Municipal Tort and Civil Rights Litigation Update

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

FOR

THE LEAGUE OF CALIFORNIA CITIES

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Los Angeles California

I. CIVIL RIGHTS—LAW ENFORCEMENT LIABILITY

A. *Caniglia v . Strom*, __U.S.__, 141 S.Ct. 1596 (2021)

- **There is no *per se* community caretaking exception to the Fourth Amendment warrant requirement, and the reasonableness of an officer's actions will be determined by ordinary principles concerning exigent circumstances.**

In *Caniglia v. Strom*, __U.S.__, 141 S.Ct. 1596 (2021), during an argument with his wife, the plaintiff placed a handgun on the dining room table and asked his wife to "shoot [him] and get it over with." His wife left the home and spent the night at a hotel. The next morning, after she was unable to reach her husband by phone, she called the police to request a welfare check. The responding officers accompanied plaintiff's wife to the home, where they found plaintiff on the porch. The officers called an ambulance based on the belief that plaintiff posed a risk to himself or others. Plaintiff agreed to go to the hospital for a psychiatric evaluation on the condition that the officers not confiscate his firearms. But once plaintiff left, the officers located and seized his weapons. Plaintiff then sued, arguing that the officers had entered his home and seized him and his firearms without a warrant in violation of the Fourth Amendment. The district court granted summary judgment and the First Circuit affirmed, holding that under the Supreme Court's decision in *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706, the officers' removal of plaintiff and his firearms from his home was justified by a "community caretaking exception" to the warrant requirement.

The Supreme Court reversed and remanded for further proceedings. The Court held that there was no general "community caretaking" exception to the Fourth Amendment. The Court noted that *Cady* held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. In reaching this

conclusion, the Court observed that the officers who patrol the "public highways" are often called to discharge noncriminal "community caretaking functions," such as responding to disabled vehicles or investigating accidents. However, the Court emphasized that searches of vehicles and homes are constitutionally different, and the very core of the Fourth Amendment's guarantee is the right of a person to retreat into his or her home and there be free from unreasonable governmental intrusion. The Court held that recognition of the existence of "community caretaking" tasks, like rendering aid to motorists in disabled vehicles, is not an open-ended license to perform them anywhere, most specifically, inside a home.

As the multiple concurring opinions in *Caniglia* emphasize, the Court's ruling is extremely narrow, and the Court does not suggest that officers might not have valid reasons to enter a home without a warrant to conduct a welfare check on an elderly or ill person for example, or even to seize firearms from a person suffering from mental illness. The focus in such cases will be on whether exigent circumstance may justify the entry, even outside the criminal context.

B. *Lange v. California*, __U.S.__, 141 S.Ct. 2011 (2021)

- **No "hot pursuit" exception for warrantless entry to arrest for a misdemeanor.**

Lange v. California, __U.S__, 141 S.Ct. 2011 (2021) arose from a police officer's warrantless entry into petitioner Arthur Lange's garage. Lange drove by a California highway patrol officer while playing loud music and honking his horn. The officer followed Lange and activated his overhead lights to signal that Lange should pull over. Rather than stopping, Lange drove a short distance to his driveway and entered his attached garage. The officer followed Lange into the garage. He questioned Lange and, after observing signs of intoxication, put him through field sobriety tests. A later blood test showed that Lange's blood-alcohol content was three times the legal limit.

The State charged Lange with the misdemeanor of driving under the influence. Lange moved to suppress the evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. The Superior Court denied Lange's motion, and its appellate division affirmed. The California Court of Appeal also affirmed. It concluded that Lange's failure to pull over when the officer flashed his lights created probable cause to arrest Lange for the misdemeanor of failing to comply with a police signal. The pursuit of a suspected misdemeanant, the court held, was always permissible under the exigent-circumstances exception to the warrant requirement. The California Supreme Court denied review.

The Supreme Court reversed and remanded. The Court acknowledged that in *United States v. Santana*, 427 U.S. 38 (1976) it had held that hot pursuit of a fleeing *felon* is itself an exigent circumstance justifying warrantless entry into a home. However, the Court declined to extend *Santana* to misdemeanors. The Court held that a *per se* rule was inapplicable to misdemeanors, and that the reasonableness of an officer's entry would be determined by the general principles articulated for exigent circumstances justifying warrantless entries.

This is another decision where the Court's ultimate holding is extremely narrow. While it struck down precedent from California and other states which applied a per se rule allowing entry in hot pursuit to arrest for a misdemeanor, the Court emphasized that in most such cases the entry would likely be justified based on ordinary exigent circumstances, such as potential loss of evidence, or chance of escape by the suspect. Nonetheless, municipalities in California should make certain that their police departments are aware of the change in law, and that officers may no longer automatically pursue a misdemeanant into a residence, absent exigent circumstances.

C. ***Lombardo v. City of St. Louis*, ___U.S. __, 141 S.Ct. 2239 (2021) (*per curiam*)**

- **Use of force claims under the Fourth Amendment must be evaluated in light of the totality of circumstances and cannot be subject to a per se rule of reasonableness.**

In *Lombardo v. City of St. Louis*, ___U.S. __, 141 S.Ct. 2239 (2021) St. Louis police officers arrested Nicholas Gilbert for trespassing in a condemned building and failing to appear in court for a traffic ticket. They brought him to the Police Department's central station and placed him in a holding cell. At some point, an officer saw Gilbert tie a piece of clothing around the bars of his cell and put it around his neck, in an apparent attempt to hang himself. Three officers responded and entered Gilbert's cell. One grabbed Gilbert's wrist to handcuff him, but Gilbert evaded the officer and began to struggle. The three officers brought Gilbert, who was 5’3” and 160 pounds, down to a kneeling position over a concrete bench in the cell and handcuffed his arms behind his back. Gilbert reared back, kicking the officers and hitting his head on the bench. After Gilbert kicked one of the officers in the groin, they called for more help and leg shackles. While Gilbert continued to struggle, two officers shackled his legs together. Emergency medical services personnel were phoned for assistance.

Several more officers responded. They relieved two of the original three officers, leaving six officers in the cell with Gilbert, who was now handcuffed and in leg irons. The officers moved Gilbert to a prone position, face down on the floor. Three officers held Gilbert's limbs down at the shoulders, biceps, and legs. At least one other placed pressure on Gilbert's back and torso. Gilbert tried to raise his chest, saying, “It hurts. Stop.”

After 15 minutes of struggling in this position, Gilbert's breathing became abnormal and he stopped moving. The officers rolled Gilbert onto his side and then his

back to check for a pulse. Finding none, they performed chest compressions and rescue breathing. An ambulance eventually transported Gilbert to the hospital, where he was pronounced dead.

Gilbert's parents sued, alleging that the officers had used excessive force against him. The district court granted summary judgment in favor of the officers, concluding that they were entitled to qualified immunity because they did not violate a constitutional right that was clearly established at the time of the incident. The Eighth Circuit affirmed, holding that the officers did not apply unconstitutionally excessive force against Gilbert.

The Supreme Court reversed in a 6-3 *per curiam* decision. The Court held that the Eighth Circuit had erred in finding that the use of a prone restraint—no matter the kind, intensity, duration, or surrounding circumstances—is per se constitutional so long as an individual appears to resist officers' efforts to subdue him. The Court noted that in such circumstances the use of force must be evaluated in light of the totality of circumstances, and that application of a per se rule was improper. The Court remanded for the Eighth Circuit to consider the various facts relevant to evaluating the use of force claim, and to determine whether the use of force violated clearly established law for purposes of qualified immunity.

Lombardo is yet another case with a very narrow holding, once again rejecting a *per se* rule in analyzing a Fourth Amendment claim. It is also the most recent in a series of cases where the Court has reversed the grant of summary judgment to police officers in the use of force context. As the dissenting justices noted, the opinion carefully avoids addressing the clearly established law prong of qualified immunity under the guise of addressing the merits issue on use of force, again skirting an issue concerning qualified immunity that has been the subject of public, political and academic criticism in recent years.

D. *Valenzuela v. City of Anaheim*, __F.3d.__, 2021 WL 3362847 (9th Cir. 2021)

- **California limitation on "loss of life" damages does not apply to wrongful death action under 42 U.S.C. section 1983.**

Valenzuela v. City of Anaheim, __F.3d.__, 2021 WL 3362847 (9th Cir. 2021) arose from a federal court judgment following a trial in which a jury determined that city police officers improperly applied a carotid artery hold in an attempt to restrain the decedent, Fermin Valenzuela, during a prolonged struggle that was captured on video. The jury found that the officers were negligent under California law, that they used excessive force in violation of the Fourth Amendment for purposes of a federal civil rights claim, and also violated California's Unruh Act.

The jury awarded a total of $13.2 million in damages. $3.6 million was awarded to plaintiffs as wrongful death damages under California law for the loss of decedent's support, society and comfort. The jury also awarded the plaintiffs $6 million in damages for pain and suffering incurred by the decedent, as well as $3.6 million as damages for decedent's loss of future life. The trial court also awarded plaintiffs a little over $1 million dollars in attorney fees and costs. The city and officers appealed.

The Ninth Circuit affirmed in a 2-1 decision. The panel majority rejected the appellants' argument that the $3.6 million in damages for decedent's loss of future life were improper because they were barred by California law. The majority acknowledged that under the controlling authority of United States Supreme Court precedent, damages in federal civil rights actions are governed by the law of the state where the incident occurred. However, the majority noted that there was an exception where state law would not apply if it would defeat the remedial purposes of the federal civil rights statute. The majority observed that in *Chaudhry v. City of Los Angeles*, 751 F.3d 1096 (9th Cir. 2014) a different panel of the court had found that California's prohibition on recovery of pain

and suffering by a decedent did not apply to a federal civil rights action, because it would defeat the remedial purpose of the statute. As a result, the majority concluded that the same reasoning should be applied to the loss of life damages here.

Valenzuela is a very significant decision as it substantially increases public entity exposure to damages in civil rights cases. The amorphous nature of such damages invites open-ended speculation by a jury untethered to any concrete standard, and will likely lead to seven figure recoveries even in cases where there are few heirs, or the decedent had strained familial relations, factors which might otherwise reduce an award in such cases. There is a strong dissent in *Valenzuela*, and a clear circuit split on the issue, so further review may be a possibility.

E. ***Evans v. Skolnik*, 997 F.3d 1060 (9th Cir. 2021)**

- **Officer entitled to qualified immunity for monitoring prisoner's phone call to civil attorney because no clearly established law put the officer on notice that the conduct could violate the Fourth Amendment.**

The plaintiff in *Evans v. Skolnik*, 997 F.3d 1060 (9th Cir. 2021) asserted that his Fourth Amendment rights were violated when he was a jail prisoner and a correctional officer listened in on his phone conversation with an attorney representing him in a civil case. The district court granted the officer summary judgment based on qualified immunity and the plaintiff appealed, arguing that it was clearly established that officers would violate the Fourth Amendment by eavesdropping on a prisoner's calls to counsel representing him in the underlying criminal matter.

The Ninth Circuit affirmed. The court held that the officer was entitled to qualified immunity because there was no clearly established law indicating that officers would violate the Fourth Amendment by sporadically monitoring calls to attorneys concerning

civil matters. The court noted that it had previously granted qualified immunity where officers had monitored a prisoner's personal calls, and that case law that generally discussed the privacy of attorney-client communications was insufficient to put an officer on notice that any invasion of such privacy would violate the Fourth Amendment. The court also emphasized that district court decisions were generally insufficient to render the law clearly established for purposes of qualified immunity.

Evans is a very helpful case for municipalities in that it strictly applies Supreme Court case law concerning the need for a plaintiff to cite highly analogous case law in order to overcome qualified immunity.

F. *Sales v. City of Tustin*, 65 Cal.App.5th 265 (2021)

- **Where federal court dismisses federal claims with prejudice, and exercises discretion to dismiss supplemental claims without prejudice and plaintiff appeals, the 30 day period to re-file the state claims in state court is tolled until the federal appellate court issues its mandate concluding the appeal.**

Sales v. City of Tustin, 65 Cal.App.5th 265 (2021) arose from a fairly common scenario. The plaintiff filed an excessive force complaint in federal court asserting claims under section 1983 as well as state law. The district court dismissed the federal claims with prejudice, and then dismissed the state claims without prejudice to re-filing them in state court. Plaintiff pursed an unsuccessful appeal in federal court, and upon issuance of mandate from the federal appellate court, promptly re-filed the state claims in state court 14 days later. The defendants moved for summary judgment, arguing that 28 U.S. section 1367(d) tolls any state statute of limitations for 30 days after the state claim is dismissed, and that the tolling period began to run when the state claims were dismissed by the district court without prejudice, even if the plaintiff appealed the dismissal of the federal

claims which ultimately prompted the district court's action. The trial court agreed, and plaintiff appealed.

The Court of Appeal reversed. Citing prior California case law, as well case law from other states, the court held that based upon the statutory language and purpose of section 1367, the 30-day tolling period did not commence until after the federal appellate proceedings were final upon issuance of the Ninth Circuit's mandate.

Sales provides helpful clarification on an issue that arises with some frequency and is a reminder that so long as an appeal of a federal claim remains pending, a plaintiff is not required to re-file dismissed claims in state court. This means that a state claim may be pursed even years after initial dismissal in federal court. It should be noted that the *Sales* court declined to speculate whether pursuit of certiorari on the federal appeal would be sufficient to toll the limitations period, notwithstanding issuance of mandate by a federal appellate court. This is significant, because depending on when a cert petition is filed, final disposition of the petition may take several months or close to a year, thus considerably increasing the delay in re-filing state claims.

G. *Lemos v. County of Sonoma*, 5 F.4th 979 (9th Cir. 2021)

- **State court jury conviction of plaintiff for interfering with an officer under Penal Code Section 148 barred subsequent federal civil rights claim under *Heck. V. Humphrey.***

Lemos v. County of Sonoma, 5 F.4th 979 (9th Cir. 2021) addresses the Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994) holding that a plaintiff cannot pursue a federal civil rights claim where success on that claim would necessarily imply the invalidity of a state court conviction. In *Lemos*, the plaintiff was involved in a verbal and physical altercation with police officers which resulted in her being tried and convicted of interfering with a police officer in violation of Penal Code section 148.

During the criminal trial the jury was specifically instructed that in order for plaintiff to be convicted they would have to find that the officer was lawfully performing his duties. When plaintiff attempted to pursue a federal civil rights excessive force claim following her conviction, the district court dismissed the action as barred by *Heck*.

The Ninth Circuit affirmed in a 2-1 decision. The panel majority emphasized that the state court jury was specifically directed to consider the lawfulness of the officer's conduct, and hence, if plaintiff were to succeed on her excessive force claim in federal court it would undermine the legitimacy of the state court conviction in violation of *Heck*. The court acknowledged that plaintiff had engaged in various acts of resistance that could have formed the basis of her conviction, but noted that for purposes of *Heck* it need not be determined exactly which act prompted the conviction.

Lemos is one of the few cases to stringently apply the *Heck* bar based on a conviction under Penal Code section 148. As dissenting Judge Berzon noted, the court had previously declined to apply *Heck* where the underlying conviction was based on a plea bargain where several acts of resistance would support the Penal Code section148 charge, precisely because without knowing the specific act on which conviction was based, it could not be determined that success on the federal claim would *necessarily* imply the invalidity of the state court conviction. Given how frequently incidents spawn both Penal Code section 148 charges and subsequent excessive force claims, there will likely be ongoing litigation concerning application of *Heck* to such claims.

H. *Gordon v. County of Orange*, __ F.4th __, 2021 WL 3137954 (9th Cir. 2021)

- **Pre-trial detainee has constitutional right to medical screening for critical medical needs, and direct physical monitoring where staff is on notice of need for monitoring.**

In *Gordon v. County of Orange*, __ F.4th __, 2021 WL 3137954 (9th Cir. 2021), the decedent died while in jail as a pre-trial detainee. His family sued, arguing that proper medical screening by the nurse examining him would have revealed his need for specialized care, and that a deputy had improperly failed to directly monitor him while in custody. The district court granted summary judgment, finding that the individual defendants were entitled to qualified immunity because plaintiff could not show that defendants had a subjective belief that particular medical treatment or monitoring was required. The court also granted summary judgment to the county, finding that plaintiff could not establish the existence on an unconstitutional policy, custom or practice for purposes of imposing liability on the county under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Plaintiff appealed.

The Ninth Circuit affirmed in part and reversed in part. The court held that the district court applied an incorrect legal standard in evaluating whether defendants' conduct violated the constitution. The court observed that a defendant's subjective intent is irrelevant in the context of a due process claim involving a pre-trial detainee. The question in such cases is whether objective facts would have indicated the need for screening. The court therefore found that the nurse was not entitled to qualified immunity, as the law was clear that pre-trial detainees have a right to be screened by medical personnel for critical medical needs. The court also found that the failure to directly monitor plaintiff's physical condition might violate the constitution, but that the deputy was entitled to qualified immunity because no existing case law would have put

him on notice that direct, as opposed to indirect physical monitoring of a special needs detainee was required to avoid liability. The court affirmed judgment for the county, noting that plaintiff failed to show any prior instances on any injuries resulting from the county's policies, and that subsequent policy changes, standing alone, do not provide a basis for *Monell* liability.

Gordon is a helpful case because the court stringently applies the clearly established law prong of qualified immunity, as well as the requirements for *Monell* liability. However, it does create an arguably new and more rigorous monitoring requirement for at risk prisoners. This may be challenging for local municipalities which maintain interim holding facilities for prisoners prior to transfer to a county jail.

I. *Leon v. County of Riverside*, 64 Cal.App.5th 837 (2021)

- **Malicious prosecution immunity of Government Code section 821.6 applies to investigative actions of law enforcement officers.**

In *Leon v. County of Riverside*, 64 Cal.App.5th 837 (2021) the widow of victim who was fatally shot by his neighbor brought suit against the county, alleging negligent infliction of emotional distress based on failure of county sheriff's deputies to promptly cover or remove the victim's body while deputies investigated the shooting and searched for the shooter. The trial court granted defendants' motion for summary judgment. It found that the individual deputy defendants were shielded from liability based on the immunity for malicious prosecution under Government Code section 821.6, because their conduct occurred in the course of a criminal investigation. The court found that the county was entitled to summary judgment because no statute imposed liability on the county for this sort of conduct by its employees. Plaintiff appealed.

The Court of Appeal affirmed. The court noted that section 821.6 immunity has been broadly interpreted to include virtually all conduct related to criminal prosecution,

including the underlying investigation of crimes. It also noted that no liability could be imposed on a public entity absent statutory authorization and that plaintiff could point to no statute that would allow liability to be imposed on the county here.

Leon is helpful because it reinforces the broad scope of malicious prosecution immunity under section 821.6. As the concurring opinion notes however, in a series of cases the Ninth Circuit has observed that the California Supreme Court has never directly addressed the scope of the immunity outside of the context of direct prosecutorial acts, such as filing or prosecuting charges. The federal appellate court finds the various Court of Appeal decisions broadly applying the immunity unconvincing, and as a result the Ninth Circuit does not apply the immunity to state claims concerning investigative conduct. The California Supreme Court has granted review in *Leon,* and now has the opportunity to clearly state its position on the issue. In the meantime, per the Court's specific order, *Leon* may be cited as persuasive, but not binding authority.

II. FIRST AMENDMENT

A. *Fulton v. City of Philadelphia*, __ U.S __, 141 S.Ct. 1868 (2021)

- **Law of general applicability that burdens religious exercise must satisfy strict scrutiny if it gives government officials discretion to grant individualized exemptions.**

In Fulton v. City of Philadelphia, __ U.S __, 141 S.Ct. 1868 (2021) a state-licensed foster care agency affiliated with the Roman Catholic Archdiocese, together with three foster parents affiliated with the agency, brought a section 1983 action against the city and city departments, alleging the city's refusal to contract with the agency unless it agreed to certify same-sex couples as foster parents violated the Free Exercise and Free Speech Clauses of the First Amendment. The district court denied motions for a

temporary restraining order and preliminary injunction filed by the agency and foster parents, and they appealed. The United States Court of Appeals for the Third Circuit affirmed, finding that as a law of general applicability the regulation in question was subject to rational basis review under *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), and amply met that standard by broadening the pool of potential foster parents.

The Supreme Court reversed. Writing for the Court, Chief Justice Roberts noted that the regulation was not in fact generally applicable under *Smith*, in that a commissioner could, within his or her sole discretion, exempt a person or entity from the requirement. As a result, the regulation, which plainly burdened the plaintiffs' right to free exercise of religion, was subject to strict scrutiny. The Court noted that the regulation did not meet the strict scrutiny requirement that any action must be narrowly tailored to advance a compelling interest. The Court acknowledged that maximizing the number of foster families is an important goal, but noted that the city failed to show that granting plaintiffs an exception will put those goals meaningful risk, and that if anything, including plaintiffs in the program seems likely to increase, not reduce, the number of available foster parents. The Court also observed that while there was a significant interest in promoting non-discrimination as a general policy, the fact that the regulation allowed exceptions at all, indicated that this general interest was not an overriding policy.

Fulton is a reminder that even in the context of drafting regulations that are generally applicable, municipalities must be aware of the potential impact on religious organizations, and be mindful not to include exceptions unless a showing can be made that the provision meets the exacting standards of strict scrutiny. *Fulton* is also significant in that five Justices indicated that they believe that *Smith* may have been incorrectly decided, and that even statutes of general applicability must meet something more stringent than rational basis review insofar as they impact religious expression. Justices

Gorsuch, Thomas and Alito would overrule *Smith* outright and apply strict scrutiny in all such cases, while Justices Barrett and Kavanaugh suggest that the ultimate standard to be applied is not clear, and in any event should await resolution at a later time in an appropriate case.

III. MUNICIPAL TORT LIABILITY

A. *Los Angeles Unified School Dist. V. Superior Court*, 64 Cal.App.5th 549 (2021)

- **Government Code section 818 bars recovery of treble damages against a public entity.**

In *Los Angeles Unified School Dist. v. Superior Court*, 64 Cal.App.5th 549 (2021) a public high school student brought a tort action against a school district alleging that a school district employee had sexually assaulted her and that the assault resulted from the school district's cover up of the employee's sexual assault of another student. The trial court denied the school district's motion to strike the claims for treble damages that were sought under Code of Civil procedure section 340.1. The school district filed a writ petition challenging the trial court's ruling.

The Court of Appeal granted the writ and directed that the treble damages claim be stricken. The court noted that Government Code section 818 expressly bars a claim for punitive damages against a public entity. Since treble damages are by their nature designed to be punitive in effect, they are necessarily barred by section 818. The court distinguished cases finding that civil penalties were not subject to section 818, observing that such penalties have a compensatory component, whereas treble damages are purely punitive in that they simply multiply the amount already found to be compensatory.

Los Angeles Unified is a very helpful decision for public entities because it reaffirms that the limitation on punitive damages in Government Code section 818 should

be broadly applied, and reduces damages exposure in cases seeking statutory treble damages.

B. *Shalab v. City of Fontana*, 11 Cal.5th 842 (2021)

- **Where statute of limitations is tolled based on a plaintiff's minority, the day tolling ends, i.e. plaintiff's birthday, is excluded in calculating whether an action is timely filed.**

In *Shalab v. City of Fontana*, 11 Cal.5th 842 (2021), the issue before the California Supreme Court was how to determine when tolling of the statute of limitations for minority under Code of Civil Procedure section 352 ends. The plaintiff had filed a state court section 1983 wrongful death action against police officers, asserting the death of his father was the result of excessive force. The alleged assault occurred when plaintiff was a minor, and he turned 18 on December 3, 2011. Plaintiff filed suit two years later, on December 3, 2013. The parties agreed that the action was governed by the two year statute of limitations for personal injuries under California law, and that the two year limitations period was tolled based on plaintiff's minority. However, defendants argued to the trial court that tolling ended when plaintiff turned 18, and that the two year limitation period expired on December 2, 2013. Plaintiff argued that under Code of Civil Procedure section 12, in calculating any period in which an act must be done, that the first day is excluded, so that his suit was timely filed. The trial court agreed with defendant, and plaintiff appealed. The Court of Appeal reversed the trial court, and the Supreme Court granted review.

The Supreme Court agreed with the Court of Appeal and affirmed. The Court noted that section 12 provides a uniform method of calculating time, and that the general rule of excluding the first day of a period should not be discarded simply because the triggering event –a plaintiff's birthday– occurred at midnight thus leaving a full court day in which to immediately pursue any legal claim. The Court also noted that excluding the

day a plaintiff turns 18 from the limitations period furthered the underlying purpose of section 352's tolling provision, which was to be highly protective of the interests of minors.

Shalabi clarifies the law on an issue that arises with great frequency and will allow public entities to more accurately calculate windows of potential liability in claims involving minors.

C. *Haytasingh v. City of San Diego*, 66 Cal.App.5th 429 (2021)

- **Hazardous recreational activity immunity of Government Code section 831.7 bars general negligence claim by surfer injured in near collision with city lifeguard jet ski, but plaintiff may assert gross negligence claim premised on violation of speed limits set by the Harbors and Navigation Code because cities are not political subdivisions of the state that would otherwise be exempted from the speed limit.**

In *Haytasingh v. City of San Diego*, 66 Cal.App.5th 429 (2021) the plaintiff suffered a catastrophic injury when he jumped off his surfboard to avoid a collision with a city lifeguard jet ski that crossed in front of him. The trial court dismissed plaintiff's general negligence claim on summary adjudication, concluding that defendants were entitled to immunity under Government Code section 831.7 because surfing is defined as a hazardous recreation activity under the statute. However, the court allowed plaintiff to proceed to trial on the theory that the lifeguard's action in driving the jet ski at an excessive rate of speed constituted gross negligence and therefore fell within an exception to the immunity. The trial court then rejected plaintiff's request that the jury be instructed that the lifeguard was required to comply with speed limits set by the Harbors and Navigation Code. The trial court concluded that as a political subdivision of the state, the city was exempt from the Code. As a result, the city's Municipal Code applied, which

expressly exempted city-operated craft from such limits. The jury found for defendants and plaintiff appealed.

The Court of Appeal affirmed in part and reversed in part. The court agreed with the trial court that the general negligence claim was barred by the immunity of section 831.7. In so holding, the court rejected plaintiff's argument that the immunity only applied to claims based on dangerous condition of public property as opposed to the negligent activities of public employees.

However, the court reversed the judgment, and remanded for re-trial of the gross negligence claim. The court held that although political subdivisions of the state were exempt from the provisions at issue in the Harbors and Navigation Code, a charter city was not a political subdivision of the state. The court observed that the state constitution used the term political subdivision with respect to counties and not cities, and that when the legislature intended a broader meaning of the term to include cities, it would expressly state that in in a provision. Since the provisions at issue did not expressly exempt cities, the speed limit applied.

Haytasingh has an excellent discussion of the broad scope that should be given to the hazardous recreational activity immunity of Government Code section 831.7. However, as the concurring opinion recognizes, the court's extremely narrow interpretation of the term political subdivision as excluding cities is somewhat strained and may have an impact beyond interpretation of these particular provisions of the Harbors and Navigation Code. Review has been sought in Haytasingh, so stay tuned.

D. *City of Chico v. Superior Court*, __Cal.App.5th ___, 2021 WL 3855292 (2021)

- **Government Code section 831.2 immunity from liability for injuries caused by a natural condition of unimproved public property, bars plaintiff's suit based on alleged improper pruning of tree in city park.**

In *City of Chico v. Superior Court*, __Cal.App.5th ___, 2021 WL 3855292 (2021), the plaintiff was injured by a falling tree branch while jogging in a city park. Plaintiff sued the city, asserting that it had improperly pruned and failed to maintain the tree, thus causing the branch to fall. The city moved for summary judgment, arguing, among other grounds, that the tree constituted unimproved public property and hence it was immune from liability under Government Code section 831.2. The trial court denied the motion and the city sought writ relief in the Court of Appeal.

The Court of Appeal granted the writ. The court noted that it was undisputed that the tree was not planted by the city and was there long before the park was created. The court rejected the contention that construction of an adjacent sidewalk constituted an improvement to the tree that would defeat the immunity. The court also rejected the plaintiff's argument that once the city pruned or maintained the tree at all, the tree was no longer in a natural condition, noting that growth of the tree itself was a natural condition.

City of Chico is a very helpful case in that the Court of Appeal applies a broad definition of natural condition of property for purposes of the immunity. The opinion also underscores the fact that even where a public entity has altered some natural conditions, say by constructing improvements in portions of a park, the immunity applies to suits based on injuries arising from portions of an area that remain in a natural condition. Given the ubiquity of trees in public parks which pre-date construction of the parks, *City*

of Chico should have a significant impact on liability claims arising from tree-related injuries.