MUNICIPAL TORT AND CIVIL RIGHTS LITIGATION UPDATE

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I. CIVIL RIGHTS—RETALIATORY ARRESTS, FREE SPEECH, AND FREE EXERCISE OF RELIGION.

Lozman v. City of Riviera Beach, Fla., __U.S. __, 138 S. Ct. 1945 (2018)

Facts

- Long series of disputes between Lozman and the City of Riviera Beach.
- During Council meeting public comment, Lozman strays off topic, ignores council member direction to stop.
- Council member has police officer arrest Lozman for disorderly conduct and resisting arrest.
- Charges later dropped.

The Video

Lower Court Proceedings

- Lozman sues City for First Amendment retaliation.
- Jury verdict for City –jury instructed that if there was probable cause for arrest, First Amendment Retaliatory arrest claim is barred.
- Eleventh Circuit affirms.

Supreme Court

- Grants review to determine whether probable cause bars a retaliatory arrest claim.
- Issue open since *Hartman v. Moore*, 547 U.S. 250 (2006) – probable cause bars a retaliatory prosecution claim.
- Almost decided in *Reichle v. Howards*, 566 U.S. 658 (2012), but case resolved based on qualified immunity.

Supreme Court

- Issue essentially not decided here either –court declines to determine whether probable cause would defeat a retaliatory arrest claim against a police officer in a routine setting.
- Very narrow holding – probable cause will not defeat a First Amendment retaliation claim against a public entity.

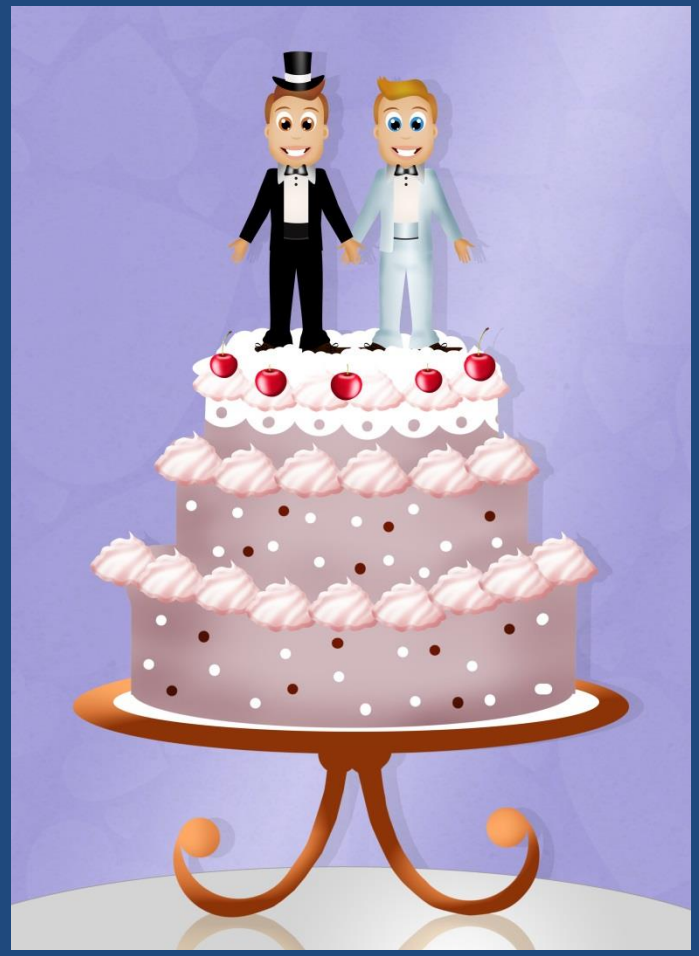
Supreme Court

- Conduct at issue core First Amendment activity –petitioning for redress, and public speech.
- Such *Monell* claims will be rare –tough to show retaliatory animus for an arrest at policy level.
- Here, special evidence shows retaliatory motive –meeting transcripts, plus the video.

Impact Of Decision

- Need to make sure that police officers at city council meetings are charged with an independent obligation to assess probable cause for arrest.
- Officers must not simply follow the directive of city council members in dealing with potentially disruptive members of the public.

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, __U.S.__, 138 S. Ct. 1719 (2018)



Facts

- Baker charged with violating Colorado's Anti-Discrimination Act for refusing to create a wedding cake for a same-sex couple.
- Baker argued that requiring him to create a cake for a same-sex marriage would violate his right to free speech and free exercise of religion.
- State Civil Rights Commission and appellate courts affirm the finding that he had violated the state statute.

Supreme Court

- Reverses 7-2
- Avoids deciding tricky issue of balancing need to prevent discrimination against free exercise of religion.
- Finds that individual member of commission expressed overt hostility to religion which is impermissible under the First Amendment.

Impact Of Decision

- A reminder – decision makers must be careful about what they say during an adjudicatory proceeding.
- Supreme Court distinguishes between remarks made in legislative capacity, and those made in an adjudicatory setting.

Minnesota Voters Alliance v. Mansky, __ U.S. __, 138 S. Ct. 1876 (2018)

Facts

- Plaintiffs challenge state statute prohibiting any person from wearing a political badge, button, or other political insignias inside a polling place on election day as violating First Amendment.
- Lower federal courts reject plaintiffs' facial and as-applied challenge to the statute.

Supreme Court

- Reverses 7-2.
- Three forums for speech -- traditional public forums, designated public forums, and nonpublic forums.
- Traditional public forum -- park, street, sidewalk-- government may impose reasonable time, place, and manner restrictions, but content based restrictions must satisfy strict scrutiny, and viewpoint discrimination prohibited. Same limitations for designated public forums.
- Non-public forum -- space that is not by tradition or designation a forum for public communication--government has more flexibility in limiting speech so long as no viewpoint discrimination.

Supreme Court

- Polling places is a non-public forum.
- Strong state interest in controlling communication.
- But state statute is vague, which could cause viewpoint discrimination.
- Does not define what constitutes “political” message.

Impact Of Decision

- Reaffirms the government's right to regulate speech in non-public forums.
- Underscores need for precision in drafting statutes regulating speech.

II. POLICE LIABILITY—WRONGFUL ARREST, EXCESSIVE FORCE, CONDITIONS OF CONFINEMENT.

Felarca v. Birgeneau, 891 F.3d 809 (9th Cir. 2018)

Facts

- University police officers break up student demonstration, using batons on some of the protesters.
- Protesters sued police officers and administration officials -- use of force was excessive under Fourth Amendment.
- District court denies summary judgment on qualified immunity.

Ninth Circuit Decision

- Reversed.
- As to some plaintiffs force was reasonable as a matter of law -- minor injuries from minimal force justified by need to disperse the crowd.
- Officers entitled to qualified immunity on other claims – law concerning use of batons not clearly established.
- Administration officials not in police chain of command cannot be held liable.
- No evidence that officials in the chain of command knew or even should have known their actions might cause excessive force.

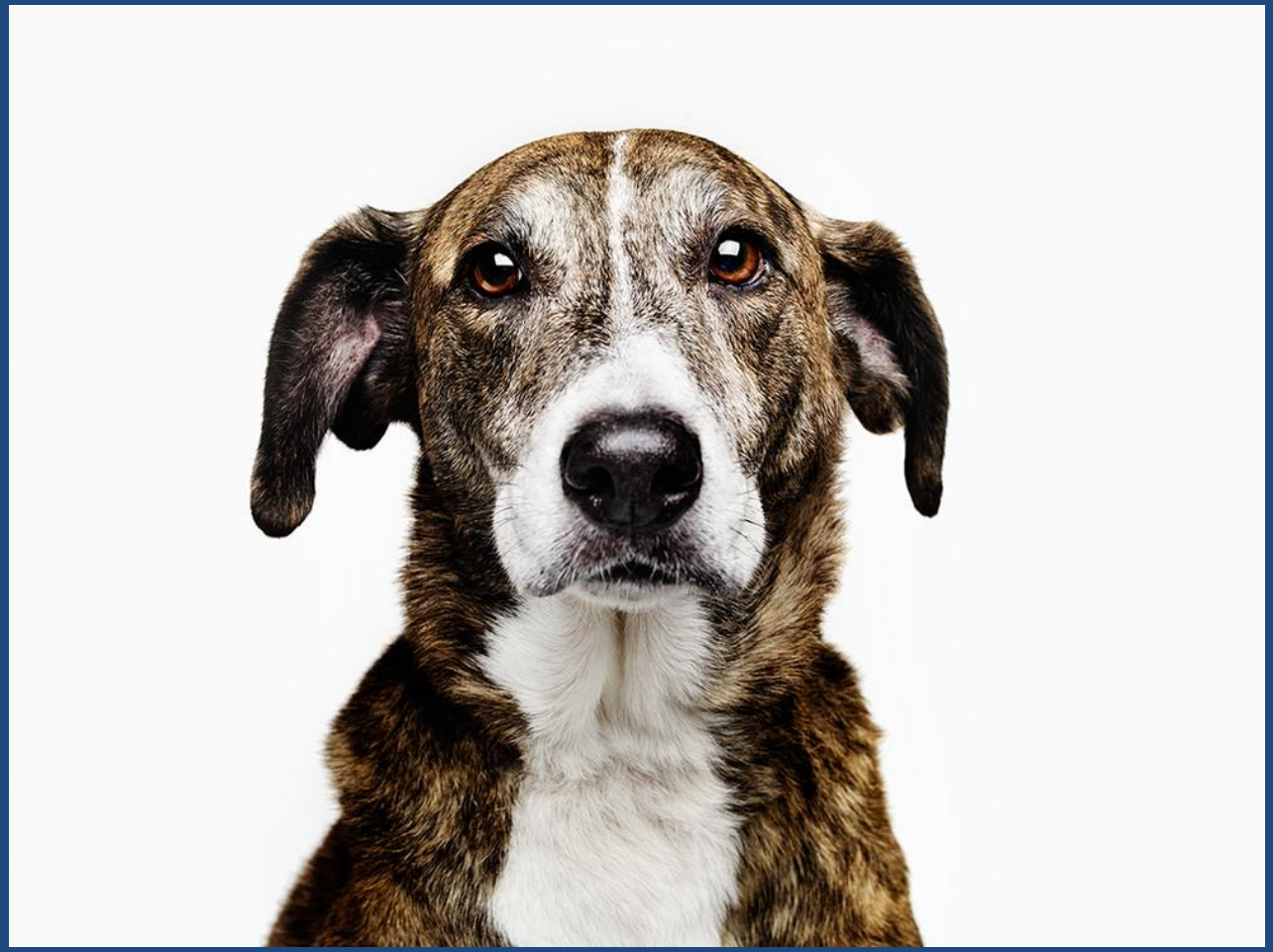
Impact Of Decision

- Establishes that minimal force may be utilized to further a legitimate state-interest in keeping order under tense, chaotic circumstances.
- Reaffirms that supervisor liability requires a direct link between an alleged constitutional violation and a supervisor's actions.
- Underscores that officers entitled to qualified immunity unless plaintiff cites clearly established law imposing liability under circumstances closely analogous to those in the underlying lawsuit.

Pike v. Hester, 891 F.3d 1131 (9th Cir. 2018)

Facts

- Plaintiff has personal dispute with police officer.
- When off duty, police officer, joined by other on-duty officers, conducts after hours canine search of plaintiff's place of business.



Facts

- Dog does not find any drugs, and officers leave.
- Plaintiff learns of search and files application for restraining order in state court.
- Court grants restraining order, and in footnote indicates that search violated the Fourth Amendment. Officer does not appeal.
- Plaintiff files suit for Fourth Amendment violation and district court grants plaintiff summary judgment on liability.

Ninth Circuit Decision

- Affirms 2-1.
- No need to address merits of Fourth Amendment claim because officer is collaterally estopped by state court judgment.
- No qualified immunity for plainly unlawful canine search.

Impact Of decision

- Very broad application of collateral estoppel --state court finding was somewhat equivocal and rendered in the context of an order that might not prompt an individual to seek review through the state courts.
- Where civil rights suit is preceded by related state court adjudicatory proceedings, for example, an administrative action concerning officer discipline or the like, findings may be given collateral estoppel effect in subsequent litigation.

Easley v. City of Riverside, 890 F.3d 851 (9th Cir. 2018)

Facts

- Plaintiff fleeing police officers on foot, clutching the waistband of his pants.
- Pulls gun from his waistband in what he asserted was an attempt to throw it away, but officers perceive he is turning to shoot them– they fire, wounding him.
- District Court grants officers summary judgment based on qualified immunity.

Ninth Circuit Decision

- Affirmed, 2-1.
- Majority finds that force was reasonable -- officers had only seconds to react to what could reasonably, even if mistakenly, appear to be a threat against them.

Impact Of Decision

- Very strong defense case, given the court's focus on the need for officers to assess the reasonable use of force under tense, rapidly evolving circumstances, which require split-second decision making that should not be second-guessed after the fact.
- Underscores that the Fourth Amendment only requires officers to act reasonably and that an officer's use of force may be reasonable, even if the officer was ultimately mistaken about what was actually occurring.

Vos v. City of Newport Beach, 892 F.3d 1024 (9th Cir. 2018),

Facts

- Officers respond to a call about a man –Vos –behaving erratically and brandishing a pair of scissors in a convenience store.
- Vos feigns taking a hostage, mimics a gun with his finger and asks officers to shoot him.
- Vos exits store and runs towards officers from a distance of 30 feet, brandishing scissors, ignoring commands.
- Officers fire, killing Vos.

District Court Proceedings

- Parents file suit for state law negligence, Civil Code 52.1, excessive force under the Fourth Amendment and violation of the ADA.
- District court grants summary judgment to defendants.

Ninth Circuit Decision

- 2-1 decision, partially affirming and reversing.
- Triable issue of fact on reasonableness of force – officers had less lethal weapons available, and Vos's mental state should be considered.
- But, officers entitled to qualified immunity based on absence of clearly established law.
- State law negligence claim viable under *Hayes v. County of San Diego,* and no immunity for 52.1 claim.
- ADA claim viable -- *Sheehan v. City and County of San Francisco*, 743 F.3d 1211(9th Cir. 2014).

Impact Of Decision

- Highly unfavorable precedent concerning the need to use less than lethal alternatives when available, as well as the requirement that officers take into account a suspect's mental impairment in determining whether a particular level of force is appropriate.
- As dissent notes, opinion seems inconsistent with Ninth Circuit and Supreme Court precedent.
- ADA issue ripe for Supreme Court review, given *Sheehan*.

Shorter v. Baca,
895 F.3d 1176 (9th Cir. 2018)

Facts

- Plaintiff sued County jail officials, asserting they had violated her right to due process by providing her inadequate mental health care while she was a pre-trial detainee.
- Routinely shackled to the bars of her cell for extended periods of time, as part of the general jail policy of securing mentally impaired inmates in order to alleviate staffing shortages and the need for direct supervision.
- Also subjected to improperly invasive body searches without justification.

District Court Proceedings

- District court grants partial summary judgment for defendants on some claims; remaining claims go to a jury, which ultimately decided in favor of defendants.
- Key jury instruction – jail security needs require deference to decisions of jail personnel.

Ninth Circuit Decision

- Reverses.
- Deference instruction unwarranted – acts of defendants not related to security concerns, but short staffing.
- Inadequate medical care claim had to be reevaluated under the objective reasonableness standard articulated in *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018).

Impact Of Decision

- Expands liability for inadequate medical treatment claims by pre-trial detainees.
- Greatly narrows application of the “deference” standard for decision-making by jail officials related to security concerns.
- Reaffirms *Gordon’s* holding that such claims are governed by a broad objective reasonableness standard under the Fourteenth Amendment.

Mendez v. County of Los Angeles, __F.3d__, 2018 WL 3595921 (9th Cir. 2018)

Facts

- CI tells officers armed and dangerous subject of arrest warrant seen on a bicycle outside residence.
- Officers initially denied entrance; eventually permission “granted.”
- Officers search outbuildings, including a shack where Mr. Mendez and his pregnant soon-to-be wife are sleeping on a futon on the floor.
- Two officers enter without “knock-announce.”
- Mr. Mendez, who sleeps with a BB gun to fend off rats, moves the gun to get up.
- Officers see the gun pointing in their direction and fire 15 shots, striking the couple several times.

District Court Proceedings

- Bench trial on Fourth Amendment excessive force and wrongful search claims.
- No excessive force under *Graham v. Connor* – officers reasonably perceived a possible threat.
- However, officers liable for excessive force based upon "provocation rule", i.e. the entry without a warrant, and without giving knock notice violated the Fourth Amendment and "provoked" the use of force.
- No liability under state law for negligent conduct occurring before the use of force.
- Nominal damages awarded for the unlawful entry claims and $4 million on excessive force claim.

Ninth Circuit Decision -- Mendez I

- Affirms in part and reverses in part.
- Reverses the judgment on the knock and announce claim, because officers entitled to qualified immunity –law on searching outbuildings not clearly established.
- Affirms judgment on the excessive force claim, holding that under the provocation rule, the unlawful entry without a warrant was reckless and "provoked" the subsequent use of force.
- Even without provocation rule liability would be proper because unlawful entry proximately caused the injury -- it was "reasonably foreseeable" that officers might meet an armed homeowner when they "barged into the shack unannounced."

Supreme Court Decision

- Court reverses, 8-0.
- Provocation rule improperly conflates two distinct constitutional violations, i.e. excessive force and wrongful entry.
- *Graham v. Connor* "totality of circumstances" standard governs excessive force claims, i.e, threat to officer, public, seriousness of the crime, etc.
- No need to decide whether the totality of the circumstances inquiry must take into account actions or decisions by police officers prior to the use of force.

Court Leaves Open Possible Recovery

- Even though wrongful seizure and wrongful entry are separate constitutional torts, in some cases the harm proximately caused by the two torts may overlap.
- “[I]f the plaintiffs in this case cannot recover on their excessive force claim, that will not foreclose recovery for injuries proximately caused by the warrantless entry.”
- Remands case to the Ninth Circuit to address the proximate cause issue.
- Prior Ninth Circuit opinion suggests that the use of force was caused by the manner of the officer’s entry, i.e. sudden and without warning, but that officers are qualifiedly immune for the knock notice violation.
- Ninth Circuit must address whether use of force was caused by the nature of entry, or by the absence of a warrant.

Ninth Circuit Decision -- Mendez II

- Ninth Circuit again affirms judgment.
- Fourth Amendment Violation is the unlawful entry, and not the mere failure to obtain a warrant.
- Although the officers' failure to knock and announce their presence may have been one cause of the plaintiffs' injuries, the entry itself was a concurrent cause of the subsequent use of force, and hence could independently give rise to liability.
- Court reinstates state law negligence claim and awards judgment based on *Hayes v. County of San Diego*, 57 Cal.4th 622 (2013) – failure to Knock and announce is negligent as a matter of law.

Impact Of Decision

- *Mendez II* greatly expands potential liability for warrantless entries –officers can be liable for injuries resulting from otherwise lawful use of force to defend themselves.
- Reaffirms the broad scope of negligence liability for police actions under *Hayes*.

Hernandez v. City of San Jose, __F.3d__, 2018 WL 3597324 (9th Cir. 2018)

Facts

- Pro-Trump protesters sued a city and its police officers, asserting they had been injured by other protesters at a campaign rally.
- Plaintiffs assert police officers, pursuant to municipal policy, not simply failed to intervene to prevent the attacks, but specifically prevented the plaintiffs from escaping the conflict and directed them to an area where they would be attacked.
- District court denies motion to dismiss based upon qualified immunity -- law clearly established that officers may not increase the danger of someone being attacked through their affirmative conduct.

Ninth Circuit Decision

- Ninth Circuit affirms.
- No qualified immunity -- law clearly established that police officers could be liable under the Due Process clause where they increase the potential danger to persons in their charge.
- Allegations that police prevented plaintiffs from fleeing violence, and even funneled them towards it, sufficient to state a claim.

Impact Of Decision

- Clarifies the standards for imposing liability against police officers engaged in crowd control activities.
- Reaffirms that there may be no duty to intervene; however officers may be liable for increasing an existing danger.
- Expands potential liability in counter-protest situations – “increasing” danger a vague concept.

III. MUNICIPAL TORT LIABILITY—RESPONDEAT SUPERIOR AND IMMUNITY

Newland v. County of Los Angeles, 24 Cal. App. 5th 676 (2018)

Facts

- County public defender injured the plaintiff in an auto accident while on his way home from work.
- Plaintiff contends respondeat superior liability, because implied requirement that public defenders have cars available for work, takes case out of “coming and going” rule.
- $14 million jury verdict.

Court Of Appeal Decision

- 2-1 reversed – County entitled to judgment.
- No evidence that the public defender was impliedly required to use a vehicle to perform his job-related functions on the day of the accident.
- Occasional use over period of years insufficient to show any requirement, and no evidence that County received any incidental benefit from vehicle use on day of the accident.

Impact Of Decision

- Reaffirms limited liability for employee accidents during commute.
- Continues trend of courts narrowly construing exceptions to “coming and going” rule.
- Underscores need for clear policies on when a vehicle is required for work.

Ramirez v. City of Gardena, __Cal.5th __, 2018 WL 3827236 (2018)

Facts

- Plaintiff sued city for death of son in a collision caused by police pursuit.
- Trial court grants summary judgment -- City had valid pursuit policy which included the requirement that all officers certify that they had read and understood the policy; hence immune under Vehicle Code section 17004.7.
- Court of Appeal affirms.

Supreme Court Decision

- Affirmed.
- Issue presented –Does section 17004.7 certification requirement mean that every officer must actually meet the requirement, or is it enough that the policy contains such a requirement?
- Held: Immunity available so long as policy contains a certification requirement, even if some officers have not complied with the requirement.

Impact Of Decision

- Clarifies immunity of section 17004.7.
- Rejects technical construction of certification requirement in favor of pragmatic approach to implementation.
- Leaves open question whether immunity could be lost where compelling evidence of widespread noncompliance with pursuit policy requirements.

Thanks!