TO: Representative Fred Patton, Chairman
Members of the House Judiciary Committee

FROM: David R. Morantz

DATE: Tuesday, January 29, 2019

RE: Hearing on HB 2065 An act concerning motor vehicles; relating to authorized emergency vehicles; duties and liability; OPPOSE

I am David Morantz and I am an attorney with the Kansas City law firm Shamberg Johnson & Bergman. I represent injured Kansans and their families who have experienced personal injury, economic loss or death as the result of dangerous and wrongful conduct or defective products. I am here today to express opposition and to request that the House Judiciary Committee take no action on HB 2065.

First, it is premature for the Legislature to pass HB 2065 while litigation is pending and before the appeals are exhausted. I understand that HB 2065 was introduced as a result of the Court of Appeals decision in *Montgomery v. Saleh*, 55 Kan. App. 2d 429 (2018) (my firm represented the plaintiffs). The defendant has appealed the decision to the Supreme Court and review has been granted. Even though HB 2065 will not affect the parties in *Montgomery,* the Legislature should allow the appeals process to proceed before new laws are passed. We cannot presume to know how the Supreme Court will rule in *Montgomery*. Passing HB 2065 would would disrupt longstanding law and policy found in "the Rules of the Road" portion of the Uniform Act Regulating Traffic found in Chapter 8, Article 15.

HB 2065 is vague, confusing, and undermines legislative intent.

H.B. 2065 strikes language from K.S.A. §§ 8-1506, -1530, and -1541 regarding the duty of an operator of an emergency vehicle "to drive with due regard for the safety of all persons." HB 2065 is ambiguous and blurs the intent of the Legislature. Section 8-1506(d) establishes the duty of emergency vehicles. By striking K.S.A. §§ 8-1506(d), the duty is no longer stated explicitly.

The remaining language exacerbates the vagueness problem: "shall not relieve the driver of an authorized emergency vehicle from the consequences of reckless disregard for the safety of others." Even if the remaining language establishes a duty between a governmental actor and an injured person, the duty is not clearly and plainly stated. The ambiguity of HB 2065 will create confusion in the law and invite courts to re-interpret legislative intent.

Unfortunately, those that lose under HB 2065 are the innocent bystanders to a police pursuit: passengers in vehicles unrelated to the pursuit or pedestrians. Remedies for the injured bystanders are already limited to those found in the Kansas Tort Claims Act. HB 2065 creates unknowns that may make it more difficult to establish a claim on which relief may be granted, meaning they would have no remedy at all despite being entirely innocent and having no connection to the pursuit, suspect or crime. Depriving innocent, law-abiding Kansans from even the limited remedy in the KTCA is not the outcome the Legislature intends now nor intended when the statutes were enacted.

Third-party fatalities and injuries resulting from police pursuits are tragic. Often, they are completely unnecessary, as when the pursuit arises from a non-violent offense. It is important to hold a reckless officer accountable when his or her judgment unnecessarily puts others in harm's way.

High speed police pursuits are common, and they kill about one person every day in the United States. From 1996 to 2015, more than 7,000 persons (an average of 355 persons per year) were killed in pursuit-related crashes nationwide.[1] One-third of those killed were occupants of a vehicle not involved in the pursuit (295) or bystanders not in a vehicle (4%).[2] Slightly more than 1% of the fatalities were occupants of the pursuing police vehicle.[3] Note that these numbers do not show the number of non-fatal injuries caused by high-speed pursuits.

Police departments across the county recognize the problem. By January 2013, all state police and highway patrol agencies, and all local police departments serving 25,000 or more residents had a written vehicle pursuit policy.[4]

K.S.A. 8-1506(d) and police pursuit rulings in Kansas.

Under K.S.A. 8-1506(a)-(c), drivers of an authorized emergency vehicle are excused from obeying traffic laws under certain conditions (essentially, when lights and sirens are activated), but subsection (d) of the statute provides:

> The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from **the duty to drive with due regard for the safety of all persons**, nor shall such provisions protect the driver from the consequences of reckless disregard for the safety of others.

HB 2065 strikes the duty from current law.

There are only a handful of appellate decisions related to cases arising out of injuries sustained from a police pursuit. The first case of any note was *Thornton v. Shore*, 233 Kan. 737 (1983), in which the Kansas Supreme Court concluded that as long as a police officer operates

[1] Bureau of Justice Statistics, "Police Vehicle Pursuits," published May 2017, *available at* https://www.bjs.gov/content/pub/pdf/pvp1213_sum.pdf
[2] *Id.*
[3] *Id.*
[4] *Id.*

his/her <u>own</u> emergency vehicle in full compliance with the requirements of K.S.A. 8-1506, the officer is entitled to the privileges and immunities granted by the statute. In other words, if the officer's vehicle didn't collide with anyone, the officer is immune. As the dissent noted, the upshot of *Thornton* was that "anytime a high-speed chase precipitates a collision in which the pursuing officer does not actually collide, the officer is immune from liability."

Next, in *Carl v. City of Overland Park*, 65 F.3d 866 (10th Cir.), the 10th Circuit found that a police department's pursuit policy could be the basis for a duty owed to an injured third party. However, the court held in favor of the officer on the issue of proximate cause, citing *Thornton*'s statement that "Kansas law should not force a police officer to be the insurer of the fleeing law violator." As a caveat, the court stated:

> we would not necessarily predict that Kansas courts would *never* find proximate cause as a matter of law in *all* cases involving police pursuits. It is possible, for example, that the Kansas Supreme Court would rule differently on the proximate cause issue if there was evidence that the police acted with recklessness or intent, such as an egregious case where an officer ignored clear danger by deliberately initiating pursuit through a parade, a school crossing zone, or a densely populated area during rush hour.

Enter *Robbins v. City of Wichita*, 285 Kan. 455 (2007), in which the Kansas Supreme Court overruled *Thornton* to read the duty established by § 8-1506(d) to include the officer's decision to pursue and decision to continue a pursuit. Thus, *Robbins* stands for the rule that a third party injured by the fleeing suspect in a police pursuit may sue the officer for a reckless pursuit. Under Robbins, the standard for breach is "reckless disregard" which is defined as "driving a vehicle under circumstances that show a realization of the imminence of danger to another person or the property of another when there is a conscious and unjustifiable disregard of that danger." In *Robbins*, the officer was not held liable because the plaintiff could not establish "reckless disregard."

Montgomery v. Saleh was the first case in which an appellate court held that the plaintiffs' claims against the officers could proceed to trial.

The *Montgomery* case arose from a police chase predicated on a tag violation and suspicion that the passenger may have been waiving a knife around. The chase occurred on Kansas Avenue in Topeka, with the vehicles traveling south from 19th Street to 29th Street, at speeds in excess of 100 mph. At the intersection of Kansas and 29th, the fleeing vehicle smashed into a truck driven by Scott Bennett whose passenger was Ms. Montgomery. They were injured as a result. Plaintiffs claim the officer's pursuit of the vehicle was unreasonable and reckless, and but for his reckless pursuit, Montgomery and Bennett would not have been injured. The District Court granted the defendants (Officer Saleh and the State of Kansas) summary judgment, ruling that although Officer Saleh owed Plaintiffs a duty and may have breached that duty, Plaintiffs could not prove causation because they did not have evidence of what the fleeing driver would have done if the pursuit had been terminated before it became reckless.

In a 2-1 opinion the Court of Appeals reversed in favor of Plaintiffs. The Court held that § 8-1506(d) creates a specific duty that Officer Saleh owed to Plaintiffs, citing *Robbins*. K.S.A. 8-1506(a)-(c) grant drivers of an authorized emergency vehicle privileges excusing them from traffic laws under certain conditions, but subsection (d) of the statute provides:

> The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of reckless disregard for the safety of others.

The Court of Appeals stated that, according to *Robbins*, § 8-1506(d) creates a duty to "all persons," which includes a duty owed to a specific individual. "The plain language of K.S.A. 8-1506 creates a duty under which law enforcement can be held liable for police pursuits."

The Court rejected arguments that the duty under K.S.A. § 8-1506(d) is a duty is owed to the public at large and not to any specific individual and, therefore, cannot be the basis of a tort claim, per the "public duty doctrine." The Court also rejected arguments that the duty from § 8-1506(d) is subordinate to the officer's "duty to maintain public order or make arrests for crimes."

The Court affirmed the holding from *Robbins* that the standard for a breach of the duty created by § 8-1506(d) is "reckless disregard" by the officer. Per *Robbins*, the breach may arise from (1) the officer's manner of operating his own vehicle, (2) the decision to *initiate* a pursuit, or (3) the decision to *continue* the pursuit.

The Kansas Tort Claims Act establishes liability as the rule with immunity as the exception, which a defendant bears the burden of establishing. The defendant argued sovereign immunity under several exceptions to the KTCA. In rejecting the arguments, the Court ruled the exceptions to the KTCA don't apply to the Defendant at all because "a statute imposing a legal duty precludes the government and its officials from claiming immunity under the KTCA." "Here, that statute is K.S.A. 8-1506(d), which requires the driver of an authorized emergency vehicle when pursuing a suspect to 'drive with due regard for the safety of all persons." Section 8-1506(d) is more specific than the KTCA's exemptions, so it applies over them. ***"To hold otherwise would mean that no police officer could ever be held liable for any pursuit resulting in an injury to a bystander, no matter how egregious and unjustifiable the pursuit."*** [Emphasis added.]

I appreciate the opportunity to testify on HB 2065. I respectfully request your opposition to HB 2065 and that the Committee take no action on HB 2065.