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Case No. N15C-08-219 ALR

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

FRANCIS J. BASS JR., as Administrator For THE ESTATE OF MARY SMITH; And ROBLISHA SMITH, individually,	)	
Plaintiffs,	)	C.A. No. N15C-08-219 ALR
v.	)	JURY TRIAL DEMANDED
OWEN COCOLIN and STATE OF DELAWARE DEPARTMENT OF SAFETY AND HOMELAND SECURITY DIVISION DELAWARE STATE POLICE,	)	
Defendants/Third Party Plaintiffs,	)	
v.	)	
STEPHEN J. JEFFERIS,	)	
Third Party Defendant.	)	

DEFENDANTS' OPENING BRIEF
IN SUPPORT OF SUMMARY JUDGMENT

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DEPARTMENT OF JUSTICE
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Date: April 28, 2017

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INTRODUCTION

This case is tragic. An innocent bystander lost her life. But the Court should not let the tragic conclusion of this lawful police pursuit skew its analysis of the legal issues—the primary one being the Trooper's decision to pursue someone whose driving he determined posed a greater risk to the public—because he just shot himself up with heroin—than the actual 52-second pursuit. This judgment call cannot amount to *gross* negligence under Delaware law. If it did, it is hard to imagine how the many day-to-day, split-second determinations demanded of law enforcement would likewise *not* be called into question. Apart from engaging in after-the-fact, intensive scrutiny over the discretionary determination of police officers, permitting Plaintiffs to proceed with this action would discourage law enforcement from ensuring public safety by freely allowing fleeing suspects to escape apprehension. Courts should be "loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger."[1] "It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights."[2]

[1] *Scott v. Harris*, 550 U.S. 372, 385–86 (2007).
[2] *Scott*, 550 U.S. at 385.

NATURE AND STAGE OF THE PROCEEDINGS

On August 28, 2015, Plaintiffs Francis J. Bass, as Administrator for the estate of Mary Smith ("Smith"), and Roblisha Smith (hereinafter "Plaintiffs") filed a personal injury action against Defendants Trooper Owen Cocolin ("Cocolin"), and the Department of Safety and Homeland Security Division of Delaware State Police (hereinafter "Defendants"). The action arises out of a motor vehicle accident that occurred on Thursday, October 2, 2014 at approximately 9:12 p.m. Cocolin was pursuing Third Party Defendant Stephen Jefferis ("Jefferis"), who, within 52 seconds of the chase, crashed into a vehicle in which Smith was the passenger. As a result of the accident, Mary Smith passed away the next day. The accident occurred at the intersection of Lea Boulevard and Philadelphia Pike. On October 12, 2015, Defendants answered the complaint, denying liability and asserting a number of defenses. Discovery has completed, and Defendants have now moved for summary judgment. This is their Opening Brief in support of summary judgment.

STATEMENT OF FACTS

I. JEFFERIS CRASHES INTO SMITH'S CAR AFTER SHOOTING UP HEROIN AND FLEEING FROM COCOLIN

Cocolin was on-duty, in an unmarked, but not undercover, state police vehicle, traveling on I-95, when, at 9:05 p.m. on October 2, 2014, he received a dispatch call. Dispatch told him that a caller informed the police that she observed people shooting up heroin while sitting in a black Mustang parked in the parking lot in front of Café Palermo on Miller Road in Wilmington.[3] Cocolin exited I-95 onto Route 202, made the left onto Miller Road and traveled to 37th Street, which is just north of the parking lot of the Home Depot and Café Palermo. He turned left into the parking lot of the Home Depot.[4] After he passed by Home Depot, Cocolin saw the Mustang, which appeared to have two occupants.[5]

At approximately 9:08 p.m., Cocolin stopped his unmarked car close to the left side of the Mustang.[6] Cocolin parked his police vehicle on a 45 degree angle facing the driver's door "B pillar."[7] The Mustang was blocked in by a curb on its left side, a storefront to the front side, and a parked vehicle to its right side.[8] Cocolin turned on his rear emergency lights, activated his front emergency takedown light (a

[3] *See* Audio Recording of Dispatch Call (A1); Call for Service Report for October 10, 2014 (A2); Cocolin Dep. 27:11–27:20 (A5). Citations to "A" herein are to Defendants' Appendix to Opening Brief.
[4] Cocolin Dep. 29:11–17 (A6).
[5] *Id.* (A6).
[6] *Id.* (A6).
[7] *See* Crime Report of Cocolin (A36).
[8] *Id.*

bright light that shines out of the front of the police car), and exited his patrol vehicle.[9] Initially, there was no movement by the occupants despite the Mustang being filled with light.[10] Cocolin approached the Mustang from the driver's side at a 45 degree angle, and once Cocolin reached the pillar between the front and rear window, he shined his flashlight in the driver's side and saw the driver's hands.[11] Cocolin saw a hypodermic needle close to Jefferis' arm and empty baggies that he believed were consistent with heroin.[12] Once Jefferis looked over his left shoulder, he dropped down into the vehicle compartment and outside the view of Cocolin.[13] Because Cocolin lost sight of Jefferis' hands, he drew his service weapon.[14] Cocolin was in his police uniform and he identified himself as a police officer, stating "State Police, let me see your hands."[15] Cocolin then heard from the vehicle's compartment, "It's a cop, he has a gun".[16] Jefferis was fumbling around and then backed the Mustang up approximately fifteen-to-twenty feet, close to where Cocolin's vehicle was positioned such that Jefferis was perpendicular to the passenger door of the police vehicle.[17] Jefferis then put his Mustang in drive and

[9] Cocolin Dep. 37:2–8 (A7).
[10] Cocolin Dep. 37:9–10 (A7).
[11] Cocolin Dep. 37:10–17 (A7).
[12] Cocolin Dep. 37:17–38:10 (A7–A8).
[13] Cocolin Dep. 38:23–39:13 (A8–A9).
[14] Cocolin Dep. 39:12–14 (A9).
[15] Cocolin Dep. 26:9–9, 39:13–15 (A4–A9).
[16] Cocolin Dep. 39:18–21 (A9).
[17] Cocolin Dep. 42:9–14 (A10).

pulled forward while turning to the left, barely missing the back passenger quarter-panel of the police car, and then drove northbound in front of the Home Depot towards 37th Street.[18]

At approximately 9:11 p.m., Cocolin entered his vehicle with the emergency lights still activated, activated the remaining emergency equipment, and notified dispatch that Jefferis was fleeing.[19] Cocolin testified that Jefferis was past the stop sign at the exit of Home Depot and 37th Street by the time Cocolin entered his vehicle.[20] In addition, when Cocolin reached the stop sign at the exit of Home Depot and 37th Street, his flashlight fell on the floor. When turning right onto 37th Street, Cocolin drove slowly so that he could retrieve his flashlight.[21] At the time Cocolin turned left onto Franklin Street, Jefferis was turning right onto Lea Boulevard.[22] When Cocolin turned right onto Lea Boulevard, he observed the Mustang traveling

[18] Cocolin Dep. 42:21–43:1 (A10–A11). As a response to the Third Party Complaint, Jefferis filed a hand-written, *pro se* affidavit, stating that "the only reason I drove off was because a gun was drawn on me and I was in fear for my life. The person with the gun was not stating he was the Police." Aff. Stephen J. Jefferis dated November 19, 2015 (A173). This was filed on December 8, 2015. Jefferis was not deposed. Yesterday, one day before the summary judgment deadline, Defendants received from Plaintiffs a typed affidavit from Jefferis, reiterating his first affidavit, but adding that Cocolin "chased me and continued to chase me forcing me to go faster and faster trying to get away from him because I was afraid he was going to kill me. Otherwise, I would have had no reason to try to get away from him." Aff. Stephen J. Jefferis dated April 11, 2017 (A174). He also added that he did not hear a siren or see lights. *Id.* ¶ 4 (A175). Of course, this last-minute affidavit provided one day before summary judgment ignores the fact that Jefferis pled guilty to various crimes, including manslaughter, in connection with this accident.

[19] Cocolin Dep. 58:21–23 (A13); see Audio Recordings of Dispatch Call (A1); Crime Report of Cocolin (A36).

[20] Cocolin Dep. 58:21–24 (A13).

[21] Cocolin Dep. 58:24–59:4 (A13–A14).

[22] Cocolin Dep. 58:21–59:21 (A13–A14).

eastbound on Lea Boulevard towards Wilmington.[23] The Mustang then went around four cars stopped on Lea Boulevard at a red light at Monroe Street.[24] The Mustang then proceeded eastbound in the westbound lanes and returned to the right side of the road after clearing the intersection.[25] Cocolin moved slowly through traffic at the Monroe Street intersection and observed Jefferis' vehicle go through the red light at the intersection of Lea Boulevard and Washington Street Extension.[26]

At approximately 9:12 p.m., after Cocolin proceeded slowly through the intersection of Lea Boulevard and Washington Street Extension, he observed Jefferis' vehicle go through the red light on Lea Boulevard at the Philadelphia Pike intersection and strike Plaintiffs' vehicle.[27] The investigating officer testified that Jefferis was traveling approximately 99 mph at the time of impact.[28]

Cocolin was approximately 0.2 miles away from the impact at the time that it occurred.[29] The total distance travelled by Cocolin during the entire pursuit from Home Depot to the scene of the accident was approximately one mile.[30] The total time that elapsed was approximately 57 seconds.[31]

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[23] Cocolin Dep. 59:18–60:9 (A14–A15).
[24] Cocolin Dep. 60:6–9, 61:10–22 (A15–A16).
[25] *Id.* (A15–A16).
[26] Cocolin Dep. 62:22–63:64:5 (A17–A18).
[27] Cocolin Dep. 63:17–23, 64:3-21 (A_18–A19); *see also* Initial Crime Report of Cocolin (Def 022).
[28] Forester Dep. 17:10–18:20 (A33–A34).
[29] *See* Crime Report of Cocolin (A37); Google Map Image of Pursuit Area (A41).
[30] *See* Crime Report of Cocolin (A38).
[31] *Id.* (A38).

Cocolin testified that he pursued Jefferis because he saw him participating in drug activity and because he was possibly under the influence.[32] Throughout the pursuit, Cocolin considered the traffic, pedestrians, time-of-day, and weather conditions in determining—in the less-than-one-minute pursuit—to continue to pursue Jefferis.[33] Cocolin agreed that the violation was a non-violent felony. He also stated that he was not aware of whether the tag for the Mustang was actually a good or bad tag.[34]

II. PLAINTIFFS' POLICE PROCEDURES EXPERT'S BASIS FOR LIABILITY

In attempting to make a case that Cocolin was grossly negligent, Plaintiffs relies upon Michael Lyman, Ph.D. ("Lyman"), a professor who has taught Criminal Justice at the Columbia College of Missouri for the past 27 years.[35] He is not a lawyer.[36] Nor has Lyman ever worked as a uniformed police or patrol officer.[37] He has never participated in chase of a suspect, other than short pursuits, like "across a parking lot," nothing as "substantial" as the chase in this case.[38] Lyman acknowledged that all pursuits are different and based upon their own facts.[39]

[32] Cocolin Dep. 51:1–22 (A12).
[33] Cocolin Dep. 96:11–97:6 (A22–A23).
[34] Cocolin Dep. 84:18–85:17 (A2—A21).
[35] Lyman Dep. 9:11–16 (A25).
[36] Lyman Dep. 28:16 (A31).
[37] Lyman Dep. 10:3–15 (A26).
[38] Lyman Dep. 10:19–11:2 (A26–A27).
[39] Lyman Dep. 11:13–21 (A27).

Notwithstanding not having any experience being a patrol officer or participating in any pursuits, other than those whose distance span a parking lot, Professor Lyman offered a number of opinions on how he believes Cocolin was grossly negligent. First, Lyman criticized Cocolin for not parking behind Jefferis' car, essentially "pinning it in" to the parking space.[40] Had he done this, according to Lyman, Jefferis would not have been able to escape.[41]

Lyman's second primary area of criticism was his "unreasonable" decision to pursue Jefferis.[42] Though Cocolin witnessed Jefferis flee after shooting what appeared to be heroin into his arm and after nearly hitting a patrol car, Lyman opined that Cocolin should have "simply let the vehicle go."[43] According to Lyman: (1) the driver was not suspected of committing a violent offense; (2) Cocolin had the license plate number (and therefore could have arrested Jefferis some other time); (3) it was improper to pursue in an unmarked (not undercover) vehicle; (4) there is evidence that the sirens on Cocolin's vehicle were not on; (5) Jefferis was traveling at a high-rate of speed in a residential neighborhood; and (6) it was reasonable to conclude that there would be motorists and pedestrians in harm's way.[44]

Lyman opined that the Cocolin's pursuit violated "nationally recognized

[40] Expert Report of Dr. Lyman dated October 20, 2016 p. 12–13, § b (A65–A96).
[41] *Id.* (A76–A96).
[42] *Id.* at p. 13, § d (A77).
[43] *Id.* (A77).
[44] Lyman Report at p. 13-16, § d (A77–A80).

guidelines" promulgated by the International Association of Chiefs of Police ("IACP").[45] The IACP guidelines cited by Lyman certainly do not prohibit Cocolin's pursuit of Jefferis. Rather, they provide the subjective guideline that the decision to pursue must be based upon the officer's conclusion that the immediate danger to the public created by the pursuit is less than the immediate or potential danger to the public should the suspect remain at large.[46] The officer is to take into consideration: road, weather and environmental conditions; population density and vehicle and pedestrian traffic; the relative performance capabilities of the vehicles; the seriousness of the offense; and any presence of passengers in both the vehicles.[47]

III. COCOLIN PROPERLY FOLLOWED DSP POLICIES

Much like the IACP guidelines, the Delaware State Police Pursuit Policy (the "Pursuit Policy"), which sets forth guidelines to be used by Delaware State Troopers in either initiating a pursuit or discontinuing a pursuit,[48] provides that a pursuit will be discontinued where the risk to the safety of the public appears greater than the necessity for immediate apprehension.[49] It expressly states that "[w]hile a fleeing

[45] The State Police are accredited by the Commission on Accreditation for Law Enforcement Agencies ("CALEA"). *See* http://dsp.delaware.gov/planning_section.shtml (last visited 4/12/17). There is very little difference between CALEA standards and IACP. Lyman Dep. 15:11–24 (A28). According to State Defendants' expert, DSP *exceeds* the CALEA standards in certain respects. *See* Expert Report of William M. Toms, Ed.D dated January 24, 2017, p. 46 (A142) .
[46] Lyman Report at 8 (A72).
[47] *Id.* at 8–9 (A72–A73).
[48] Delaware State Police Pursuit Policy (A42–A63).
[49] *Id.* § 11.A (A5–A51).

felon has no right to a leisurely escape, his apprehension is to be constantly weighed against the likelihood of serious physical harm or death to the trooper or third parties."[50]

With respect to initiating a pursuit, the Pursuit Policy provides that it is necessary for the trooper to make a preliminary determination considering, among other things, the seriousness of the offense.[51] While the policy prohibits the continuation of pursuits for suspected traffic offenses, it expressly gives officers the discretion to pursue those suspected of driving under the influence.[52] "Criminal activity, including suspected DUI violations, in the trooper's discretion may be pursued."[53] Similar to the IACP, officers are to consider, in addition to the seriousness of the offense, weather and road conditions, vehicle and pedestrian traffic, the location of the pursuit, the speeds involved, and the familiarity with the area of the pursuit.[54] For the continuation of all pursuits, the Pursuit Policy references the above factors.[55] and provides further guidance, requiring that the officer also consider the condition of the pursuit vehicle and the abilities of the pursuing officer.[56] In unmistakable terms, the Pursuit Policy states: "A

[50] *Id.* § 11.B (A51).
[51] *Id.* § 3.1 (A45).
[52] *Id.* (A45).
[53] *Id.* (A45).
[54] *Id.* § 3.A.1.C (A45).
[55] *Id.* § 11.A.1 (A50).
[56] *See id.* § 11.A-C (A50–A52).

discontinuation of the pursuit will be employed in every case when the risk to the safety of the public or troopers appears greater than the necessity for immediate apprehension . . . ."[57]

In addition to finding fault with Cocolin's actions, Lyman also opined that the Pursuit Policy is to blame for the incident. He criticized the policy on two grounds. First, Lyman claims that the Pursuit Policy fails to give officers the ability to terminate the pursuit without first notifying a supervisor.[58] Professor Lyman also claims, in direct contradiction to language of the Pursuit Policy,[59] that the policy fails to expressly direct that officers shall not pursue when a pursuit poses a greater danger to the public than a non-violent suspect who is permitted to go free.[60]

* * *

Jefferis is presently incarcerated for his actions in connection with this accident. He pled guilty to manslaughter, driving under the influence, and disregarding a police signal.[61]

The causes of action alleged against State Defendants are negligence, gross

[57] *Id.* § 11.A (A50–A51).
[58] Lyman Report at 12 (A76); Lyman Dep. 22:3–27 (A30).
[59] *See, e.g.*, Pursuit Policy § 1.D (A42).
[60] *See* Lyman Report at 17-18 (A81–A82). When questioned, Lyman essentially acknowledged that his opinion contradicted the Policy and demonstrated that he merely quibbles with the wording. *See, e.g.*, Lyman Dep. 19:13-21 (A29) (Lyman answering, in responding to the question whether 1.D provides that risks and benefits must be weighed, "It basically does say that."); Lyman Dep. 22:12-17 (A30) (where he acknowledged that § 1.D "eludes" to officer's ability to terminate a pursuit but testifying that believes the policy is "problematic," apparently because it does not expressly state that they must terminate if they make the decision that a pursuit is too dangerous).
[61] *See* Certified Copy of Jefferis' Plea Agreement dated June 8, 2015 (A144).

negligence, and vicarious liability.[62]

The State of Delaware's self-insurance program for state owned automobiles applies to this accident up to the amount of $1,000,000.00, as set forth in the automobile policy attached hereto.[63] As such, sovereign immunity has been waived, but only up to the coverage limit.

With regard to potential coverage for the Delaware State Police, there is a Law Enforcement Agency/Officers Professional Liability Insurance policy.[64] However, there is a specific exclusion of coverage provision in that policy that excludes coverage "arising out of the ownership, operation, use, loading, or unloading or any land motor vehicle including machinery or apparatus attached thereto . . . ."[65] In addition, the professional liability policy excludes coverage for claims arising out of the official employment policies or practices of the state or political subdivision.[66]

[62] *See generally* Am. Compl.
[63] *See* PMA Automobile Policy (A145–A167).
[64] *See* Delaware State Police Professional Liability Policy (A168–A172).
[65] *Id.* at p. 2, Subsection E (A169).
[66] *Id.* at p. 2, Subsection H (A169).

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[67]

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.[68]

A genuine issue of material fact is one that "may reasonably be resolved in favor of either party."[69] "When the evidence shows no genuine issues of material fact in dispute, the burden shifts to the nonmoving party to demonstrate that there are genuine issues of material fact that must be resolved at trial."[70] "When the party opposing summary judgment is the party who will bear the burden of persuasion at trial, that party is obliged to point to facts in the record that will support its prima facie case at trial."[71]

A party opposing summary judgment is not entitled to trial "on the basis of a

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[67] *See* Super. Ct. Civ. R. 56(c); *see also Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[68] *Burkart v. Davies*, 602 A.2d 56, 59 (Del. 1991).
[69] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 259 (1986).
[70] *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 145 (Del. 2009).
[71] *Sikander v. City of Wilmington*, 2005 WL 1953040, *2 (Del. Super. July 28, 2005), *aff'd*, 2006 WL 686589 (Del. Supr. Mar. 17, 2006).

hope that he can develop some evidence during trial to support his claim."[72] "Where the evidence is *merely colorable* or is *not significantly probative*, summary judgment must be granted."[73] "Thus, the Court acts as a gatekeeper, and if there is not sufficient evidence submitted to the Court to show the conduct meets this high standard, the Court may grant summary judgment and remove from the trial any potential prejudice to the defendant that may occur in the plaintiff's effort to support the allegation."[74]

II. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF ESTABLISHING A GENUINE ISSUE THAT COCOLIN'S PURSUIT OF JEFFERIS WAS THE PROXIMATE CAUSE OF THE ACCIDENT.

Before addressing the pursuit and the alleged conduct during it that Plaintiffs claim subjects Cocolin and DSP to liability, Defendants are entitled to summary judgment for a more straightforward reason: Plaintiffs have failed to put forth sufficient evidence on the issue of proximate cause—that the reason Jefferis fled and continued to flee was because he knew that he was being pursued by law enforcement, specifically by Trooper Cocolin. Although issues of proximate cause are generally left to the jury,[75] as issues of fact typically are, there must, at a minimum, be a triable issue to present to the jury. "To prove proximate cause a

[72] *Johnson v. Nelson*, 2015 WL 2128604, at *2 (Del. Super.)
[73] *Id.* (emphasis in original).
[74] *Sikander*, 2005 WL 1953040, *2.
[75] *See McKeon v. Goldstein*, 164 A.2d 260, 262 (Del. 1960) ("The question of proximate cause is usually a question of fact to be determined by the trier of fact.").

plaintiff must show that the result would not have occurred 'but for' the defendant's actions."[76] Until yesterday, the only evidence of record on Jefferis' state of mind at the time he fled is in his sworn affidavit. In it, Jefferis states that "the only reason [he] drove off was because a gun was drawn on [him] and [he] was in fear for [his] life. The person with the gun was not stating that he was the Police."[77] Plaintiffs do not dispute the veracity of Jefferis' statement or otherwise provide evidence to the contrary. In fact, Plaintiffs' expert witness wholly adopted Jefferis' explanation for why he fled, accusing Cocolin of not identifying himself as law enforcement and justifying Jefferis' unawareness.[78] And yesterday's affidavit from Jefferis supports further that, according to him, he thought someone was trying to kill him. If Jefferis was not trying to get away from an unreasonable police pursuit, all of Plaintiffs' evidence and arguments that the pursuit was unreasonable is irrelevant. Absent any evidence to support Plaintiffs' allegations that Cocolin's decision to pursue Jefferis played a role in the manner and duration of Jefferis' flight and ultimate crash, Plaintiffs have failed to make a sufficient showing on the issue of proximate cause. Accordingly, State Defendants are entitled to summary judgment as a matter of law.

III. GROSS NEGLIGENCE IS THE APPLICABLE STANDARD FOR THE STATE AS WELL AS COCOLIN.

[76] *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526, 532 (Del. 1998).
[77] Aff. Stephen J. Jefferis dated November 19, 2015 (A173).
[78] Lyman Report p. 13 (A77).

To survive summary judgment, Plaintiffs must establish a prima facie case of gross negligence against both Cocolin ***and*** DSP. The law is clear that to sustain an action against the State, its agencies and officials, a party must overcome two hurdles. First, the plaintiff bears the burden of proving that the State has waived sovereign immunity for the claims asserted against it. Second, after establishing waiver of sovereign immunity, the plaintiff must additionally show that the action is not barred by the State Tort Claims Act, 10 *Del. C.* §§ 4001–4005, (the "STCA").[79]

A. Sovereign Immunity, the Insurance Act, STCA and the AEVS

There is no question that sovereign immunity has been waived with respect to Plaintiffs' claims related to Cocolin's operation of his police vehicle during his pursuit of Jefferis. The State has waived sovereign immunity for liability arising from the operations of its motor vehicles, including those taken during police pursuits, by self-insuring against those risks in accordance with 18 *Del. C.* § 6511.[80] Moreover, the General Assembly has eliminated the defense of governmental immunity—a term found to be synonymous with sovereign immunity—for owners of authorized emergency vehicles responding to an emergency. This waiver of sovereign immunity, however, does not abrogate the STCA and the requirements to overcome the protections afforded under it. The Delaware Supreme Court has

[79] *See Pauley v. Reinoehl*, 848 A.2d 569, 573 (Del. 2004)
[80] *See generally* PMA Automobile Policy (A145–A167).

already considered and rejected arguments that sovereign immunity and the STCA are legally one in the same, wherein a showing of one supplants a need to satisfy the other. In rejecting this line of argument, the Supreme Court articulated the different sources underlying the two doctrines and the distinct purpose each were intended to serve: sovereign immunity, the Court explained, is a vestige of common law that was adopted and incorporated into Delaware's constitutional framework; the STCA on the other hand, was a measure enacted by the General Assembly to safeguard the policy and decision making authority of government officials by further limiting civil liability arising from those decisions to certain instances. To avoid summary judgment, therefore, it is not sufficient for Plaintiffs to simply demonstrate waiver of sovereign immunity; Plaintiffs must further establish facts that overcome State Defendants' immunity under the STCA.

1. Sovereign Immunity and its waiver under 6511

Sovereign immunity provides that "neither the State nor a State agency can be sued without its consent."[81] The Delaware Supreme Court explained that this doctrine is part of Delaware's constitutional law, "established by Delaware's first constitution and continued thereafter by successive Constitutions."[82] The courts are

[81] *Id.*
[82] *Pajewski v. Perry*, 363 A.2d 429, 433 (Del. 1976).

not empowered to disregard the doctrine of sovereign immunity.[83] Rather, sovereign immunity may only be waived by the General Assembly through an Act that clearly evidences an intention to do so.[84] Because of the injustice the courts perceived resulted from the absolute immunity of this defense, it applied the doctrine reluctantly, but repeatedly encouraged the General Assembly to waive, at least to a limited extent, sovereign immunity for injuries to the public caused by the State and its employees.[85]

In response,[86] the General Assembly enacted 18 *Del. C.* § 6511 (the "Insurance Act") effective in 1968. The Insurance Act waived sovereign immunity by requiring the State to insure against certain kinds of risks and losses:

> The defense of sovereignty is waived and cannot and will not be asserted to any risk or loss covered by the state's insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance, and every commercially procured insurance contract shall contain a provision to this effect where appropriate.

18 *Del. C.* § 6511. The purpose of this Act was two-fold: One, the Act was designed

[83] *See id*. (explaining that as the Constitution was no less binding on the courts than on any other branch of government, the courts could not refuse to enforce the doctrine of sovereign immunity when it was asserted (citing *Shellhorn & Hill, Inc. v. State*, 187 A.2d 71, 74 (Del. 1962))).
[84] *See Pauley*, 848 A.2d at 573.
[85] *See Pajewski*, 363 A.2d at 433 ("[I]t is fair to say that our Courts have applied [sovereign immunity] with express reluctance and with an invitation to the General Assembly to remove it."); *id.* ("In Delaware, sovereign immunity is based on a Constitutional provision which the Court applied and criticized repeatedly before 1968 . . . The Courts urged the Legislature to do what Justice Wolcott called 'common justice' by a statute eliminating the doctrine and making the State answer for its fault in a court of law." (citing *George & Lynch, Inc. v. State*, 97 A.2d 734, 735 (Del. 1964))).
[86] *See id.* at 435 ("Against that background, it seems clear to us that the Insurance Act embodied in 18 *Del. C.* ch. 6 was the response made by the General Assembly to the cases.").

to protect the public from wrongful acts of State officials and employees; Two, the Act was also intended to protect the State from loss to state-owned property.[87] The Delaware Supreme Court construed the Insurance Act as not just an enabling legislation, but a mandatory directive requiring the State to insure against "any type of risk which the State may be exposed."[88] Pursuant to this mandate, the State obtained, and currently has, coverage for liability of its motor vehicles. Accordingly, and to the extent coverage is provided under the State's automobile policy, the State has waived the defense of sovereign immunity for liability stemming from the operations of its motor vehicles.

2. The additional limitation to civil liability under the STCA

Separate from sovereign immunity, the STCA was put in place to further limit the civil liability of state agencies and its officials.[89] After waiving sovereign immunity under the Insurance Act, the General Assembly, in 1978, enacted the STCA.[90] The STCA, as characterized by the Delaware Supreme Court, codified

[87] *Id.*
[88] *Id.* (citing 18 *Del. C.* § 6502).
[89] Unlike the STCA, the County and Municipal Tort Claims Act, 10 *Del. C.* §§ 4010-4013, enacted a year after the STCA, was a legislative fix to remove the prior waiver of immunity for the counties and municipalities. *See Porter v. Delmarva Power & Light Co.*, 488 A.2d 899, 904 (Del. Super. Ct. 1984) (explaining that the clear purpose of the County and Municipal Tort Claims Act was in response to Delaware Supreme Court decisions finding that the State had waived sovereign immunity for municipalities and counties through its respective charters); *Fiat Motors of N. Am., Inc., v. Mayor & Council of City of Wilmington*, 498 A.2d 1062, 1064 (Del. 1985) (finding that the County and Municipal Tort Claims Act was not a mere alteration of municipal immunity but extended immunity to areas where it did not formerly apply). Indeed, the preamble of that bill expressly states that it was reestablishing the principle of sovereign immunity for counties and municipalities throughout the State of Delaware. 62 Del. Laws. Ch. 124.
[90] 61 Del. Law. Ch. 431.

existing common law standards on official immunity to "discourage law suits which created a chilling effect on the ability of public officials and employees to exercise the far reaching decision-making authority which complex government demands of them."[91] The Supreme Court has rejected arguments that the STCA is synonymous with and waives sovereign immunity under the circumstances identified in it.[92] The Court reasoned that if the STCA is "to operate as a complete waiver of sovereign immunity, that would have the effect of expanding liability beyond that to which the State agreed under the State Insurance Program."[93] This, the Court noted, "would be inconsistent with both the purpose and the title of the STC[A]."[94] "The General Assembly crafted the STC[A] to limit liability, not to abolish sovereign immunity."[95] Thus, the Supreme Court has instructed that the STCA "must be applied to limit the State's liability where it has, by some means independent of 10 *Del. C.* § 4001, waived immunity."[96]

3. Amendment to Section (d) of the AEVS

In 1981, a few years after enacting the STCA, the General Assembly revised

[91] *Pauley ex rel Pauley v. Reinoehl*, 848 A.2d 561, 565 (Del. 2003) (citations omitted), *opinion vacated on reargument sub nom. Pauley v. Reinoehl*, 848 A.2d 569 (Del. 2004)
[92] *Doe v. Cates*, 499 A.2d 1175, 1180–82 (Del. 1985).
[93] *Pauley ex rel Pauley v. Reinoehl*, 848 A.2d at 566.
[94] *Id.*
[95] *Id*; see also *Doe v. Cates*, 499 A.2d at 1180–81 (observing that the title of the STCA bill "Limitations on Civil Liability of the State, its subdivisions, and its public officers" speaks of limiting civil liability and does not mention sovereign immunity at all).
[96] *Id.* at 1181.

a portion of the Authorized Emergency Vehicle Statute, 21 *Del. C.* § 4106, (the "AEVS") addressing the liability of the driver of an authorized emergency vehicle when responding to an emergency.[97] Prior to this amendment, the driver of an emergency vehicle, though privileged to disregard certain rules of the road when responding to an emergency, was nevertheless under an express "duty to drive with due regard for the safety of all persons."[98] That duty, as interpreted by this Court, in a decision a few years before the amendment, imposed liability on a driver of a town fire truck for ordinary negligence.[99] The amendment to Section (d) of the AEVS elevated the standard of liability across the board for drivers of all authorized emergency vehicles—whether drivers of city, county, state, or private vehicles—to gross negligence. The amendment also clarified that this heightened standard of liability applied only to drivers and was not extended to owners of those vehicles. In its entirety, amended subsection (d) of the AEVS states:

> The driver of an emergency vehicle is not liable for any damage to or loss of property or for any personal injury or death caused by the negligent or wrongful act or omission of such driver except acts or omissions amounting to gross or wilful or wanton negligence so long as the applicable portions of subsection (c) of this section have been followed. The owner of such emergency vehicle may not assert the defense of ***governmental immunity*** in any action on account of any

[97] 63 Del. Laws ch. 162.
[98] *See* 54 Del. Laws ch. 160.
[99] See *Pauley v. Reinhoel*, 2002 WL 1978931 *5 (Del Super.) (observing that given the timing of the amendment to the AEVS it was reasonable to infer that the case finding a volunteer fireman for the Millsboro Fire Company liable for negligence had bearing on the amendment's passage) *aff'd sub nom. Pauley ex rel Pauley v. Reinoehl*, 848 A.2d 561 (Del. 2003), *opinion vacated on reargument sub nom. Pauley v. Reinoehl*, 848 A.2d 569 (Del. 2004).

> damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of such driver or owner.

21 *Del. C.* § 4106(d) (emphasis added). The Delaware Supreme Court has interpreted "governmental immunity" as used in the AEVS to be interchangeable with sovereign immunity.[100] The Court found that the Delaware law existing at the time of the amendment's passage, along with the limited legislative history, to evince an intent by the General Assembly to preclude the defense of sovereign immunity as a complete bar to suit.[101] In its decision, the Court explained that the term "governmental immunity" referred to the immunity of both the State and other governmental agencies.[102]

4. The AEVS does not abrogate the STCA

Although sovereign immunity is barred as a complete defense under the AEVS, it does not eliminate the requirements of the STCA. Nowhere in its decision interpreting governmental immunity, did the Supreme Court even remotely suggest that the AEVS overrode the STCA and the statutory immunity afforded under it. To the contrary, despite finding that the defense of sovereign immunity to be unavailable as an absolute bar to suit under the AEVS, the Court held that "[a]ctions

[100] *Pauley v. Reinoehl*, 848 A.2d at 572.
[101] *Id*; *see also Pajewski*, 363 A.2d 434 (referencing an opinion using the phrases "governmental immunity" and "sovereign immunity" interchangeably).
[102] *Pauley v. Reinoehl*, 848 A.2d at 572.

against the State, however, are further limited by the requirements of the [STCA]."[103] The Court again clarified the dual showings necessary to proceed with an action against the State—the inapplicability of sovereign immunity and facts overcoming the statutory protections of the STCA.

Overlooking these dual requirements imposed against a party seeking damages against the State, this Court, in a lone opinion, *Mathangani v. Hevelow*, summarily found that the AEVS exposed owners of state-owned emergency vehicles to liability for ordinary negligence.[104] This decision, however, is internally inconsistent, ignores the policy reasons underlying the AEVS, and provides no reasoning for abrogating the well-established immunity of the STCA. To begin with, the *Mathangani* decision is inconsistent in and of itself. In one part of its decision, the Court concluded that the police officer's conduct was discretionary and thus immunized from liability under the STCA.[105] As such, the Court found that DSP could not be vicariously liable for the police officer's conduct, negligent or not.[106] In another part, the decision noted that DSP, as owner of the officer's vehicle, could be liable for the negligent acts of the police officer under the AEVS.[107] Without addressing the apparent discrepancies in the standard for liability under the AEVS

[103] *Id.* at 573.
[104] *Mathangani v. Hevelow*, 2016 WL 3587192 (Del. Super.).
[105] *See id.* at *4–5 (holding that the officer's acts were by law discretionary and thus immune from liability under the STCA and further finding that the DSP could not be vicariously liable for those acts).
[106] *Id.*
[107] *Id.* at 6.

and under the STCA, the *Mathangani* decision stated that both statutes were consistent, remarking that the STCA was subject to other laws of the State and that under both statutes, DSP could be liable for simple negligence.[108] This finding, however, made no mention of the different standards in liability, or why the AEVS abrogated and trumped the STCA.[109] Moreover, the decision misconstrued the holding of *Pauley v. Reinoehl* as finding the protections of STCA to be inapplicable in a police pursuit.[110] As explained above, the Delaware Supreme Court in *Pauley* made clear that the STCA served as an additional barrier to suit, one that a party must overcome to sustain an action against the State. Nowhere in that decision did the Supreme Court indicate that the AEVS trumped the provisions of the STCA.

Should the court nevertheless find ambiguity as to the effect of the AEVS on the STCA, the court must rule in favor of the State and find that the protections of the STCA remain intact. The Delaware Supreme Court has "repeatedly stated that 'where a party seeks to hold the State or state agency liable under a statute, any reasonable doubts as to the proper construction of the statute should be resolved in

[108] *Id.*
[109] *Id.* at *6–7.
[110] The facts in *Pauley* are inapposite to those presently before this Court. In *Pauley v. Reinoehl*, DSP acknowledged that the facts, as established, overcame the immunity of the STCA—because the conduct at issue was one conceded to be ministerial and was therefore not subject to immunity under the STCA. *See Pauley v. Reinoehl*, 2002 WL 1978931, at *3 (noting that the state defendants conceded that the challenged conduct, driving, was ministerial under the STCA). Unlike the concessions in that case, here, Cocolin's decision to pursue Jefferis is, as explained in more detail below, discretionary and therefore protected under the STCA.

favor of the State.'"[111] Here, not only has the Supreme Court made clear that sovereign immunity and the STCA are two very different requirements, but a finding to the contrary that the AEVS abrogates the STCA would undercut the obvious purpose of the AEVS. Taken as a whole, the AEVS operates to except drivers of authorized vehicles from certain rules of the road and to provide heightened protection when responding to an emergency. It would seem contrary to this purpose to eliminate the STCA and expose the State and its agencies to liability where it would otherwise (in non-emergency circumstances) be immune. Accordingly, before being permitted to proceed with their claims against *either* the DSP or Cocolin, Plaintiffs must satisfy the elements identified in the STCA to defeat the immunity under it.

B. Plaintiffs Must Establish Gross Negligence for Cocolin's Discretionary Decision to Initiate Pursuit and to Continue to Pursue Jefferis to Overcome the Immunities of the STCA.

The STCA shields the State, its agencies and, public officers or employees from liability where the act or omission complained of arises from (1) an official duty involving discretion; (2) the public officer or employee acts in good faith; and (3) the act or omission was done without gross or wanton negligence.[112] The plaintiff has the "burden of proving the absence of one or more of the immunity elements."[113]

[111] *Doe v. Cates*, 499 A.2d at 1180.
[112] *See Pauley v. Reinhoel*, 2002 WL 1978931 *3.
[113] *Brown v. Robb*, 583 A.2d 949, 952 (citing 10 *Del. C.* § 4001(3)).

Plaintiffs must establish gross negligence to proceed with his claims against Cocolin and DSP.

Plaintiffs' allegations of negligence focus on Cocolin's decision to pursue Jefferis—a discretionary act subject to immunity under the STCA. "The Court has held that it is a question of law whether an act is discretionary (*i.e.*, there is no "hard and fast rule") or ministerial (*i.e.*, there is a prescribed rule)."[114] This Court has found that certain decisions taken during a police chase are discretionary.[115] So too have many other jurisdictions. The Supreme Court of Wisconsin, for example, held that "an officer's decision to initiate or continue high-speed chase is a discretionary act entitled to immunity."[116] Because Cocolin's decision to pursue (and for how long) is a discretionary act, Plaintiffs must prove gross negligence to defeat the immunity under the STCA and to impose liability against DSP. Further, as discussed herein, the Pursuit Policy makes clear that the decision to initiate and pursue is highly

[114] *Mathangani*, 2016 WL 3587192, at *4; *Sadler-Ievoli v. Sutton Bus & Truck Co.*, 2013 WL 3010719, at *2 (Del. Super.) (explaining that discretionary acts require some determination or implementation which allows a choice of methods).
[115] *Mathangani*, 2016 WL 3587192, at *4.
[116] *Estate of Cavanaugh by Cavanaugh v. Andrade*, 550 N.W.2d 103, 113(Wis. 1996); *see, also, Morgan v. Barnes*, 472 S.E.2d 480, 481 (Ga. App. 1996) (decision to pursue vehicle is discretionary); *City of Lancaster v. Chambers*, 883 S.W.2d 650, 655 (Tex.1994) (initial decision to pursue and the pursuit involves officer's discretion) *Fonseca v. Collins*, 884 S.W.2d 63, 67 (Mo. App.1994) (officer's decision to continue pursuit while seeking permission is discretionary); *Bachmann v. Welby*, 860 S.W.2d 31, 34 (Mo. App. 1993) (officer's decision regarding route and speed to travel in responding to all-points bulletin was discretionary); *Pletan v. Gaines*, 494 N.W.2d 38 (Minn.1992) (an officer's decision to chase a fleeing suspect is "inherently" discretionary); *Colby v. Boyden*, 400 S.E.2d 184, 187 (Va. 1991) (exercise of discretion is involved "even in the initial decision to undertake the pursuit"); *Frohman v. City of Detroit*, 450 N.W.2d 59, 63 (Mich. App. 1989) (when officer "initiated pursuit, exceeded the speed limit ... [and] discontinued pursuit ... he was performing discretionary as opposed to ministerial acts.").

discretionary. Indeed, Plaintiffs' entire theory of liability, supported by their expert witness, is critical of the policy as providing too much discretion.

IV. NO GENUINE ISSUE OF MATERIAL FACT EXISTS TO DISPUTE THAT COCOLIN'S WAS NOT GROSSLY NEGLIGENT IN PURSUING JEFFERIS FOR SUSPECTED DUI.

Plaintiffs cannot demonstrate Cocolin was grossly negligent. "Gross negligence, though criticized as a nebulous concept, signifies more than ordinary negligence or inattention."[117] "Gross negligence is a higher level of negligence representing 'an extreme departure from the ordinary standard of care.'"[118] Where alleged acts of gross negligence involve errors of judgment, as here, "the burden on the plaintiff is a substantial one."[119] As one court observed, "[i]n those jurisdictions that apply a gross negligence or similar standard, it appears that virtually all appellate opinions addressing vehicular police pursuits of suspected law violators that ended in collisions between the pursued vehicles and vehicles of third parties hold ***as a matter of law*** that the police conduct at issue did not constitute gross negligence or its equivalent."[120]

Though not binding on this Court, the facts and reasoning of *Walker* are particularly on point with this case.[121] There, officer Wingate saw a driver who

[117] *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987).
[118] *Brown v. Robb*, 583 A.2d at 953 (quoting W. Prosser, Handbook of the Law of Torts 150 (2d ed. 1955)).
[119] *Sadler-Ievoli.*, 2013 WL 3010719, *4.
[120] *Dist. of Columbia v. Walker*, 689 A.2d 40 (D.C. Cir. 1997) (emphasis added).
[121] *Dist. of Columbia v. Walker*, 689 A.2d 40.

looked "rather young" and began pursuing him without activating lights and sirens. After learning that the car was stolen, the officer attempted to stop the vehicle. After a failed attempt to box the vehicle in, near a high school, Wingate and two other police vehicles initiated a pursuit. During the pursuit, the suspect went the wrong way on a one-way street and went through several red lights, in a partially residential neighborhood. The suspect drove over a sidewalk, or bump, onto a parkway and fishtailed, momentarily losing control. On the parkway, the suspect accelerated to 90 miles per hour. The three police cars were as close as five car lengths behind, when another police department joined the chase. After Wingate radioed in that this other department joined the chase, he was ordered to cease the pursuit. Within a minute or less, the suspect hit another car, killing the driver. Shortly before the collision, the parkway turned into a two-lane road divided by a double yellow line. The suspect had crossed the double line to pass three cars. According to the suspect, after he passed the three cars, he remained in the lane against oncoming traffic because his passenger had grabbed his arm. The chase covered about five miles. The suspect testified that he wanted to stop the car and run away at various points in the chase, but the police did not give him the chance to do so.[122] After the trial court denied a motion for a directed verdict, the jury returned a verdict in favor of the

[122] *See Walker*, 689 A.2d at 43–44.

plaintiff, and the officers appealed.[123]

The Court of Appeals reversed, holding that the above facts did not amount to gross negligence as a matter of law.[124] The court observed that the question in the case was not whether the officers violated a national standard—*i.e.*, whether the need to apprehend the car was outweighed by the foreseeable risks in a pursuit.[125] According to the court, that "might be the appropriate inquiry under an ordinary negligence standard."[126] The inquiry is whether the conduct "so grossly deviated" from the conduct required under the circumstances.[127] Disregarding alleged negligent acts that had no relevance to the actual cause of the accident, the court emphasized the "primary focus" must be not be upon the conduct of the officers "in all its aspects."[128] The court held as a matter of law that the acts did not amount to gross negligence even though, like here, there were claims that the suspect was not alleged to have committed a violent crime.[129]

Consistent with the trend noted in *Walker*, the Court here should exercise its gatekeeper function and hold as a matter of law that Plaintiffs have not met their "high standard" of establishing gross negligence. There is no claim that Cocolin

[123] *Id.*
[124] *Walker*, 689 A.2d at 48.
[125] *Id.* at 46.
[126] *Id.*
[127] Id.
[128] Id.
[129] *Id.* at 48.

should not have responded to the call. And Cocolin's decision to pursue the Mustang driven by someone who he had just observed shooting up heroin, who disregarded his orders, and who nearly hit his patrol car is entirely consistent with the Pursuit Policy, which expressly gives an officer the discretion to pursue someone suspected of DUI.[130] Consistent with not only the Pursuit Policy, but also the IACP guidelines, Cocolin appropriately concluded that the need to apprehend someone driving erratically and likely high on heroin outweighed the risk in initiating and continuing a pursuit that ultimately lasted less than one minute.[131] The pursuit lasted less than one minute and Cocolin was nearly a quarter of a mile away when the suspect hit the Smith vehicle.

There is no evidence that Cocolin violated any standard of care, let alone in a manner that could come close to constituting gross negligence. To be sure, Plaintiffs do not claim that applicable standards forbid pursuits of people suspected of driving under the influence. Rather, both the Pursuit Policy *and* the guidelines upon which Professor Lyman rely, require that an officer exercise discretion and make a split-second decision on whether a pursuit should be initiated to protect the public and then to weigh a number of factors—here in less than one-minute—to determine

[130] Pursuit Policy D.1.b. (A45).
[131] *See* Pursuit Policy 11.A.1 (A50) (requiring discontinuation of a pursuit where the risk to safety of the public is greater than the necessity for apprehension); Lyman Rpt. at 8 (quoting IACP guidelines requiring that the decision to initiate a pursuit must be based upon the officer's conclusion that the immediate danger to the public created by the pursuit is less than the danger if the suspect remains at large).

whether the continuation of the pursuit is worth it. Armed with the benefit of hindsight, the crux of Plaintiffs' expert conclusion—and therefore the strength of Plaintiffs' case—is simply that Cocolin failed to weigh the factors appropriately. This is certainly not gross negligence.[132]

Professor Lyman's personal opinion that, if Cocolin had boxed-in the Mustang, this incident would have never have happened, also serves as no basis for a finding of gross negligence—or even a disputed fact regarding same. Lyman cites no authority for this criticism. In fact, his opinion on this point is directly contrary to Delaware law. In *Flonnory v. State*,133 three Wilmington police officers approached a vehicle on three sides after receiving a call of suspected drug activity occurring in the car. A subsequent search revealed drugs and the driver was convicted. The Court reversed, holding that the way the officers positioned themselves on the driver, passenger and rear of the vehicle constituted a seizure

[132] To the extent Plaintiffs argue that Cocolin was grossly negligent in speeding or disregarding traffic signs or signals, such actions are privileged and cannot constitute negligence, even if, for officers such as Cocolin, emergency lights and sirens were not activated. *See* 21 *Del. C.* § 4106(b)-(c); *Sikander v. City of Wilmington*, 2005 WL 1953040, at *5 (Del. Super. July 28, 2005) ("Having found that Officer Conner was privileged to enter the intersection against a red light, the City of Wilmington may not be found vicariously liable for its agent's exercise of this privilege."), *affirmed in relevant part* 897 A.2d 767 (Del. 2006); *see also Mathangani*, 2016 WL 3587192, at *5 ((granting summary judgment to officer where acts only amounted to negligence during police chase); *Estate of Alberta Rae v. Murphy*, 2006 WL 1067277, at *1 (Del. Super. Mar. 13, 2006) (granting summary judgment in fatal car accident case where state employee may have been negligent, but not grossly negligent, in taking eyes off the road causing the accident), *aff'd sub nom.*, 956 A.2d 1266 (Del. 2008); *Sikander v. City of Wilmington*, 2005 WL 1953040, at *5 (Del. Super. July 28, 2005) (granting summary judgment to officer who caused an accident while responding to a call), *affirmed in relevant part* 897 A.2d 767 (Del. 2006).

133 805 A.2d 854 (Del. 2001).

(without reasonable suspicion), essentially pinning the car in. Because, the Court held, an anonymous tip of drug dealing in a car did not provide three officers with reasonable suspicion, the seizure violated the Constitution and the evidence should have been suppressed.[134] Thus, under *Flonnory*, Cocolin, armed with a tip of drug activity in a vehicle, would likely have effected an unconstitutional seizure had he pinned in the Mustang in the way Professor Lyman believes he should have done.

Additionally, actions taken prior to the actual pursuit are not properly considered in the gross negligence analysis. As the *Walker* court explained, it is "essential to keep in mind that liability is not imposed upon proof of negligence in the abstract but only upon proof that the negligence charged was the proximate cause of the injury."[135] The focus must be only on the actions that could be said to have *proximately* caused the collision, not on all aspects of his conduct leading up to the collision.[136] Lyman's overly simplistic observation that, if Cocolin blocked Jefferis in, he would not have been able to flee. But investigating crime, pursuant to instructions of criminal procedure by the Delaware Supreme Court, cannot support proximate cause, even if somehow grossly negligent.

It must be remembered that the police officer's conduct should be judged not

[134] *Flonnory*, 805 A.2d at 858.
[135] *Walker*, 689 A.2d at 46; *see also Mathangani*, at *5 (not considering in the gross negligence analysis alleged negligence that were not facts related to the cause of the accident).
[136] *Id.*

by hindsight but should be viewed in light of how a reasonably prudent police officer would respond faced with the same difficult emergency situation.[137] "The officer is not to be held to the same coolness and accuracy of judgment of one not involved in an emergency vehicle pursuit."[138] "If the officer does not pursue an individual believed to be dangerous on the road, such as an intoxicated driver, that individual may nonetheless continue on a dangerous course of conduct and seriously injure someone."[139] Cocolin was not grossly negligent as a matter of law.

V. STATE DEFENDANTS ARE ENTITLED TO SOVEREIGN IMMUNITY ABOVE THE INSURANCE PROVIDED BY THE SELF-INSURANCE PROGRAM.

Delaware law is clear that the defense of sovereign immunity cannot be asserted to a risk or loss covered by the State self-insurance program, regardless of whether the State insurance coverage program was funded by direct appropriation or whether the State purchased commercially available insurance to cover the loss.[140] However, as noted in *Doe v. Cates*,[141] the General Assembly made clear when it enacted 18 *Del. C.* § 6511 that it intended to waive sovereign immunity only to the extent that either the State insurance coverage program was funded or commercial insurance was available.[142] When the State or any of its political subdivisions make

[137] *Boyer v. State*, 594 A.2d 121, 136–37 (Md. 1991).
[138] *Id.*
[139] *Id.* at 137.
[140] *See* 18 *Del. C.* § 6511
[141] *Doe v. Cates*, 499 A.2d at 1177 (citing *Pawjeski*, 363 A.2d 429, 435 (Del. 1976)).
[142] *Pauley v. Reinoehl*, 848 A.2d at 573.

insurance available for the purpose of remedying harm caused by its emergency vehicles in an accident, then governmental immunity may not be asserted to bar a claim up to the limit of that coverage.[143] It follows and has that any jury verdict beyond the applicable coverage limit is subject to the defense of sovereign immunity.

The State of Delaware self-insurance program provides one million dollars in motor vehicle liability coverage that is potentially applicable to this case if liability is established.[144] Pursuant to the above case law, any jury verdict above the one million dollar coverage is subject to the defense of sovereign immunity.

VI. DSP IS ENTITLED TO SUMMARY JUDGMENT ON ANY DIRECT CLAIM AGAINST IT RELATING TO ITS PURSUIT POLICY.

Any argument that the Law Enforcement Agency/Officers Professional Liability Insurance applies to this case is without merit. The Delaware Supreme Court has already squarely addressed this issue, finding that the State has not purchased insurance for and has not thus waived sovereign immunity for claims of negligent training and hiring against DSP.[145] Nor has Plaintiffs provided evidence that the State has since procured insurance for such liability. Indeed, the exclusion

[143] *Id.* at 575.
[144] *See* PMA Automobile Policy (A145–A167).
[145] *See Pauley v. Reinoehl*, 848 A.2d at 573 ("No statutory enactment has been identified in which the General Assembly has waived the State's immunity for claims arising from the way the State Police trains and supervises its officers.").

set forth in the Law Enforcement Professional Liability policy at subsection E specifically excludes coverage "arising out of the ownership, operation or use of a land motor vehicle. . . ."[146] Applied to this case, there is no dispute that the allegations of negligence arise out of Cocolin's use of the police vehicle. As such, subsection E excludes coverage under the Law Enforcement Professional Liability policy as to any State Defendant. Moreover, exclusion H is clear to exclude coverage "arising out of the official employment policies or practices of the state or political subdivision." Applied to this case, exclusion H precludes coverage for DSP arising out of the DSP Divisional Pursuit Policy. Accordingly, any argument that DSP was negligent as a result of the DSP Pursuit Policy is barred by sovereign immunity.

Even if Plaintiffs somehow could show a waiver of sovereign immunity, DSP is entitled to summary judgment on such a claim. The only evidence in the record that the Pursuit Policy is to blame for this accident is the personal opinions of Lyman on two areas of the policy. But the Court can read the policy just as easily as Professor Lyman and will see that it directly contradicts Lyman's opinions. First, he argues that the Pursuit Policy fails to give officers the ability to terminate the pursuit without first notifying a supervisor.[147] But the policy contains no such

[146] *See* DSP Professional Liability Policy Subsection E (A169).
[147] Lyman Report at p. 12 (A76); Lyman Dep. 22:3–27 (A30).

provision and it is replete with provisions to the contrary.[148] Though it is not clear what provision, if any, Professor Lyman relies upon for his opinion, to the extent he is referring to sections 3.A.1.b or 11.A.7, it is clear those sections stand only for the simple proposition that a supervisor who is in radio contact can order the termination of a pursuit. That is a far cry from the policy *requiring* supervisor approval for a termination before a pursuit can be terminated. It simply flies in the face of common sense—in addition to the plain language of the policy—that the one actually pursuing a suspect would not be able to make the determination that the public safety requires that continuation of a pursuit is simply not worth it.

Moreover, even if the Court were to construe the evidence in favor of Plaintiffs on this point, the opinion is completely irrelevant. There is no evidence that Cocolin did not terminate the pursuit because he did not obtain approval from a supervisor. Thus, the whole discussion on this point is academic as there is no evidence that a failure to obtain supervisor approval caused this accident.

Finally, Professor Lyman's other criticism of the policy—that it fails to expressly direct that officers shall not pursue when a pursuit poses a greater danger to the public than allowing the suspect to go free. Again, as just noted, the Pursuit

[148] *See* Pursuit Policy § 1.D (A42) ("**If the pursuit continues, the risk to you or innocent bystanders must be considered.**") (emphasis in original); *id.* § 11.A (A50) ("A discontinuation of pursuit will be employed in every case when the risk to the safety of the public or troopers appears greater than the necessity for immediate apprehension. . . .").

Policy addresses this issue. It expressly states that "While a fleeing felon has no right to a leisurely escape, his apprehension is to be constantly weighed against the likelihood of serious physical harm or death to the trooper or third parties." § 11.B (DEF301); *see also* § 3.1; § 11.A. Professor Lyman's opinions are simply contradicted by the plain language of the policy and border on the frivolous.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter summary judgment in their favor.

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