeing driver is a relevant consideration. Framing the Fourth Amendment analysis, the Court quoted from *United States v. Place* (1983) 462 U.S. 696, 703, that "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." This test means the Court "must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate." *Id.* at 5928.

Finding "no obvious way to quantify the risks on either side," the Court observed that Harris "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." It was "equally clear that Scott's

actions posed a high likelihood of serious injury or death to respondent–though not the near *certainty* of death" that existed from the shooting of a fleeing suspect in *Garner*. *Id.*

The Court then asked rhetorically, "how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person? We think it appropriate in this process to take into account not only the number of lives at risk, but also their relative culpability. It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless-high-speed flight that ultimately produced the choice between two evils that Scott confronted." *Id.* at 5928. In contrast, the potential bystander victims were entirely innocent. The Court had "little difficulty in concluding it was reasonable for Scott to take the action that he did." *Id.*

The Court then emphatically rejected the idea that cutting off the chase could be lawfully required. Such a rule would reward fleeing motorists for their recklessness, and, since the motorist would have no definite way of knowing the pursuit was actually abandoned, there would be no assurance the motorist would stop the reckless driving. *Id.*

One final point of interest in the decision is that the Supreme Court found it irrelevant whether Deputy Scott had been specifically authorized to employ the ramming maneuver. *Id.* at 5929, fn. 1. Likewise, specific permission would be irrelevant under our California statutory immunity, so long as the underlying written policy was deemed sufficient.

Of course, Scott's supervisors are entitled to attach some relevance to the question of specific permission in any administrative inquiry or post-pursuit analysis. We have no information, from the opinion or otherwise, of any administrative proceedings in this case. But the Supreme Court's view that permission is irrelevant would give the department one less argument in any disciplinary proceeding it might undertake against Deputy Scott for his tactics.

For our local purposes, we find the Supreme Court decision to be a welcome recognition of modern street reality, and a sensible outcome that carries both moral lessons for society and practical lessons for officers in the field.

But there is a caveat worthy of mentioning here. It would, of course, be incorrect to assume this case establishes that any ramming of a fleeing vehicle would never be found violative of the Fourth Amendment. As Justice Scalia observes, the "objective reasonableness" test formulated in *Graham* is a highly fact-oriented analysis. Like all police use of force, cases of ramming a fleeing vehicle during a pursuit are judged individually based on the totality of the circumstances.

Stay safe!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 27 years, following 13 years as a police officer, supervisor and police attorney.

Marc J. Berger is the firm's senior law and motion and writs and appeals specialist. He has been associated with Michael P. Stone since 1986.