



Municipal Tort and Civil Rights Litigation Update

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MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE
FOR
THE LEAGUE OF CALIFORNIA CITIES
CITY ATTORNEYS SPRING CONFERENCE
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I. CIVIL RIGHTS—LAW ENFORCEMENT LIABILITY

A. *Rivas-Villegas v. Cortesluna*, __U.S.__, 142 S.Ct. 4 (2021)

- **Officer entitled to qualified immunity from excessive force claim arising from placing knee against suspect's back during handcuffing.**

In *Rivas-Villegas v. Cortesluna*, __U.S.__, 142 S.Ct. 4 (2021) Union City police officers responded to a 911 call reporting that a woman and her two children were barricaded in a room for fear that Ramon Cortesluna, the woman's boyfriend, was going to hurt them with a chain saw. Officer Rivas-Villegas knocked on the door and commanded the Cortesluna to come out. Cortesluna came out, carrying a metal tool in one hand, with a large knife visible in his pocket. Cortesluna was ordered to drop the tool and raise his hands, which he did, only to start to lower his hands towards the knife, prompting an officer to shoot him twice in rapid succession with beanbag rounds. Rivas-Villegas then pushed Cortesluna to the ground, and straddled Cortesluna, placing his right foot on the ground next to Cortesluna's right side with his right leg bent at the knee. He placed his left knee on the left side of Cortesluna's back, near where Cortesluna had a knife in his pocket. He raised both of Cortesluna's arms up behind his back for approximately eight seconds, as another officer handcuffed the suspect.

Cortesluna sued the officers, asserting that the two beanbag rounds, as well as Officer Rivas-Villegas knee on his back, constituted excessive force in violation of the Fourth Amendment. The district court granted summary judgment to the officers based on qualified immunity, but the Ninth Circuit reversed in part, and affirmed in part in a 2-1 decision. A majority concluded that there was no liability for use of the beanbag rounds, but that Officer Rivas-Villegas's placement of his knee against plaintiff's back could constitute excessive force. The majority held that there was no qualified immunity,

because in *LaLonde v. County of Riverside*, 204 F. 3d 947 (9th Cir. 2000) the court had held that an officer could be held liable for excessive force for digging a knee into the back of a prone, compliant suspect, causing severe injuries.

The Supreme Court reversed in a per curiam opinion. The Court held that Rivas-Villegas was entitled to qualified immunity, because no clearly established law would have suggested that placing his knee against Cortesluna's back could give rise to an excessive force claim. The Court noted that even assuming that Circuit Court opinions could clearly establish the law, the *LaLonde* case was not sufficiently similar to the situation confronted by Rivas-Villegas. In *LaLonde*, officers were responding to a mere noise complaint, whereas here they were responding to a serious alleged incident of domestic violence possibly involving a chainsaw. Moreover, LaLonde was unarmed. Cortesluna, in contrast, had a knife protruding from his left pocket for which he had just previously appeared to reach. Further, here video evidence shows that Rivas-Villegas placed his knee on Cortesluna for no more than eight seconds and only on the side of his back near the knife that officers were in the process of retrieving. LaLonde, in contrast, testified that the officer deliberately dug his knee into his back when he had no weapon and had made no threat when approached by police.

Rivas-Villegas is important for several reasons. First, after two years without an opinion granting qualified immunity to police officers, it represents a clear statement by the Court that the doctrine of qualified immunity remains strong, notwithstanding greater public scrutiny of the doctrine and widespread academic criticism. Second, from a practical standpoint, the case reaffirms that because of the fact bound nature of excessive force claims, a plaintiff must cite case law with highly analogous facts, in order to overcome qualified immunity. Finally, the case should be helpful in defending use of force case arising from relatively minor applications of force.

B. *City of Tahlequah v. Bond*, __U.S.__, 142 S.Ct. 9 (2021)

- **Officers entitled to qualified immunity for shooting suspect threatening them with a hammer.**

City of Tahlequah v. Bond, __U.S.__, 142 S.Ct. 9 (2021) arose from a 911 call to City of Tahlequah Police by a woman who reported that her ex-husband was intoxicated and refusing to leave the premises. Three officers arrived and briefly spoke with the agitated ex-husband, who refused to submit to a pat down search and instead walked back into the garage. The officers followed, keeping a distance of at least seven feet and calling for him to stop and come back. He instead grabbed a hammer from a tool rack and raised it as if he was going to swing it like a bat, prompting the officers to draw their weapons. Ignoring commands to drop the hammer, he then moved to the side to give himself unobstructed access to one of the officers, and brought the hammer back as if he was going to throw it. The officers fired, killing him.

The ex-husband's estate sued the officers and the City for excessive force. The district court granted the defendants' motion for summary judgment, finding that the use of force was reasonable, and that in any event the officers were entitled to qualified immunity given the absence of clearly established law addressing a similar factual scenario. However, the Tenth Circuit reversed. The court noted that under Tenth Circuit case law, an officer can be held liable for creating the circumstances that ultimately caused the need to use force, and here a jury could find that the officers improperly prompted the encounter by following the suspect into the garage. The panel also held that immunity was not available because it was clearly established by Tenth Circuit authority that officers could be held liable for prompting the need to use force.

The Supreme Court reversed in a per curiam opinion. The Court found it unnecessary to determine whether the force was excessive, because it concluded that the officers were entitled to qualified immunity. The Court noted that none of the cases cited

by the Tenth Circuit as clearly establishing the law, was even remotely similar to the situation presented here.

Like *Cortezluna*, *City of Tahlequah* is important in that it reaffirms the Supreme Court's commitment to applying the clearly established law test to excessive force cases with rigor.

C. ***Thompson v. Clark*, __U.S.__, 142 S.Ct. 1332 (2022)**

- **Malicious prosecution claim falls within Fourth Amendment and only requires plaintiff to show favorable termination of criminal proceeding, not indication of innocence.**

Thompson v. Clark, __U.S.__, 142 S.Ct. 1332 (2022) addresses a long-standing open issue in section 1983 actions: Is there a constitutional claim for malicious prosecution, and if so, what are its elements?

In *Thompson*, the plaintiff was accused of child abuse by an unstable relative, and refused to cooperate with officers when they came to investigate. Examination of the child disclosed no signs of abuse, though plaintiff was arrested, charged with obstruction and detained in custody for two days. The charges were dropped prior to trial with no statement by either a prosecutor or judge as to why.

Plaintiff sued for malicious prosecution under the Fourth Amendment. The district court dismissed the action, noting that under Second Circuit authority plaintiff could only show a favorable termination of the criminal proceeding if the record revealed that charges were dropped because he was innocent, and there was no such indication here. The Second Circuit affirmed.

The Supreme Court reversed, 6-3. Writing for the majority, Justice Kavanaugh observed that while the Supreme Court had never articulated a constitutional basis for a malicious prosecution claim, the lower federal appellate courts had come to a consensus

that the Fourth Amendment provided a basis for the claim. The Court therefore held that such claims fell within the Fourth Amendment. Looking to the elements of malicious prosecution as they existed in 1871 when section 1983 was enacted, Justice Kavanaugh noted that for purposes of showing a favorable termination, a plaintiff need only show that he was not convicted. As a result, the plaintiff here did not need to show that any dismissal was the result of innocence –it was enough that the charges had been dismissed.

Thompson is an extremely significant case, as it is the first time the Supreme Court has expressly recognized, and articulated a constitutional claim for malicious prosecution. In some respects, it may not have an impact in many Circuits which had already recognized such claims. However, as Justice Alito noted in his dissenting opinion, joined by Justices Thomas and Gorsuch, the Court’s opinion leaves many questions open and may spawn greater confusion. For example, the Court does not explain why the Fourth Amendment supports such a claim, instead deferring to the consensus of the lower courts. The Fourth Amendment requires a “seizure.” Is filing a criminal complaint, without an arrest, the equivalent of a seizure? Malicious prosecution requires a showing of malice, while subjective intention has no relevance to Fourth Amendment seizures. Does a constitutional malicious prosecution claim do away with the malice requirement, or is subjective motivation now part of some Fourth Amendment claims? *Thompson* will clearly spawn additional litigation to resolve these questions.

D. *Estate of Aguirre v. County of Riverside*, 29 F.4th 624 (9th Cir. 2022)

- **Officer not entitled to qualified immunity for shooting suspect who was holding a baseball bat sized stick, because suspect did not present immediate threat of harm to the officer or bystanders.**

In *Estate of Aguirre v. County of Riverside*, 29 F.4th 624 (9th Cir. 2022) Sergeant Ponder of the Riverside Sheriff's Department received radio reports that someone in Lake Elsinore, California, was destroying property with a baseball bat-like object, and had threatened a woman with a baby. Arriving at the scene he confronted the suspect, who was holding a baseball bat sized stick and waving it about. After unsuccessfully attempting to pepper spray the suspect, the officer ordered him to drop the stick, and when he failed to do so, drew his firearm. Believing he was being attacked, the officer fired six shots from approximately 15 feet away, ultimately killing the suspect. The suspect's estate filed suit, asserting that the use of force was excessive, and violated the Fourth Amendment. The district court denied the officer's motion for summary judgment based on qualified immunity and the officer appealed.

The Ninth Circuit affirmed. The court held that there was a material issue of fact as to whether the suspect posed a threat to the officer or bystanders at the time the shots were fired. While some witnesses testified that the suspect was holding the stick as if to swing it at the officer, others testified that the suspect was holding the tip of the stick downward in a non-threatening manner. In addition, two of the six shots had entered through the suspect's back, indicating that he was turning away from the officer. The panel noted that because the underlying constitutional violation was "obvious" it was not necessary to identify closely analogous case law, but nonetheless observed that prior case law did establish that officers could not use deadly force against a suspect who was merely holding a weapon, and posed no immediate threat to the officer or others.

Estate of Aguirre is a troubling decision, in that the Ninth Circuit’s suggestion that the underlying constitutional violation was “obvious,” will no doubt be cited by plaintiffs opposing motions for summary judgment in an attempt to avoid having to point to clearly established law in order to escape application of qualified immunity. Moreover, the fact that the panel saw a need to nonetheless identify existing “clearly established law” belies the court’s characterization of the violation as “obvious.” In addition, the court’s analysis of existing case law is at a very high level of generality, with no discussion of specific factual similarities and is precisely the approach the Supreme Court has repeatedly decried.

E. *Williamson v. City of National City*, 23 F.4th 1146 (9th Cir. 2022)

- **Officers entitled to qualified immunity for use of minimal force against protestor who passively resists commands.**

After six protesters disrupted a city council meeting and refused to leave, police officers were summoned to remove them. Per their advance plans, the protestors went limp and required the officers to lift and carry them out of the meeting. One of the protestors filed suit for excessive force under 42 U.S.C. section 1983, as well as under the Bane Act, asserting she suffered a torn rotator cuff as a result of the officers having pulled on her arm while carrying her out of the meeting. The district court denied summary judgment based on qualified immunity, finding that the severity of the plaintiff’s injury indicated the force might have been excessive. The officers appealed.

The Ninth Circuit reversed, finding that the application of force was reasonable as a matter of law. The court noted that the officers had used the minimal amount of force necessary to remove plaintiff and the other protestors, and plaintiff did not suggest any less intrusive means by which the officers could have removed her and the other

protesters. The panel did not discount the severity of plaintiff's injury, but emphasized that it was not dispositive on whether the level of force was reasonable. The court observed: "There can be situations in which the risk of harm presented is objectively less significant than the actual harm that results. And if a person reacts more adversely to a use of force than would be expected objectively, that does not itself establish that 'a reasonable officer on the scene' failed to appreciate the risks presented and act accordingly."

Williamson is an extremely helpful case that provides a thorough analysis of the case law concerning use of force against protestors. It also clarifies that just because a plaintiff suffers a more severe reaction to the level of force than anticipated, that does not mean that the force is excessive.

F. *Hyde v. City of Wilcox*, 23 F.4th 863 (9th Cir. 2022)

- **Officers entitled to qualified immunity for initial use of force against combative detainee, but no immunity for application of similar level of force after detainee was restrained.**

Luke Ian Hyde—a 26-year-old man with mental health issues, including bipolar disorder, schizophrenia, and attention deficit hyperactivity disorder—managed his condition through prescription medications. One night around midnight he was pulled over by a City of Wilcox detective who thought he was driving under the influence. He was booked around 1:30 a.m. and submitted to a blood draw. He tested negative for alcohol but positive for amphetamines, a finding consistent with his Adderall prescription. Over the next five and a half hours, Hyde napped, ate, talked to officers on duty, and requested a phone to contact a lawyer.

Hyde did not receive his prescribed medication, and by 7:30 a.m., he became restless. Minutes later, he charged toward the door, fell to the floor, and injured his head. Deputy Robinson and Sergeant Pralgo opened Hyde's cell, while a medic waited in the booking area to examine Hyde's head wound. Hyde first emerged from his cell calmly, but then sprinted through the booking area and into the female cell area while Robinson, Pralgo, and Detention Officer Bohlender unsuccessfully tried to tackle him. Hyde reached a dead end in the female cell area, where he stood with his back against the wall, facing Robinson, Pralgo, and Bohlender. At this point, Pralgo, and Robinson deployed their Tasers at Hyde in a fast sequence three times. A scuffle ensued with Pralgo, Robinson, and Bohlender heaping onto Hyde, and trying to handcuff him to the door handle. Two other officers entered the fray, and with Hyde lying on the ground, Robinson delivered 11 close-fisted strikes to Hyde's legs while other officers fastened leg irons on him. Pralgo again used his Taser twice on Hyde's thigh for about five seconds each time.

At 8:02 a.m., Hyde was dragged to his feet and collapsed to his knees as at least six officers lifted his body and handcuffed his hands behind his back. At 8:03 a.m., Pralgo retrieved the restraint chair, and four officers hoisted Hyde's body into it with his hands cuffed behind his back and his legs fastened in leg irons. At 8:05 a.m., Pralgo again used his Taser on Hyde's thigh for about five seconds, while officer Callahan-English used her arms to force Hyde's head into a restraint hold as four officers fastened Hyde into the chair. Hyde was "fully restrained" in the chair at 8:06 a.m.

Shortly thereafter he began gasping for air and passed out. Attempts to revive him were unsuccessful and he died in the hospital several days later.

Hyde's parents filed suit against various officers, the County Sheriff and Wilcox City Police Chief, as well as the City and County, asserting claims for excessive force and failure to provide necessary medical care to their son. The individual defendants moved to dismiss the complaint based on qualified immunity, and the municipal

defendants argued that the complaint failed to allege facts showing any improper conduct by policymakers for purpose any claim under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). The district court denied the motions to dismiss and defendants appealed.

The Ninth Circuit affirmed in part and reversed in part. The court held that the force applied by all of the officers prior to Hyde finally being handcuffed and restrained, was reasonable as a matter of law. Hyde was being combative, and the use of intermediate levels of force, i.e., the Taser, arm holds and hand strikes, was appropriate. However, the court held that force applied by Praglo and Callahan-English two minutes after Hyde was restrained and no longer actively resisting, was excessive, and the officers were not entitled to qualified immunity because it is clearly established that officers cannot use an intermediate level of force against a restrained, compliant individual.

The court also held that plaintiffs had failed to allege specific facts as to how the named defendants denied Hyde medical care, or how any training deficiency purportedly caused Hyde's death for purposes of supervisory and municipal liability under *Monell*.

Hyde provides useful guidance on application of force over the course of a lengthy incident, making it clear that once a suspect is no longer resisting, officers can no longer employ significant levels of force. The opinion is also helpful in clarifying that conclusory allegations about lack of training are insufficient to support a *Monell* claim. *Hyde* also underscores one of the drawbacks to litigating qualified immunity by way of a motion to dismiss instead of summary judgment. The officers maintained that Hyde continued to struggle even after restrained, which could be seen in a video of the incident. But the court noted that the video was not part of the record, and hence it had to accept the allegations of the complaint at face value.

G. *J.K.J v. City of San Diego*, 17 F.4th 1247 (9th Cir. 2021)

- **Officers entitled to qualified immunity for failure to discern that arrestee had ingested drugs and required immediate medical care.**

J.K.J v. City of San Diego, 17 F.4th 1247 (9th Cir. 2021) arose from the death of plaintiff's mother, Aleah Jenkins, while in police custody. San Diego police officers Nicholas Casciola and Jason Taub stopped a Cadillac with an expired registration. A third officer, Lawrence Durbin, arrived to provide backup. Inside the Cadillac there were two men in the front, and Jenkins in the back. The two men had prior convictions for drug offenses. The officers knew or became aware of these prior convictions as they investigated. Durbin questioned Jenkins, who spoke coherently and showed no signs of distress. When the officers discovered that she was subject to arrest based on a warrant involving a prior methamphetamine offense, they handcuffed her and put her in Durbin's cruiser.

The officers searched the Cadillac and found "a saran wrap-like plastic ... known to law enforcement officers ... as being commonly used for narcotics sale." They also found two wallets, one of which was full of cash. They did not find any drugs.

Inside Durbin's cruiser, Jenkins vomited. Taub called for paramedics and asked Jenkins if she was detoxing. Durbin asked if she was withdrawing. Jenkins responded: "No, I'm sick[,] my stomach is turning." She then added, "I'm pregnant." Hearing this explanation, Durbin told Taub, "Don't worry about it," indicating that paramedics were not needed. Taub approached Jenkins and asked: "Did you eat something, just for our knowledge?" She responded, "Mmm-mm," while shaking her head slightly from side to side. Taub replied, "Alright, that's fine. We just wanna make sure you're gonna be ok." Durbin then remarked: "She says she's pregnant." The call to paramedics was canceled.

Durbin drove Jenkins to a police station for fingerprinting. The trip took over an hour. En route, Jenkins told Durbin she did not want to go to jail. She requested water and a bathroom break. And on several occasions, she groaned and screamed. When Durbin spoke to her, Jenkins sometimes responded and sometimes remained silent. At one point she screamed loudly, “[P]lease help me, please help me!” and “[O]h my [G]od, please, stop, stop, stop!” Durbin asked, “What's going on?” When Jenkins remained silent for about ten minutes, Durbin stopped the car to check on her. He opened the rear door and patted her, saying, “I need you to stay awake.” Jenkins then said, “I'm sick.” When she again screamed, Durbin told her to “[k]nock it off.” Jenkins shouted, “[H]elp me[,] please.” Durbin responded, “[Y]ou're fine,” and continued driving to the police station.

On arrival, about three minutes later, Durbin opened the rear door and again patted Jenkins, who was lying face down across the backseat. Jenkins screamed and took several quick, audible breaths, to which Durbin responded: “Stop hyperventilating ... you are doing [that] to yourself.” Durbin then removed Jenkins from the cruiser to the pavement. Jenkins screamed and asked for help, and Durbin remarked to an approaching officer: “She doesn't want to go to jail.” Durbin and the other officer fingerprinted Jenkins as she lay on her side, handcuffed. Durbin asked Jenkins if she still wanted water, and she responded at a normal volume: “Yes, please.” After confirming Jenkins' identity, Durbin and the other officer placed her back inside the cruiser.

About eleven minutes later, Durbin opened the rear door of his cruiser. Jenkins was unconscious. Durbin immediately removed her from the car and radioed for paramedics. Soon, another officer arrived with a breathing tool, and Durbin began CPR. He remarked to the gathering officers that Jenkins had a narcotics warrant, but that this was not a narcotics arrest. He then added, “She may have ingested something,” telling the

other officers that he had Narcan in his trunk. Paramedics arrived. Despite their efforts, Jenkins fell into a coma. Nine days later, she died.

Her minor son filed suit against the officers and the City, alleging that the officers had failed to summon needed medical care for Jenkins and that the failure was the result of inadequate training. The defendants moved to dismiss the complaint, and after granting plaintiff leave to amend, the district court eventually granted the motion and dismissed the action. Based on the allegations of the complaint, and review of video of the incident that had been incorporated by reference in the complaint, the court found that none of officers had acted improperly.

The Ninth Circuit affirmed. The court noted that the district court had properly exercised its discretion in considering the video, as it had been incorporated by reference in the complaint. The video indicated that the officers asked Jenkins whether she had ingested any drugs and she told them she had not. Nor were any drugs found in the car or on any passenger. Though Jenkins acted erratically, she was also calm at times, and as a result, none of the officers could be said to have acted unreasonably in failing to immediately call paramedics prior to her passing out. The court also noted that the complaint failed to allege any facts showing a lack of training.

J.K.J. is a very helpful case that properly defines the limitations on a law enforcement officer's obligation to summon medical care for arrestees. It is particularly useful in setting out the circumstances in which a district court can consider video in the context of deciding a motion to dismiss, which may allow officers to raise qualified immunity at the pleading stage, instead of on summary judgment.

H. ***Murchison v. County of Tehama*, 69 Cal.App.5th 867 (2021)**

- **Officers not entitled to qualified immunity where they entered plaintiff's property without a warrant or exigent circumstances, and prompted the use of force by failing to identify themselves as police officers.**

The plaintiff in *Murchison v. County of Tehama*, 69 Cal.App.5th 867 (2021) lived in a rural area and a road passed through his property. Plaintiff viewed the portion of the road on his property to be private, and strung a rope across with a sign stating that the road was closed. A real estate agent and client attempted to use the road and plaintiff confronted them. The client thought he saw a handgun in plaintiff's pocket, but was not certain.

The agent reported the encounter to the Sheriff's Department, trying to confirm that the road was a public roadway. It was determined that plaintiff was a convicted felon, who could not lawfully possess firearms. As a result, Sergeant Knox and Deputy Garrett decided to investigate. Their plan was to see if they could prompt plaintiff to brandish a firearm, at which point they would arrest him.

The officers were in plainclothes, driving an unmarked SUV. When they reached plaintiff's property, Garrett started walking towards the closed road. Plaintiff told Knox and Garrett the road was closed, and that if they crossed over the rope they would be trespassing. Garrett stepped over the rope and plaintiff, who did not know they were law enforcement officers, went into his house and called 911.

Knox and Garrett decided to leave. As they turned their vehicle around in plaintiff's driveway, Garrett saw a bolt-action rifle on a table in an outbuilding on plaintiff's property and told Knox. Although they acknowledged there was no emergency, they decided to get the rifle and confront plaintiff. Knox began to walk quickly

towards the outbuilding and rifle. Plaintiff who was on the phone with the 911 operator, saw Knox and thought that he was going to steal the rifle. Plaintiff then began running towards the outbuilding. Seeing plaintiff run, the officers became concerned he would reach and load the rifle, so they began running as well. Knox reached the outbuilding first, but ran past it and intercepted plaintiff., Knox drew his service weapon and pointed it at plaintiff's head from a distance of nine inches while identifying himself as a Sheriff's officer and commanding plaintiff to get on the ground. As plaintiff tried to get on the ground he was slammed from behind and his face ground into the earth. He was eventually handcuffed, but then released when it was determined that his criminal conviction had been expunged and he could lawfully own firearms.

Plaintiff filed suit asserting claims for excessive force and unlawful entry in violation of the Fourth Amendment under section 1983 and the Bane Act, as well as claims for wrongful arrest and battery. The trial court granted defendants' motion for summary judgement, finding that the officers had acted properly, and that in any event they would be entitled to qualified immunity.

The Court of Appeal reversed. The court held that plaintiff could proceed on his unlawful entry claim because the officers had entered his property to secure the rifle without a warrant, and there were no exigent circumstances justifying the entry. The court also held that plaintiff could proceed on his excessive force claim, because even though the officers could reasonably perceive that plaintiff might pose a threat once he started running towards the rifle, plaintiff's actions were prompted by the officers own improper action in entering his property and failing to identify themselves as officers earlier. Finally, the court found that the officers were not entitled to qualified immunity because the basic principles concerning warrantless entries were well established and several cases from various federal appellate courts had found officers liable for excessive

force based on their having provoked a confrontation by failing to identify themselves as law enforcement officers.

Murchison is a prime example of the adage, “bad facts make bad law.” The court’s discussion of the unlawful entry issue is certainly correct. However, the analysis of the excessive force claim is problematic insofar as it suggests that tactical decisions by officers that prompt the use of force can be considered as part of the reasonable force analysis. The Supreme Court has suggested that such an approach is improper, even though it has emphasized that it has not yet squarely decided the issue, and the federal appellate courts are divided on the question. In addition, the court’s analysis of clearly established law for purposes of the qualified immunity inquiry deals largely with generalities, an approach repeatedly repudiated by the Supreme Court.

I. *Ochoa v. City of Mesa*, 26 F.4th 1050 (9th Cir. 2022)

- **To maintain due process claim based on excessive force, family members of suspect killed by law enforcement officers must show that use of force was unrelated to any legitimate law enforcement purpose.**

In *Ochoa v. City of Mesa*, 26 F.4th 1050 (9th Cir. 2022) the plaintiffs asserted a Fourteenth Amendment claim against a city and several law enforcement officers, arguing that the officers had used excessive force in killing a family member. The officers moved for summary judgment based on qualified immunity, arguing, among other grounds, that there had been no excessive force as officers had shot the decedent because he was wielding two knives, threatening officers and acting erratically as they attempted to arrest him. The district court granted summary judgment, finding that the use of force was proper.

The Ninth Circuit affirmed. The court noted that the plaintiffs' due process claim for injury to familial rights was subject to a much higher standard than a Fourth Amendment claim that could be brought by the person who was subjected to the alleged excessive force. To make out a Fourth Amendment claim, an individual need only show that an officer's use of force was not reasonable. In contrast, a due process claim by family members requires proof that the officers' conduct "shocks the conscience," and in the context of rapidly evolving events, such a showing can only be made where the officers' actions are unrelated to any legitimate law enforcement purpose, and undertaken solely with the purpose to inflict harm. Here the officer's actions were plainly related to the legitimate law enforcement purposes of effecting an arrest and protecting the officers and public from the dangerous conduct of a suspect.

Ochoa provides an excellent discussion of the differences between Fourth Amendment claims and Fourteenth Amendment claims, and is a reminder that even if a decedent's estate has a viable Fourth Amendment claim based on unreasonable use of force, any Fourteenth Amendment claim by family members faces an uphill battle because of the much more rigorous standard for such claims.

II. FIRST AMENDMENT --RLUIPA

A. *Houston Community College System v. Wilson*, __ U.S __, 142 S.Ct. 1253 (2022)

- **Community College Board did not violate First Amendment rights of member by issuing a censure condemning the member's actions which did not impair member's ability to perform duties.**

Houston Community College System v. Wilson, __ U.S __, 142 S.Ct. 1253 (2022) arose from an internal dispute among members of the governing body of a community college. Over several years the plaintiff had accused the Board of wasting money and had filed several lawsuits challenging the Board's actions. The Board eventually passed a resolution censuring the plaintiff, characterizing his conduct as "not only inappropriate, but reprehensible." The plaintiff sued the Board, arguing that the censure was in retaliation for his exercise of his First Amendment rights. The district court dismissed his action, but the Fifth Circuit reversed, holding that plaintiff had stated a proper First Amendment claim.

The Supreme Court reversed. Writing for a unanimous court, Justice Gorsuch noted that "elected bodies in this country have long exercised the power to censure their members," and there is no reason to believe that the First Amendment was intended to change that practice. Moreover, the Board's action in adopting the resolution was itself a communicative act, and allowing plaintiff's suit to proceed would mean plaintiff could use his right to free speech "as a weapon to silence other representatives seeking to do the same." Justice Gorsuch emphasized that the censure did not impair plaintiff's ability to perform his duties, and that the Court did "not mean to suggest that verbal reprimands or censures can never give rise to a First Amendment retaliation claim."

Houston Community provides guidance on the degree to which political bodies may censure members without running afoul of the First Amendment. In issuing such declarations a City Council must be careful to confine its actions to a simple statement, and avoid taking collateral action such as barring participation in sessions or voting, that may impair a member’s ability to perform their duties.

B. *New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596 (9th Cir. 2022)

- **City ordinance barring religious assemblies in ground floor of buildings in downtown area violates RLUIPA insofar as ordinance allows similar secular gatherings in places such as theatres.**

In *New Harvest Christian Fellowship v. City of Salinas*, 29 F.4th 596 (9th Cir. 2022) a church challenged a City zoning ordinance prohibiting “[c]lubs, lodges, places of religious assembly, and similar assembly uses” from operating on the “ground floor of buildings facing Main Street within the Downtown Core Area.” The church asserted that the provision violated the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §§ 2000cc et seq., by imposing a substantial burden on religious exercise, and by treating churches less favorably than similar secular facilities, such as theatres. The district court granted summary judgment to the City and the church appealed.

The Ninth Circuit affirmed in part and reversed in part. The court held that the ordinance did not substantially burden the exercise of religion by church members. The court noted that (1) the church could have conducted worship services in the building had it been willing to hold services on the second floor or reconfigure the first floor; (2) the

church was not precluded from using other sites within the City and at least one suitable property has come on the market during the course of this litigation; and (3) at the time it purchased the building, the church was on notice that the zoning restrictions would prohibit it from conducting worship services on the first floor.

However, the court reversed summary judgment on the equal terms provision of RLUIPA, noting that the record demonstrated that other nonreligious assemblies, such as theatres, which were permitted to operate on the first floor of the Main Street Restricted Area, were similarly situated to religious assemblies with respect to the City's stated purpose and criterion. Because the City prohibited the church from hosting worship services on the ground floor of the Main Street Restricted Area but permitted theatres to operate on the ground floor in that area, it impermissibly treated religious assemblies on less than equal terms with nonreligious assemblies.

New Harvest is very helpful in terms of providing clear guidelines on defending RLUIPA claims based on substantial burden arguments, as well as reaffirming the need to review any restriction on religious activity very carefully, to make certain that similar secular activities are treated in a like manner.

C. *Riley's America Heritage Farms v. Elasser*, 29 F.4th 484 (9th Cir. 2022)

- **School official entitled to qualified immunity for terminating school contractor for posting controversial remarks on personal social media account.**

In *Riley's America Heritage Farms v. Elasser*, 29 F.4th 484 (9th Cir. 2022) a school field trip vendor and its principal shareholder brought a section 1983 action against public school officials, alleging a violation of their First Amendment rights after the school district severed its longstanding business relationship with the vendor due to

postings which shareholder made on his personal social media account and about which the parents of several school children complained. The trial court granted summary judgment to the individual defendants based on qualified immunity and dismissed injunctive relief claims against the school district.

The Ninth Circuit reversed the district court with respect to the claims for injunctive relief, but affirmed the dismissal of the damages claims against the individual defendants based on qualified immunity. The court found that there were triable issues of fact as to whether the defendants had retaliated against plaintiffs for expressing their political views, but held that qualified immunity applied because no clearly established law would have put the defendants on notice that plaintiffs' speech was protected by the First Amendment so as to give rise to a retaliation claim. The court emphasized that the right to be free from First Amendment retaliation cannot be framed as the general right to be free from retaliation for one's speech. Instead, the right must be defined at a more specific level tied to the factual and legal context of a given case. Applying these principles, the court noted that when the underlying events occurred, it was not clearly established that a school district could not cease patronizing a company providing historical reenactments and other events for students because the company's principal shareholder had posted controversial tweets that led to parental complaints.

Riley's represents one of the Ninth Circuit's most stringent applications of the clearly established law prong of qualified immunity. It provides strong support for application of the immunity in most First Amendment retaliation cases based on public employee speech, where the line between protected and unprotected speech is not easy to discern.

III. MUNICIPAL TORT LIABILITY

A. *Perez v. City and County of San Francisco*, 75 Cal.App.5th 826 (2022)

- **City may be liable for injuries caused by off duty officer's failure to prevent theft of personal firearm that was sometimes used in the course of employment.**

In *Perez v. City and County of San Francisco*, 75 Cal.App.5th 826 (2022) the plaintiff's son was shot and killed with a firearm that had been stolen from an off duty police officer's personal vehicle. The weapon was not the officer's primary service weapon, but a personal secondary weapon that he would sometimes carry both on and off duty. The trial court granted summary judgment to the officer's municipal employer on the grounds that respondeat superior did not apply because the theft of the firearm and subsequent shooting were unrelated to the officer's performance of his official duties.

The Court of Appeal reversed. The court noted that the employer was aware of an encouraged use of personal secondary weapons, and even had regulations specifying that weapons were never to be left unsecured in an unattended vehicle. The weapon was in the vehicle because the officer had carried it to a training program that was part of his official duties, and regularly carried it even when off duty because he might be called upon at any time to perform his law enforcement duties. The court emphasized that law enforcement officers were unique in that their duties require them to carry firearms, and they have the right to carry them even when off duty, which means police departments should contemplate potential liability when formulating and enforcing regulations concerning firearm usage and storage by officers. In so holding, the court acknowledged that its holding was inconsistent with *Henriksen v. City of Rialto* (1993) 20 Cal.App.4th 1612, where the court had held that a city could not be held liable for injuries caused by an off-duty officer's accidental discharge of a weapon.

Perez is concerning, because its broad statement of principles of respondeat superior as applied to law enforcement officers effectively erases any distinction between on duty and off duty conduct. It greatly expands potential municipal liability for off duty conduct by officers, and will require police departments to more scrupulously regulate off duty conduct by officers, which will likely lead to friction with unions or other associations representing law enforcement personnel.

B. *DePaul Industries v. Miller*, 14 F.4th 1021 (9th Cir. 2021)

- **City attorney entitled to qualified immunity from due process claim based on decision not to renew contract with vendor, because no clearly established law that vendor had any protectible property interest in the contract..**

Oregon law requires that in some circumstances municipalities must contract with qualified nonprofit agencies for individuals with disabilities, what are known as QRFs. The plaintiff was a QRF that contracted with a city to provide unarmed security guards at various city facilities for several years. The city decided that it wanted armed security personnel and therefore did not renew the contract with the QRF. The QRF sued, among others, the City Attorney, arguing that the QRF statute created a property interest in the municipal contract, and that the City Attorney had violated its due process rights in refusing to renew the contract. The district court denied the City Attorney's motion for summary judgment based on qualified immunity.

The Ninth Circuit reversed. The court held that the City Attorney was entitled to qualified immunity because no case had interpreted the QRF statute as creating a property right in public contracts, and as a result there was no clearly established law that would have put the City Attorney on notice of any potential due process claim.

DePaul Industries is a reminder that qualified immunity applies to the actions of all public employees, and not just police officers. The case is very helpful because the court rigorously applies the clearly established law prong of qualified immunity and should be particularly useful in cases where the challenged conduct involves application or interpretation of a statute or regulation.

C. ***Mubanda v. City of Santa Barbara*, 74 Cal.App.5th 256 (2022)**

- **Hazardous recreational activity immunity of Government Code section 831.7 applies to wrongful death suit against suit arising from paddle board accident.**

In *Mubanda v. City of Santa Barbara*, 74 Cal.App.5th 256 (2022), the plaintiff filed a wrongful death suit against the City, asserting that her son had drowned after falling off a paddle board due to the dangerous condition of the harbor. The City moved for summary judgment, arguing, among other grounds, that paddle boarding was a hazardous recreation activity within the meaning of Government Code section 831.7 and hence the City was immune from liability. The trial court agreed and granted the motion.

The Court of Appeal affirmed. The court noted that paddle boarding was akin to boating, which is expressly cited as a type of hazardous recreational activity in section 831.7. The panel also rejected the plaintiff's argument that the City's conduct could be characterized as falling within the gross negligence exception to the immunity. The court observed that the City taken numerous actions to promote the safety of paddle boarding within the harbor, including the posting of signs within the harbor regarding preferred paddling areas, distributing maps and lanyards to paddle boarders with paddling tips, providing training to rental facilities, requiring paddle boarders to wear personal flotation devices and to have whistles, actively patrolling the harbor for paddle boarder violations,

airing and posting public service announcements regarding paddle board safety and publishing paddle boarding safety tips in a City newsletter. The court held that declaration of plaintiff's expert to the effect that the City had been grossly negligent was insufficient to create an issue of fact as it was simply an expert's expression of his general belief as to how the case should be decided and not admissible for that purpose.

The court also rejected plaintiff's contention that the immunity did not apply because the City was aware of a hidden danger that would not necessarily be known by one participating in the activity. The court noted that plaintiff had not identified any hidden condition of the harbor causing the accident, and that the risk of falling off a stand-up paddle board and drowning in a harbor is inherent in that type of hazardous recreational activity.

The court similarly rejected the plaintiff's argument that the exception applicable to activities for which a fee is charged by a public entity had any relevance here. The decedent had rented the paddle board from a private vendor, and while the City received rent and a portion of revenue from the vendor, the City itself was not charging the decedent to use the paddle board in the harbor.

Mubanda is an excellent case that provides clear guidance on application of the hazardous recreational activity immunity and its exceptions. The discussion concerning the inadmissibility of conclusory expert testimony is also extremely helpful.

D. *Martinez v. City of Beverly Hills*, 71 Cal.App.5th 508 (2021)

- **For purposes of dangerous condition liability, different standards apply to sidewalks than to alleys in determining whether a defect is so obvious as to give rise to constructive notice of a dangerous condition.**

In *Martinez v. City of Beverly Hills*, 71 Cal.App.5th 508 (2021) plaintiff worked at a law firm that occupies three offices within walking distance of each other in the City of Beverly Hills. The law firm's main office is located at 361 South Robertson Boulevard, and can be accessed from the rear by an alley that runs parallel to the boulevard. The alley is "relatively flat" and paved with asphalt, and has a drainage channel (a "swale") made of concrete that runs down its center. The law firm's employees used the alley to walk between its offices. Plaintiff parked in a space in the alley near the satellite office where she worked, and walked through the alley's center to get to the main office only once a month. One morning plaintiff was walking through the alley from the law firm's main office to her satellite office. She was wearing soft-bottomed flip-flops and as she walked toward the alley's center, the front edge of her flip-flop hit the edge of the swale and she fell. The asphalt that is normally flush against the edge of the swale had worn away, creating a divot that was approximately 1.75 inches in depth. The divot had been there for at least two years.

Plaintiff sued the City, asserting that that divot in the swale constituted a dangerous condition of public property. The City successfully moved for summary judgment on the ground that it had neither actual, nor constructive notice of the divot and the plaintiff appealed.

The Court of Appeal affirmed. The court held that there was no evidence that the City had actual notice of the divot. The City had not received any complaints about the alley's divot in the six years preceding plaintiff's accident and had not been presented

with any claims or lawsuits concerning the alley in the preceding 15 years. The court rejected plaintiff's contention that a jury could somehow infer that the City had actual notice because the City did not produce a declaration from every possible City employee who may have been in the alley in the past specifically denying having seen the divot.

The court observed that a public entity can be deemed to have constructive notice of a dangerous condition if it is "obvious." However, the court emphasized that a defect is not obvious just because it is visible, or just because it is non-trivial. The court noted that whether a particular defect was sufficiently obvious to impart constructive notice depends upon the location, extent, and character of the use of the public property. As a result, the small divot at issue here might have been obvious for purposes of constructive notice had it been located on a sidewalk, because the City would have been aware of regular, heavy pedestrian traffic on a sidewalk, thus making frequent and routine inspection of the sidewalk a reasonable burden to impose on the City. In contrast, since it was located in an alley way not designed for regular pedestrian use, nor regularly inspected for such use, the divot would not be so obvious to the City so as to have imposed an obligation to inspect for and rectify the condition. In short, because the cost of keeping alleys as defect-free as sidewalks for foot traffic has greater cost and less benefit, public entities may reasonably elect to apply less rigorous scrutiny when inspecting alleys for defects (as compared with sidewalks). In other words, the universe of "obvious defects" for alleys is smaller than the universe of "obvious defects" for sidewalks. In so holding, the court rejected the opinion of plaintiff's expert that the divot was sufficiently obvious to impart constructive notice, because it constituted a legal conclusion.

Martinez is an extremely helpful case, in that it clarifies the standards for determining when a defective condition is so obvious as to give rise to constructive notice for purposes of dangerous condition liability. It also clarifies that municipalities have a

lesser duty to inspect alleys for potential hazards to pedestrian, while emphasizing the duty to inspect and repair sidewalks. The case also contains helpful language rejecting expert testimony that is ultimately nothing more than a legal conclusion, which is all too commonly found in oppositions to motions for summary judgment in dangerous condition cases.

E. *Coble v. Ventura County Health Care Agency*, 73 Cal.App.5th 417 (2021)

- **Governor’s Executive Order N-35-20 only extended time to file claims, not late claim applications.**

The central issue in *Coble v. Ventura County Health Care Agency*, 73 Cal.App. 5th 417 (2021) was whether the Governor’s Covid-19 Executive Order N-35-20 which extended the time to file claims under Government Code section 911.2, also extended the time to file late claim applications. Plaintiff had submitted her late claim application to the County more than one year after accrual of her cause of action. When the County denied the late claim application, she sought relief from the claim statute under Government Code section 946.6. The trial court denied late claim relief because the late claim application had been submitted beyond the one- year period of Government Code section 911.4.

The Court of Appeal affirmed. The court held that the language of Executive Order N-35-20 was not ambiguous. The Order specifically stated that: “The time for presenting a claim pursuant to Government Code section 911, et seq., is hereby extended by 60 days.” The court noted that the claim statutes specifically distinguish between claims and applications for late claim relief, and hence the Governor’s use of the term claim meant that the claim period was extended, not the late claim application period.

Coble provides guidance on an issue that will likely crop up over the course of the next year or so as pandemic era suits move through the judicial system.

F. *Andrews v. Metropolitan Transit System*, 74 Cal.App.5th 597 (2022)

- **Two- year statute of limitation applies to plaintiff's lawsuit where claim rejection notice failed to give statutorily required notice to consult an attorney.**

In *Andrews v. Metropolitan Transit System*, 74 Cal.App.5th 597 (2022) the plaintiff was injured on a bus and submitted a timely claim for damages within the six-month period specified by Government Code section 911.2. The Transit System denied the claim, advising the plaintiff that any suit had to be filed within six months, and that a shorter statute of limitations might apply as to any federal claim. Plaintiff filed suit eight months after the denial notice was sent and the trial court granted summary judgment to the Transit System on the ground that suit had been filed beyond the six- month period set out in Government Code section 945.6 (a)(1).

The Court of Appeal reversed. The Court held that denial notice served by the Transit System failed to substantially comply with the requirements of Government Code section 913, because it did not inform plaintiff that she could consult an attorney and should do so immediately. As a result, the defective denial notice was ineffective, and the default two-year limitation period applied to plaintiff's action.

Andrews is a reminder that the claims statutes are strictly construed, and denial notices should be drafted to closely adhere to, if not outright copy, the statutory language to avoid waiver issues.