Municipal Tort and Civil Rights Litigation Update

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

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I. CIVIL RIGHTS – LAW ENFORCEMENT LIABILITY

A. In *Golick v. State of California*, 82 Cal. App. 5th 1127 (2022)

- **No duty of care was found to hostage victims killed by person who exchanged fire with a deputy sheriff.**

In *Golick et al. v. State of California et al., 82 Cal. App. 5th 1127 (2022),* Pathway Home, a private corporation, contracted with the State Department of Veterans Affairs and provided mental health services at the Veterans Home. An agreement between the State and Pathway included a lease of space at the Veterans Home. Also, an interagency agreement between the State and the Sheriff's Department obligated the latter to “respond to all calls for service” at the Veterans Home, including “criminal, non-criminal, and traffic related calls.”

A month after one veteran was terminated from the program for violating policies and his treatment plan, he returned and entered the facility with a loaded semi-automatic rifle. He held three employees hostage and exchanged gunfire with a sheriff’s deputy. During the shooting sequence, which lasted approximately 10 seconds, the deputy fired 13 rounds and the veteran fired 22 rounds. Law enforcement officers had no further engagement with Wong. About eight hours later, an FBI SWAT team entered the room and found the veteran and the three employee hostages dead.

The victims’ families filed wrongful death actions against multiple defendants, including the County, the Sheriff’s Office, and the sheriff’s deputy. Plaintiff’s allegations included the following: (1) a contract between CALVET and the sheriff’s office required providing service calls at the Veterans Home, and (2) the County had a special relationship with Pathway’s employees.

The trial court sustained demurrers, and the First District Court of Appeal affirmed. First, the County defendants owed no duty of care under the special relationship doctrine because a contractual obligation to respond to service calls does not equate to a contractual duty to protect the deceased employees from patients. Second, the sheriff’s deputy did not

increase the risk of harm. Allegations that the deputy's conduct agitated the veteran and prompted him to kill his hostages were speculative. Furthermore, the plaintiffs did not allege that the hostages detrimentally relied on anything that the deputy said or did.

***Significance*:** While the deputy had a duty to act reasonably when using deadly force, it did not include a duty to prevent the hostage-taker from shooting the hostages where the facts did not show that the deputy's actions increased the hostage's risk of harm. Also, there was no special relationship between the hostages and the deputy because the deputy gave no assurances to the employees about their safety. Furthermore, the complaint only alleged that the Sheriff's Department had a contractual obligation to respond to service calls at the Veterans Home; however, this did not create a contractual duty to protect the decedents from patients.

B. *Verdun v. City of San Diego*, 51 F.4th 1033 (9th Cir. 2022)

- **Ninth Circuit upholds chalking practice under the special needs exception to the warrant requirement.**

In 2021, the Sixth Circuit held in Taylor v. *City of Saginaw, Michigan*, 11 F.4th 483 (6th Cir. 2021) that chalking tires for purposes of parking enforcement was a search under the 4th Amendment and was not justified as a community caretaking function or as an administrative search. However, in October of 2022, the Ninth Circuit ruled oppositely.

The City of San Diego utilized tire chalk since at least the 1970s as an efficient and cost-effective way to determine a car's violation of time limits on City parking spots. The City's parking officer places a chalk mark on every vehicle parked in a given area of the City; parking officers do not single out particular vehicles. Plaintiffs, who were found in violation of the City's parking time limits, challenged under 42 U.S.C. § 1983 alleging that such actions by the City violated the Fourth Amendment.

In *Verdun v. City of San Diego, 51 F.4th 1033 (9th Cir. 2022)*, the Majority, in a decision authored by Judge Daniel Bress, questioned whether tire chalking constitutes a search under the physical trespass theory of *United States v. Jones*, 565 U.S. 400 (2012), a Supreme

Court case involving the installation of a GPS tracking device on a vehicle to monitor movements. But assuming arguendo that it is a search, the administrative search doctrine permits the chalking. Under that doctrine, warrantless searches that are reasonable under the circumstances are permitted where not for the primary purpose of crime control. The Majority found that chalking tires is minimally intrusive and serves the "strong governmental interest in managing traffic and parking."

Judge Patrick Bumatay dissented, arguing that the city violated the Fourth Amendment under the Constitution's history and text. The majority opinion stated that the dissent provided an "unsupported and revisionist account of Fourth Amendment doctrine."

Significance**:** This decision provides guidance that California cities may use chalk to mark the tires of parked vehicles to track how long they have been parked to enforce parking restrictions in unmetered public parking spaces. However, the 9th Circuit decision creates a split with the 6th Circuit. A petition for writ of certiorari was filed on March 24, 2023

C. *Peck v. Montoya*, 51 F.4th 877 (9th Cir. 2022).

- **Non-integral participants in an excessive force claim are entitled to qualified immunity.**

Peck v. Montoya, 51 F.4th 877 (9th Cir. 2022) arises from an officer-involved shooting of a 60-year-old legally blind man. While on the phone with his contractor, the man showed his real estate agent a gun and said he wanted to kill his contractor. Hearing this over the phone, the contractor called the police. Deputies arrived, surrounded his home, and confronted him with guns drawn. The deputies learned during a prolonged stalemate - which included swearing at the officers and the man pulling down his pants and "mooning" the deputies – that the gun was in the house. The blind man -- agitated and screaming the deputies should kill him -- said "If you come in my house, I'm going to shoot you." He also asked the deputies, "What are you going to do, shoot a blind man?" Seeing movement in the house, the deputies fatally

shot him through the window. There was a triable issue of fact as to whether he grabbed his gun before they fired.

The man's surviving spouse brought an action for excessive force against the deputies under 42 U.S.C. Section 1983. The District Court denied summary judgment for all defendants, and the deputies appealed.

The Ninth Circuit held that while the deputies said the man "reached for and grabbed onto" the gun, the facts most favorable to the non-moving plaintiff on summary judgment would be that the deputies shot an unarmed and blind man. Plaintiff's expert testified that (1) the deputy's description of where the gun was located is inconsistent with where it was recovered, and (2) the decedent must have been standing at least several feet away from the gun. Therefore, on the claim of excessive force, the Ninth Circuit concluded that deputies who shot the man were not entitled to qualified immunity.

As to the three officers who did not shoot, the Ninth Circuit pointed out that "individual actions" do "not themselves rise to the level of a constitutional violation" under Section 1983 unless the official is an "integral participant" in the unlawful act (citing *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 941 (9th Cir. 2020)).

Accordingly, the Ninth Circuit reversed the District Court by finding that the non-shooting officers were not integral participants. They did not meet a liability test for officers who (1) "knew about and acquiesced in" the violation as part of a "common plan" or (2) "set in motion" acts by others that they "knew or reasonably should have known" would cause others to violate the Constitution. *Id.* at 891. The shooting was completely unplanned, and they did not have any reason to know that their actions—providing armed backup—would cause a constitutional violation. Therefore, they were not integral participants subjecting themselves to liability.

Significance: The case provides an analysis of the integral-participant doctrine in the Ninth Circuit. This doctrine subjects individual police officers to potential liability without

identifying or analyzing an officer's specific conduct. This becomes a fact-intensive analysis. The Ninth Circuit has previously come to opposite findings of liability in two cases analyzed in this decision. In *Boyd v. Benton County*, 374 F.3d 773 (9th Cir. 2004), officers executed a warrant on a residence, during which a flash-bang grenade was purportedly improperly deployed. The court rejected the contention that only the officer who threw the flash-bang grenade could be held liable. In that case, every officer was aware of the decision to use the flash-bang, did not object to it, and participated in the search operation knowing the flash-bang was to be deployed. In *Blankenhorn v. City of Orange*, 485 F.3d 463 (9th Cir. 2007), it was alleged that officers improperly placed hobble restraints on an arrestee. The Ninth Circuit found that officers who had initially tackled the suspect and those who handcuffed him could be held liable for another officer's ultimate application of hobble restraints. There, the Ninth Circuit found that those actions were instrumental in the officers' gaining control of [him], which culminated in "excessive force."

D. *Villalobos v. City of Santa Maria*, 85 Cal.App.5th 383 (2nd Dist. 2022)

- **Officers acted reasonably using less lethal force on an armed suspect where negotiations were futile, he was acting more agitated and erratically, and he presented an immediate threat of harm to himself.**

Santa Maria Police Department officer responded to a report of a "suspicious person with a knife." When they arrived at the scene, they saw Decedent standing in the middle of the road holding a knife with a long blade. The officers ordered him to drop it, but he refused. He then walked over to front of a gas station's price sign yelling at the officers and holding a knife to his throat. A detective said to Decedent, "You know it's a sin to kill yourself." Decedent responded, "I am not going to kill myself, you are going to kill me. . . . You guys are here to hurt me." The detective repeatedly told Decedent that they didn't want to hurt him.

The incident was recorded on video. Decedent appeared upset, chattered incessantly, and placed the knife to his throat as if he planned to kill himself. Spanish-speaking officers

and FBI-trained negotiators attempted to calm him and persuade him to surrender. At the 42nd minute, a sergeant orders officers to deploy less-than-lethal beanbag rounds and 40mm rubber projectiles because of Decedent's "failure . . . to converse with the negotiators to establish any meaningful dialogue." There was also a change in the Decedent's demeanor, as he appeared to look for escape routes.

The officers fired several times, striking Decedent in the torso with projectiles. He grabbed the knife with both hands and jumped up and down three times. Each time, he forcefully stabbed himself in the abdomen. He then appeared on the video to slash his throat with the knife. He then charged full speed toward the officers with a knife clearly visible in his right hand, and the officers fired several rounds of live ammunition. The cause of death was multiple gunshot wounds.

Plaintiff's expert opined that a reasonable officer acting consistent with standard police practices would have allowed the negotiation process to continue. The Court of Appeal, however, disagreed, finding that Decedent charged the officers in an apparent attempt to commit "suicide by cop." "Despite stabbing himself three times in the abdomen and slashing his throat with the knife, Decedent was unable to kill himself. So he provoked the police into killing him." Plaintiff argued that the police should have had a plan on how to proceed without the use of deadly force after the firing of less-lethal weapons, such as a police dog, rushing in with shields, deploying water cannons, or utilizing the SWAT team. But the Court of Appeal made clear that there is no precedent requiring the use of all feasible alternatives where deadly force is justified. As such, the Court of Appeal found that the trial court properly granted the defendants' motion for summary judgment.

Significance: This is a good state court decision to reaffirm the principle that law enforcement officers are not required to use less intrusive means when confronted with a situation in which deadly force could justifiably be used. As the Ninth Circuit stated in *Scott v. Henrich*, 39 F. 3d 912 (9th Cir. 1994): "Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment."

E. *Murguia v. Langdon*, 61 F.4th 1096 (9th Cir. 2023)

- **Police officer and county social worker may be liable under § 1983 for injuries caused by a third party where the officer and social worker's conduct allegedly rendered the victim more vulnerable to injury than had the employee not acted (the "state-created danger" exception to immunity)**

Jose Murguia called 911 seeking emergency mental health help for the mother of his infant twins, Heather Langdon. Sheriff's department deputies went to the couple's home and separated Murguia from Langdon and the twins. A neighbor took Langdon and the twins to a church, where the pastor called the City of Visalia police. The police who responded drove Langdon to a shelter, which in turn called the City of Tulare Police Department. The Tulare police officers called Child Welfare Services, who determined that Langdon did not present an immediate danger to the twins. Tulare police officers then drove Langdon and the twins to a motel for the night. Early the next morning, Langdon drowned the twins.

Murguia sued two of the sheriff's deputies, a Tulare police officer, and the social worker for their role in these events. The complaint alleged violation of Fourteenth Amendment substantive due process rights. The district court dismissed the complaint with prejudice for failure to state a claim. The Ninth Circuit reversed over a dissent from Judge Ikuta.

The panel majority explained that failing to prevent private parties' actions typically is not a basis for liability under the Due Process Clause, but that there are two exceptions: (1) "'when the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger (the state-created danger exception)'; and (2) 'when a special relationship exists between the plaintiff and the state (the special-relationship exception).'"

The special-relationship exception did not apply because the defendants did not have custody of the twins as that exception requires. But the state-created danger exception did apply as to some of the defendants—namely, the Tulare police officer who arranged a motel room and left Langdon isolated there with the twins, and the county social worker, who "rendered the twins more vulnerable to physical injury" by allegedly falsely telling the Tulare officer that Langdon had no history of child abuse when in fact she had a history, and Child Welfare Services had an open case against her.

In dissent, Judge Ikuta argued that the majority erred in allowing a substantive due process claim "despite the absence of any abuse of power entrusted to the state," and instead based "solely on negligence and mistake, exactly what the Supreme Court has told us not to do." Judge Ikuta also disagreed with the notion that "officials may be liable for failing to take affirmative action to protect children from a dangerous parent . . . . "

Significance: *Murguia* provides a useful primer on the special-relationship and state-created danger bases for substantive due process liability. Judge Ikuta's dissent is also notable in that, like other dissents she has written, it is written to highlight where the Ninth Circuit has deviated from Supreme Court precedent (*e.g.,*"[T]he majority makes three mistakes that conflict with the Supreme Court's doctrine and, in doing so, finally tears our state-created danger doctrine clear of its moorings.") This can bolster a Supreme Court certiorari petition by pointing to the dissent to support an argument that the Ninth Circuit is acted contrary to Supreme Court doctrine. This makes the case another one to keep an eye on for further developments.

II. SUBSTANTIVE DUE PROCESS

A. *Sinclair v. City of Seattle*, 61 F.4th 674 (9th Cir. 2023)

- **Under binding Ninth Circuit precedent, parents have a Fourteenth Amendment substantive due process right to the companionship of their adult children (an outlier position)**

Plaintiff's adult son was shot in Seattle's Capital Hill Occupied Protest (CHOP) zone, which the Seattle police withdrew from policing for a month during the 2020 George Floyd protests. Plaintiff sued the City under § 1983, alleging that it violated her Fourteenth Amendment substantive due process right to her son's companionship. Her theory was that the City's handling of CHOP created a foreseeable danger, and that the City was deliberately indifferent to the danger.

The district court dismissed the case with prejudice. The Ninth Circuit affirmed.

Writing for the Ninth Circuit panel, Judge Ryan Nelson observed that it is well-settled that parents have constitutional rights to the companionship of their *minor* children, and that binding Ninth Circuit precedent extends that right to *adult* children. (*Id.*) Accordingly, the question was whether Plaintiff could establish that (1) the City's "affirmative actions created or exposed her son to 'an actual, particularized danger [that he] would not otherwise have faced,' (2) that the injury he suffered was foreseeable, and (3) that the [City] was deliberately indifferent to the known danger." The panel found that the Plaintiff's allegations "support the strong inference that the City acted with deliberate indifference toward the dangers of permitting and encouraging establishment of the CHOP zone." But, the Plaintiff could not show a *particularized* danger to her son, distinct from the danger to anyone in the CHOP zone.

Judge Nelson also wrote a separate concurrence pointing out that most other circuits do not recognize a substantive due process right to the companionship of adult children, and arguing the Ninth Circuit to revisit en banc its past recognition of such a right.

Significance: *Sinclair* highlights an area of potential exposure for public entities in the Ninth Circuit that doesn't exist in other circuits—i.e., liability to parents for loss of companionship of their adult children. Judge Nelson's concurrence is an effort to change the law, either via en banc review or by drawing the attention of the U.S. Supreme Court. This is an area to keep an eye on.

III. CIVIL RIGHTS – FIRST AMENDMENT

A. *Yim v. City of Seattle*, 63 F.4th 783 (9th Cir. 2023)

- **A city ordinance prohibiting landlords from inquiring into tenants' or potential tenants' criminal background violated the landlords' First Amendment speech rights—but the ordinance's prohibition on landlords *acting* based on criminal history information did not violate the landlords' Fourteenth Amendment substantive due process.**

The City of Seattle enacted the Fair Chance Housing Ordinance, which prohibits landlords from inquiring about tenants' criminal history and from taking adverse action, such as denying tenancy, based on that information. Landlords and a trade association sued the City, alleging that the ordinance violated their First Amendment and substantive due process rights. The district court upheld the ordinance. The Ninth Circuit reversed in an opinion holding that there was no substantive due process violation, but that the ordinance did impermissibly impinge on landlords' free speech rights.

First Amendment. The panel opinion applied the "intermediate scrutiny" test applicable to commercial speech. (The panel punted on whether the regulated speech might be non-commercial, triggering strict scrutiny, since the result would have been the same under either test.) Under the intermediate scrutiny standard, courts analyze whether the regulated speech is misleading, whether the asserted government interest is substantial, whether the regulation directly advances the government interest, and whether it is no more extensive than necessary to serve that interest. The panel summarily concluded that the regulated speech is not

misleading or illegal, and that the City's interest in reducing barriers to housing and the use of criminal history as a proxy for racial discrimination—are substantial. It also found that the ordinance directly advanced the City's interests, and that an exception for federally assisted housing did not undermine its efficacy. But, the ordinance failed the final prong of the intermediate scrutiny test: It was not narrowly drawn to achieve the City's goals. The Ninth Circuit reasoned that other jurisdictions' ordinances that are designed to achieve the same goals don't foreclose *all* inquiry into criminal history; they allow landlords to consider at least some criminal history. That other jurisdictions' ordinances "appear to meet [the City's] housing goals but [are] significantly less burdensome on speech" indicates that the City's inquiry provision is not narrowly tailored.[1]

Substantive due process. The panel also considered whether the ordinance's "no adverse action" prong violated landlords' Fourteenth Amendment substantive due process right to exclude people from their property. The panel concluded that there is no fundamental right to exclude, and therefore the ordinance only had to pass rational basis review. Because there was a rational basis for the ordinance (reducing barriers to housing and reducing racial discrimination), it "easily" survived Fourteenth Amendment review.

Judge Wardlaw and Judge Bennett each wrote separate opinions to explain their differing views on whether the regulated speech was commercial (Judge Wardlaw) or non-commercial (Judge Bennett). Neither viewed the answer to that question as impacting the outcome of the appeal. Judge Gould, however, *would* have reached a different outcome: He wrote separately to explain his view that the no-inquiry provision is narrowly tailored to the government's interest, and therefore constitutional.

Significance: The opinion notes that other cities, including some in California, have adopted ordinances similar to Seattle's, or variations on Seattle's. The *Yim* opinion provides a

[1] The panel expressly did *not* opine on the constitutionality of those other jurisdictions' ordinances.

framework for reviewing existing ordinances to assess whether they are constitutional, and for any cities drafting new ordinances in this area.

B. *No on E v. Chiu*, 62 F.4th 529 (9th Cir. 2023)

- **Plaintiffs failed to establish reasonable likelihood of establishing First Amendment violation in City ordinance requiring "secondary-contributor" disclosures on political ads by independent expenditure committee.**

Under a San Francisco ordinance, committees spending money to support or oppose a candidate for City elective office or City measure must disclose not only the name of the top contributors to the committee, but also, where those contributors are themselves committees, the name of and dollar amount contributed by *those* committees' top contributors. The information must appear in print, audio, and video ads.

An independent expenditure committee ("No on E"), the committee's founder, and a No on E contributor whose major donors would be subject to the disclosure requirement, sued to invalidate the ordinance on First Amendment grounds. The district court denied their motion for a preliminary injunction. The Ninth Circuit affirmed.

The Ninth Circuit first considered its jurisdiction, and concluded that the appeal was not moot despite the election having occurred, because the election-related controversy was capable of repetition yet evading review. Turning to the merits, the Ninth Circuit agreed that the plaintiffs did not establish a likelihood of success on the merits. Compelled disclosure requirements are reviewed under an "exacting scrutiny" standard, which requires a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." (Internal quotation marks omitted.) The secondary-contributor requirement passed that test. The requirement is substantially related to the City's compelling interest in "informing voters about who funds political advertisements." Any burden on the Plaintiffs' First Amendment rights was modest, especially given the City's offer that it would not enforce

the ordinance with respect to print ads that were 5"x5" or smaller, or to digital and audio advertisements of 60 seconds or less. And the requirement was sufficiently narrowly tailored to the interest in information disclosure.

Significance: *No on E* provides a comprehensive overview of the First Amendment analysis that applies to election disclosure requirements. Although Plaintiffs' challenge to the ordinance here failed, the court noted a distinction between that is worth taking into account when drafting this type of ordinance: Disclaimers that consume the *majority* of the space/time in an ad may be deemed an impermissible burden on free speech, whereas disclaimers consuming less than 40% of the space/time are likely not unduly burdensome. Specifying that disclaimers are required only on ads of a certain size or length, such that they don't consumer the majority of the advertisement, thus, may help an ordinance survive a constitutional challenge.

C. *Spirit of Aloha Temple v. County of Maui*, 49 F.4th 1180 (9th Cir. 2022)

- **Church could bring facial challenge to county's zoning scheme, and zoning scheme was an impermissible prior restraint on religious expression.**

A non-profit and its director applied to the County of Maui for a special use permit to hold "weekly church service[s]," "sacred programs, educational, inspirational, or spiritual including Hawaiian cultural events, and spiritual commitment ceremonies such as weddings" on land the director owned. The County's zoning scheme provides five guidelines for considering a church or religious institution's special use permit application, but doesn't specify which ones *must* be considered or are dispositive. The planning commission denied the application for failure to satisfy two of the guidelines, even though another guideline was satisfied.

Plaintiffs sued the County, alleging—among other things—that the County zoning scheme violates the First Amendment's prohibition on prior restraints. They asserted this both

as a facial challenge (i.e., to the regulations as written) and an as-applied challenge. The district court granted summary judgment for the County on that claim. The Ninth Circuit reversed.

Under established case law, plaintiffs can bring facial challenges to laws aimed at expressive conduct, but not to laws of general application without a close connection to expression. The Ninth Circuit held that a facial challenge was permissible here because the zoning scheme regulates use of property for expressive conduct, namely, religious activity. Turning to the merits, the Ninth Circuit held that the zoning scheme was an unconstitutional prior restraint. Laws cannot condition enjoyment of a constitutional right on the "uncontrolled will of an official"—for example, by requiring a permit that can be granted or withheld as a matter of discretion. The County scheme did just that. As written, it allowed the planning commission to deny a permit based on any of the five guidelines, including "whether '[t]he proposed use would not adversely affect surrounding property.'" That "adversely affect" guideline is not objective; it allows "a limitless range of subjective factors," amounting to "unbridled discretion." Although some of the other guidelines were more objective, the scheme did not *require* that they be considered or make them dispositive. They thus did not save it. Because the regulation "gives officials unbridled discretion to deny a permit [and] limits expressive conduct," it violates the First Amendment.

Judge Clifton dissented in part. He "reluctantly" agreed that the plaintiffs had standing to bring a facial challenge under binding precedent, but he disagreed that the facial challenge succeeded. In his view, "[w]hen the procedural protections afforded by the permit scheme are properly accounted for, the challenged guideline sufficiently fetters government decisionmakers."

Significance: In light of *Spirit of Aloha*, consider reviewing your local zoning provisions to ensure that, to the extent they impact expressive conduct, they provide objective criteria and cabin decisionmakers' discretion.

IV. MUNICIPAL TORT LIABILITY

A. *Hacala v. Bird Rides, Inc.*, _ Cal.App.5th __, 2023 WL 2851729 (2023)

- **City immune from liability to pedestrian injured by tripping over electric scooter.**

The family of a pedestrian who tripped over a Bird scooter parked on a City of Los Angeles sidewalk sued the City and Bird for negligence and related claims. The trial court sustained both defendants' demurrers without leave to amend. The Court of Appeal affirmed the dismissal as to the City. It reversed as to Bird, over a dissent.

Plaintiffs' claims against the City were premised on City employees allegedly failing to monitor Bird's compliance with the rules imposed in Bird's City-issued operating permit. The Court of Appeal rejected that theory in light of Government Code section 821, which immunizes public entities' employees from liability for injuries caused by a failure to enforce an enactment, and section 815.2, under which a public entity is not liable for an injury if its employee is immune from liability. The appellate court rejected an argument that enforcing the permit requirements was a *ministerial* task, and therefore not within section 821 immunity: The permit terms gave the City *discretion* to remove improperly parked scooters and to revoke Bird's permit, but did not *require* the City to do so.

The Court of Appeal also held that the plaintiffs could not assert a dangerous condition claim against the City: Sidewalks aren't defective or dangerous simply because third parties may improperly park scooters on them in a way that could harm others.

By contrast, the panel majority held that plaintiffs could pursue negligence claims against *Bird* for failure to exercise ordinary care in managing its scooters—specifically, on theories that it knew customers were likely to leave scooters on sidewalks in a manner that posed a tripping hazard but failed to locate and remove such scooters, and to install "always-on" lights on its scooters to make them more visible. The majority also held that plaintiffs could pursue a public nuisance claim against Bird. Justice Lavin dissented on these points; he would have affirmed the demurrer as to both Bird and the City.

***Significance*:** Electric scooters have become part of the urban landscape in many cities. *Hacala* gives cities a strong defense to tort claims by pedestrians injured by parked scooters, especially where the scooter company is operating under a permit from the city, and the permit gives the city discretion as to enforcement of permit conditions.

B. *Greenwood v. City of Los Angeles*, 89 Cal.App.5th 851 (2023)

- **Under Government Code section 855.4, a city is immune from claims based on failure to remedy dangerous condition on public property (typhus).**

A deputy city attorney sued the City of Angeles on a dangerous condition theory, alleging that accumulated trash and other items outside her office caused a typhus outbreak and caused her to become ill. The City demurred based on Government Code section 855.4, which provides that public entities aren't liable for (a) injuries "resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community if the decision whether the act was or was not to be performed was the result of the exercise of discretion vested in the public entity or the public employee, whether or not such discretion be abused," or (b) injuries "caused by an act or omission in carrying out with due care a decision described in subdivision (a)." The trial court sustained a demurrer, and the Court of Appeal affirmed.

The Court of Appeal found it "apparent from the face of the complaint" that the City's decision not to take steps to stop the spread of typhus next to City Hall was an exercise of discretion. The court rejected the plaintiff's argument that section 855.4 immunity *also* required that the City acted with the due care referenced in section 855.4, subdivision (b): Subdivisions (a) and (b) are distinct bases for immunity, so immunity attaches if *either one* applies.

Justice Bendix wrote separately to question a prior decision, *Wright v. City of Los Angeles* (2001) 93 Cal.App.4th 683, to the extent that it holds that section 855.4 immunizes

public entities from any disease-related injury occurring on public property—Justice Bendix would distinguish between a governmental response to a disease outbreak (covered by section 855.4) and a public entity's responsibility to keep its facilities safe and sanitary. She nonetheless agreed that the demurrer was properly sustained here because the allegations pertained to a government response to a disease outbreak.

Significance: Given the number of camps of unhoused people in urban areas these days, cities are likely to be seeing more of this type of claim. Section 855.4 immunity should be on the radar screen of any attorney defending these claims.

C. *Malear v. State of California*, 89 Cal.App.5th 213 (2023)

- **The doctrine of substantial compliance can excuse a plaintiff's filing an initial complaint that does not comply with the Government Claims Act, if the plaintiff files a First Amendment Complaint that does comply with Claims Act requirements before litigation begins in earnest.**

A San Quentin prisoner who contracted COVID-19 sought to sue the State for transferring prisoners to San Quentin, blaming the transferees for a COVID-19 outbreak.

Plaintiff presented a Government Claims Act claim to the defendants on July 15, 2020. He filed his complaint on July 27, 2020, *before* defendants notified him of whether his claim was rejected. Three months later, after his claim was rejected, Plaintiff filed an amended complaint that alleged he'd complied with the claims presentation requirement. He then served the First Amended Complaint, and a copy of the original complaint, on the defendants. The trial court sustained a demurrer on the ground that Plaintiff had not complied with the Claims Act presentation requirements because he sued before receiving notice that his claim was rejected.

The Court of Appeal reversed, holding that Plaintiff had substantially complied with the Claims Act presentation requirements. Although his initial complaint was premature, his

superseding First Amended Complaint fulfilled the purposes of the Claims Act: "[F]or practical purposes, the lawsuit here did not begin in earnest until defendants were served with Malear's first amended complaint"—i.e., until after defendants had considered and rejected the claim as presented. Defendants, thus, had an opportunity to consider the claim before actively entering litigation.

Malear disagreed with *Lowry v. Port San Luis Harbor District* (2020) 56 Cal.App.5th 211, which read *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983 as eliminating the substantial compliance doctrine for prematurity defects (and on which the trial court had relied in sustaining the demurrer). *Malear* read *DiCampli-Mintz* more narrowly than*Lowry: Malear* construed *DiCampli-Mintz* as only rejecting substantial compliance regarding who a claim must be *delivered to*—i.e., the facts presented in *DiCampli-Mintz. DiCampli-Mintz* concluded that applying the substantial compliance rule in that context would have been inconsistent with the Claim Act's purpose and would have created uncertainty in the claims presentation process. *Malear* reasoned that there were no similar concerns here.

Malear emphasized the "narrow[ness]" of its own holding: "[W]e simply hold that when a lawsuit is prematurely filed before the actual or deemed denial of a government claim, application of the substantial compliance doctrine is generally appropriate if the original complaint is not served before an amended complaint alleging the requisite denial of a government claim is filed in compliance with Code of Civil Procedure section 472."[2]

Significance: *Malear* creates a split with *Lowry* as to *DiCampli-Mintz*'s impact on substantial compliance arguments in Claims Act presentation cases. Unless and until the Supreme Court takes up the issue, in any case where premature complaint filing is at issue,

[2] Note that only *part* of the *Malear* decision was certified for publication. The Claims Act discussion is in the published portion of the opinion, and therefore citeable/precedential. Later sections of the opinion addressing the merits of the plaintiff's claim and the applicability of California Emergency Services Act immunity are unpublished, and therefore not citeable or precedential.

there will be room to argue in the lower courts as to which of the decisions is closer factually, and which is more persuasively reasoned.

D. *California-American Water Company v. Marina Coast Water District*, 86 Cal.App.5th 1272 (2022)

- **Public entities can impliedly or expressly waive their right to require Government Claims Act compliance; a plaintiff claiming waiver does not need to establish detrimental reliance.**

The Monterey County Water Resources Agency, California-American Water Company ("Cal-Am"), and the Marina Coast Water District ("Marina"), got into a dispute over a water supply project. Marina is a public agency entitled to the protections of the Claims Act.

Cal-Am presented a Claims Act claim to Marina, contending that Marina was responsible for causing the water supply project to fail. Cal-Am later sued Marina. Marina asserted a Claims Act defense, arguing that Cal-Am's Claims Act claim was substantively deficient. Cal-Am opposed the defense, arguing that Marina impliedly and/or expressly waived its right to require Claims Act compliance by (1) entering into an agreement with an alternative dispute resolution procedure that superseded the Claims Act, and (2) Marina's counsel's actions and statements. The trial court granted summary judgment for Marina. The Court of Appeal reversed, finding triable fact issues as to both implied and express waiver. In so holding, it rejected Cal-Am's argument that implied waiver requires the plaintiff to prove that it detrimentally relied on the alleged wavier; the Court of Appeal held that implied waiver turns solely on whether the waiving party's conduct was """so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.""" (Opinion 21-22.)

***Significance*:** Various statutes provide that public entities can lose the benefits of certain Claims Act defenses if they do not provide timely notice with statutorily-prescribed language, and send it to the correct place. But *Cal-Am* appears to be the first precedential

decision recognizing that entities also may impliedly waive their right to require compliance with Claims Act presentation requirements in other ways, including through statements by their lawyers or by entering into contracts with other dispute resolution procedures. The availability of an implied waiver argument is likely to make Claims Act presentation-requirement defenses a tougher ground for demurrer or summary judgment, especially given that a plaintiff asserting implied waiver does not have to prove detrimental reliance.

E. *Marin v. Department of Transportation*, 88 Cal.App.5th 529 (2023)

- **The *Privette* doctrine shielded a public entity from liability for an injury to its contractor's employee, where the public entity did not exercise its retained control in a way that affirmatively contributed to the employee's injury.**

A construction worker employed by a Department of Transportation contractor was killed on a highway owned and operated by the Department, when a drunk driver entered closed lanes of the work site and hit him. His family sued the Department for creating a dangerous condition on public property in violation of Government Code section 835, and vicarious liability for its employees' negligence under Government Code section 815.2.

The Department moved for summary judgment, arguing among other things that *Privette v. Superior Court* (1993) 5 Cal.4th 689 barred the suit because the Department had delegated workplace safety to its subcontractor. Under *Privette* and its progeny, one who hires an independent contractor is not liable for injuries to the contractor's employees, unless the hirer retains control over worksite safety, and its exercise of retained control affirmatively contributed to the employee's injuries. (5 Cal.4th at p. 702; *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202, 215; *Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 276.) This requires, among other things, a showing that the hirer *induced* the injury-causing conduct or its exercise of retained control contributes to the injury *independently* of any contribution by the contractor. (*Sandoval, supra*, 12 Cal.5th at p. 277.)

The trial court granted summary judgment, and the Court of Appeal affirmed.

The appellate court first addressed the trial court's evidentiary rulings—specifically, the trial court's summarily sustaining 31 of the Department's 32 evidentiary objections in a blanket ruling with no explanation. The trial court's approach left no way of knowing whether the court had accepted all the grounds offered for each objection or just one. Without a "meaningful basis" to review the trial court's reasoning under the abuse-of-discretion standard usually applicable to evidentiary rulings, the appellate court "g[a]ve plaintiffs the benefit of the situation and consider[ed] all the evidence in the record" as if the Department had waived its objections.

Turning to the merits, the appellate court reasoned that the Department's contract with its independent contractor expressly delegated matters of safety at the project site. That the contract gave the Department's residential engineer the final decision on manner of performance of the work "does not suffice to raise a triable issue as to whether the [Department] retained control over safety at the project site and actually exercised this retained control in such way as to affirmatively contribute to the decedent's death." Nor did any of Plaintiffs' other evidence suffice. That the Department could have authorized a lane closure at most proved that the Department was aware of an unsafe practice and failed to exercise retained control to correct it. And evidence that the Department expected its contractor's employees to learn and follow safety policies is not evidence that the Department both retained control and exercised its retained control in a way that affirmatively contributed to the injuries. Because it was undisputed that the Department did not "direct the means or methods of decedents' work on the day in question or instruct his employer on how to provide for his or his coworkers' safety, summary judgment was appropriate."

***Significance*:** *Marin* provides a useful review of the *Privette* doctrine regarding when a hirer—including a public entity—may and may not be liable for injuries to a contractor's employee. The contours of the doctrine may be helpful in deciding how to structure relationships with contractors, and in assessing potential liability if an injury occurs. *Marin*'s

decision to treat the Department's evidentiary objections as waived also reinforces the importance of securing reasoned rulings on objections at the summary judgment stage whenever possible. One way to increase the likelihood of obtaining specific, reasoned rulings is to limit the number of objections you make, by paring down to only the strongest, most important ones.

F. *Fajardo v. Dailey*, 85 Cal.App.5th 221 (2022)

- **Size alone does not determine whether rut in sidewalk presents a dangerous condition; defendant seeking summary judgment has the burden of presenting admissible evidence on the size of a rut and on the surrounding circumstances.**

Plaintiff allegedly tripped and fell on an asphalt patch between two sidewalk slabs while on a walk around his neighborhood. He sued the landowner whose property the sidewalk abutted. The trial court granted summary judgment for the landowner, arguing that the sidewalk condition was a trivial defect. The trial court granted the motion. The Court of Appeal reversed.

The Court of Appeal began with an overview of sidewalk defect liability: Although property owners are required to maintain their land in reasonably safe condition, "a property owner is not liable for damages caused by a minor, trivial, or insignificant defect on its property." A defect may be trivial as a matter of law—and a case susceptible to summary judgment—where reasonable minds could only conclude that there was no substantial risk of injury. But summary judgment is inappropriate where the evidence would permit reasonable minds to differ on whether the defect was dangerous. The size of the crack is relevant, but not definitive for these purposes: Courts must consider any circumstances that "'might make the defect more dangerous than its size alone would suggest . . . .'"

Applying these standards, the *Fajardo* court found that the defendant failed to meet his moving burden of proving that the defect was trivial as a matter of law. Although the

defendant claimed that the rise was less than one inch, her expert's declaration to that effect did not explain how the expert knew that. It thus had no evidentiary value. And the defendant did not provide an admissible photo or other evidence of the asphalt patch *at the time of the accident*.

Fajardo further held that even if the defendant *had* met her burden, the plaintiff's evidence created a triable issue of material fact on the height differential. That evidence included an expert declaration that the rise was more than an inch high, supported by admissible photographs. It also included a detailed photo of the asphalt patch two days after the plaintiff's fall, showing that the patch "appears to have a rough texture, an uneven surface, and a jagged edge where it meets the concrete." Based on this evidence, "[r]easonable minds could differ about whether the condition of the asphalt patch, combined with the one- and one-half inch height differential, 'presented a substantial risk of injury.'"

Significance*: Fajardo* provides a clear discussion of the trivial defect doctrine in the context of sidewalk accidents, and illustrates that it is not enough for a defendant to submit evidence of the size of a crack or rise—the defendant must present evidence of "all" the surrounding circumstances. *Fajardo* also drives home the importance of dotting i's and crossing t's when it comes to authenticating evidence: Explain how the declarant knows the information asserted, when photos were taken and by whom, etc.

G. *Flores v. City of San Diego, 83 Cal.App.5th 360 (2022)*

- **Because City's vehicle pursuit policy training included fewer minutes of instruction than required by POST standards, City was not entitled to Vehicle Code section 17004.7 immunity from claims based on a death in a motorcycle death while being pursued by police.**

Plaintiffs whose son/boyfriend died in a motorcycle crash while being pursued by police sued the City of San Diego for wrongful death and negligence. The trial court granted summary judgment for the City based on Vehicle Code section 17004.7. Section 17004.7

immunizes an agency from liability for collisions involving vehicles being pursued by peace officers, if the agency does three things: (1) *adopts* a written policy on vehicle pursuits that complies with the section 17004.7, (2) *promulgates* a policy that complies with section 17004.7, and (3) *trains* officers on the policy in compliance with section 17004.7.

The Court of Appeal reversed. Although the City had *adopted* a compliant vehicle pursuit policy, it failed to prove as a matter of law that it adequately *trained* officers on the policy.

As context: Section 17004.7, subdivision (b)(1) requires "regular and periodic training on an annual basis for[] vehicular pursuits . . . ." Section 17004.7, subdivision (d) defines "regular and periodic training" to mean "annual training that shall include, at a minimum, coverage of each of the subjects and elements set forth in subdivision (c) and that shall comply, at a minimum, with the training guidelines established pursuant to Section 13519.8 of the Penal Code." Penal Code section 13519.8 authorizes the Commission on Peace Officer Standards and Training (POST Commission) to develop "guidelines" for creating vehicle pursuit policies, and "standards and objectives" for training regarding those policies. POST Commission Regulation 1081 requires a minimum of one hour of annual training.

Flores held that Regulation 1081's training requirements are "training guidelines established pursuant to" section 13519.8, and therefore that an agency must adhere to them in order to qualify for section 17004.7 immunity. It rejected the City's argument that Regulation 1081 is inapposite because section 17004.7 refers to "guidelines" established pursuant to section 13519.8, and the POST Commission developed Regulation 1081 under section 13519.8's authorization to develop "standards and objectives" (not "guidelines") for training. The court concluded that the Legislature "used the terms 'guidelines' and 'standards' interchangeably in the statutory scheme related to vehicle pursuit policies," and that section 17004.7 requires compliance with "any vehicle pursuit training regulations established by the POST Commission" pursuant to section 13519.8.

Flores also rejected an argument that the POST Commission exceeded its authority in setting minimum time standards for training. Section 13519.8 delegates to the POST Commission the creation of courses, standards, and objectives for training. Flores concluded that the Commission reasonably interpreted "Standards" to include "the minimum amount of time the training should comprise," to help ensure meaningful and effective training.

Flores's conclusion that section 17004.7 requires compliance with Regulation 1081's minimum time standard meant that to be entitled to summary judgment, the City had to present undisputed facts demonstrating that it provided at least one hour of vehicle pursuit policy training in the year before the incident. The City failed to make that showing: The City's training video for its vehicle pursuit policy was just under 26 minutes long, and there was no evidence of vehicle pursuit policy training beyond the video. Accordingly, the trial court erred in granting summary judgment.

Significance: Flores highlights that it's not enough merely to adopt a vehicle pursuit policy—to secure section 17004.7 immunity, make sure that officers are trained on the policy for at least an hour every year.

H. *Thompson v. County of Los Angeles*, 85 Cal.App.5th 376 (2022)

- **Liability under Government Code section 815.6 must be based on an enactment that creates an obligatory duty, not a discretionary duty.**

Los Angeles County social workers concluded that plaintiffs' young son was at risk of harm and took him into protective custody. After a juvenile court released the child to his parents, they sued for negligence per se and intentional infliction of emotional distress. The trial court sustained the County's demurrer, concluding that plaintiffs did not allege a mandatory duty that would overcome Government Code section 815's governmental immunity. The Court of Appeal affirmed.

The appellate court observed that plaintiffs appeared to be relying on Government Code section 815.6, which says that "Where a public entity is under a mandatory duty imposed by an

enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." The court explained that liability under section 815.6 requires "an enactment that creates an obligatory duty," not a "discretionary or permissive duty." Put another way, "[i[t is not enough that an enactment requires a public entity or officer to perform a function if the function itself involves the exercise of discretion."

The only duty that plaintiffs identified was a policy manual requirement that social workers make "'necessary collateral contacts' with people 'having knowledge of the condition' of children subject to allegations." The appellate court held that this provision is discretionary, not mandatory: Many people have "knowledge" of a child's condition, and the County exercises discretion in deciding which of them are "necessary" contacts. Because the provision requires discretion, it "does not create a mandatory duty" triggering liability under section 815.6.

Significance: *Thompson* highlights the broad immunity bestowed on public entities, and the high bar that plaintiffs face in attempting to identify a mandatory duty that would defeat immunity under Government Code section 815.6. The opinion would support an argument that arguable violation of a requirement that vests discretion in public officials is not sufficient to create liability.