PERMISSION TO PURSUE? [MONTGOMERY V. SALEH, 361 KAN. 649, 466 P.3D 902, (KAN. 2020).]

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INTRODUCTION

More now than ever, law enforcement agencies and professionals are concerned about liability incurred by the performance of their duties. When discussing agency liability, discussion is often focused on the use of force. The operation of motor vehicles, especially in pursing suspected criminals, is also a significant source of liability for law enforcement agencies. Until recently, Kansas law has been rather favorable to law enforcement officers engaged in pursuits with fleeing suspects. However, in a recent Kansas Supreme Court case, a district court's grant of summary judgment in favor of a Kansas Highway Patrol Trooper and the State of Kansas was overturned in a 4-3 decision after the Court found that various exceptions to the Kansas Tort Claims Act did not apply and the duty imposed on law enforcement officers engaged in a pursuit is more specific than the one imposed by the public duty doctrine. As a result, law enforcement agencies have begun altering their policies and have become reluctant to pursue even the most serious offenders. An in-depth analysis of *Montgomery v. Saleh* can shed light on what the case actually means for law enforcement agencies and officers and the amount of liability they face in these pursuits.

I. BACKGROUND

A. Montgomery v. Saleh

At around 9:30 p.m. on August 23, 2010, while stopped at a red light near the intersection of SW Topeka Boulevard and 32nd Terrace in Topeka, Kansas Highway Patrol Trooper Tim Tillman observed the passenger of the vehicle stopped next to him holding a knife and speaking to the driver.[1] Sgt. Tillman could not hear what the passenger was saying but after the light turned green and the vehicle drove away, Sgt. Tillman observed the passenger of the vehicle swing the knife toward the driver of the vehicle.[2]

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[1] *Montgomery v. Saleh*, 311 Kan. 649, 650, 466 P.3d 902, 906 (2020).

[2] *Id.*

Sgt. Tillman, who was in plain clothes and driving an unmarked vehicle, reported the vehicle's license plate number to dispatch and was informed that the license plate belonged to another vehicle.[3] Sgt. Tillman requested back-up and Kansas Highway Patrol Troopers Terry Fields and Patrick Saleh responded to assist.[4] It was determined that Trooper Saleh would perform the stop because his vehicle was equipped with a spotlight.[5] All that was known to Trooper Saleh at the time was that the license plate on the vehicle was registered to another vehicle[6] and that the passenger was reported to have a knife and had been seen "swinging out the knife pretty strangely[7]."[8]

Trooper Saleh was traveling south on Topeka Boulevard and drove past the vehicle before performing a U-turn and activating his emergency lights, siren, and dashboard video camera directly behind the vehicle.[9] At this time, the driver of the vehicle, Robert Horton, turned east on to 20th Street and rapidly accelerated before running a stop sign and turning south on to Kansas Avenue[10].[11] Horton then continued to accelerate and proceeded through a red light at the intersection of 21st Street and Kansas Avenue.[12] Trooper Saleh continued to pursue the vehicle but fell further behind as he was traveling at speeds of 80 to 90 miles per hour while he estimated Horton's speed to be in excess of 100 miles per hour.[13] Trooper Saleh decided to terminate his pursuit just south of the intersection of 27th Street and Kansas Avenue; however, before Trooper Saleh deactivated his emergency equipment, the vehicle he was pursuing ran through a red light at the intersection of Kansas Avenue and 29th Street, colliding with a pickup truck and injuring the occupants. Trooper Saleh was approximately two and a half blocks behind Horton's vehicle when it collided with the pickup and was too far behind to see the collision.[14] The entire length of the pursuit was about a minute and a half and it was discovered that the passenger of Horton's vehicle was a minor who had been reported as a runaway, although no knife was found in the vehicle.[15]

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[3] *Id.*

[4] *Id*.

[5] *Id.* at 651.

[6] Potentially a misdemeanor violation of Kan. Stat. Ann. § 8-142.

[7] Depending on the circumstances, potentially a felony violation of Kan. Stat. Ann. § 21-5412.

[8] *Saleh*, 361 Kan. at 651.

[9] *Id.*

[10] Potentially a felony violation of Kan. Stat. Ann. § 8-1568(b)(2).

[11] *Saleh*, 361 Kan. at 651.

[12] *Id.*

[13] *Id.*

[14] *Saleh*, 361 Kan. at 651, 672.

[15] *Id.* at 651.

The injured occupants of the pickup filed separate actions against Trooper Saleh and the State of Kansas alleging negligence.[16] Trooper Saleh and the State of Kansas moved for summary judgment and argued that: "(1) [the plaintiffs] had failed to make a prima facie case of negligence; (2) Saleh did not owe a duty to [the plaintiffs] under the public duty doctrine; and (3) the State had absolute immunity and Saleh had qualified immunity under the Kansas Tort Claims Act (KTCA), K.S.A. 75-6101 et seq."[17] The motion was granted by the district court finding the evidence proffered by the plaintiffs was insufficient for a jury to find that the actions of Trooper Saleh and the State of Kansas were the cause in fact for the injuries sustained by the plaintiffs.[18] The district court did reject the defendants arguments that the public duty doctrine applied and that they had immunity under the KTCA and also found that "a factual dispute existed as to whether Saleh had breached his duty of care."[19]

The plaintiffs appealed the grant of summary judgment to the Kansas Court of Appeals and the defendants cross-appealed.[20] The Court of Appeals affirmed the findings of the district court on the issues of the public duty doctrine, the defendants' immunity under the KTCA, and the proof of Saleh's breach of a duty.[21] However, the court reversed the district court's finding that the evidence presented by the plaintiffs would prevent a jury from finding that the defendants actions was the cause in fact of the harm to the plaintiffs and remanded the case to the district court for further proceedings.[22]

The defendants appealed to the Kansas Supreme Court which granted their petition for review and issued an opinion on June 26, 2020.[23] In a 4-3 vote, the Kansas Supreme Court affirmed the findings of the Kansas Court of Appeals.[24] Specifically, the Court held that Kan. Stat. Ann. § 8-1506(d) imposes a duty on law enforcement officers that is more strict than the public duty doctrine, that a law enforcement officer's pursuit of a fleeing suspect can be the proximate cause of a collision if evidence exists to support a reasonable inference that the pursuit was the cause of fact the collision, and that an officer's pursuit of a fleeing suspect does not meet one of the exceptions of the KTCA.[25]

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[16] *Id.*
[17] *Id.*
[18] *Id.* at 651-652.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 666.
[25] *Id*. at 649.

B. Legal Background

Law enforcement officials primarily deal with criminal law and thus may have limited knowledge of the concepts and procedures associated with civil case proceedings. It is important that these concepts of civil law be understood in order to fully grasp why the Court issued the ruling that it did and just what exactly the Court is saying about law enforcement's liability associated with vehicle pursuits.

1. Summary Judgment

It is first important to understand exactly what summary judgment is and what it is not. Summary judgment is a method that a party can use to dispose of all or part of a claim without the need for a trial.[26] A motion for summary judgement can be filed at any time prior to 30 days before the discovery process is finished.[27] The law requires a motion for summary judgement be granted when: 1) there is no genuine issue as to any material fact; and 2) the moving party is entitled to judgment as a matter of law.[28] In simpler terms, summary judgment is appropriate when there does not need to be a trial because the important facts of the case are not in dispute and given the facts presented, the law requires that the party requesting summary judgment would prevail in the case. Matters of law are decided by judges whereas matters of fact can be decided by a judge or a jury.

When filing a motion for summary judgment, the moving party will provide a statement of uncontroverted facts and the opposing party will either admit the facts or controvert them. When disputing a motion for summary judgment, the party must "come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case."[29] Additionally, "[t]he trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought."[30] In other words, when a party moves for summary judgment, the court will consider any facts in a light most favorable to the other party and will only grant

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[26] Kan. Stat. Ann. § 60-256(a) & (b)

[27] Kan. Stat. Ann. § 60-256(c).

[28] *Id.*

[29] *Saleh*, 361 Kan. at 653 (quoting *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 621, 413 P.3d 432, 437 (2018)).

[30] *Id.* at 652 (quoting *Patterson v. Cowley County, Kansas*, 307 Kan. 616, 621, 413 P.3d 432, 437 (2018)).

summary judgment if there is no way that a jury or the court could find that the law favors the opposing party.

2. Negligence

In this case, the claims brought against Trooper Saleh and the State of Kansas were for negligence. The elements of negligence are: 1) the existence of a duty; 2) a breach of that duty; 3) damages as a result of the breach; and 4) that the breach of the duty is the proximate cause of the damages.[31] The Kansas Supreme Court has found that "summary judgment is rarely appropriate in negligence cases" but it may be warranted where "a plaintiff fails to establish a prima facie case demonstrating the existence of" the four elements of negligence.[32] For a plaintiff to establish a prima facie case of negligence, they must "present[ ] 'evidence which, if left unexplained or uncontradicted, would be sufficient to carry the case to the jury and sustain a verdict in favor of the plaintiff on the issue it supports.'"[33]

a. Duty

The existence of a duty of care to another party is the element that the rest of the negligence elements rely upon. If there is no duty, then a breach cannot occur and the damages cannot be the cause of the harm to another party. As previously indicated, the existence of a duty is a question of law to be decided by the judge.[34] In general, a party has a duty to exercise reasonable care.[35] It is also "the general rule that an actor has no duty to control the conduct of a third person to prevent that person from causing harm to others unless a 'special relationship' exists between the actor and the third party or the actor and the injured party."[36] Because existence of a duty has to do with the foreseeability of harm, "a special relationship or specific duty has been found when one creates a foreseeable peril, not readily discoverable, and fails to warn."[37] The Kansas Supreme Court relied on the Second Restatement of Torts to find that:

> There is no duty so to control the conduct of a third person as to prevent

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[31] *Id.* at 653 (citing *Hale v. Brown*, 287 Kan. 320, 322-23, 197 P.3d 438, 440 (2008)).

[32] *Id.* (citing *Thomas v. Board of Shawnee County Comm'rs*, 293 Kan. 208, 221, 262 P.3d 336, 346 (2011)).

[33] *Id.* (quoting *Robbins v. City of Wichita*, 285 Kan. 455, 470, 172 P.3d 1187, 1198 (2007)).

[34] *Id.* (citing *Robbins*, 285 Kan. at 460.)

[35] *Durflinger v. Artiles*, 234 Kan. 484, 489, 673. P.2d 86, 92 (1983).

[36] *Nero v. Kansas State Univ.*, 253 Kan. 567, 571, 861 P.2d 768, 772 (quoting *Thies v. Cooper*, 243 Kan. 149, 151, 753 P.2d 1280, 1282 (1988)).

[37] *Id*. at 572 (quoting *Durflinger*, 234 Kan. at 499).

> him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.[38]

Not all foreseeable harm will result in liability, however. The Kansas Supreme Court recognized that "[e]ven though a harm may be foreseeable . . . a concomitant duty to prevent the harm does not always follow. 'Rather, the question is whether the risk of harm is sufficiently high and the amount of activity needed to protect against harm sufficiently low to bring the duty into existence.'"[39] The Court listed the following factors as relevant in determining whether a duty is owed to a third party:

> the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.[40]

A concept known as the public duty doctrine applies to cases involving law enforcement professionals and recognizes "a general rule that law enforcement duties are owed to the public at large and not to any specific person."[41] This rule is limited however in that only "[a]bsent some special relationship with or specific duty owed an individual" will a law enforcement official not be immune from claims arising out of the performance or nonperformance of the officer's general duties.[42] Thus, "[l]iability arises only when an officer breaches a specific affirmative duty owed to a particular person."[43] and plaintiffs must establish that the defendants "owed a duty to them individually rather than a duty owed to the public at large."[44]

i. Kan. Stat. Ann. § 8-1506

Every law enforcement officer in Kansas, as part of their initial training, is instructed on the provisions of Kan. Stat. Ann. § 8-1506. This statute

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[38] *Id.* (quoting Restat 2d of Torts, § 315).

[39] *Nero*, 253 Kan. at 575 (quoting *Baldwin v. Zoradi*, 123 Cal. App. 3d 275, 286, 176 Cal. Rptr. 809, 816 (1981)).

[40] *Id.* at 576 (quoting *Baldwin*, 123 Cal. App. 3d at 286).

[41] *Saleh*, 361 Kan. at 653 (quoting *Conner v. Janes*, 267 Kan. 427, 429, 981 P.2d 1169, 1171 (1999)).

[42] *Id*. (quoting *Connor*, 267 Kan. at 429).

[43] *Id.* at 654. (quoting *Connor*, 267 Kan. at 429).

[44] *Id.* at 653 (citing *Williams v. C-U-Out Bail Bonds*, 310 Kan. 775, 778, 450 P.3d 330, 334 (2019)).

establishes the duty of law enforcement officers in the operation of an emergency vehicle and permits drivers of authorized emergency vehicles to violate various traffic laws if they are using their lights and sirens.[45] However, emergency vehicle operators are not excused "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 reckless disregard for the safety of others."[46] While this statute establishes a duty for law enforcement officers in the operation of an authorized emergency vehicle, the Kansas Supreme Court has recognized that the statute "require[s] a standard of care higher than mere negligence, obligating plaintiffs to establish more consequential, material, and wanton acts to support a breach of the standard of care."[47] The duty created by Kan. Stat. Ann. § 8-1506 has been extended to a law enforcement officers decision to pursue a fleeing suspect.[48]

b. Breach of Duty

Once a duty has been established, it must be determined if the defendant breached that duty. The question of whether or not a duty has been breached is generally a question of fact.[49] Therefore, if the material facts of the case are in dispute, a case will survive a motion for summary judgment and the Court will leave it to the jury to decide. However, this does not mean that existence of a dispute about any fact in the case will necessarily bar judgment as a matter of law and where "the disputed fact, however resolved, could not affect the judgment, it does not present a genuine issue of a material fact."[50] If the material facts of the case are not in dispute, the question of whether a duty was breached becomes one for the court.[51]

c. Damages

Damages are a required element for a negligence cause of action. An action may be "may be negligent in the colloquial sense because it involves a lack of due care [but] no cause of action arises therefrom unless the person complaining has been injured in consequence thereof."[52] The term

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[45] Kan. Stat. Ann. § 8-1506.

[46] Kan. Stat. Ann. § 8-1506(d).

[47] *Robbins v. City of Wichita*, 285 Kan. 455, 467, 172 P.3d 1187, 1196 (2007).

[48] *Id*. at 466.

[49] *Saleh*, 361 Kan. at 656 (citing *Deal v. Bowman*, 286 Kan. 853, 858, 188 P.3d 941, 945-46 (2008)).

[50] *P.W.P. v. L.S.*, 266 Kan. 417, 423, 969 P.2d 896, 900 (1998) (quoting *Seabourn v. Coronado Area Council, B.S.A.*, 257 Kan. 178, 189, 891 P.2d 385, 394 (1995).

[51] *Calwell v. Hassan*, 260 Kan. 769, 777-79, 925 P.2d 422, 427-29 (1996).

[52] *Kitchener v. Williams*, 171 Kan. 540, 545, 236 P.2d 64, 69 (1951).

"damages" is often used synonymously with the term "injury" but they are in fact "words of widely different meaning" with "injury" representing "the invasion of the legal right or the 'tort'" and "damages" representing "the sum recoverable as amends for the wrong" or "the indemnity paid the person who had suffered loss on account of the injury."[53] A plaintiff's negligence cause of action generally accrues when the "act giving rise to the cause of action first causes substantial injury."[54]

d. Causation

The final element required to prove a negligence claim is that the breach of a duty by the defendant was the "proximate cause of" the plaintiff's damages.[55] In other words, "[i]ndividuals are not responsible for all *possible* consequences of their negligence, but only those consequences that are *probable* according to ordinary and usual experience."[56] There are two elements of proximate cause: 1) cause in fact; and 2) legal causation.[57]

Cause in fact is proven by showing a "cause-and-effect relationship between a defendant's conduct and the plaintiff's loss by presenting sufficient evidence from which a jury can conclude that more likely than not, but for defendant's conduct, the plaintiff's injuries would not have occurred."[58] "Proximate cause requires more than mere cause in fact."[59]

Legal causation is established by showing "it was foreseeable that the defendant's conduct might create a risk of harm to the victim and that the result of that conduct and contributing causes was foreseeable."[60] It is typically a question of fact to be determined by a jury "[w]hether conduct in a given case is the cause in fact or proximate cause of plaintiff's injuries "[61] When considering causation in a motion for summary judgment, a question of fact for the jury exists when there "appears to be sufficient circumstantial evidence to create a question of fact concerning causation . . . [and] [i]n examining the record in the light most favorable to [the moving party], a factfinder could conclude that the defendants' actions more likely than not

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[53] *Id*. at 546.

[54] Kan. Stat. Ann. § 60-513(b).

[55] *Saleh*, 361 Kan. at 659.

[56] *Puckett v. Mt. Carmel Reg'l Med. Ctr.*, 290 Kan. 406, 420, 228 P.3d 1048, 1060 (2010) (quoting *Hale v. Brown*, 287 Kan. 320, 322, 197 P.3d 438, 440 (2008)).

[57] *Russell v. May*, 306 Kan. 1058, 1075, 400 P.3d 647, 660 (2017).

[58] *Drouhard-Nordhus v. Rosenquist*, 301 Kan. 618, 623, 345 P.3d 281, 286 (2015).

[59] *Hale v. Brown*, 38 Kan. App. 2d 495, 496, 167 P.3d 362, 363 (2007).

[60] *Drouhard-Nordhus*, 301 Kan. at 623 (citing *Puckett*, 290 Kan. at 420).

[61] *Baker v. Garden City*, 240 Kan. 554, 557, 731 P.2d 278, 281 (1987) (citing *Durflinger*, 234 Kan. at 488; *Steele v. Rapp*, 183 Kan. 371, 379, 327 P.2d 1053, 1060 (1958)).

caused the [harm]."[62]

3. Kansas Tort Claims Act (KTCA) (Kan Stat. Ann. §§ 75-6101 et seq.)

The Kansas Tort Claims Act (KTCA) was enacted in 1979 and is a set of statutes that is applicable to "claims arising from acts and omissions" of state and municipal governmental entities.[63] The KTCA represents the Kansas Legislature's statutory waiver of sovereign immunity and establishes the government's consent to be sued for the same actions which a private party could be sued.[64] While "liability [is] the rule and immunity the exception" under the KTCA, "the waiver of sovereign immunity is not absolute."[65] There are 24 exceptions from liability included in the KTCA, provided that the act or omission giving rise to the cause of action is the caused by "[a] governmental entity or an employee acting within the scope of the employee's employment."[66]

While there are a variety of reasons these exceptions have come to be enumerated in the statute, "[c]ertain governmental functions must be afforded a reasonable protection from litigation in order to encourage a vigorous and uninhibited performance of their public duties. Judges, counsel, witnesses and others involved in the judicial process might be deterred if their conduct and decisions could be constantly second-guessed in litigation."[67] Additionally,

> A related concern for police raises a proximate cause issue that might also be reflected in a broad discretionary function. The police officer cannot stop every driver who exceeds the speed limit, and a decision to stop may be influenced by the extent to which the driver is exceeding the limit, the time of day, the extent of traffic congestion, the perceived level of danger under all the circumstances, and the need to deter other violators by making a highly visible display of enforcement. A decision to not stop a speeding driver who then is involved in an accident may risk litigation which is too heavily dependent on second-guessing.[68]

One exemption from liability under the KTCA is where a governmental agency is alleged to have caused damages by "enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any

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[62] *Yount v. Deibert*, 282 Kan. 619, 631, 147 P.3d 1065, 1074 (2006) (citing *Patterson v. Brouhard*, 246 Kan. 700, 702, 792 P.2d 983, 985-86 (1990)).

[63] Kan. Stat. Ann. § 75-6101.

[64] William E. Westerbeke, *The Immunity Provisions in the Kansas Tort Claims Act: The First Twenty-Five Years*, 52 U. Kan. L. Rev. 939, 939-945 (2004).

[65] *Id.* at 945.

[66] Kan. Stat. Ann. § 75-6104.

[67] Westerbeke, *supra* note 63, at 966-967.

[68] *Id.* at 968.

statute, rule and regulation, ordinance or resolution."[69] In its interpretation of this exemption, the Kansas Supreme Court pointed out that all state agencies are created by law and almost every task performed by an agency is done to carry out or enforce the law; thus if the Court were to interpret this exemption broadly, "then it becomes almost impossible to conceive of an action by a governmental agency which does not constitute enforcing or carrying out a law."[70] Therefore, the Court found the exemption in Kan. Stat. Ann. § 75-6104(c) is not applicable unless "claimant's sole asserted claim of causal negligence is the public entity's enforcement or failure to enforce a law."[71] In other words Kan. Stat. Ann. § 75-6104(c) "does not provide an exemption where the agency, in enforcing or failing to enforce a law, commits some additional tortious act or omission which would be negligence at common law, and which act or omission causes damage."[72]

Arguably one of the greatest exemptions from liability under the KTCA is the "discretionary function" exception which precludes liability from "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved."[73] The Kansas Supreme Court, in *Robertson v. Topeka*, opted to adopt the "nature and quality test" as opposed to the "planning level-operation level test" to evaluate whether the actions fall under the discretionary exemption.[74] Rather than focusing on the status of the employee, the central focus of the "planning level-operational level test," the nature and quality test determines "'[w]hether the judgments of a Government employee are of "the nature and quality" which Congress intended to put beyond judicial review.'"[75] Particularly important in the *Robertson* opinion, the Court stated:

> It would be virtually impossible for police departments to establish specific guidelines designed to anticipate every situation an officer might encounter in the course of his work. Absent such guidelines, police officers should be vested with the necessary discretionary authority to act in a manner which they deem appropriate without the threat of potentially large tort judgments against the city, if not against the officers personally.[76]

Exceptions from liability under the KTCA that should be of importance to Sheriffs, Chiefs of Police, and other agency administrators are the "police

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[69] Kan. Stat. Ann. § 75-6104(c).
[70] *Cansler v. State*, 234 Kan. 554, 568, 675 P.2d 57, 68 (1984).
[71] *Id.*
[72] *Id.*
[73] Kan. Stat. Ann. § 75-6104(e)
[74] *Robertson v. Topeka*, 231 Kan. 358, 360-364, 644 P.2d 458, 460-64 (1982).
[75] *Id.* at 361 (quoting *Downs v. United States*, 522 F.2d 990, 997 (6th Cir. 1975)).
[76] *Id.* at 362.

protection exemption" and the "personnel policy exemption." The "police protection exemption" states that governmental entities will not be liable for any claims that arise from "failure to provide, or the method of providing, police or fire protection."[77] This section of the statute essentially codifies the "public duty doctrine" previously discussed herein.[78] More specifically, the Kansas Supreme Court has held that this exception to liability

> is aimed at such basic matters as the type and number of fire trucks and police cars considered necessary for the operation of the respective departments; how many personnel might be required; how many and where police patrol cars are to operate; the placement and supply of fire hydrants; and the selection of equipment options. Accordingly, a city is immunized from such claims as a burglary could have been prevented if additional police cars had been on patrol, or a house could have been saved if more or better fire equipment had been purchased. We do not believe subsection ([n]) is so broad as to immunize a city on every aspect of negligent police and fire department operations.[79]

The "personnel policy exemption" prevents liability in claims arising from "adoption or enforcement of, or failure to adopt or enforce, any written personnel policy which protects persons' health or safety unless a duty of care, independent of such policy, is owed to the specific individual injured."[80] The "personnel policy exemption" was enacted in an effort to overturn the Kansas Supreme Court's decision in *Fudge v. City of Kansas City*.[81] In *Fudge*, Kansas City Police officers were dispatched to a bar where Delmar Henley had been drinking with friends, celebrating a birthday.[82] Henley had consumed about 30 beers and 10 shots and was stumbling around, knocking over chairs, and being belligerent.[83] When the bartender asked Henley to leave, he refused and the police were called.[84] Before the police arrived, Henley and the others exited the bar and congregated in the parking lot.[85] Police officers arrived and approached Henley "within four or five feet . . . observ[ing] his intoxicated condition."[86] There was a dispute

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[77] Kan. Stat. Ann. § 75-6104(n).

[78] *Henderson v. Montgomery Cty. Bd. of Comm'rs*, 57 Kan. App. 2d 818, 824, 461 P.3d 64, 70 (2020) (citing *Hopkins v. State*, 237 Kan. 601, 609-10, 702 P.2d 311, 317-18 (1985)).

[79] *Keiswetter v. State*, 304 Kan. 362, 371-72, 373 P.3d 803, 809-10 (2016) (quoting *Jackson v. City of Kansas City*, 235 Kan. 278, 292, 680 P.2d 877, 890 (1984)).

[80] Kan. Stat. Ann. § 75-6104(d).

[81] *Jarboe for Jarboe v. Bd. of Cty. Comm'rs*, 262 Kan. 615, 627-29, 938 P.2d 1293, 1302-04 (1997); Westerbeke, *supra* note 63, at 969-71.

[82] *Fudge v. Kan. City*, 239 Kan. 369, 370, 720 P.2d 1093, 1096-97 (1986).

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

over whether the officers told Henley to get in car and leave, however, when "Henley drove out of the parking lot he veered his car into the southbound lane of Roe Lane, heading north . . . nearly result[ing] in a collision with a southbound Kansas City police car, which stopped to avoid an accident."[87] James Fudge was driving south on Roe Lane in a delivery van when he approached Henley traveling northbound.[88] Henley's vehicle collided with Fudge's causing Fudge to be thrown from the vehicle and to sustain injuries which he died from twenty days later.[89] Henley was convicted of vehicular homicide and served six months in jail.[90]

Fudge's wife and children brought a wrongful death and survival action against Henley and the City of Kansas City and after a trial, a jury found the City of Kansas City and the police officers to be 18% at fault.[91] The City of Kansas City appealed to the Kansas Supreme Court where the issue before the Court was whether the City was immune from liability under the KTCA.[92] In its analysis, the Court found that while the public duty doctrine only establishes a duty to the public as a whole and not to a specific individual, the Kansas City Police Department's operating manual and a General Order set forth a requirement to take intoxicated individuals, who are at risk of harming themselves or others, into protective custody, which created a duty to take Henley into custody.[93] After finding the officer's had a duty to Henley, the Court then turned to "the question of how that special duty became an obligation to James Fudge."[94]

The Court relied on the adoption of the Restatement (Second) of Torts § 324A in *Schmeck v. City of Shawnee*, 232 Kan. 11, 651 P.2d 585 (1982) which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.[95]

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[87] *Id.*
[88] *Id.* at 370-71.
[89] *Id.* at 371.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.* at 372-73.
[94] *Id.* at 373.
[95] *Id.* (citing *Schmeck v. City of Shawnee*, 232 Kan. 11, 24, 651 P.2d 585, 595-96 (1982)).

The Court's theory was that the officers should have known that taking Henley into custody was necessary for the safety of others and that "[t]heir failure to do so significantly increased the risk that Henley would cause physical harm to others," thus making them liable for their failure to do so.[96] Therefore, because the officers failed to follow the department policies on dealing with an intoxicated individual, they were not exempt from liability. Essentially, the Court found that the officers found an individual duty to Fudge "based on the failure-to-act doctrine, which imposes a duty of reasonable care on the actor who undertakes to aid a person in danger, fails to carry through in a reasonable manner, and thereby increases the risk to the person in peril."[97]

As stated previously, *Fudge* was at least partially overruled by an amendment to the KTCA, however, that may not mean that *Fudge* is to be totally disregarded.[98] Some are of the belief that "[t]he independent duty provision simply prevents judicial reliance solely on an internal guideline or policy to find a duty owed to an individual citizen."[99] In instances such as the *Fudge* case, where "the court did not base the duty owed to plaintiff entirely on the guideline, but merely used the guideline to establish a traditional common law duty based upon an undertaking by the police outside the tavern," liability may still exist.[100] There appears to be some overlap between the discretionary function exception and the personnel policy exemption but the Supreme Court's ruling in *Jarboe* that the KTCA amendment overruled *Fudge*, "should not be read broadly to render as discretionary every governmental decision made pursuant to an internal procedure, guideline or policy."[101]

III. COURT'S DECISION

The Kansas Supreme Court affirmed the Court of Appeals decision and remanded the issue to the district court for further proceedings.[102] The Court determined that while Trooper Saleh had only a general duty to the public under the "public duty doctrine," pursuits by law enforcement officers are governed more specifically under Kan. Stat. Ann. § 8-1506 which requires officers to "drive with due regard for the safety of all persons."[103] This

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[96] *Id.*

[97] Westerbeke, *supra* note 63, at 969.

[98] *Id.* at 969-70 (citing *Jarboe for Jarboe v. Bd. of Cty. Comm'rs*, 262 Kan. 615, 627, 938 P.2d 1293, 1302 (1997))

[99] *Id.* at 971.

[100] *Id.*

[101] *Id*.

[102] *Saleh*, 361 Kan. at 666.

[103] *Id.* at 655 (quoting Kan. Stat. Ann. 8-1506).

requirement creates a specific duty to all persons, and while historically this duty only applied to operation of a vehicle in a pursuit, the Court in *Robbins v. City of Wichita* "expanded this duty to include the decisions to initiate and continue a pursuit."[104] Perhaps, the most significant part of the Court's decision regarding the duty of law enforcement officers when engaging in pursuits is that "plaintiffs must establish law enforcement drove with reckless disregard for the safety of others in order to demonstrate a breach of that duty" creating a higher standard of conduct than would be required in an ordinary negligence case.[105]

In reference to the breach of duty, the Court found that in order to establish that the law enforcement officer drove with reckless disregard for the safety of others, it must be shown that they were "driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger."[106] Again, this standard applies not only to the officer's operation of the vehicle but also to his decision to initiate and continue pursuit of a fleeing suspect.[107] In support of their claim that Trooper Saleh breached a duty, the plaintiffs utilized Saleh's dashboard camera recording, a deposition of Trooper Saleh, the Kansas Highway Patrol's policy referencing initiation and continuation of pursuits, and an affidavit from a criminologist acting as an expert witness.[108] Based on the evidence presented, the Court concluded that a "material issue of fact exists as to whether Saleh exhibited reckless disregard in his decision to continue the pursuit of Horton" and that a jury could find that Trooper Saleh breached his duty.[109] While addressing the breach of duty, the Court compared the facts in this case to the facts in *Robbins* and observed that the officers in *Robbins* were investigating a more serious crime which made the pursuit more reasonable in *Robbins* and justified summary judgment for the officers.[110]

Next, the Court addressed the issue of causation and found that "police conduct can, in some circumstances, be the proximate cause of an accident involving a third party."[111] Based on the evidence presented by the plaintiffs and viewing it in a light most favorable to the plaintiffs, the Court concluded that "a dispute exists as to whether Trooper Saleh's conduct was

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[104] *Id.*
[105] *Id.*
[106] *Id.* at 656. (quoting *Robbins*, 285 Kan. 455, syl. ¶ 6).
[107] *Id.* (citing *Robbins*, 285 Kan. 465-66).
[108] *Id.* at 656-57.
[109] *Id.* at 657-58.
[110] *Id.* at 658-59.
[111] *Id.* at 660.

a cause in fact for the plaintiffs' injuries."[112]

The Court then turned to the defenses of Trooper Saleh and the State which claimed immunity under the KTCA.[113] First addressing the discretionary function, the Court found that since Kan. Stat. Ann. § 8-1506 imposes a mandatory duty on law enforcement officers in the operation of their vehicles, the discretionary function did not apply in this case.[114] The Court determined that the "'method of providing police . . . protection' exception" did not apply in this case because it was not the type of basic matter which the Court has previously found the exception to be aimed at.[115] Finding that there were disputes of material fact on the issues of breach and causation and that none of the KTCA immunities applied, the Court held that the plaintiffs' claims should not be dismissed as a matter of law and that further proceedings were warranted.[116]

IV. COMMENTARY

This case comes during a contentious time in the United States with increased calls for police accountability and many trying to reign in what is perceived as unfettered police power. Others feel that the majority of law enforcement is being unfairly targeted and find themselves asking whether the police have any protection at all. The primary takeaway from *Saleh* is that the legal standard has not changed. Kan. Stat. Ann. § 8-1506 has been the standard for operation of an emergency vehicle and has remained unchanged since 1977. In *Saleh*, the Kansas Supreme Court has not implemented any new rules but has simply reaffirmed old ones. This case has caused law enforcement agencies around the state to reevaluate their pursuit policies. However, this case should not create an exaggerated response by agencies to implement policies that all but forbid vehicle pursuits. Hopefully, this article will shed light on what exactly the Court did and did not say.

It is important for the leadership of law enforcement agencies and those making policy to understand that the Kansas Supreme Court did not make a determination of liability in this cased based on the merits. That is not the job of the Kansas Supreme Court. Instead, the Court in this case has merely made a determination that the Kansas Court of Appeals was correct when they determined that the Shawnee County District Court had misapplied the law by wrongly granting Summary Judgment for Trooper Saleh and the

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[112] *Id.* at 663.
[113] *Id.*
[114] *Id.* at 664-65.
[115] *Id*. 665-66.
[116] *Id.* at 666.

State of Kansas. However, the decision by the Court of Appeals and the Supreme Court that the case be remanded for further proceedings does not mean that Trooper Saleh and the State of Kansas will necessarily be liable. This decision simply means that the evidence before the Court, when interpreted in a way that is most favorable to the plaintiffs, is sufficient for the case to be presented to a jury to decide the facts. The Court has determined that Trooper Saleh had a duty to the individual defendants and it is up to a jury to decide: 1) whether Trooper Saleh breached his duty by driving in reckless disregard for the safety of others in his decision to initiate and continue pursuing Horton's vehicle; 2) whether Trooper Saleh's conduct was the proximate cause of the accident that caused harm to the plaintiffs; and 3) what damages the plaintiffs suffered.

This case is not determining liability in a blanket "liable or not liable" fashion but is pointing out that these cases are to be judged on a case-by-case basis. As with many instances in law enforcement, this case, and any other cases involving a vehicle pursuit, will depend on the reasonableness of the police officers' actions in initiating and continuing to pursue a fleeing vehicle. For example, pursuing a fleeing suspect at 100 miles per hour down Topeka Boulevard during rush hour for only a speeding violation is probably unreasonable.[117] However, pursuing a fleeing suspect at 100 miles per hour on the Kansas Turnpike in Lyon County at midnight for the same speeding violation may very well be reasonable. Even further, pursuing a fleeing suspect down at 100 miles per hour Topeka Boulevard during rush hour might be reasonable if the suspect has just committed or is about to commit a violent crime.[118] The reasonableness is important because if an officer is acting reasonable, then he is not acting negligently or recklessly and is not civilly liable.

There are many factors to consider when deciding to initiate or continue a pursuit. The Court in *Saleh* was presented with the following excerpt from the Kansas Highway Patrol policy, referred to as OPS-16:

> Officers are expected to make a diligent and reasonable effort to stop all suspected or actual violators. The decision to initiate pursuit must be based on the pursuing officer's conclusion that the immediate danger to the officer and the public created by the pursuit is less than the immediate or potential danger to the public should the suspect remain at large. [119]

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[117] It is true that often times simple traffic stops result in the discovery of more serious offenses and when a person flees it is likely not based solely on the reason that the officer is stopping them; however, the reasonableness of an officer's conduct is going to depend on what was known to them and not on speculation.

[118] There are a number of variables to be factored in to whether an officer's conduct in a police chase is reasonable. These examples are for comparative and demonstrative purposes and are not to be interpreted as concrete rules.

[119] *Saleh*, 361 Kan. at 656. (citing *Schmeck v. City of Shawnee*, 232 Kan. 11, 24, 651

Additionally, the policy listed factors to consider when deciding to initiate a pursuit which included: "a. nature and seriousness of violation; b. road, weather and environmental conditions; c. population density and presence of vehicular/pedestrian traffic; d. officer's familiarity with area; e. patrol vehicle condition; f. alternative methods of apprehension; g. likelihood of successful apprehension; h. mutual aid agreements with city and county authorities."[120] The policy also stated: "The primary pursuing unit shall continually re-evaluate and assess the pursuit situation including all of the initiating factors and terminate the pursuit whenever he or she reasonably believes the risks associated with continued pursuit are greater than the public safety benefit of making an immediate apprehension."[121] This is not to say that this policy is superior to any others or that it should be used as an example; each department should tailor their policy to their own standards, training, and capabilities. However, this policy does utilize a risk/benefit analysis to judge the reasonableness of the pursuit as well as a list of factors to be considered by the officer.

The Court's opinion in *Saleh* should also provide reassurance to law enforcement professionals engaged in vehicle pursuits based on the how the justices lined up in this case. The opinion in *Saleh* was a "per curiam" opinion. Typically, judicial opinions are signed by the justice who composed the opinion as well as those other justices who agreed with it.[122] When a majority of justices agree about an opinion, it becomes controlling case law.[123] Those justices who disagree with the majority may compose a dissenting opinion explaining why they disagree.[124] In cases where none of the opinions are supported by a majority of the justices, the Court issues a plurality opinion which may or may not be binding on lower courts but at the very least offer persuasive authority.[125] "Per curiam" opinions are different in that they are opinions attributed to the Court as a whole instead of one or more justices.[126] "Per curiam" opinions were historically "used to signal that a case was uncontroversial, obvious, and did not require a substantial opinion."[127] However, this does not seem to be the case in *Saleh*,

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P.2d 585, 595-96 (1982)).

[120] *Id.* at 656-57.

[121] *Id.* at 657.

[122] James A. Bloom, *Plurality and Precedence: Judicial Reasoning, Lower Courts, And The Meaning Of United States v. Winstar Corp.*, 85 Wash. U. L. Rev. 1373, 1375-76 (2008).

[123] *Id.*

[124] *Id.* at 1376-77.

[125] *Id.* at 1377.

[126] Ira. P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*, 86 Tul. L. Rev. 1197, 1199 (2012).

[127] *Id.* at 1200.

a case in which three of the seven Supreme Court Justices joined the dissent.[128] [129]

The dissenting justices in this case expressed that they would reverse the decision of the Kansas Court of Appeals and affirm the District Court's decision to grant summary judgment for Trooper Saleh and the State of Kansas.[130] The dissent felt that summary judgment was appropriate because they determined that the plaintiffs had "failed to establish a prima facie case that Kansas Highway Patrol Trooper Patrick Saleh breached his duty of care under K.S.A. 8-1506 and that this alleged breach caused the plaintiffs' injuries."[131] It was pointed out by the dissenting justices that the plaintiffs did not allege that Trooper Saleh was acting recklessly when he initiated the pursuit and that the evidence did not suggest that he was acting recklessly.[132]

As previously pointed out, the first law enforcement officer to observe Horton's vehicle witnessed the vehicle's passenger wielding a knife, a point that the dissent felt was minimized by the majority.[133] [134] This observation by the officer may have provided more of a reason for the officer to continue his pursuit and made the decision to pursue the vehicle more reasonable. Furthermore, the pursuit was initiated around 9:30 p.m., lasted about a minute and thirty seconds, and "took place mainly on a dry, artificially lit four-lane road with light traffic."[135] The dissent also noted additional relevant facts:

> During the pursuit, Saleh activated his emergency equipment. Saleh followed Robert Horton through a stop sign at 20th Street while turning south on to Kansas Avenue. As the two cars were preparing to enter the intersection on 21st Street, Horton ran through a red light at a high rate of speed while Saleh slowed down as he passed through the intersection. The pursuit also passed several other cars waiting to cross or turn onto Kansas Avenue. Horton also crossed the yellow lane line and weaved around a car as he approached 29th Street. [136]

Based on these facts, it is hard to see how Trooper Saleh's decision to initiate a pursuit was unreasonable, let alone reckless. Although it was noted

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[128] *Saleh*, 361 Kan. at 674.

[129] At the time *Saleh* was decided, there were two vacancies on the Kansas Supreme Court due to the retirement of Chief Justice Lawton R. Nuss and Justice Lee A. Johnson. Judge Henry Green and Judge Steven Leben from the Kansas Court of Appeals were assigned to hear this case.

[130] *Id.* at 666.

[131] *Id.* at 666-67.

[132] *Id.* at 667.

[133] *Id.*

[134] No knife was found later in the vehicle or at the accident scene.

[135] *Id.* at 668.

[136] *Id*.

that Trooper Saleh "acknowledged that the pursuit was unlikely to be successful after Horton ran the red light at 21st Street," he decided to continue the pursuit because he "did not appear to have an alternative method of apprehending Horton or determining if Horton or his passenger were at risk. At that time, Horton's identity was unknown. Additionally, the Toyota had an improper license plate, so the vehicle registration likely could not be used to identify the driver."[137] The dissenting justices compared the facts of the *Robbins* case to this case and found that even though the facts in *Saleh* were not as extreme as the *Robbins* case, it did not mean that Trooper Saleh's decision to pursue was not justified or that Trooper Saleh did not have reason to believe that Horton was a danger to the public.[138] Justice Rosen who authored the dissenting opinion recognized the all too common plight of law enforcement officers: "[Trooper] Saleh was faced with split-second decisions, particularly given the relative brevity of the pursuit, and I am reluctant to second-guess those decisions based on this record."[139]

This case begs the question: "If continuing to pursue a vehicle may expose a law enforcement officer and/or agency to liability, the why should they engage in vehicle pursuits with suspects at all?" This question was addressed by the dissent which answered:

> Saleh was placed in an impossible decision-making situation. If he had not pursued a car in which he had reason to believe a violent crime could be occurring, he risked being found liable for a "negligent or wrongful . . . omission" under the Tort Claims Act. But if he did not stop the pursuit a few seconds earlier, he risked being found liable for engaging in "reckless" conduct by exhibiting "a conscious and unjustifiable disregard of the danger" under K.S.A. 8-1506. [140]

Although not the focus of this case, it is worth considering the possibility that by choosing not to initiate or continue a vehicle pursuit with a fleeing suspect, an officer or agency may also be liable for any harm caused by that decision. It is no secret to those both inside and outside of the legal profession that in cases involving a negligence claim, the plaintiffs often target those parties with the deepest pockets. The same factors that are used to weigh an officer's decision to initiate or continue a pursuit will also be used to weigh their decision to discontinue or not engage in a pursuit.

As with the *Saleh* case, an officer's failure to engage in or continue a pursuit that ends in harm would have to rise to a level of recklessness in order for the officer or agency to be liable. While it may seem unlikely that

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[137] *Id.*
[138] *Id.* at 669
[139] *Id.*
[140] *Id*.

an officer's declination to pursue out of concern for the safety of others would ever rise to the level of reckless, situations may exist where a fleeing suspect has committed such a serious crime or their driving poses such a risk to the public that an officer's failure to pursue may be a conscious disregard for the safety of others.

Take for example, a scenario where an officer initiates a pursuit with a vehicle but then decides to terminate the pursuit for safety concerns. The per curiam opinion in *Saleh* mentioned the testimony of a criminologist who was of the belief that "it was more likely than not that drivers of fleeing vehicles will continue to flee as long as they are being chased" and "it is more likely than not that [Horton] would not have crashed into the pick-up driven by [the plaintiff]" if Trooper Saleh had terminated pursuit.[141] But what if this speculation turns out to be untrue?[142] Kansas Highway Patrol Lieutenant Scott Martin testified that "one of the reasons for terminating a pursuit is the hope that the vehicle being pursued will then slow down and not create a hazard to vehicular and pedestrian traffic."[143] What is an officer to do then when they choose to terminate a pursuit and the "hope" that Lieutenant Martin testified to does not come to fruition?[144] Turning back to the example, what if the officer terminates the pursuit, deactivating his lights and sirens and returning to a normal speed, but the suspect continues to drive erratically, posing a danger to the public? Furthermore, what if after the pursuit has been terminated and the officer can no longer see the suspect, dispatch receives a call from the public reporting an erratic driver matching the description of the fleeing vehicle. This situation poses an even more difficult decision for officers involved and may or may not result in liability for failing to pursue the suspect.

While this seems like an impossible choice for law enforcement officers, the dissent supported the following findings of the district court:

> [W]ithout extrinsic evidence or some evidence emanating from either Mr.

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[141] *Id.* at 662.

[142] The dissent found speculation such as this to be insufficient to establish a breach of a duty. *Id.* at 670 ("[T]o survive summary judgment, the plaintiff must provide evidence supporting a reasonable inference that the defendant's conduct more likely than not caused the injuries sustained. A plaintiff cannot accomplish this task by relying on conjecture, speculation, or surmise. Nor will evidence of the mere possibility of causation suffice."); *Id.* at 671 ("An expert must have a factual basis for his or her opinions in order to separate them from mere speculation." (quoting *Kuxhausen v. Tillman Partners, L.P.*, 291 Kan. 314, 318, 241 P.3d 75 (2010)).

[143] *Id.* at 662.

[144] The dissent recognized "it is also likely the suspect may want to get as far away as possible from law enforcement and thus continue driving at a high rate of speed and ignoring traffic signals" and found that nothing in the criminologist's testimony "suggests either one of these possibilities is more likely than the other." *Id.* at 672.

> Horton or his passenger about the extent or likelihood of their attention to the pursuing vehicle of Trooper Saleh or of Mr. Horton's state of mind or probable reactions, a conclusion that he would have stopped if Trooper Saleh had stopped rests within the realm of speculative assumption . . . . Plaintiffs cannot, as a matter of proof—and based on the entirety of the evidence advanced—establish that Mr. Horton would see, hear, or be aware of, and if he did, would have responded positively, timely, or responsibly to the termination of the pursuit even had Trooper Saleh elected to do so at any point where the specter of a finding of reckless disregard in the act of continuing to pursue might reasonably arise." [145]

The dissenting justices also agreed with the district court that "Dr. Alpert's report lacks the type of factual basis normally found in expert reports. It does not, for example, state why, or in what time frame, or in what distance, or under what circumstances fleeing criminals generally slow down after they realize a police pursuit has ended."[146] Considering all of the evidence presented together, the dissent concluded:

> Nothing in this recording suggests Horton was prepared to slow down within seconds of losing sight and sound of the police pursuit. In fact, in the latter half of the pursuit, Horton had already far outdistanced Saleh and at some points he was out of Saleh's sight. Saleh was too far behind Horton to witness the collision. Furthermore, Saleh was reducing his speed of travel, realizing that he could not safely keep pace with Horton, but Horton did not slowdown in response.[147]

In further support of their position, the dissent cited *Stanley v. City of Independence*, 995 S.W.2d 485 (Mo. 1999), a case from the Missouri Supreme Court which affirmed a grant of summary judgment for the City of Independence.[148] In *Stanley*, an officer attempted to stop a vehicle utilized in an armed robbery.[149] After a 45-second pursuit that reached speeds of 70 miles per hour, the fleeing suspect crossed over in to the oncoming traffic lane and collided with another vehicle, killing the occupants.[150] A wrongful death suit was initiated against the City of Independence but was dismissed on summary judgment with the court finding that the conduct of the officers "was not the proximate cause of the collision."[151] The Missouri Supreme Court held:

> The suspects in the van made the initial decision to flee, sped through red lights and in the wrong lane of traffic, and collided with the decedents. Any negligence by [the officer] is connected to the plaintiffs' injury solely through

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[145] *Id*. at 671.
[146] *Id.* at 672.
[147] *Id.* at 673.
[148] *Id.* at 674.
[149] *Id.*
[150] *Id.*
[151] *Id.*

> the conduct of the fleeing van. Thus, the only conceivable causal link between the officer's alleged negligence and the collision is the conjectural effect of his pursuit on the pursued vehicle. Shortly after initiating the pursuit, the officer observed, "this guy is going nuts on us." There is nothing other than speculation to reach a conclusion that the officer's conduct was a "cause" of the collision. Put another way, there is no way to tell whether the collision would have been avoided if the officer had abandoned the pursuit after initiating it. Thus, there is no factual basis to support a finding of proximate cause.[152]

The dissents conclusion was that there was a lack of evidence to establish causation and a breach of duty and based upon that, the district court's grant of summary judgment dismissing the action against Trooper Saleh and the State should be affirmed.[153]

V. CONCLUSION

While the Kansas Supreme Court has extended the duty imposed on law enforcement officers to drive with due regard for the safety of others when operating a motor vehicle to an officer's decision to initiate, continue, and terminate a pursuit, and the standard of care remains the same and an officer will only be liable if they are found to have acted recklessly. The Supreme Court in *Saleh* did not determine whether or not Trooper Saleh's conduct met the level of recklessness required for the plaintiff's to be successful in their claim, but rather only determined that it was a question that, according to prior established law, was appropriately determined by a jury. This case should not be seen as either a moratorium on police vehicle pursuits nor as permission to engage in these pursuits with disregard for the safety of the public. This case does however reaffirm the importance for law enforcement agencies to have a clearly outlined policy pertaining to vehicle pursuits as well as the need to explore intervention techniques that can be utilized to bring pursuits to a swift and safe conclusion.

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[152] *Id.* (quoting *Stanley*, 995 S.W. 2d at 488).
[153] *Id.*