FLORIDA TRAFFIC-RELATED APPELLATE OPINIONS

April – June, 2007

[Editor's Note: In order to reduce possible confusion, the defendant in a criminal case will be referred to as such even though his/her technical designation may be appellant, appellee, petitioner, or respondent. In civil cases, parties will be referred to as they were in the trial court, that is, plaintiff or defendant. In administrative suspension cases, the driver will be referred to as the defendant throughout the summary, even though such proceedings are not criminal in nature. Also, a court will occasionally issue a change to a previous opinion on motion for rehearing or clarification. In such cases, the original summary of the opinion will appear followed by a note. The date of the latter opinion will determine the placement order in these summaries.]

Driving Under the Influence

Pflieger v. State, 952 So. 2d 1251 (Fla. 4th DCA 2007).

The defendant was charged with driving under the influence after being administered a breath test on an Intoxilyzer 5000. At trial, a breath technician testified to observing the annual inspection of the instrument (not conducting it) and the annual department inspection report was admitted into evidence over the defendant's objection. The jury found the defendant guilty of DUI and the county court certified the following question to the district court:

> Whether the introduction of the annual inspection of the breath testing instrument or intoxilyzer as a business or public record violates the Confrontation Clause as interpreted by *Crawford v. Washington* where the State does not produce any testimonial evidence as to actual inspection?

The district court affirmed, holding that the annual inspection report does not qualify for exclusion under Crawford v. Washington, 541 U.S. 36 (2004), on the basis of the "common nucleus" test for testimonial statements, which centers on the reasonable expectation of an objective declarant that the declarant's statement may later be used in the investigation or prosecution of a crime. The district court observed that an inspection report, like a hospital record of a blood test, is "intended for the non-testimonial purpose of making sure the machine is working

properly or for accurate medical treatment, respectively." Thus, the use of such a report for litigation purpose is a secondary purpose and does not raise the concerns expressed in Crawford.

The district court then rejected the defendant's claim of entitlement to the manufacturer's "source code" information, citing Moe v. State, 944 So. 2d 1096 (Fla. 5th DCA 2007).

Conner v. State, 32 Fla. L. Weekly D983 (Fla. 2d DCA April 13, 2007).

The defendant was convicted of DUI manslaughter and vehicular homicide as a result of an accident involving his car and a bicycle. At trial, the court allowed the state to ask a law enforcement officer whether the defendant's impairment contributed to the crash and to the death of the victim. In addition, the trial court allowed the introduction of a photograph of the victim lying in a pool of blood at the scene of the accident.

The district court reversed, holding that the question asked the law enforcement officer (whose role was to present evidence concerning impairment) was error since it necessarily called for an opinion that the defendant was guilty of negligently or recklessly operating his motor vehicle and not just that he was impaired and contributed to the accident and death of the victim. This was tantamount, in the court's opinion, to impermissibly asking for an opinion that a defendant is guilty of each element of a crime charged (which equated to an opinion of guilt of the crime itself). In addition, the district court held that in light of the disparate elements of the two crimes (particularly concerning causation) the question not only called for an improper opinion but also indiscriminately mixed the elements of the two crimes charged. On the issue of whether the error was harmless, the court concluded:

> The error was not harmless because: (1) there was evidence presented establishing an unlawful blood alcohol level in the victim, (2) there were no independent eyewitnesses to the impact, and (3) at the accident scene, [the defendant] claimed that another vehicle's improper driving caused him to swerve into the victim's bicycle. [The defendant's] defenses to the charges against him were based upon the dual theory of the victim's own intoxication and the negligent operation of another vehicle, or a combination of the two factors, causing the crash, i.e., [the defendant] essentially contended, if

> impaired, he was 'faultless.' The prejudice of the improper opinion testimony is further underscored by the compound, indiscriminate nature of the question which elicited it, especially considering that causation was a disputed issue at trial. Thus, the error in admitting this testimony completely undermined the defense and could not be harmless. Reversal is required.

The district court also held that the photograph of the victim should not have been admitted since it was only relevant to show where the body was found, a fact not in dispute. The court thus found it unnecessary to address whether the photograph was "overly gruesome" or whether it was harmless error.

Wiblens v. Department of Highway Safety and Motor Vehicles, 956 So. 2d 503 (Fla. 1st DCA 2007).

The defendant challenged an order of the department suspending his drivers license, which order was signed and dated October 3, 2006, by the hearing officer who issued the suspension. On November 3, 2006, thirty-one days later, the defendant filed a petition for writ of certiorari in circuit court. The circuit court dismissed the petition as untimely filed since it was beyond the 30 days from the date of rendition allowed by rule 9.100(c)(1), Florida Rules of Appellate Procedure.

The district court denied the defendant's petition for writ of mandamus, citing to the department's rule that "the date of rendition of a final order shall be the date of mailing entered on the driver license record." While conceding that the defendant had presented evidence that the order was mailed on October 4, 2006, thirty days before the petition in circuit court was filed, the court found such evidence irrelevant. The district court observed that the department's record of the defendant's drivers history, which noted that the order was rendered on October 3, was insufficient since it did not specifically reflect the date when the order was mailed. The district court concluded as follows:

> Upon consideration of the above, we find that the order suspending [defendant's] license has not yet been rendered as that term is defined by the department's rule. Thus, the time for review of that order has not yet begun and there is no rendered order for the circuit court to review. [citations omitted] The circuit court therefore correctly dismissed the certiorari petition, although for the wrong

> reason. The petition for writ of mandamus must accordingly be denied, but this disposition is without prejudice to [defendant's] right to seek review in the circuit court once the order has been properly rendered by the making of an entry in his drivers license record that the order was mailed to him. The department must give [the defendant] notice of such entry in order to comply with due process. Finally, we note that our holding today does not result in invalidation of a multitude of departmental orders.

Department of Highway Safety and Motor Vehicles v. Wejebe, 954 So. 2d 1245 (Fla. 3d DCA 2007).

After being stopped for speeding and driving recklessly, the defendant failed two field sobriety tests and was placed under arrest. He then submitted to breath testing and registered .107 and .095 on an Intoxilyzer 5000, serial number 66-002194. At his administrative hearing, the defendant introduced evidence that this particular machine had previously been the subject of a court order recommending that the machine be taken off-line immediately and be subject to a complete overhaul. In addition, the defendant introduced testimony of two witnesses with expertise in breath-testing to the effect that the machine was out of substantial compliance on the date of the defendant's arrest and there was no evidence in the inspection and maintenance records that proper remedial actions had been taken to ensure the accuracy of the machine's results. The two witnesses explained that FDLE procedures require an intoxilyzer machine that renders an out of tolerance reading to be taken off-line, inspected, and kept out of service until the reason for the erroneous reading can be determined and corrected. These witnesses further testified that unless this is done, the machine is deemed out of compliance, even if subsequent monthly inspections render proper results. The administrative hearing officer concluded that the machine was in compliance and ordered a drivers license suspension.

The circuit court granted the defendant's petition for writ of certiorari, finding that the administrative order departed from the essential requirements of law because collateral estoppel barred relitigation of the admissibility of the breath test result from Intoxilyzer 66-002194, the agency's action was not supported by competent and substantial evidence because the department failed to put forth sufficient evidence that Intoxilyzer 66-002194 was functioning properly in light of the defendant's evidence, and the department departed from the essential requirements of law by relying on the breath test results in suspending the

defendant's drivers license.

The district court affirmed, finding that the circuit court applied the correct law. The court observed that while the department is not required to initially prove the intoxilyzer was in compliance once the driver submits proof that the machine was not in substantial compliance with appropriate regulations, the department must then prove substantial compliance. The district court then held that since there was no evidence presented that the machine had not failed inspections, that it had been repaired, or that applicable regulations do not require repair after failed inspections, the test results were not competent, substantial evidence to support the hearing officer finding that the defendant had a breath-alcohol level of .08 or higher.

Bruch v. State, 954 So. 2d 1242 (Fla. 4th DCA 2007).

After being involved in a fatal automobile accident and being observed as possibly being under the influence the defendant was given a blood test, resulting in an illegal reading. The kit used in administering the test was used 28 days after the expiration date placed on the label by the manufacturer. The defendant was subsequently convicted of DUI manslaughter causing injury on theories of both impairment and blood alcohol level.

The district court affirmed, rejecting the defendant's argument that the testing kit should be presumed unreliable. After examining the applicable case law, statutes, and regulations the court concluded as follows:

> There is no challenge to the blood alcohol evidence as not being in compliance with the FDLE regulations. The FDLE regulations do not specify compliance with any expiration date on the kit employed. The failure of the FDLE regulation to require that the test kits be used before any expiration date is not a violation of due process where, as here, the evidence supports the scientific reliability of this test done with an expired date. The use of a test from a kit with an expired date is not per se error. Hence the general jury verdict on both the impairment alternative and the DUBAL alternative is not reversible because the jury was instructed on the presumption of impairment. Both DUI alternatives were supported by proper evidence.

Department of Highway Safety and Motor Vehicles v. Lankford, 956 So. 2d 527 (Fla. 1st DCA 2007).

After an administrative hearing, the defendant's drivers license was suspended for driving under the influence. Upon petition for writ of certiorari the circuit court concluded that the hearing officer should have invalidated the defendant's suspension because the arresting officer did not provide a reason for failing to bring the videotape of the traffic stop and arrest to the hearing as directed by a subpoena duces tecum.

The district court quashed the circuit court's order, noting that the argument was waived when the defendant failed to object before the hearing officer. In addition, the district court observed that it had found no provision in statute or rule authorizing the invalidation of a DUI license suspension because a witness did not provide the hearing officer with a good reason for failing to bring evidence pursuant to a subpoena (appropriate procedure is for a party to enforce a subpoena duces tecum in circuit court when a witness fails to comply).

Castillo v. State, 955 So. 2d 1252 (Fla. 1st DCA 2007).

The defendant was convicted of DUI manslaughter and DUI with great bodily harm. His motion for postconviction relief was denied by the trial court. Among the grounds for the motion were that his counsel was ineffective for 1) failing to pursue evidence that the defendant was not intoxicated at the time of the accident, but that alcohol he drank near the time of the accident accounted for the blood alcohol content of a sample taken two hours after the accident, which indicated intoxication at that time; 2) failing to object to testimony given and medical records made by a nurse, who was not qualified as an expert, that the defendant exhibited "Horizontal Gaze Nystagmus" (HGN), a condition evidencing intoxication; and 3) failing to object to the admission of the nurse's records on the ground that they were untrustworthy, and for failing to argue that the nurse was not an expert qualified to give her opinion as to whether the defendant was intoxicated based on the result of the HGN test.

The district court reversed, holding that the trial court should not have granted summary judgment on the above grounds, but rather should have held evidentiary hearings on such claims, if not able to attach portions of the record conclusively refuting them. On the first claim, the district court held that the trial court erred in finding it was refuted by the record because this argument would

have been contrary to the defendant's trial defense that he had been drinking. The district court observed that the trial court should have held a hearing to determine whether an alternative theory, which was consistent with other evidence presented at trial, should have been presented by counsel. On the second and third issues the district court held that HGN testing constituted scientific evidence, that the testifying nurse had not been qualified as an expert, and that the records may not qualify as medical records under the business records exception, since the requisite trustworthiness had not been established.

State v. Dubiel, 958 So. 2d 486 (Fla. 4th DCA 2007).

The defendant was involved in an automobile accident and taken to a hospital where a law enforcement officer asked the defendant to take a blood test without informing him of the consequences of his failure to consent as outlined in section 316.1932(1)(c), Florida Statutes. The trial court granted the defendant's motion to suppress, declining to extend the legal reasoning from a breathalyzer test opinion to a blood test. The court then certified the following question to the district court (as rewritten by the district court):

> Does the reasoning of *State v. Iaco*, 906 So. 2d 1151 (Fla. 4th DCA 2005), which holds that failure to advise of the consequences of refusal to take a breathalyzer test does not warrant suppression of the tests in a criminal prosecution, apply to the failure to advise of the consequences of refusal to permit a blood test administered under section 316.1932(1)(c)?

The district court answered the question in the affirmative and reversed the trial court's granting of the motion to suppress. Observing that the language in the breath-testing statute discussed in Iaco, section 316.192(1)(c), is nearly identical to that in the blood test statute, section 316.1932(1)(a), the district court reasoned that the failure to advise of the consequences of refusal to allow a blood test does not warrant suppression of the results in a criminal proceeding. The court then distinguished the opinion relied upon by the trial court, Chu v. State, 521 So. 2d 330 (Fla. 4th DCA 1988), noting that the Chu opinion involved a blood test administered outside of a hospital or medical facility and thus was not covered by the relevant statute.

Hernandez v. State, 959 So. 2d 355 (Fla. 3d DCA 2007).

The defendant drove from a bar with an intoxicated passenger and subsequently was involved in a crash which killed two occupants of another vehicle. Subsequent testing revealed that the defendant had a .232 percent blood alcohol reading and the passenger .182 percent.

In trials before separate juries, the passenger was convicted of DUI manslaughter and manslaughter by culpable negligence and the defendant was convicted of manslaughter by culpable negligence. The juries apparently rejected the testimony of the defendant and the passenger that the defendant was driving, favoring instead expert and lay testimony to the effect that the defendant was in the back seat of the vehicle.

The district court affirmed, rejecting the defendant's argument that the evidence was insufficient to support the culpable negligence convictions. The court noted that:

> Our conclusion is based upon the determination that [the defendant's] conduct of refusing to permit a sober operator to drive the vehicle, and instead insisting upon operating the vehicle himself with only another highly impaired person available to operate the truck indeed amounted to 'consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have know, was likely to cause death or great bodily injury' . . . thus satisfying the elements of manslaughter by culpable negligence.
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> We also reject the only claim pressed by the [defendant] at oral argument: that the state's case was fatally flawed by the fact that no evidence shows the precise circumstances in which [the passenger] was given or otherwise took over the wheel. Because we think it obvious that the possibility that the only other also-intoxicated driver would indeed actually drive the vehicle upon [the defendant's] inability or unwillingness to do so was directly within the zone of danger created by [the defendant's] conduct in the first place . . .

Labovick v. State, 958 So. 2d 1065 (Fla. 4th DCA 2007).

The defendant was charged with DUI manslaughter/failure to render aid and

driving under the influence (among other offenses). At the subsequent plea proceeding defense counsel advised the trial court that he objected to any adjudication, conviction, or sentence on the DUI count on double jeopardy grounds. At sentencing, the court denied the defendant's double jeopardy motion to strike the DUI count and sentenced the defendant for both DUI manslaughter and DUI. The defendant did not reserve the right to appeal the denial of his double jeopardy motion.

The district court reversed, holding that the sentencing on the DUI was barred by double jeopardy under the general statutory rule barring sentencing on "offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense." Section 775.021(4)(b)3., Florida Statutes. Since all of the elements of DUI fell within the greater offense of DUI manslaughter, that is, DUI is a Category One lesser included offense of DUI manslaughter, conviction of the former was prohibited.

The district court also rejected the state's other arguments, to wit, that the defendant had not reserved the right to appeal (the record showing that the defendant entered an open, unbargained plea to multiple counts, without expressly waiving his right to appeal the double jeopardy issue, and thus did not waive the right) and that the defendant committed multiple offenses because there was more than one episode of driving under the influence (defendant never stopped his car at any point during what amounted to a single episode and thus there was not a sufficient temporal break to allow the offender to reflect and form a new criminal intent).

Leopold v. Department of Highway Safety and Motor Vehicles, 960 So. 2d 819 (Fla. 4th DCA 2007).

After denying a petition for writ of certiorari based on Lescher v. Department of Highway Safety and Motor Vehicles, 946 So. 2d 1140 (Fla. 4th DCA 2006), the district court certified the following question to the Supreme Court:

> Does the amendment to section 322.271(4), Florida Statutes, which eliminated hardship driver's licenses effective July 1, 2003, violate the prohibition against *ex post facto* laws as to persons who could have applied for a hardship license before the amendment became effective?

Criminal Traffic Offenses

Sierra v. State, 32 Fla. L. Weekly D992 (Fla. 4th DCA April 11, 2007).

The defendant was charged with felony driving while license suspended, based on a suspension for several unpaid civil traffic infractions. Prior to the felony case going to trial the defendant utilized the procedure in section 318.14(10)(a), Florida Statutes, which allows persons to obtain a withheld adjudication from the clerk of court in relation to a driving while license suspended charge where such suspension is a result of a failure to appear, failure to pay civil penalty, or a failure to attend a driver improvement course. The trial court denied the defendant's motion to dismiss.

The district court granted the defendant's petition for writ of prohibition, citing Janos v. State, 763 So. 2d 1094 (Fla. 4th DCA 1999), for its holding that:

> . . . we find that the clerk of court was statutorily authorized to accept the petitioner's plea of no contest to DWLS and resolve it without a conviction, notwithstanding the fact that a felony DWLS charge for his conduct was filed in circuit court. The plea disposition of the misdemeanor DWLS bars late prosecution for felony DWLS under double jeopardy principles. Prohibition is the appropriate remedy when the accused is placed in double jeopardy.

[Note: The district court, on May 30, 2007, withdrew the above opinion and replaced it with an opinion replacing the statement that the defendant utilized the statutory procedure "prior to the felony case going to trial" with the language "paid his fines and secured the replacement of his license prior to his arraignment on the felony charges." 32 Fla. L. Weekly D1381 (Fla. 4th DCA May 30, 2007).]

In re: Standard Jury Instructions in Criminal Cases (No. 2005-6), 958 So. 2d 361 (Fla. 2007).

The Supreme Court adopted amendments to two standard jury instructions and created two new jury instructions relating to criminal traffic offenses. Specifically, the court took the following actions:

Instruction 28.9 – No Valid Driver's License [322.03]

Adds a definition for "drive" and "actual physical control" and amends the definition of "motor vehicle," "valid driver's license," and "street or highway."

Instruction 28.9 – No Valid Commercial Driver's License [322.03]

Creates a new instruction, including definitions for the terms "commercial motor vehicle," "valid commercial drivers license," "expired," "suspended," "revoked," "canceled," and "actual physical control." Establishes no valid driver's license as a Category One lesser included offense.

Instruction 28.11 – Driving While License Suspended, Revoked or Canceled With Knowledge [322.34(2)]

Amends instruction to add alternative options dealing with statutory requirements necessary to show knowledge from entries in the records of the Department of Highway Safety and Motor Vehicles. Adds definitions for "drive" and "actual physical control." Lists no valid driver's license as a Category One lesser included offense.

Instruction 28.11(a) – Driving While License Revoked as a Habitual Traffic Offender [322.34(5)]

Creates new instruction with the two elements of driving a motor vehicle and having a license revoked as a habitual traffic offender. Defines the terms "habitual traffic offender," "revoked," and "actual physical control." Lists no valid driver's license as Category One lesser included offense.

Cruz v. State, 956 So. 2d 1279 (Fla. 4th DCA 2007).

As a result of precipitating an extended chase during which he exceeded 100 miles per hour and involving multiple pursuing officers, the defendant was charged with the offenses (among others) of high-speed or wanton fleeing and willful wanton reckless driving. He was convicted by a jury of these charges. On appeal, he claims the above two convictions violated the double jeopardy prohibition.

The district court affirmed, holding that the five elements of high-speed or wanton fleeing and the two elements of willful wanton reckless driving do not require proof of identical elements. In addition, the court observed that while reckless driving is listed as a Category Two lesser included offense in the standard jury instruction for high speed or wanton fleeing, prosecution of the former is not barred by section 775. 021(4)(a)3., Florida Statutes, which prohibits prosecution of offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense, since that provision only applies to Category One lesser included offenses. The court added that, in any case, there was evidence that the criminal episode, which involved three separate officers in three separate cars, could have been subject to multiple prosecutions on that ground.

Arrest, Search and Seizure

Miles v. State, 953 So. 2d 778 (Fla. 4th DCA 2007).

The defendant was a passenger in a motor vehicle stopped for a traffic violation. A check of his identification revealed the existence of an outstanding arrest warrant. He was arrested and a subsequent search revealed that he possessed cocaine. The trial court denied the defendant's motion to suppress, finding that the officer had "confirmed" the existence of the arrest warrant and thus had acted in good faith. The defendant was convicted of possession of cocaine.

The district court reversed, holding that once the defendant had made a prima facie showing that the arrest warrant was invalid (the defendant testified that the referenced charge of for driving on a suspended license had been dismissed in open court), the burden shifted to the state to prove the search was valid. Since the state had not proved that the mistake was attributable to the trial court clerk or judiciary, rather than law enforcement, it failed to meet its burden of proof.

State v. Lee, 957 So. 2d 76 (Fla. 5th DCA 2007).

The defendant's vehicle was stopped after an officer noticed from a distance of 40 or 50 feet that the defendant's tag light was not working, confirming that fact by turning his headlights off briefly. Upon approaching the vehicle the officer detected the odor of cannabis. Upon searching the vehicle, crack cocaine was discovered. The trial court suppressed the evidence, noting that there was no

evidence or testimony that the tag was not clearly legible at 50 feet, as required for a violation of section 316.221, Florida Statutes, and that in the absence of a confirming inspection of the vehicle the detention was not permissible.

The district court reversed, holding that the stop was proper since probable cause existed, that is facts and circumstances within an officer's knowledge sufficient to warrant a man of reasonable caution to believe an offense had been committed. In the instant case, the officer's observation that the light was not working, from 40 to 50 feet away, was sufficient to support a belief that the taillight was inoperative and to stop the vehicle and approach the defendant without further inspection of the vehicle.

Hurd v. State, 958 So. 2d 600 (Fla. 4th DCA 2007).

The defendant, after being followed by an officer for two miles, was pulled over for violations of section 316.155, Florida Statutes, failing to give a turn signal, and section 316.089, Florida Statutes, failing to maintain a single lane. A subsequent search of the defendant resulted in the discovery of drugs. The trial court denied the defendant's motion to suppress, finding that any reasonable officer would have stopped the driver out of concern for his welfare and for violation of the two traffic offenses committed directly in front of the officer.

While conceding that the constitutional validity of a traffic stop depends on purely objective criteria (that is, whether probable cause for the stop existed), the district court held that the motion to suppress should have been granted. In relation to the failure to give a turn signal charge, the court cited the Supreme Court opinion in State v. Riley, 638 So. 2d 507 (Fla. 1994), which held that section 316.155 requires a signal only if another vehicle would be affected by the turn. In light of testimony from the officer and defendant that there was no other traffic on the road, there was no probable cause for the stop. On the maintaining a single lane violation, the district court observed that case law established that failure to maintain a single lane alone cannot establish probable cause when the action is done safely. After examining the record, the court concluded that the observed driving did not provide the officer with the reasonable suspicion necessary for a stop, since there was no evidence of impairment, unfitness, or a vehicle defect, any one of which would have supported the stop even in the absence of a traffic violation.

Morris v. State, 958 So. 2d 598 (Fla. 4th DCA 2007).

The defendant's vehicle was parked in a vacant lot with an expired license plate. An officer who had observed the same vehicle two weeks earlier, decided to have it towed and impounded. Before that occurred the officer inventoried the vehicle and discovered heroin. The defendant's motion to suppress was subsequently denied and the defendant pled nolo contendere to possession of heroin.

The district court reversed, holding that the nonconsensual warrantless search of the vehicle was illegal. The district court framed the issue as whether the officer had the authority to impound the vehicle, without which the search would be a warrantless and illegal search. In finding that no authority existed, the court noted that section 320.07, Florida Statutes, prohibiting the failure to have a valid sticker reflecting current registration, does not authorize the impounding of a motor vehicle. The court distinguished this provision from those specifically authorizing impoundment, such as section 316.191, drag racing; section 316.193, driving under the influence; and section 322.34, driving while license suspended or revoked.

Torts/Accident Cases

Wells v. City of St. Petersburg, 958 So. 2d 1076 (Fla. 2d DCA 2007).

The plaintiffs in a civil suit were injured when a vehicle which had run a red light collided with their vehicle after running a stop sign at a high speed. Officers of the defendant city had initiated a traffic stop of the vehicle for the red light violation. The trial court granted summary judgment in favor of the defendant, finding that the record facts did not support the contention that a pursuit occurred but rather showed only a brief unsuccessful attempted traffic stop posing no undue risk to the public.

The district court reversed the summary judgment, noting the existence of genuine conflicts between the officer's testimony (that the chase was brief and quickly terminated) and the testimony of the passenger of the pursued car (that the chase continued until the crash occurred), which could not be resolved within the context of a summary judgment. In light of the well-established legal principle involved, that is, that a law enforcement officer should take such steps as may be

necessary to apprehend an offender, but, in doing so may not exceed proper and rational bounds nor act in a negligent, careless or wanton manner, the district court held that there were liability issues, turning on the manner in which the chase was conducted, and thus summary judgment was inappropriate.