



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. *Duarte v. City of Stockton*, 60 F.4th 566 (9th Cir. 2023), cert. denied, No. 22-1080, 2023 WL 4163261 (U.S. June 26, 2023)

- ***Heck v. Humphrey* does not apply where criminal charges were dismissed after entry of a plea held in abeyance pending compliance with certain conditions.**

Plaintiff went to purchase food from a nearby taco truck. Police had responded to that general area because of reports of shots being fired and so-called “sideshow” activity. Plaintiff ended up standing within a few feet of a group of police officers detaining someone else. When Plaintiff did not back up, officers forcefully took him to the ground. Police eventually struck him in the leg with a baton, breaking a bone.

Plaintiff was charged with violating Penal Code section 148(a)(1) for willfully resisting, obstructing, or delaying a peace officer. He pleaded “nolo contendere” to the charge. The plea was “held in abeyance” pending completing ten hours of community service and obeying to all laws. After the six months of abeyance elapsed, the charges against Duarte were “dismissed” in the “interest of justice” on the People’s motion.

This case involved an analysis of *Heck v. Humphrey*, 512 U.S. 477 (1994). That case held that Section 1983 claims must be dismissed if they would “necessarily require the plaintiff to prove the unlawfulness of his conviction.” *Id.* at 486. Plaintiff alleged that *Heck* did not bar his Section 1983 claim because the criminal charges against him were dismissed without entry of a conviction. The Ninth Circuit agreed that Plaintiff was not convicted because the state court never entered an order finding him guilty of the charge to which he pleaded.

Significance: Without a conviction, *Heck* does not apply.

B. *Murguia v. Langdon*, 73 F.4th 1103 (9th Cir. 2023)

- **Petition for panel rehearing and petition for rehearing en banc denied in case in which 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 a 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.

Circuit Court Panel Majority

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 there alone 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 such a history, and Child Welfare Services had an open case against her.

Circuit Court Panel Dissent (Ikuta)

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”

Dissent from Denial of Rehearing En Banc (Bumatay)

In a dissent from the denial of rehearing en banc, Judge Patrick J. Bumatay -- joined by Judges Consuelo M. Callahan, Sandra S. Ikuta, and Ryan D. Nelson -- argued that the state-created danger doctrine should be narrowed. Most circuits, including the Ninth Circuit, have recognized the state-created danger doctrine as a 14th Amendment substantive due process right. But, Judge Bumatay noted that the 5th Circuit has not adopted the doctrine and asserted that the doctrine “finds no support in the text of the Constitution, the historical understanding of the ‘due process of law’ or even Supreme Court precedent.”

The dissent demonstrated a concern about the expansion of the doctrine: “Now, commonplace actions—like providing a ride, booking a motel room or telling a lie—when done by a state actor, could become due process violations if the actions eventually lead to

injuries caused by third parties.” Judge Bumatay noted the Supreme Court’s *Dobbs v. Jackson Women’s Health Organization* decision for the idea that courts should be reluctant to recognize rights not mentioned in the Constitution.

Significance: The dissents by Judges Bumatay and Ikuta argue the Ninth Circuit has deviated from Supreme Court precedent and highlight a circuit split. This can bolster a Supreme Court certiorari petition. Dissents from denials of en banc petitions (“dissentals” as they have become known) have been characterized by one Ninth Circuit judge as reading, “inappropriately, like petitions for writs of certiorari,” providing one judge’s blueprint for how the favored party ought to frame the case for Supreme Court review. (Marsha S. Berzon, *Introduction*, 41 *Golden Gate U. L. Rev.* 287, 294 (2011).) However, the first such dissent was in 1943, and appellate judges have employed them with increasing regularity. (Jeremy D. Horowitz, *Not Taking “No” for an Answer: An Empirical Assessment of Dissents from Denial of Rehearing En Banc*, 102 *Geo. L.J.* 59, 60 (2013).)

Federal appeals courts apply the state-created-danger doctrine differently, so Supreme Court review of this case may be more likely than in most (but still unlikely as few cases are granted cert.).

C. ***Bernal v. Sacramento Cnty. Sheriff’s Dep’t*, 73 F.4th 678, 683 (9th Cir. 2023)**

- **Ninth Circuit provides guidance on when, and to what extent, law enforcement may detain, and question people not suspected of engaging in criminal activity but who have information essential to preventing a threatened school shooting.**

At approximately 10:00 a.m. on March 5, 2018, Sheriffs’ Deputies were working to locate Ryan Bernal, a high school student, who had sent a text to his friend saying he intended to shoot up the school that day. They called Ryan’s mother, Celia Bernal, who said Ryan was at his grandparents’ house but refused to provide the address because she did not know if the person calling was actually a sheriff’s deputy. The Deputies then contacted Celia Bernal, and

her husband William Bernal, (the “Bernals”) at their home. During the interaction, the Bernals refused to speak with the deputies and attempted to drive off. The Deputies held Celia’s arms and used a twist-lock to prevent her from leaving. The Deputies also pointed a firearm at William as he retrieved a cell phone from a bag on the hood of the vehicle to record the Deputies restraining Celia. The Deputies holstered their weapons, told William to calm down and to put the phone away. William, standing at 6 feet 3 inches and weighing 290 pounds, yelled at the Deputies that he was going to keep recording. Two Deputies, who both stood at approximately 5 foot 7 inches and weighed approximately 160 pounds each, then forcibly restrained him, and put him in handcuffs. The interaction lasted approximately twenty minutes. William and Celia led the Deputies to Ryan’s grandmother’s house. Ryan was arrested by the Folsom Police Department and pled no contest to a misdemeanor.

The Bernals filed a lawsuit under 42 U.S.C. § 1983 alleging, among other things, violations of their Fourth Amendment rights. The district court granted summary judgment in favor of the Deputies. The 9th Circuit affirmed as to Celia but reversed as to William.

The Court held that to justify a suspicion-less seizure of a material witness, there must be exigencies requiring immediate action, the gravity of the public interest must be great, and the detention must be minimally intrusive, both in length of time and amount of force used. Applying those principles, the 9th Circuit held that the exigencies inherent in preventing an imminent school shooting provided the Deputies with limited authority to briefly detain and question the Bernals about Ryan’s location. Finding that the emergency presented by an impending school shooting, coupled with the information the Deputies knew the Bernals possessed, constituted the “special circumstances” described in *Terry v. Ohio*, 392 U.S. 1, 34, 88 S. Ct. 1868, 1886, 20 L. Ed. 2d 889 (1968) (White, J., concurring).

The Bernals’ liberty interests remained very high, as they were not themselves suspected of criminal activity, and the longer the government detains non-suspect witnesses, the more the detention interferes with rights protected by the Fourth Amendment. Accordingly,

the detention must be brief and must end after it is clear the witness is not willing to divulge the information sought.

The Court held that the Deputies' actions in preventing Celia from leaving after she said she did not want to speak with them did not violate the Fourth Amendment. The unique exigencies of preventing a school shooting permitted the deputies to require Celia to remain at her home for a few minutes so they could question her. Additionally, the Court found that the authority to detain Celia provided the Deputies with the authority to use some degree of force to detain her and that the degree of force used was reasonable. However, the Court found that a jury could find the force used against William to be unreasonable under the circumstances and that qualified immunity did not apply to the Deputies' actions taken against William.

Significance: This case provides the 9th Circuit analysis of when, and to what extent, law enforcement may detain people not suspected of engaging in criminal activity but who have information essential to preventing a threatened school shooting.

D. Hill v. City of Fountain Valley, 70 F.4th 507 (9th Cir. 2023)

- **Upheld summary judgment dismissing federal cause of action for unreasonable seizure without probable cause under Qualified Immunity.**

On April 30, 2019, police received a 911 report of a Ford Mustang being driven erratically with a blindfolded female passenger. However, the driver of the vehicle, Benjamin Hill, was taking the blindfolded woman, his wife, on a surprise anniversary dinner. The 911 caller provided the license plate number which led police to Benjamin's home, which Benjamin shared with his parents. The police arrived at the home suspecting a kidnapping may be in progress.

Teresa, Benjamin's mother, pulled into the driveway shortly after the officers arrived. The officers asked if Benjamin lived at the residence and if he drove a Ford Mustang. Benjamin's mother answered "yes" to both questions but refused to give officers his phone number. Stephen, Benjamin's father, then exited the home to help bring the grandchildren into the house. The officers continued to try to ask questions about Benjamin as Teresa went inside. The officers told Stephen they were investigating a report of Benjamin driving erratically with a blindfolded woman in his car. Stephen informed the officers that Benjamin was out with his wife. The officers told Stephen to take his granddaughter inside and to return with Benjamin's phone number.

The officers observed a man looking out of one of the windows of the home who matched the description of Benjamin, a man later identified as Benjamin's brother. The officers ordered the man and Teresa to exit the house, but they did not comply. Stephen stepped back outside, shutting the door behind him, and told the officers that they could not go in. The officers suspected Teresa and Stephen may be hiding Benjamin, and immediately arrested Stephen. Teresa and Brett then exited the house to check on Stephen and provided the officers with sufficient information to dispel the confusion about the situation.

The Hills sued for excessive force against Stephen, unreasonable seizure of all the Hills, First Amendment retaliation against Stephen, and several state law claims. The District Court granted summary judgment for the officers on all claims as to all plaintiffs, except for the false arrest as to Stephen. The Ninth Circuit upheld the District Court's findings that there was no excessive force, or First Amendment retaliation, and that qualified immunity applied to the claim for unreasonable seizure without probable cause.

Significance: The Court provided an updated analysis of what is needed to establish claims of unreasonable seizure, excessive force, First Amendment retaliation, and claims of intentional or negligent infliction of emotional distress. Additionally, the Court gave greater guidance on the limits of when officers can rely on exigent circumstances to make an arrest.

E. *Hopson v. Alexander*, 71 F.4th 692 (9th Cir. 2023)

- **Interlocutory appeal reversed District Court denial of summary judgment on Qualified Immunity.**

On January 25, 2018, a plain-clothes detective exited a gas station and observed a vehicle in the parking lot acting suspiciously as he walked back to his unmarked vehicle. The Detective observed the vehicle back into a parking spot and its driver, Mr. Jones, proceeded to nervously look around, craning his neck and body 180 degrees to look at the surroundings. The Detective observed Mr. Jones repeat this behavior several times for approximately 15 minutes, backing into a new spot and then nervously scanning his surroundings, but Mr. Jones never exited his vehicle. This behavior caused the detective to suspect that Mr. Jones was preparing to commit an armed robbery of the gas station.

Then another vehicle, driven by Mr. Hopson, parked next to Mr. Jones' car. Mr. Jones then exited his car and entered Mr. Hopson's car. The two exchanged items. Mr. Jones went back to his car to retrieve something and then returned to Mr. Hopson's car. The Detective called for backup and additional officers arrived a few minutes later. The Detective and other officers approached the vehicle with guns drawn. Mr. Hopson claimed he was forcefully

removed from the vehicle but suffered no physical injuries. It was discovered that Mr. Hopson had a history of assault and weapons charges, a suspended driver's license, and was in possession of a handgun with an extended magazine. Mr. Hopson successfully moved in criminal court to suppress the evidence found in his car; the criminal court found no reasonable suspicion for the stop resulting in the dismissal of all charges against Mr. Hopson.

Mr. Hopson sued for violations of his Fourth and Fourteenth Amendment rights based on excessive force and stopping him without reasonable suspicion. The District Court dismissed the suspicion-less stop claim on summary judgment citing *Terry v. Ohio*, 392 U.S. 1 (1968). However, the District Court did not dismiss the excessive force claim, finding a factual dispute. The officers pursued an interlocutory appeal based on qualified immunity.

The Ninth Circuit reversed the District Court's decision on excessive force, finding that the officers were entitled to qualified immunity because the officers did not violate clearly established constitutional law based on *Terry v. Ohio*.

Significance: The Ninth Circuit provided additional guidance on qualified immunity and *Terry v. Ohio*.

F. *Est. of Strickland v. Nevada County*, 69 F.4th 614 (9th Cir. 2023)

- **Ninth Circuit upholds dismissal of excessive force allegations for failure to state a claim at the pleading stage.**

On January 1, 2020, Sheriff's deputies and a Grass Valley police officer responded to reports of a man walking down a residential road with a shotgun. The man, Strickland, was actually carrying a black, plastic BB gun marked with an orange tip. The officers who arrived recognized Strickland as a homeless man with mental health conditions who had been released from custody days before. The officers ordered Strickland to drop the gun. Strickland told the officers it was a BB gun and pointed to the orange tip. The officers told Strickland to drop the gun because they did not know it was fake. One officer armed with a taser then approached Strickland while other officers continued to provide lethal cover. Strickland dropped to his knees but was not pointing the gun at the officers. The Officer deployed the taser, but it was not effective. Seconds later Strickland pointed the gun at the officers who opened fire, killing Strickland.

Strickland's estate sued the officers for excessive force. The District Court dismissed for failure to state a claim. Strickland's estate appealed claiming an excessive force claim cannot be adjudicated at the Rule 12(b)(6) stage and that the exchange of discovery could reveal additional evidence. The Ninth Circuit disagreed, finding that based on the facts in the complaint it was objectively reasonable for the officers to use lethal force. Therefore, amendment of the complaint would be futile, and the pleading standards must be met before discovery can occur.

Significance: The Ninth Circuit held that it is objectively reasonable for officers to use lethal force when a person points a gun in their direction, even when that gun may (but may not) be fake.

G. *Leon v. County of Riverside*, 14 Cal.5th 910 (2023)

- **California Supreme Court defines the scope of the immunity provided under California Government Code 821.6.**

Government Code section 821.6 provides: “A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.” Although its text appears focused on malicious prosecution, earlier appellate rulings had expanded into a broader rule of immunity. This case disavows those broader readings.

Jose Leon was shot and killed near his home. When Sheriff’s Deputies arrived on scene, they heard additional gunshots. Deputies dragged Jose behind a vehicle where they unsuccessfully tried to revive him. The act of dragging Jose caused his pants to move down to his ankles exposing his genitals, and his body was left exposed for approximately eight hours while Deputies investigated the shooting. It was eventually determined that the shooter had killed himself after killing Jose. Jose’s wife, Dora, filed a suit for negligent infliction of emotional distress by leaving her husband’s body exposed. The trial and appeals courts granted immunity to the County and the Deputies under Government Code 821.6. The Supreme Court overturned the lower court rulings, finding the Court of Appeal erred in conferring the absolute immunity of section 821.6 to the County for the alleged mishandling of the plaintiff’s husband’s body, because the claim of negligent infliction of emotional distress did not result from the institution or prosecution of judicial or administrative proceedings.

The California Supreme Court’s decision focused on the language of section 821.6 immunizing public employees only from liability for injuries “caused” by the institution or prosecution of any judicial or administrative proceeding. The County did not dispute that section 821.6 immunity only applied to injuries “caused” by the institution or prosecution of official proceedings but argued the injuries caused by police investigations qualify for section 821.6 immunity because of the close relationship they have to prosecutions. The County relied

on *Amylou R. v. County of Riverside*, 28 Cal. App. 4th 1205 (1994) and its progeny which extended section 821.6 immunity to harms caused by criminal investigations because investigations are an essential step toward formal proceedings. Citing this line of cases, the County argued that section 821.6 immunity applied in this case even though no charges were filed because the investigation revealed the shooter had killed himself. The Supreme Court was not persuaded.

The Supreme Court provided a detailed historical and legal analysis of section 821.6 and found *Amylou R.* and its progeny are unsupported by the common law history, and legislative intent of section 821.6. The Supreme Court further explained that *Amylou R.* and its progeny are inconsistent with the Supreme Court's earlier interpretation of section 821.6 in *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710 (1974) and the later *Asgari v. City of Los Angeles*, 15 Cal. 4th 744 (1997). *Sullivan* found section 821.6 immunity did not apply to a false imprisonment suit where the county failed to release an inmate when his sentence was served. In *Asgari*, the Court held section 821.6 would not provide immunity for false imprisonment that occurred before a person's criminal arraignment, but after arraignment the continued incarceration would be the result of the judicial proceedings, and section 821.6 immunity would apply. In both cases the cause of the injury was the controlling factor in determining application of section 821.6 immunity.

However, the Supreme Court's ruling in *Leon* only affected the application of section 821.6 immunity and refrained from reaching the other defenses raised by the County under Government Code Sections 820.2 and 820.4, or any other immunity provision that may apply.

Significance: The Supreme Court overturned *Amylou R.* and its progeny, narrowing the scope of conduct that qualifies for the immunity provided under section 821.6.

II. CIVIL RIGHTS – NON-POLICING CONTEXTS

A. *Coal. on Homelessness v. City & Cnty. of San Francisco*, 93 Cal. App. 5th 928 (2023)

- **A city’s policy of towing safely and lawfully parked vehicles without a warrant based solely on the accrual of unpaid parking tickets were unlawful seizures under Article I, Section 13 of the California Constitution and the Fourth Amendment to the United States Constitution.**

During the COVID-19 pandemic, the San Francisco Municipal Transportation Authority ceased ordering tows for unpaid parking citations. In June 2021, the SFMTA resumed ordering such tows except where the amounts owed are \$2,500 or less and “when a parking enforcement officer ... can identify that [a] car is being used as a shelter, the officer will not place a boot on the car, and also will not direct that the car be towed for unpaid and delinquent parking citations, regardless of the amount of money that is owed on those citations unless the car is parked in a tow-away zone, in a place that creates a hazard, or in similar circumstances).”

On appeal, the main issue was whether the challenged warrantless tows were permissible under the vehicular community caretaking exception to the Fourth Amendment’s warrant requirement. The Court of Appeal concluded the City did not show that legally parked cars with unpaid parking tickets that present no threat to “public safety and the efficient movement of vehicular traffic” may be towed under that exception (citing (*S. Dakota v. Opperman* (1976) 428 U.S. 364, 369.)) Specifically, the government’s interest in deterring parking violations and nonpayment of parking fines did not justify warrantless tows under the vehicular community caretaking exception. Such deterrence does not justify warrantless tows of lawfully registered and lawfully parked vehicles. The Court of Appeal also rejected the argument that the city could justify towing cars for unpaid parking tickets by analogizing to warrantless property seizures in the forfeiture context. A car cannot be considered property

subject to warrantless seizure because it might become subject to forfeiture at some future point.

Significance: While a city has legitimate and important interests in enforcing parking regulations, there are no cases relying on that rationale to approve towing under the community caretaker exception. Case decisions have limited caretaking tows to those that address present, location-based obstacles to public safety or convenience. This will create significant administrative hurdles to enforcing parking tickets. Legislation may be in the offing.

B. *Polanco v. Diaz*, No. 22-15496, 2023 WL 5008202 (9th Cir. filed August 7, 2023)

- **Defendants were not entitled to qualified immunity based on their deliberate indifference to the risk faced when the state transferred potentially COVID-positive inmates to the facility where a correctional officer worked.**

A San Quentin correctional officer, Gilbert Polanco, was assigned to transfer 122 inmates from a prison experiencing a major COVID outbreak to San Quentin, where no cases had been reported. Prison officials did not provide personal protective equipment or take other measures to minimize COVID transmission. Polanco soon contracted COVID and later died. Polanco's family sued prison officials. After the district court denied the officials' motion to dismiss based upon qualified immunity, the officials filed an interlocutory appeal.

The Ninth Circuit found that plaintiffs sufficiently alleged a violation of Polanco's substantive due process right to be free from a state-created danger. In deciding a motion to dismiss, the Ninth Circuit found facts sufficiently pled to state federal claims: failing to adequately test or screen inmates before the transfer, the transfer itself, and housing the inmates in open-air cells. These decisions placed Polanco in a more dangerous position than before, the danger was particularized and sufficiently severe to raise constitutional concerns,

and defendants were aware of the danger to employees that transferring potentially COVID-positive inmates to San Quentin would pose.

In his dissent, Judge Ryan D. Nelson wrote that he found defendants entitled to qualified immunity because no clearly established law placed defendants on notice that their alleged mismanagement of the COVID pandemic at San Quentin was unconstitutional. He noted that the transfer of inmates occurred during a period of “global chaos.”

Circuit Judge Michelle T. Friedland, writing for the majority, responded in a footnote: “Underpinning much of the dissent is the premise that conditions were simply too uncertain in the spring of 2020 to hold government officials liable for their responses to COVID-19. But at the motion to dismiss stage, we must take all of Plaintiff’s allegations as true, and Plaintiffs have plausibly alleged that Defendants knew of, and consciously disregarded, the risk that COVID-19 posed to San Quentin employees”

Significance: Judge Nelson’s dissent criticizes the panel majority’s rationale for failing to meet “the high burden the Supreme Court requires” when it comes to a finding of qualified immunity. He pointed out that the Supreme Court has admonished the Ninth Circuit “not to define clearly established law at a high level of generality.” Judge Nelson lamented in language that might invite a Supreme Court certiorari petition: “As is not uncommon in our circuit, the majority regrettably fails to heed this guidance.”

III. MUNICIPAL TORT LIABILITY

A. *Tansavatdi v. City of Rancho Palos Verdes*, 14 Cal.5th 639 (2023)

- **Design immunity does not categorically preclude failure to warn claims involving a discretionarily approved roadway element.**

A bicyclist was riding down a roadway in a section that did not have a bike lane where it passed a community park. When the cyclist approached an intersection, he rode in the right-turn-only lane but went straight through the intersection. The truck driver believed the cyclist would turn right because he was in the right-turn-only lane. He collided with the truck.

His mother sued the City for her son's death. The City submitted substantial evidence that the road design -- including the absence of a bike lane in order to provide parking spaces at the park -- had been prepared by licensed traffic engineers and approved by the City. Although the city established entitlement to design immunity, Plaintiff alleged the city was still liable because there was no warning about the absence of the bike lane.

The California Supreme Court found that a public entity can be entitled to design immunity, but still be held liable for failure to warn if a plaintiff establishes (1) the public entity had actual or constructive notice that its design resulted in a dangerous condition; (2) the dangerous condition qualified as a concealed trap; and (3) the absence of a warning sign was a substantial factor in causing the injury.

Significance: Even if a condition was knowingly created as part of an approved design, public entities must warn when they have notice that an approved road design presents a hidden or concealed danger to the public. Cities cannot “remain silent” when they have notice that a reasonably approved design is dangerous to the public. This may cause significant erosion of design immunity.

B. *Los Angeles Unified Sch. Dist. v. Superior Ct., 14 Cal.5th 758 (2023)*

- **The California Supreme Court determines that a statute affording up to treble damages did not override the Claims Act protections for public entities.**

California law provides for up to treble damages when a plaintiff sues for childhood sexual assault and proves that the assault “was as the result of a cover up” (Code Civ. Proc., § 340.1(b)(1)). The issue before the California Supreme Court was whether treble damages may be sought under section 340.1(b)(1) against a public entity defendant, or whether such awards are prohibited under the Government Claims Act (Gov. Code, § 810 et seq.), which specifies that a public entity may not be held liable in tort for “damages imposed primarily for the sake of example and by way of punishing the defendant.” (Gov. Code, § 818.)

Plaintiff, a sexual assault victim, essentially asserted that, the Legislature did not intend for a section 818 analysis to apply at all. Her alternative arguments assume that such an analysis applies, but characterized damages under section 340.1(b)(1) as sufficiently nonpunitive that they may be imposed on a public entity.

The California Supreme Court found that section 340.1(b)(1), read in conjunction with Government Code section 818, does not reveal an intent to apply section 340.1(b)(1) to public entities.

Significance: This is a good decision for public entities and is important for its precedential value in other statutory contexts. There was nothing in section 340.1(b)(1) that explicitly overrode the Government Claims Acts. Since the statute did not reveal an intent to apply to public entities, it would be up to the Legislature to do so.

C. *Stack v. City of Lemoore, 91 Cal. App. 5th 102, 308 Cal. Rptr. 3d 45 (2023), reh'g denied (May 22, 2023), review denied (July 26, 2023)*

- **One and three-quarter inch sidewalk displacement not a trivial defect.**

Plaintiff tripped and fell while jogging in the City of Lemoore. A concrete sidewalk panel was displaced by one and three-quarter inches above its adjacent panel (the first defect). The lifted panel sloped slightly downward away from the first defect, runs into the next sidewalk panel, which in turn sloped upward and creates a second elevated ridge where it meets with the following downward-sloping, raised panel (the second defect) – i.e., three panels in a wave formation. Plaintiff was familiar with both defects from having jogged over this sidewalk some 300 times in the previous two years. During this particular jog, he was focused ahead on the second defect, and he caught his toe on the lip of the first defect and fell, breaking his wrist.

Plaintiff prevailed in a jury trial. On appeal, the City argued that the sidewalk condition must be deemed trivial as a matter of law because of its open and obvious nature, the plaintiff

admitted familiarity with the condition, and the absence of prior accidents there. The Court of Appeal disagreed, emphasizing a “holistic, multi-factor analysis” as to whether a defect is trivial:

- Size of the defect (the most important factor)
- Additional factors
 - Nature and Quality of the Condition;
 - Obstructions;
 - Lighting and Weather Conditions;
 - Prior Accidents

In this case, the one-and-three-quarter-inch height differential of the first defect weighted heavily against finding the sidewalk condition trivial as a matter of law. The height was “nearly double the one-inch threshold where courts grow reluctant to take the issue from the jury.” The fact that he jogged this stretch of sidewalk some 300 times over a two-year period before his accident did not bear on the triviality of the defect encountered.

Significance: There are three takeaways: (1) the court of appeal showed deference to the role of a jury even though the existence of a trivial defect is a matter of law; (2) when a defect is greater than one inch, courts are reluctant to find it not dangerous as a matter of law; (3) the Court of Appeal decided to “respectfully part ways with the Court of Appeal precedent weighing a particular plaintiff’s familiarity with the defect as part of the dangerous condition analysis.” The case is important for sidewalk displacement trip and fall cases.